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Malik, Mullah, Siyar, State

The Role of non-State Law in the Regulation of Armed Non-State Groups

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MALIK, MULLAH, SIYAR, STATE
THE ROLE OF NON-STATE LAW IN
THE REGULATION OF ARMED
NON-STATE GROUPS.

A Thesis in Fulfilment of the Degree of Doctorate of
Philosophy in Law

King's College London, School of Law, 2017

Jessica Hazelwood

Contents

Abbreviations	4
Abstract.....	6
Introduction.....	7
Hypothesis	12
Assumptions.....	13
Definitions.....	14
Methodology.....	18
Literature Review.....	20
Structure of the Thesis	23
Scope and Limitation	24
PART I.....	26
Chapter 1 Non-Native Invasive International Law.....	27
1.1 International Law in Non-International Armed Conflict	35
1.2 Binding Armed Non-state Groups in International Law	41
Chapter 2 Tracing Conflict in Islam*	47
2.1 The Jahiliyya	53
2.2 Building Islamic Law: Revelation, the Shahada, & the Umma	56
2.3 The Hijra: Moving a Movement	58
Chapter 3 <i>Allahu a'lam</i>, God Knows Best	61
3.1 The Epistemological Foundation of Islamic law	61
3.2 Sources of Islamic Law	62
3.3 'Ilm Usul al- <i>Fiqh</i> : the Central Role of the Islamic Jurist.....	67
3.4 The Islamic Jurists & His Tools.....	69
3.5 <i>Ijtihād</i> and Its Role in Modern Warfare.....	71
3.6 <i>Mujtahid</i> Qualification.....	76
3.7 The Importance of Being <i>Salaf</i>	79
Chapter 4 Islamic International Law and the Right to War	84
4.1 Siyar and the Islamic Framework for Conflict Relations.....	84
4.2 Binding Islamic Groups: Pacta Sunt Servanda and ' <i>al 'aqd Shari'at at al-mut'aqidin</i>	88
4.3 Unapologetic <i>Jihad</i>	93
4.3.1 Right Authority	97
4.4 The Doctrine of Abrogation in Justifying Aggressive <i>Jihad</i>	100
4.5 The Sword Verse 9:5	102
4.6 Dar al Baghy	105

Chapter 5 Islamic Laws of Armed Conflict.....	110
5.1 Directives of Abu Bakr and ‘Umar	113
5.2 Distinction in Islamic Extremism	116
5.2.1 Distinction and Apostasy	120
5.2.2 Distinction and Jahiliyya.....	123
5.3 Battles	125
5.4 Prisoners Of War (POW)	130
5.5 Distinction: Property	133
5.5.1 Religious Property.....	134
5.6 Means and Methods of Warfare.....	135
5.7 Proportionality	143
PART II	146
Chapter 6 Afghanistan: Ethno-Political Dynamics and Conflict History.....	148
6.1 Afghan Resistance to Domination	149
6.2 Anglo Afghan Wars	153
6.3 Abdur Rahman and the Durand Line Agreement 1893	155
6.4 Durand Line	157
6.5 Resistance to Centralization: The Urban Rural Divide.....	160
6.6 The <i>Mujahidin</i> , Saur Revolution and Soviet Invasion.....	165
6.7 The Geneva Accords 1988 and the Soviet Withdrawal	169
6.8 An Afghan Solution.....	172
Chapter 7 The Pashtuns: Customary Law and Conflict Conduct	175
7.1 Pashtunwali	179
7.2 Melmastia.....	181
7.3 Badal	183
7.3.1 Pashtun Compensation.....	184
7.3.2 Blood Revenge.....	186
7.4 Nanawatay.....	188
7.5 Gundi & Tarburwali.....	188
7.6 Namus	190
7.6.1 Women.....	191
7.6.2 Illicit Sex, Gender Crimes and Abduction.....	191
7.7 Narkh	192
7.8 Pashtunwali Resilience to Instability and Resistance to Completing Legal Orders	194
Chapter 8 The Afghan Taliban, 1994-2001	197
8.1 ‘Every Pashtun is not a Talib but every Talib may be Pashtun.’	202

8.2 ‘Every Afghan is a Deobandi’	203
8.3 Department for the Promotion of Virtue and the Elimination of Vice.....	205
8.4 Mullah Omar	206
8.5 The Taliban Insurgency 1994-2001	208
8.6 IHL Distinction in the Afghan Conflict 1994-2001	209
8.6.1 Taliban Distinction: People.....	210
8.6.2 Taliban Distinction: Property.....	214
8.7 Osama Bin Laden.....	217
8.8 Violations of International Humanitarian Law	219
8.9 Creating Unstable Rights Through Legal Pluralism	223
Chapter 9 In the End.	228
Annexes	233
Annex 1 Common Article 3 of the Geneva Convention.....	233
Annex 2 The Charter of Medina	234
Annex 3 Pashtun Tribes	235
Glossary	237
Islamic/Arabic Terms.....	237
<i>Pashtunwali</i> / Afghan Terms	243
Bibliography	249
Books	249
Academic Journals	264
Communications and Cases	275
Legal Texts, Charters and UN Documents	276
Human Rights	278
Criminal and Humanitarian.....	279
Conference Papers, Studies, Reports and Guidelines	280
Newspaper Articles, Blogs and Magazines.....	284

Abbreviations

AH Anno Hegirae

AI Amnesty International

ANSA/ANSG Armed non-state actor/ armed non-state group

AP Additional Protocol (to the Geneva Conventions 1949)

CA3 Common Article 3

CE Common Era

CIHL Customary International Humanitarian Law

DRA Democratic Republic of Afghanistan

HI(H) Hizb-i-Islami (Hekmatyar)

HI(K) Hizb-i-Islami (Khalis)

HIIA Harakat-e-Inqilab-e Islami Afghanistan Islamic Revolutionary Movement of Afghanistan.

HJI Harakat ul-*Jihad* ul-Islami (Movement of the Islamic *Jihad*)

HM Hizb u-*Mujahidin* (Party of the *Mujahidin*)

HRW Human Rights Watch

HUA Harakat ul-Ansar (Movement of the Partisans)

HUM Harakat ul-*Mujahidin* (Movement of the *Mujahidin*)

HW Hizb-e Wahdat-e Islami Afghanistan.

IAC International Armed Conflict

ICC International Criminal Court

ICRC International Committee of the Red Cross

ICTR International Criminal Tribunal for Rwanda

ICTY International Criminal Tribunal for the Former Yugoslavia

IEA Islamic Emirate of Afghanistan

IED Improvised Explosive Device

IHL International Humanitarian Law

IHRL International Human Rights Law

IJU Islamic *Jihad* Union

IMU Islamic Movement of Uzbekistan

ISAF International Security Assistance Force

ISI Inter Services Intelligence Directorate

HIIA *Harakat-e-Inqilab-e Islami Afghanistan.*

JI Jamaat-i-Islami (Society of Islam)

JKLF Jammu and Kashmir Liberation Front

JM Jaish-i-Muhammad (Army of Muhammad)

JTI Jamiat Tulaba Islam. Student wing of **JUI**.

JUI Jami'at-i-*Ulama*-i-Islam (Society of the *Ulama* of Islam).

JUP Jami'at-i-*Ulama*-i-Pakistan (Society of the *Ulama* of Pakistan)

LJ Lashkar-e-Jhangvi (Army of Jhangvi)

LOAC Laws of Armed Conflict

LT Lashkar-e-Taiba (Army of the Pure/Righteous) Pakistani Salafi *jihadi* group. Based in eastern Punjab province.

NIAC Non-International Armed Conflict

PDPA Peoples Democratic Party of Afghanistan. Leftist party in power 1978-92

Parcham 'Banner' in Dari. A faction of the communist PDPA

Khalq 'Masses' in Pashto. A faction of the PDPA

PIR Tajik Party of the Islamic Resistance

PML Pakistan Muslim League

POW Prisoner of War

PPP Pakistan People's Party

SMP Sipah-i-Muhammad Pakistan (Army of Muhammad, Pakistan)

SSP Sipah- i-Sahaba Pakistan (Army of the Companions of the Prophet, Pakistan)

UTO United Tajik Opposition

Abstract

This thesis seeks to examine how insurgent groups that have evolved in a legally pluralistic environment reconcile a conflict of norms in their conflict conduct. It seeks to separate their conflict practice from their narrative. It does this through a case study of the Afghan Taliban operating over the period of 1994-2001, considering the impact of international, tribal, and Islamic law in their conflict conduct.

Unleashing the non-native invasive ‘beast’ that is international law in the area of non-international armed conflict (NIAC) has seen it unable to effectively adapt or flourish in an environment it was never designed to inhabit. Despite the proliferation of international law within the area of NIAC, its near total failure, to account for the capacity, ability and will of least half of the actors inhabiting the legal space (armed non-state actors) coupled with high levels of competition from the native, domestic law to maintain exclusivity over such conflicts, has restrained its successful infiltration and application. As armed non-state groups (ANSGs) continue to violate the most basic humanitarian and human rights norms, dominant international legal regulation is questioned as being too far removed, too unnatural, and paralyzed by its own constitution to effectively address such violations within NIAC.

At first instance, international attempts to formally engage these groups may be diplomatically controversial, if not illegal. Furthermore, ANSGs may not want the same international or domestic legitimacy as States rendering political pressure from third states or the international community impotent. Compounding this, ANSGs are not economically dependent on host States, and are likely to finance their operations through private companies, third states or illegal means. Therefore, the international community lacks coercive power when the institutions and mechanisms for doing so are non-existent, ineffective or irrelevant. Dominating contemporary conflicts yet unyielding to international legal influence, international regulation of these groups is a fiction.

While there is burgeoning literature on the difficulties faced by the international community in its regulation of ANSGs, attempts to manipulate both international treaty-based and customary law in efforts to impose binding and enforceable obligations continue. An attempted multi-faceted, and often tenuous legal transposition from the state actor to non-state actor results in, if not undermining, at very least diluting the effectiveness of the international regime in its ability to mitigate against the cruel destiny of civilians caught in the cross fire.

ANSG’s that identify as Islamic add an extra dimension to be understood by the international community. There is a humanitarian imperative to move beyond positive international law in its attempt to regulate Islamic ANSG conduct and look to alternate non-state and informal legal systems which international law can inform but is not dictated or dominated by it. The growing trend from legal theorists and international lawyers has resulted in the distinction between law and non-law losing much of its relevance, rather there is an added emphasis on whether and how the subjects of norms, rules and standards come to accept those norms rules and standards, and if such norms are regarded as authoritative, may constitute law.

When the existence of international law as a practical element in the conduct of human affairs is questioned, and when such precepts claimed to be fundamental in that law are daily set at nought by belligerent’s in conflict, alternatives to that law warrant exploration. Far from advocating the removal of international law from the NIAC formula, it is argued that it would be better partnered with sub-state *law* to perform a ‘coordinated’ legal intervention on the regulation of ANSGs. Rather than explore ANSGs in terms of binding obligations they should or could possess in abstract regulatory regimes, this research will focus on examining the *law* and regulation that exists in reality as evidenced in both their own rhetoric and in practice.

Introduction

‘[Islamic extremists] *speak of deep philosophical ideas—it would be nice to think that someone is arguing... with the readers of Sayyid Qutb... Presidents will not do this. Presidents will dispatch armies, or decline to dispatch armies, for better and for worse.*’¹

The aspirations of contemporary international law have not translated into a language intelligible by certain armed non-state groups (ANSGs) who reassert their interpretation of justice through Revelation. Critics of international law have exposed its anaemic *lingua franca* in both its conventional and customary legal framework; ‘its connections with the inequalities and exploitation inherent in the colonial encounter’² renders the universality of international law a consequence of imperial expansion.³ The law governing the international society of states evolved in an era where Muslim majority countries were subjected to colonial domination and ‘belated incorporation into [the] European and Western international order.’⁴ The respective ontologies attached to Islamic and Western legal norms manifest in tangible differences ‘exacerbated by geopolitical tensions and misunderstandings along with local cultural beliefs.’⁵ Yet there are continued efforts through the international system to encourage adherence to these culturally relativist, if not sclerotic, sources.⁶ Such approaches in isolation are unlikely to yield greater compliance with humanitarian norms by Islamic militants in their quest for legitimacy.⁷

¹ Paul Berman, ‘The Philosopher of Islamic Terror’ *The New York Times* (New York, 23 March 2003)

² Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007) 117

³ Antony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in the Nineteenth Century International Law’ (1999) 40 (1) *Harv Int L J*

⁴ Hedley Bull and Adam Watson, *The Expansion of International Society* (Clarendon Press 1984), 1; Harfiya Abdel-Haleem, Oliver Ramsbotham, Saba Risaluddin & Brian Wicker, *The Crescent and the Cross: Muslim and Christian Approaches to War and Peace* (Palgrave 1998) 133

⁵ Abdullahi An-Na’im, ‘Human Rights in the Arab World: A Regional Perspective’ (2001) 23 *Hum Rts Q* 725, 726

⁶ For example, the Communist Party of Peru in a statement rejected human rights as ‘bourgeois, reactionary, counter-revolutionary rights [which are] weapon[s] of revisionists and imperialists.’ Ben Saul, ‘Enhancing Civilian Protection by Engaging Non-State Armed Groups Under IHL’ (2017) 22(1) *Journal of Conflict and Security Studies* 39, 44.

⁷ See Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press 2005) 1-2. See for example Kamran Hashemi, *Religious Legal Traditions, International Human Rights Law and Muslim States* (Brill Nijhoff 2008) 10; Guyora Binder, ‘Cultural Relativism and Cultural Imperialism in Human Rights Law’ (1999) 5 *Buffalo Human Rights Law Review* 211; Sonia Harris-Short, ‘International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child’ (2003) 25(1) *Human Rights Quarterly* 130; Federico Lenzerini, ‘The Debate on ‘Universalism’ and ‘Cultural Relativism’ in International Human Rights Law’ in Chapter One, *The Culturalization of Human Rights Law* (OUP 2014)

This thesis aims to explore whether conflict conduct of contemporary *mujahidin* flows from fidelity to the foundations of faith or whether other sources of law impact conflict behaviour. It seeks to separate their conflict practice from their narrative. It does this through a case study of the Afghan Taliban operating over the period of 1994-2001, considering the impact of international, tribal/local and Islamic law in the conflict conduct.⁸

Many violent ANSGs generate an Islamic theory ‘to legitimize revolt in terms of mainstream Sunni thought’ claiming such revolt is based on a sophisticated tradition of medieval Islamic jurisprudence.⁹ While the ideological understandings of their narrative does not represent the global Muslim population, the basis of this theory warrants examination, in particular whether it is in practice congruent with Islam and whether this interpretation of puritanical Islam is compatible with conventional international humanitarian law (IHL).¹⁰ Understanding the application of Islamic law and legal theory through a *salafi* lens and the points that distinguish between violent and non-violent puritans will aid the dialogue with groups that operate ‘beyond the pale’.¹¹ Accepting *Shari’a*’s role as unifier, greater weight is attached to tenets of Islamic law and its position within the international legal order.¹² Such a stance is in its own way radical. The Islamic law of nations transformed from a narrative to normative character in the thirteenth century, yet eight centuries later is still awaiting meaningful incorporation in the international system despite over one-fifth of the global population identifying as Muslim.¹³

⁸ Moazzem Begg, ‘*Jihad* and Terrorism: A War of the Words’ (2008) 1 *Arches Quarterly*

⁹ Arguably the most prominent form of transnational non-state armed activism in the world, Islamic extremist groups have been ‘labelled a threat to international peace and security and targeted for repression through interstate cooperation.’ Emmanuel Sivan, *Radical Islam: Medieval Theology and Modern Politics* (Yale University Press 1985) 92.

¹⁰ Modern Islamic discourse sees selective invocation of a particular juristic text to promote their individual conclusion, ‘without ever articulating a principle for including or excluding certain jurists or texts.’ Mairaj Syed, *Islamic Law and The Apologetics of Jihad: A Review, Is Jihad A Just War?* (2002) 2 *UCLA J. Islamic & Near Eastern Law* 155, 157.

¹¹ The phrase ‘beyond the pale’ dates to the 14th century, when the part of Ireland under English rule was delineated by a boundary of stakes or fences, known as the English Pale. To travel outside of that boundary was to leave behind all the rules and institutions of English society, which the English considered synonymous with civilization itself. Urban Dictionary <<http://www.urbandictionary.com/define.php?term=beyond%20the%20pale>> accessed 26/04/17.

¹² Noel James Coulson, *A History of Islamic Law* (Edinburgh University Press 2005) 5-6; James Cockayne, ‘Islam and International Humanitarian Law: From a Clash to a Conversation Between Civilizations’ (2002) 84 (847) *IRRC* 597, 599.

¹³ In 2010, the global Muslim population was estimated at 1.6 billion. That number is projected to increase to 2.2 billion by 2030. The Pew Forum on Religion and Public life <http://www.pewresearch.org/fact-tank/2017/11/29/5-facts-about-the-muslim-population-in-europe/>. Conservatively, *Shari’a* as a completely formed ‘law’ existed simultaneously with ‘Western law’ until the nineteenth century, when the evolution of a Western hegemony and European colonial rule diluted and in some instances entirely eclipsed it. Wael Hallaq, *An Introduction to Islamic Law* (Cambridge University Press 2009)1; Hisham Ramadan, *Understanding Islamic Law* (Ata Mira Press 2006) xi; Philip Jessup in Majid Khadduri, *Islamic Law of Nations* (John Hopkins Press 1966) viii; Lawrence Rosen, *The Justice of Islam: Comparative Perspectives on Islamic Law and Society* (OUP 2000) ix.

Militant groups, regardless of ideological or religious underpinnings, are not monoliths. A historical-legal sketching of Islam exposes a harmonizing base from both humanitarian and humanitarian legal perspectives, which has been warped as the law evolved and regional custom shaped the application of *Shari'a*.¹⁴ However, Islam cannot be identified wholesale with the actions of particular radical Islamic groups, nor can radical Islam be considered as having a coherent doctrine among and between various groups. The pathologically criminal are not a Muslim anomaly.¹⁵ However, the haste, bordering on reflex, with which puritanical Islamic movements are relegated to such status reflects a complete failure to understand the socio-cultural conditions that generate such movements and their concomitant affiliations; the structure and dynamics of these groups; ethno-regional diversities; and these movements' relationship to violence.¹⁶ 'Armed groups will not disappear if we ignore them...' ¹⁷ nor will they disappear if we bomb them. Engagement of these groups is key.

The manipulation of religious language in pursuit of military strategy is not novel, nor constrained to Islam. Twenty-first century extremists espouse the virtues of post-classical Islamic jurisprudence to justify their conduct. Many self-proclaimed revolutionary Islamic heads issuing their own peculiar constitution of *jihad*, more a grouping of *Qur'anic* quotations and derivative arguments dressed in *Qur'anic* verse as opposed to a coherent theological doctrine.

Motivations for insurgencies vary. Certain Islamic extremists seek state privileges such as sovereignty, territorial control, status and prestige, while others emphatically reject the sovereign nation-state and its international legal system. A dispassionate distinction must be

¹⁴ *Shari'a* principles are more than law encompassing the total way of life that includes faith (*imam*) and practices (*amal*), personal behaviour, legal and social transaction.

¹⁵ Ammara Durrani, 'Implications of September 11 for the Middle East' (2002) 55(4) *Pakistan Horizon* 27; Roxanne Euben & Muhammad Zaman, *Princeton Readings in Islamist Thought* (Princeton University Press 2009) 408.

¹⁶ Contrast with perceptions around non-Islamic revolutionary movements. See for example David Graeber 'Occupy Wall Street's Anarchist Roots' *Al Jazeera* (New York, 30 November 2011); David Bromley 'Violence and New Religious Movements' in James Lewis, *The Oxford Handbook of New Religious Movements* (OUP 2004) 143.

¹⁷ Marco Sassoli, 'Engaging Armed Non-State Actors with International Humanitarian Law' (2008) 6 *Hum. Sec. Bull* 15, 16.

drawn between the theological, ideological and secular motivations of these groups and their relationship to mainstream religious views and expressions.¹⁸

To imagine international peace and security the principles and rules of international humanitarian law need to be promoted and respected. To enhance the protection of civilians, a culture of compliance with basic humanitarian norms must not only be established but must be tailored to both the militant group and the operational environment. This means distinguishing strict constructionists from militants claiming a puritanical base;¹⁹ intellectual movements accompanied by political violence from the purely violent, and engaging in arguments regarding what these groups posit as a legitimate Islamic legal justification for certain conflict conduct.²⁰ Violence in the name of Islam is not the same as violence permitted by Islam.²¹ The proliferation of Islamic militant groups condemns lazy labelling to compound an already derisive relationship between these ‘*jihadists*’²² and the international system. The study of violent armed non-state groups comprising majority Muslims cannot be constrained to normative debates on the role of religion in politics. Context is determinative as ‘no actor and no state [...] moves directly from [theory] to state practice...’²³

In this framework, two arguments are made in this thesis: first, we must accept Islamic law as a jurist’s law because the exclusive use of the *Qur’an* and *Sunna* without additional interpretation by jurists cannot constitute Islamic law.²⁴ Islamic history clearly accepts the near exclusive authority that jurists possessed in wielding and articulating rules and norms of

¹⁸ Rolf Mowatt-Larssen, ‘Islam and the Bomb Religious Justification for and Against Nuclear Weapons’ (2011) *Belfer Center for Science and International Affairs* 1.

¹⁹ Extreme interpretations of religion do not equate to illegitimate interpretations. ‘Radical’ and ‘extremism’ refer to psychological and social processes in which a person develops deviant ideas from the norm. Maurits Berger, ‘*Jihad* and Counter *Jihad*’ in M Cherif Bassiouni, *Jihad and its Challenges to International and Domestic Law* (Hague Academic Press 2010) 235.

²⁰ Peter Leuprecht, ‘Ways Out Of the World Disorder?’ in *The New Challenges of Humanitarian Law in Armed Conflict* (Martinus Nijhoff 2005) 57.

²¹ M Cherif-Bassiouni, ‘Misunderstanding Islam on the Use of Violence’ (2015) 37(3) *Houston J. Int’l Law* 651.

²² This misnomer is too often attached to groups who are simply criminals. Furthermore, one who engages in ‘*jihad*’ is properly called a *mujahid* or (pl) *mujahideen*. *Mujahudin*, *mujahideen* are all accepted spellings.

²³ Cockayne, (n12) 597; Kevin Reinhart ‘Legitimacy and Authority’ in Islamic Discussions of ‘‘Martyrdom Operations’/ ‘Suicide Bombings’’ *Enemy Combatants, Terrorism, and Armed Conflict Law: A Guide to the Issues*, ed David Linnan Westport (Greenwood Publishing 2008) 171.

²⁴ The Prophet Muhammad is reported to have said ‘The scholars are the heirs of the Prophets.’ John Esposito & John Voll, *Makers of Contemporary Islam*, (OUP 2001) 8. It would be incorrect to assume the foundational corpus of Islamic law has been identified, with voids existing in relation to dynamics between Islamic law, tribal law, [the ancient Semitic- Mesopotamian legal traditions, and Jewish law]; dispute resolution mechanisms and due process requirements. This should not be confused with suggesting the absence of an effective rule of law system. Furthermore, it is contended that the foundations of Islam incorporated traditions of societies that it eventually subsumed, in particular the Byzanto-Roman and Sasanid civilizations. Hallaq *Origins* (n6) 2-4.

Islamic law on the basis of the divine texts.²⁵ ‘The Law as a topically-organized finished product consisting of precisely-worded rules is the result of juristic interpretation; it stands at the end, not at the beginning, of the interpretive process.’ Secondly, as Islam sees the application of law founded on a system of social morality upon which the efficacy of law depends and from which it could not be separated, groups that exclusively use the *Qur’an* and *Sunna* without additional interpretation by jurists cannot be regarded as Islamic.²⁶ This is not to comment on the legitimacy of an insurgency, nor is it questioning their identity as Muslims, it is purely related to whether a group can claim to be Islamic if it consistently and systematically conducts hostilities in a manner specifically prohibited by *Shari’a* as interpreted by the jurists. The growing trend for contemporary Islamic militants to claim their insurgencies are based on *salafi* practice and custom requires an analysis of, *inter alia*, combatant conduct; the degree of compliance with existing norms; incentives and disincentives for compliance within the *salafi* framework; acknowledging the risk in ‘which the endeavour to find classical legal explanations for the acts of contemporary Muslims is [possibly] antiquarian, if not Orientalist.’²⁷

The next step, and the purpose of this thesis is to look beyond the narrative to the practice of these Islamic ANSGs, assessing if the conduct is compliant with IHL and Islamic laws of armed conflict (LOAC). Comparison between Islamic ANSGs in their respective conduct in hostilities

²⁵ Bernard Weiss, ‘Interpretation in Islamic Law: The Theory of Ijtihād’ (1978) 26(2) *The American Journal of Comparative Law*, 200. Recognizing that there are examples of statutory Islamic law promulgated by national territorial legislatures, these laws are the codification of juristic interpretation. The fact that Islamic nationalism cannot exist warns against accepting Islam as a statutory law. Aharon Layish, ‘The Transformation of the *Shari’a* from Jurists Law to Statutory Law’ (2004) 1 *Die Welt des Islams*, New Series 44, 86 in ME Badar, ‘Ius in Bello under Islamic International Law’ (2013) 13 *Intl Crim. L. Rev.*, 596; Sadiq Reza, ‘Torture and Islamic Law’ (2007) 8(1) *Chi. J. Int’l L.* 23, 25.

²⁶ Orthodox Sunni Muslims would advocate that anyone who professes to be a Muslim should be accepted as Muslim. God is the ultimate judge of the truth of their conviction. Islam is a unique example of a socio-religious and political movement. It does not consciously distinguish between the moral and legal. Islam comprises *aqidah*, a set of beliefs; *akhlaq*, a code of moralities; and *Shari’a*, a set of laws, which can be further divided into personal and public legal traditions. The personal legal traditions encompass *ibadat* (pl. *ibadat*) which regulates the relationship between *Allah* and the individual, It includes worship issues, rules of prayer, fasting, rules on *hajj* pilgrimage, *zakat* and *jihad*; and *munakahat* which regulates the legal relationship between individuals akin to Western family law. Hallaq *Origins* (n6) 46; Khadduri *Islamic Law* (n13) 9. Durrani (n15) 115. Majid Khadduri, *The Islamic Conception of Justice* (John Hopkins Press 1984) 229-232; Naseem Razi, ‘*Qur’anic* Legislation in Modern Context’ (2011) 8 *Pakistan Journal of Islamic Research* 17, 28. Ibrahim Abu-Rabi ‘Book Review: Discovering Islam: Making Sense of Muslim History and Society (1992) 60 (3) *Journal of the American Academy of Religion* 537; David Westbrook, ‘Islamic International Law and Public International Law: Separate Expressions of World Order’ (1993) 33 *Va. J. Int’l L.* 823.

²⁷ Reinhart (n23) 171.

is of probative value but will be limited to groups who operate in similar legal pluralistic environments, legal landscapes encompassing tribal and religious law.²⁸

Whether rooted in popular myth or bigotry, Islamic fundamentalism, false or otherwise is part of our daily lives. Mapping the intellectual terrain of political Islam past and present and positioning the Prophet and his actions within the Islamic law construct is essential to aid in recovering the Muslim intellectual tradition currently obscured by certain militant groups.²⁹ This exercise is conditional on understanding there are no fixed or universal keys for reading the intellectual map of political Islam. Traversing the vast terrain of this phenomenon, through variable contexts of time and space it is clear there is no ‘one fundamentalism fits all formula for generalising about a complex current that is multi-vocal, and whose discourses speak to multiple “islams” in the name of a single and universal Islam.’³⁰

Hypothesis

‘I am a Pashtun for 5000 years, a Muslim for 14 centuries and a Pakistani for 64 years. Where do you think my identity lies?’³¹

²⁸ Subjected to the same criticism as CIHL, common behaviour among all ANSGs would not create a customary rule. Determining the existence of a customary rule under international law is fraught with difficulties, compounded in the NIAC context. The reality is that courts, tribunals, or other bodies posit a rule as customary, and this rule is either accepted or rejected by states. *Tadic* illustrates this point. Tribunal pronouncements indicated that the customary laws of NIAC were much more developed than previously thought. The fact that the majority of states accepted the tribunal’s findings at the Rome Conference crystallized any customary law ‘overreach’ by the tribunal. *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999. [Hereinafter *Tadic*]. Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 104; See also Special Tribunal of Lebanon, CH/AC/2010/02, *Prosecutor v. El Sayed*, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, para 47.

²⁹ Although the medieval Islamic theory of public international law is today in a state of disuse, it has been by no means repudiated by the majority of Muslim states. The Organization of the Islamic Conference (OIC), voted in 1980 to establish an International Islamic Law Commission with the goal being to ‘devise ways and means to secure representation in order to put forward the Islamic point of view before the International Court of Justice and such other institutions of the United Nations when a question requiring the projection of Islamic views arises therein. Abdullah Ahsan, *The Organization of the Islamic Conference* (International Institute of Islamic Thought 1988) 36. Abdullahi An-Na’im, ‘Towards an Islamic Hermeneutics for Human Rights, in Abdullahi An Na’im, *Religious Values, An Uneasy Relationship* (Rodopi 1995) xiv. Contextualizing Revelation, that is calling for its interpretation in light of the era in which it was revealed, is not without danger. For example, in the 1990s, Nasr Hamid Abu Zayd, a Muslim professor at Cairo University, argued that the Quran, while divinely revealed, was a cultural product of seventh-century Arabia, he was branded a heretic by the conservative-dominated *Ulama* of Egypt’s famed al-Azhar University and forced to divorce his Muslim wife (the couple fled Egypt together).’ Reza Aslan, *No God But God: The Origins, Evolution and Future of Islam* (Random House 2012) 169.

³⁰ Muhammad Abdalla, ‘Interregional challenges of Islamic extremist movements in North Africa’ (2011) Institute for Security Studies 26

³¹ Farhat Taj, *Taliban and Anti Taliban* (Cambridge Scholars Publishing 2011) 1

The Afghan Taliban (1994-2001) operated through various legal systems: state based legal codes, IHL, Islamic law and local customary law. The conflict conduct of Pashtun Taliban could be regulated through any or all of these legal systems. While the Taliban as a Movement adjusted justification for conflict conduct to fit in an Islamic legal framework, in practice conduct was regulated through a hybrid tribal-religious law. IHL compliance was incidental, dependent on whether the tribal (local) or religious norm is compatible with IHL norms. Where there exists a conflict of norms regarding behaviour in war, Islam takes precedence in the narrative irrespective of what 'law' was used in practice. The system of reference individual Taliban or their leaders allude to, tribal, international or Islamist, depends on the circumstances under which a particular decision is taken and on the particular tactical or strategic aim at stake.

Assumptions

A case study of the Afghan Taliban over the period of 1994-2001 is used to test the hypothesis which is based on the following assumptions:

- i) Islamic law (*Shari'a*) is influenced by non-Muslim sources.
- ii) Where a functioning alternate law exists, for example tribal or local law, a group which identifies as operating within that framework will use that law to regulate certain conduct.
- iii) Tribal institutions are distinguished from tribal identity. Using tribal law norms in conflict conduct does not equate to a tribal conflict.
- iv) Where the group comprises Muslims who also identify as tribal, the group will use Islam to regulate behaviours that have no tribal base (for example rules around devotion: fasting and prayers). Tribal law or a hybrid tribal religious law will regulate relationships.
- v) Where this group comprises Muslims and exist in a state where Islam is the dominant religion, this group will use Islamic narratives to legitimize behaviour to third parties (with the exception of behaviour around devotion/rituals) that is in practice shaped by tribal law.
- vi) Tribal practices will influence the group's understanding of Islam.

Definitions

‘[L]aw everywhere begins with custom [and] custom is the natural starting point of legal evolution.’³² Law, broadly defined, is a series of rules, often enforced by institutions, which govern the behavior of individuals in society. Law need not be the formal rules passed by the legislature. It can be unenumerated but enforced by the expectations of a community. Such informal rules are still ‘law’ since individuals within the collective are expected to behave a certain way, and when they fail to meet that standard, they are held to account by the community. Law defines the parameters of acceptable behavior. Social norms are distinguished as expectations of a certain social group that are enforced by that group. Norms can be just as binding and can exact the same amount of punishment when they are broken, yet they are not law. Law is different than norms because it is accepted across a coherent grouping, such as a state or a town, whereas norms are applicable through social convention to a less identifiable grouping. Primitive law evolved through custom irrespective of a centralized authority. Custom is meant to entrench ‘the institutions of antiquity in an immutable way’.³³

Non-State law in the context of this research is taken to mean any law that is not state legal code. Contextualizing the research to Afghanistan (in Part II), non-state law includes international law, with a focus on IHL, religious law and tribal law. My use of the term ‘tribal law’ refers to *Pashtunwali*, the customary unwritten law (*riwaj*) that is also living law in the border regions of Afghanistan and Pakistan where more than three million Afghan lived as refugees for more than twenty years.³⁴ The term ‘tribal’ may understand certain Afghan conflict and community dynamics, however in using ‘tribal’ rather than ‘local’, it implies that Afghans have social qualities that often are not present.³⁵ One cannot assume social structures follow a general template throughout Afghanistan or even within a single ethno-linguistic group.³⁶

³² James Bryce, *Studies in History and Jurisprudence*, (1901) 640 in Yoram Dinstein, *International Law As A Primitive Legal System* (1986) 19 *International Law And Politics* 8.

³³ Dinstein *International Law* (n32) 8.

³⁴ The position of *Pashtunwali* is to be appreciated against the historical domination of the Pashtun tribes in nation building. The application of local law at the micro-level emphasises local law as an unwritten code of honour. Karin Ask, ‘Legal Pluralism and Transitional Justice in Afghanistan: A Gender Perspective’ (2003) *Hum. Rts. Dev. Y.B.* 347, c.f. Asta Oleson, *Islam and Politics in Afghanistan*, (Curzon Press 1995). A detailed analysis of the political status of *Pashtunwali* in the border region between Afghanistan and Pakistan is to be found in Akbar Ahmed, *Millennium and Charisma among Pathans* (Routledge 1976)

³⁵ Department of the United States Army, ‘My Cousin’s Enemy is My Friend: A Study of Pashtun ‘Tribes’ in Afghanistan’ White Paper, Afghanistan Research Reachback Centre (2009) *Small Wars Journal* 24

³⁶ Gilles Dorronsoro, *The Taliban’s Winning Strategy in Afghanistan* (Carnegie Endowment for International Peace 2009)

Legal pluralism refers to situations in which there is more than one source of law, each of which exerts control over the behavior of individuals in that society. Afghanistan is a nation with legal pluralism because in addition to the formal written law other non-written, informal, religious or tribal law has significant effects. Anthropologists examine sets of rules to understand how an informal legal system works. As outlined by Llewellyn and Hoebel (1941) there are three ways to look at such rules: 1) rules as abstract principles, 2) rules as actual behaviour, and 3) rules as principles derived from legal decisions in cases of trouble.³⁷

There is no single legal definition of an armed non-state group. No international treaty explicitly defines the term.³⁸ Legal instruments do however provide guidelines regarding the types of armed groups that are covered under the term,³⁹ for example those with an organizational hierarchy that enables leaders to control subordinates and permits them to carry out ‘sustained and concerted military operations.’⁴⁰ The International Council on Human Rights Policy defines ANSGs as ‘groups that are armed and use force to achieve their objectives and are not under state control.’⁴¹ This definition has two elements: lack of state control and the use of force.

ANSGs vary widely in size, organization, motives, goals and resources. They often have a fluid membership and rapidly changing goals which compound the difficulty of formulating a useful definition.⁴² Common terminology used to reference ANSG include: guerrillas, insurgents, rebels, irregular forces, belligerents, revolutionaries, dissident armed forces and freedom fighters. The term explicitly excludes criminal organizations such as the mafia and drug cartels, private security companies or mercenaries, who are described in part as parties motivated by ‘the desire for private gain.’⁴³ Rebels, insurgents and belligerents are depicted as positioned on a sliding scale dependent on the degree of control over territory and recognition by

³⁷ Karl Llewellyn & Edward Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (University of Oklahoma Press 1941)

³⁸ Dawn Steinhoff, ‘Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups’ (2010) 45 *Tex Int’l L J* 298. A. 47(2) AP II

³⁹ Orla Buckley, ‘Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara’ (2011-2012) 37 *N.C.J Int’l L & Com. Reg.* 793, 797

⁴⁰ Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of Victims of Non-international Armed Conflict, Art 1(1) June 8 1977, 1125 UNTS 3 [hereinafter AP II]

⁴¹ Int’l Council on Human Rights Policy, Ends and Means: International Council on Human Rights Policy, *Ends and Means: Human Rights Approaches to Armed Groups* (ICHRP, 2000), 5

⁴² Claudia Hoffman, ‘Engaging Non-State Armed Groups in Humanitarian Action’ (2006) 13 *Int’l Peacekeeping* 369; Marco Sassoli, ‘Seriously: Ways to Improve Their Compliance With International Humanitarian Law’ (2010) *I J Int’l Hum L Stud.* 14

⁴³ Art 47(2) AP II

government.⁴⁴ At one extreme such ANSG resemble *de facto* governments with control over territory and population. This can be difficult to measure and varies widely, as some ANSGs influence territory through non-physical means such as using the area to recruit members, traffic small arms and light weapons, plant landmines, block the delivery of aid, and engage in a range of other activities.⁴⁵

At the other extreme ANSGs are militarily and politically inferior to the established government, operating as loosely organized groups or cells, ‘exercising no direct control over territory and operating only sporadically.’⁴⁶ The degree of discipline and amount of control within the command structure is also difficult to quantify, especially when ANSGs operate underground or there is limited public information or access to the group.⁴⁷ The threshold ambiguities relating to the requisite levels of violence and organization sufficient to make a group ‘party’ to a conflict imports vagueness on whether these groups are actual addressees of international law or are confined to the scope of domestic criminal law.⁴⁸ It is for States (both third states and the state directly involved in the conflict) to appraise, by granting or withholding, if only implicitly, recognition of insurgency, and whether the requirements of violence and organization have been fulfilled.⁴⁹

Islamic ANSGs are referred to as extremist, fundamentalist (*usuliyya*), traditionalist, and totalitarian. Clarity around the authors understanding and use of the terms is important. The terms ‘fundamentalist’ and ‘extremists’ are contested terms. In the context of this research, extremist relates to those political actors who seek to impose Islamist ideology through violence, threatened and actual, against civilian targets that do not share their vision of *fi sabil Allah*, the [true] path of God. Fundamentalists have less of a violent flavour attached to the term, and while an ambiguous term, it is usually based on oversimplified polemics and often unscholarly interpretation of the scriptural texts. The term Islamic fundamentalism has been

⁴⁴ Hoffman (n42) 3986; Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (OUP 1988) 24; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); ILC Commentary A/56/10. Report of the IL adopted at its 53rd session 2001 para 9 of Article 10, 115

⁴⁵ Buckley (n39) 798.

⁴⁶ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 1

⁴⁷ Hoffman (n42) 398-9.

⁴⁸ See *Prosecutor v Haradinaj, Balaj, and Brahimaj* ICTY, Trial Chamber, 3 April 2008 in particular para 49 and 60 which reveals a high but realistic threshold. Sassoli ‘Seriously’ (n42) 14.

⁴⁹ Antonio Cassese, *International Law* (OUP 2005) 125; Clapham *Obligations* (n44) 271

criticized for both coherence and political potency.⁵⁰ Originally used in relation to Protestant Christianity, after the 1979 Iranian revolution it has been used to identify ‘radical Islam’ or Islamist movements in Muslim countries.⁵¹ While ensuring the religion maintains authentic, fundamental roots is essential, there is an inherent danger that ‘fixating on the past ... is a sort of (aberrant) fundamentalism.’⁵² Fundamentalists claim, often fanatically, to be the authentic voice of the tradition. It implies the ‘activist affirmation of a particular faith that defines that faith in an absolutist and literalist manner.’⁵³ Parekh outlines both structural and individual elements of fundamentalism. Structurally, there is a separation between religion and society; either a single text or various texts in hierarchical relationship; direct access by the believer to those texts and authority within the religion for using the state to enforce religion. The individual fundamentalist will not separate politics from religion, will reject the authority of interpretive tradition however will simultaneously read the text in light of political objectives justifying the process ‘to challenge and remake the world.’⁵⁴ Generally, fundamentalists are loyal to a leader rather than a doctrine.⁵⁵

This research considers a distinct ethnic tribal group of Afghanistan, the Pashtuns. Ethnicity which is a vague term is defined in terms of identifying traits of an ethnic community, a collective name, a myth of common ancestry, shared historical memories, a distinctive shared culture, association with a specific territory and a sense of solidarity.⁵⁶ In many cases, members of a tribe have memories of tribal identities that do not always determine their behaviour. Anthropologists define this disconnect between the narrative and action using the term ‘native model’ (also known as the ‘emic’ model). Every society has its own way of thinking about itself, and that image of itself may not correspond exactly to the description of an external observer.⁵⁷

⁵⁰ Dieter Eickelman & James Piscatori, *Muslim Politics* (Princeton University Press 1996).

⁵¹ Sivan (n9); John Esposito, *Political Islam: Revolution, Radicalism or Reform?* (Lynne Rienner 1997); Mohammed Ayoob (ed.), *The Politics of Islamic Reassertion* (Croom Helm 1981) 17

⁵² Abdel-Haleem (n4) 121.

⁵³ John Voll, ‘Fundamentalism’, in John Esposito (ed.), *The Oxford Encyclopedia of the Modern Islamic World* (OUP 1995) 32-34.

⁵⁴ Bhikh Parekh, ‘The Concept of Fundamentalism’ in Alexandras Shtromas (ed.) *The End of ‘Isms’?: Reflections on the Fate of Ideological Politics after Communism’s Collapse* (Blackwell 1994) 105-106, 116.

⁵⁵ William Maley (ed), *Fundamentalism Reborn? Afghanistan and the Taliban* (Hurst & Co 1998) 18.

⁵⁶ John Hutchinson & Anthony Smith, *Ethnicity* (OUP 1996) 6-7.

⁵⁷ The native model should always be taken into account because it influences how people think and it reflects a certain subset of a culture’s belief system, which also changes over time. Department of the United States Army (n34) 7.

Methodology

*‘What you see and what you hear depends a great deal on where you are standing. It also depends on what sort of person you are.’*⁵⁸

Through my work within the humanitarian community I have been exposed to people from varied backgrounds who have worked in the Pashtun belt in the Afghanistan-Pakistan region during various periods of its conflict history. My own experiences in this region, in Peshawar and Kandahar, also gave me a unique perspective on the people straddling the border.

In this thesis, the Kandahari Taliban operating from 1994 through to 2001 will be used as a case study, focusing on how their conduct aligned with Islamic Siyar, *Pashtunwali* and IHL.⁵⁹ Account will be taken of their ethnic unity, tribal heritage and religious leanings in understanding this regulatory system.

Adopting an anthropological approach, this research considers the context of enforceable norms: the social, political, economic. It moves past Western conceptions of law, and while taking account of formal justice institutions and their social environment, it also encompasses law-like activities and processes of establishing order in other social domains including informal and unofficial law. Local worlds are impacted by global events; just because something is distinguished as law, whether it be local or international, does not mean it is obeyed.

Primary sources of this research consist of autobiographies, declassified diplomatic cables, newspapers, field reports; background papers, studies, guidelines; and Taliban propaganda material. Secondary sources include: textbooks; academic journals; research and conference papers; blogs by media and academic commentators. Using interviews conducted by the Afghanistan Justice Project, an independent non-governmental group that has investigated military operations in Afghanistan from 1979 through 2001 and reports from the Afghanistan Human Rights Commission, Human Rights Watch and Amnesty International, I have focused on three main events to test my hypothesis: the massacre at Mazar-i-Sharif (1998); the

⁵⁸ CS Lewis *The Magician's Nephew* (Harper Collins 2005)

⁵⁹ Vincent Bernard, ‘Interview with David Kilcullen’ (2011) Vol 93 (883) *IRRC* 587, 596

destruction of the Bamiyan Buddhas (2001); and the refusal of the Islamic Emirate of Afghanistan to hand Osama bin Laden over to the the United States of America (2001).

As Glaser and Straus state:

Comparative analysis requires a multitude of carefully selected cases, but the pressure is *not* on the sociologist to ‘know the whole field’ or to have all the facts ‘from a careful random sample.’ His job is not to provide a perfect description of an area, but to develop a theory that accounts for much of the relevant behaviour.⁶⁰

Two field trips were taken to Afghanistan. While in Afghanistan the first time, one of my ICRC colleagues was kidnapped across the border in Quetta, Pakistan, his beheaded corpse discovered in April 2012. The body was left on a road outside the city in southern Baluchistan province, with a note attached which said he had been killed because a ransom had not been paid to his captors. ICRC humanitarian activities in Pakistan were scaled down significantly and remain minimal.

A couple of months later I was involved an unfortunate incident with an improvised explosive device (IED) which subsequently led to the formulation of the research hypothesis of this thesis. While walking to Mirwais hospital from the carpark, a group of colleagues and I passed, as we did every day, a large old tree. This day there was a motorbike resting against it. The very moment we passed the bike it made a sound like a car backfiring and small fragments of the bike flew into the group. We all jumped, and one of my colleagues remarked it must have overheated. About an hour later we were evacuated from the hospital and subsequently discovered that the bike had its wheels fitted with explosives and bullets.⁶¹ The remote controlled IED had failed. The impact of this targeted attack meant all activities in Kandahar were temporarily halted and health care activities at the hospital ceased for a year. There were several theories about who was responsible, a rogue talib, the Taliban as a strategic move or an individual Pashtun who invoked his right to revenge to defend his honour.

⁶⁰ Barney Glaser & Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Pub. 1967) 30.

⁶¹ Basir Naadim, ‘Bomb Rigged Bike Seized un Kandahar’ Pajhwok Afghan News (Kabul, 22 Jun 2012) <http://archive.pajhwok.com/en/2012/06/22/bomb-rigged-bike-seized-kandahar> accessd 04 November 2015.

I failed to understand what possible benefit the Taliban as an ANSG would gain from this war crime.⁶² I set about researching the Taliban. The first thing I discovered was that there are two distinct Taliban Movements: the original and the neo or resurgent Taliban. The ‘neo-Taliban’ which reconstituted in 2002 sought to reclaim the moral highroad in Afghanistan by rebranding themselves as a broad-based independence movement as opposed to the original movement of religious fundamentalists obsessed by personal morality. It is the neo-Taliban that has generally targeted aid workers. My second trip (2017) narrowed the group demographic and added context and nuance to the group I wanted to examine, the original Afghan Taliban. In particular I wanted to look at ex-fighting members of the mujahideen in the Soviet invasion (1979-1989) and first to second year converts in Mullah Omar’s original Taliban (1994 -2001). Focus was limited temporally, historically, tribally and geographically: temporally to being involved in the movement over the period of 1994/5-2001; historically to being members of the *mujahideen*, fighting under *Hizb-i-Islami* either Hekmatyar or Khalis’ faction at any point from 1979-1989; tribally to identifying as Pashtuns; geographically to being born and maintaining familial links to Kandahar.

Literature Review

Relevant bodies of literature to this thesis are: global law; the application and applicability of international law to ANSGs; transitional justice, Islamic law, IHL, customary and local law. These are considered in turn.

Work by legal theorists and international lawyers has resulted in the distinction between law and non-law losing much of its relevance.⁶³ Attempts at theorizing the sources of international law in a global world go in from two directions. On the one hand, international lawyers are discussing how the sources doctrine needs to be reconfigured to account for the role of actors other than States. On the other hand, legal theorists have been analysing new legal phenomenon including self-regulation and spontaneous law.⁶⁴

⁶² ‘Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law’ Article 8(2)(e) ICC Statute.

⁶³ Jan Klabbers, Anne Peters & Geir Ulfstein, *The Constitutionalization of International Law* (Oxford Scholarship Online 2009) 98

⁶⁴ The Sources of International law (Sources Doctrine) is enumerated in Article 38 (1) ICJ. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevens 1179 [hereinafter ICJ Statute], available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&> (accessed Nov 16, 2014)

The work of Sousa Santos, a legal sociologist, is heralded by many as representative of post-modern thinking about global law.⁶⁵ For Santos, law can come in a variety of settings: the state but also at work or in local communities. Instead of looking for a criterion to distinguish law from non-law, he is more interested in probing how norms interact. Santos claims all law is characterised by the complex interplay between rhetoric, bureaucracy and violence. Legal orders with little bureaucracy typically rely on rhetoric, whereas those where bureaucracy has taken off and a monopoly on violence is established have less room for rhetoric.⁶⁶ Gavin Anderson starts from the premise that ‘the primary reference point’ in explaining law in a globalized era is no longer the nation-state, but rather the global economy. As a result, Anderson dismisses traditional state-centric ideas about law and presents a wide array of sources of legal pluralism, including ‘laws made in the family, in the workplace, in indigenous societies, among neighbours.’⁶⁷ This research builds on the work of Anderson and Sousa by adding weight to local or tribal law to the extent that it can displace state-centric law as the main regulator of conduct.

Scholarly contributions to the field of the internal regulation and legitimization of the ANSGs are scarce. Literature is constrained to explaining the growth of the legitimacy in terms of a response to governance failure. Literature on the normative regulation of armed non-state groups is limited. Scholars attribute legitimacy seeking by armed non-state groups through adherence and reference to international law, relegating local, tribal, or religious norms to a subsidiary status.⁶⁸

Academic attention on the regulation of armed non-state groups has focused on the difficulties in binding ANSGs within a State-centric international legal framework.⁶⁹ There has been some lateral movement looking at internal regulation. For example, Sandesh Sivakumaran posited

⁶⁵ Boaventura de Sousa Santos, *Toward A New Legal Common Sense* (2nd edn Butterworths 2002)

⁶⁶ See de Sousa Santos (n65) 86 – 88; Jan Klabbers, ‘(I Can’t Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors’ in Jarna Petman and Jan Klabbers (eds.) *Nordic Cosmopolitan. Essays in International Law* (Ashgate 2009) 94.

⁶⁷ Gavin Anderson, *Constitutional Rights After Globalization* (Hart 2005) 11-12.

⁶⁸ Stefanie Herr, ‘Binding Non-State Armed Groups to International Humanitarian Law – Geneva Call and the Ban of Anti-Personnel Mines: Lessons from Sudan,’ (2010) 95 Frankfurt: Peace Research Institute Frankfurt 1; Klejda Mulaj ‘Violent Non-State Actors: Exploring Their State Relations, Legitimation, and Operationality,’ *Violent Non-State Actors in World Politics*, ed. Kledja Mulaj (Columbia University Press 2010) 1-25

⁶⁹ See Francois Bugnion, ‘Jus ad Bellum, Jus in Bello and Non-International Armed Conflict’ (2003) 6 *YIHL* 167; Sassoli ‘Seriously’ (n42); Steinhoff ‘Talking to the Enemy’ (n38); Andrew Clapham, ‘The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement’ Feb 2010 <<http://ssrn.com/abstract=1569636>> accessed 14 February 2016; Olivier Bangerter, *Internal Control: Codes of Conduct within Insurgent Armed Groups*, (Small Arms Survey, 2012)

the idea that IHL could be used to regulate intra-party conduct;⁷⁰ and Nagamine who discusses the gap between what a group posit in doctrine as guiding their conduct and their actual conflict conduct.⁷¹ While manuals and codes of conduct are reflective of a group's normative legitimization strategy, it is seen in this context as obscuring the reality of how these groups act on the ground. Rather such manuals are accepted as a normative document, not a tactical guideline.⁷² Although internal regulation *vis a vis* external legitimacy is deduced from other theories, it is rarely developed.⁷³ Consider Abrahms theory that ANSGs use of terrorism is to maximize social solidarity as opposed to achieving political objectives. He proposes that ANSGs 'routinely engage in actions to perpetuate and justify their existence even when these undermine their official political agendas.'⁷⁴ This idea lends to the conclusion that where a conflict between internal and external legitimacy exists, ANSGs will prioritize the internal.⁷⁵ My contribution is deconstructing the ANSG narrative and adding emphasis to ANSG practice.

The expansion of international criminal law has been 'accompanied by a critical turn in transitional justice scholarship'⁷⁶ which has 'led to an increasing interest in bottom-up justice initiatives in the wake of political violence often established and supported by non-state actors.'⁷⁷ These shifts in the scholarship have highlighted disagreements between global and local transitional justice objectives within an environment of diverse actors with multiple interests.⁷⁸ In this growing body of literature focusing on post-conflict bottom up justice initiatives, the relative absence of pre-conflict or conflict grass-roots initiatives to obviate the

⁷⁰ Sivakumaran, *Law* (n28).

⁷¹ Greg Kleponis, 'Throwing the Book at the Taliban' (2010) *Small Wars Journal* 47; Yoshinobu Nagamine *The Legitimization Strategy of the Taliban's Code of Conduct Through the One-Way Mirror* (Palgrave Macmillan 2015); Niaz Shah, 'The Use of Force Under Islamic Law' (2013) 24 *EJIL*

⁷² Kate Clark, 'The Layha' Afghan Analysts Network, (2011); Niaz Shah, 'The Islamic Emirate of Afghanistan: A Layeha [Rules and Regulations] for Mujahidin' (2012) 35 *Studies in Conflict & Terrorism* 456; Niaz Shah, 'The Taliban Layeha for Mujahidin and the law of armed conflict' (2012) 3 *International Humanitarian Legal Studies* 192; Muhammad Munir, 'The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law' (2011) 93 *IRRC* 81

⁷³ Nagamine (n71) 6.

⁷⁴ Max Abrahms 'Why Terrorism Does Not Work,' (2006) 31(2) *International Security*; Max Abrahms 'What Terrorists Really Want,' (2008) 32(4) *International Security* 101-102.

⁷⁵ Abrahms theory relies however on the presumption that ANSGs have a difficult choice to make between internal and external legitimacy dictated by social or economic environment. This however, considers acts of terrorism which is only one means of legitimization.

⁷⁶ Nicola Palmer, *Courts in Conflict: Interpreting the ayers of Justice in Post-Genocide Rwanda* (Oxford Scholarship Online 2015)

⁷⁷ Kieren McEvoy and Lorna McGregor, 'Transitional Justice from Below: An Agenda for Research, Policy and Praxis' in Kieren McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008)

⁷⁸ Rosalind Shaw, Lars Waldorf, and Pierre Hazan, *Localizing Transitional Justice: Interventions and Priorities after Mass Violence* (Stanford University Press 2010); Martin Lau, 'Islamic Law and the Afghan Legal System' (LSE Research Online 2010) http://eprints.lse.ac.uk/28366/1/Lau_LSERO_version.pdf

need for transitional justice mechanisms conflict conduct is a gap that is ready to be filled. This thesis aims to highlight pre-conflict faultlines that, if acknowledged and addressed at grass-roots level, could have avoided or mitigated the need for transitional justice.

Comparative analysis between Islamic law and IHL draw almost exclusively on the Western experience.⁷⁹ Further most academic literature is desperate in its efforts to reconcile Islamic Laws of Armed Conflict (LOAC) within IHL. These efforts, while promoting an environment of harmony on paper among an increasing xenophobic world, it is neither academically honest nor helpful in understanding the basis of fundamentalist's ideas.

Literature on the Pashtuns also suffers from Anglo-centricity. Sir Olaf Caroe's book *The Pathans: 550 BC –AD 1957* remains one of the most robust studies of the Pashtun heritage.⁸⁰ Although there have been a number of ethnographic studies focusing on Pashtuns in Pakistan, there are relatively few such studies specifically on Pashtuns in Afghanistan.⁸¹

Structure of the Thesis

The thesis is divided into two parts. The first part will look at the general legal frameworks for non-state regulation of Islamic ANSGs namely Islamic Law and IHL. Recognizing that discussing Islamic groups in abstraction ignores the culture and context in which they flourish, part II contextualizes this research with a case study of the Afghan Taliban. This will add another non-state legal framework to be considered, the tribal law which is operational through the Pashtun belt.

Chapter one examines the ability of international law to regulate armed non-state groups considering the western bias underpinning its evolution. It looks at the ANSGs in the legal order and focuses on the international law applicable in NIAC. The chapters on Islam are intended to expand an understanding of Muslim heritage in relation to war, or more correctly the methods employed to achieve peace. Chapters two and three provide a historical and contextual survey of the sources of Islamic law, illustrating the debate around *jihad* and its interpretations. This is necessary as the majority of Islamic ANSGs that have emerged over the

⁷⁹ Khadduri, *Islamic Law* (n13) xii.

⁸⁰ Olaf Caroe, *The Pathans: 550 B.C.-A.D. 1957* (OUP 1958)

⁸¹ One exception is the field research on the Zadran clan in eastern Afghanistan by Alef-Shah Zadran, 'Kinship, Family and Kinship Terminology' (1980) *Afghanistan Quarterly* 33.

last three decades have claimed to be informed by principles stemming from early Islam. It considers juristic principles and their use in being able to justify conflict conduct. Chapters four and five trace the origins and evolution of Islamic use of force doctrine. It considers the weight that early Muslims attached to agreements and positions Islamic just war theory in early Islam. Finally, it considers Islamic LOAC through primary and secondary sources as well as grand narratives. It uses the modern restatement of IHL in the Geneva Conventions as the comparator.

Part two contextualizes the research with a case study of the Afghan Taliban over the period of 1994-2001. Chapter six begins with providing country context about Afghanistan, considering its creation and the ethno-political dynamics within the country. It briefly examines 19th and 20th century Afghan conflicts highlighting certain conflict conduct against *Pashtunwali* with *salafi* LOAC. The analysis of conflict conduct seeks to understand how the *mujahid*-cum Taliban operated within the plural legal orders in Afghanistan examining the interaction and hierarchy between the different norms. Chapter seven introduces the tribal law, *Pashtunwali*. It considers this law's role as an alternative or symbiotic regulatory framework for Pashtuns in Afghanistan. Chapter eight brings the various laws together, measuring certain Taliban conflict conduct, in particular conduct relating to the principle of distinction, against these various legal frameworks.

Scope and Limitation

With a history stretching to antiquity it was necessary to temporally bracket the research. For the purpose of illuminating the evolution of the conflict conduct of the Afghan Taliban, the period covering the latter part of the Great Game including the first Anglo Afghan Wars through to 2001 will be considered in greater detail, with emphasis on the period 1978-2001. It is conceded that much of the literature available on 19th century Afghanistan provides an Anglo-centric view of the state, a British and Indian military history of the various conflicts. Sources from Pashtun perspective are sparse.⁸²

After the NATO invasion, the 'neo-Taliban' regrouped in 2002 evidencing important discontinuities with the original Taliban of 1994-2001. The group evolved both technologically and ideologically. The Taliban issued a rule book, the *Layeha*, in 2006 which has been

⁸² Mark Simner, *Pathan Rising: Jihad on the North West Frontier of India, 1897-1898* (Fonthill 2016) 9

subsequently revised several times and subject to much scholarly attention. As this research is confined to a specific period of the Taliban insurgency, up until it became an international armed conflict (IAC) in 2001 the Layeha falls outside the scope of this research and will not be considered.

There are enormous difficulties in establishing an authoritative and objective record of past abuses in Afghanistan. Such difficulties include the dearth of documentary evidence, the atrophy of public institutions that could contribute to official truth telling.⁸³ As such, examples which are used to illustrate hierarchy or conflict of norms are widely known and their occurrence is accepted.

This research does not consider radical Islamist ideologues in great detail. Sayyid Qutb and Azzam, Zaraqawi have cameo appearances in this work as their platform has been transnational *jihad* and the Taliban insurgency was originally localized, and while puritanical in ideology, it was constrained to Afghanistan and the border region of Pakistan. Further, this research makes no claim to have represented an exhaustive understanding of Islamic law as would be expected from a student of theology, rather it forms part of a socio-legal research focused on norm regulation.

This thesis occupies an isthmus joining the socio-legal discipline with theology. It does not claim to provide an exhaustive analysis of Islamic law. At best, it hopes to avoid orientalist generalizations about Islam to enable the reader to understand certain nuances of Islamic law.

⁸³ The Afghanistan Justice Project (AJP), 'Casting Shadows: War Crimes and Crimes Against Humanity: 1978 – 2001' (Belgium 2006) 7

PART I

Chapter 1 Non-Native Invasive International Law

‘[International] laws are like cobwebs: strong enough only to detain the weak, and too weak to hold the strong.’⁸⁴

This chapter will examine the challenges to both conventional and customary international law within non-international armed conflict (NIAC), contextualizing these challenges within the international system. While these challenges have been addressed separately by different scholars, a holistic approach illuminates the complex reality that international law is paralyzed by its own constitution.⁸⁵ Failing to account for the exigencies of the people it seeks to govern and misdirecting resources by exclusively modelling ANSG regulation within the state-centric international system accentuates the problem.⁸⁶ It will briefly critique the existing relevant international law applicable to NIAC, highlighting intractable problems relating to its application. Adopting a critical perspective, this chapter aims to show the need to move beyond a positive, formal legal position in ANSG regulation and look towards alternate non-state law, which can be informed by international law but not dictated or dominated by it.

The international legal framework governing armed non-state groups (ANSGs) is convoluted at best.⁸⁷ Within this context, the continued ability of ANSGs to wage war and mimic state functions, threatens core ‘Westphalian’ principles of sovereignty and territorial supremacy.⁸⁸ State preservation dictates insurgents be regulated under the vertical domain of domestic law. Paradoxically, it is ANSGs’ very ability to undermine the state and truncate the process of peace that elicits international intervention.

To precondition regulation on only the most serious ANSGs is problematic. Whether a group is willing to comply with restraints will only be shown ‘by the result of the process and therefore cannot be a precondition to the process.’⁸⁹ The terms of recognition on an

⁸⁴ Anacharis in Leuprecht (n20) 48

⁸⁵ Charles Garraway, ‘The Use and Abuse of Military Manuals’ (2004) 7 *YIHL* 434

⁸⁶ Klabbers ‘Constitutionalization’ (n63) 125

⁸⁷ ANSGs referenced in this research are taken as qualifying as a party to the conflict and therefore engaged in a NIAC

⁸⁸ The Peace of Westphalia is the name commonly used for the treaties of Osnabruk signed in 1648 to end the Thirty Years War. The Treaty established *inter alia*, principles of the sovereign state, and equality among nation states. Derek Croxton, ‘The Peace of Westphalia of 1648 and the Origins of Sovereignty’ (1999) 21(3) *The International History Review* 569; Jennifer Beard, ‘The International law in Force: Anachronistic Ethics and Divine Violence’ in Johns, Joyce and Pahuja (eds), *Events: The Force of International Law* (Routledge 2011) 18

⁸⁹ Sassoli ‘Seriously’ (n42) 15.

insurrectional group by the relevant state, will dictate the international rights and obligations that flow from this status. It can also be determinative of whether a state will engage an armed group.⁹⁰ The political legitimacy that ANSGs gains from legal recognition can be more harmful to a state than any loss in the state's ability to apply domestic laws.⁹¹ Because the legal consequences of recognizing an insurgent group are vague, States are reluctant to admit that the conditions have been met for the application of international law, fearing it is tantamount to conceding governmental loss of control while elevating the status of the rebels.⁹²

Attempts by the international legal community to make its law inclusive and applicable to all actors involved in NIAC is continually frustrated by the state, which is unwilling to relinquish these Westphalian privileges to account for actors who seek to threaten them.⁹³ This has resulted in international law seeking to craft a delicate balance between humanitarian concerns within these conflicts and deference to the State. Although the scales are biased to favour the State, international law continues to fashion inroads in the area of NIAC, engaging in exhaustive political and diplomatic negotiations between state institutions to reach agreement not only on the legal classification of the conflict but also on the status of insurgents, its ultimate aim, for states to forfeit exclusivity in favour of international supervision.⁹⁴ Once international law succeeds in gaining a state-accepted role within NIAC, the binding nature and subsequent application of obligations stemming from the relevant international instruments is contentious,⁹⁵ and realistically can only be aspiration as a result of ANSGs inability to accede to international conventions, their non-participation in its formation, and by virtue of the traditional Westphalian enforcement mechanisms largely ignoring these groups.⁹⁶

⁹⁰ Eibe Reidel, 'Recognition of Insurgency' in Rudolf Bernhardt (ed) *Encyclopaedia of Public International Law*, vol IV (Elsevier 2000a) 47-50.

⁹¹ International legal protections may imply that the insurgents earn political rights when they gain legal recognition. Zegveld (n46); Lindsay Moir, *Law of Internal Armed Conflict* (Cambridge University Press 2002); Clapham *Obligations* (n44) 275; Stephen Krasner 'Sharing Sovereignty: New Instruments for Collapsed and Failing States' (2004) 29(2) *Quarterly Journal for International Security* 655

⁹² Steinhoff 'Talking to the Enemy' (n38) 310; Clapham *Obligations* (n46) 272

⁹³ Sassoli 'Seriously' (n42) 18.

⁹⁴ Zegveld (n46); Moir (n91); Clapham *Obligations* (n44) 275; Pascal Bongard & Jonathon Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look At International Mechanisms and the Geneva Call Deed of Commitment (2011) 93 (883) *IRRC* 673, 674.

⁹⁵ IHL is governed by the Geneva Conventions, the extent to which each applies in the area of NIAC is contentious.

⁹⁶ International law, by virtue of its construction, mandates dialogue and sanction ultimately between itself and the state, and state to state. However, ratification of international law does not equate to compliance with that law. Marco Sassoli 'Possible Legal Mechanisms To Improve Compliance By Armed Groups With International Humanitarian Law And International Human Rights Law' Paper Submitted At The University Of Quebec In Montreal (Vancouver, 13-15 November 2003)

The normative international framework applicable to ANSGs encompasses several branches of law: relevant international humanitarian law; human rights law; criminal law and customary law. Lacking a hierarchy of norms within and across these bodies of law, there are increasing claims that certain of these norms bind ANSGs irrespective of their acceptance.⁹⁷ However, the majority of legal constructions justifying the binding nature of these obligations have the disadvantage of often making ANSGs' obligation dependent on the government against which they fight.⁹⁸

Refusing to accept the reality that ANSGs are navigating within an international legal abyss, the international community returns to its default position, seeking refuge in customary law. International law, however, weights majority state practice alone in the creation of its customary law with no account for insurgent practice or *opinio juris*.⁹⁹ ANSGs generally disregard these laws, and it has been argued that evaluation of their compliance is redundant.¹⁰⁰ Much time, resource and academic discourse has been invested in enumerating *de lege lata* and *de lege ferenda*¹⁰¹ in this area, with little consensus on the enforcement of international obligations under international law, and little success in regulating ANSG conduct.¹⁰²

This already cumbersome international legal regime, is compounded with the competing domestic law of the place in which the conflict is occurring. Plagued with political and diplomatic constraints, the international regulation of NIAC occupies one of the most challenging areas of international law.¹⁰³

⁹⁷ Academie de droit international humanitaire et de droits humains a Geneve 'Armed Non-State Actors and International Norms: Towards a Better Protection of Civilians In Armed Conflicts', 2 <<http://ssrn.com/abstract=1698180>>

⁹⁸ Sassoli 'Seriously' (n42) 29.

⁹⁹ Further, in the Arab world, for the most part, state practice was determined by the unrepresentative and unelected elites that control the state apparatus. Mark Drumbl 'Victimhood in our Neighbourhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order' (2003) 81 *N.C. L. Rev.* 82.

¹⁰⁰ *Opinio juris* (OJ) translates as the 'acceptance of a practice as sufficient to create legal obligations.' It is described as the psychological component of CIL because it refers to an attitude that states have toward a behavioural regularity. Jack Goldsmith & Eric Posner, *The Limits of International Law* (OUP 2005) 24; Sassoli 'Seriously' (n42) 13. However, this position should be contrasted with the legal anthropologist Hoebel who compared customary law with international law as for both reaching solutions acceptable to all concerned as the ultimate objective. Jonathon Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 80 *IRRC* 655, 658.

¹⁰¹ Translated: What the law is (*lege lata*) and what the law should be (future law) (*lege ferenda*).

¹⁰² A.P.V Rogers, 'Unequal Combat and the Law of War' (2004) 7 *YIHL* 6.

¹⁰³ Sivakumaran *Law* (n28); Zegveld (n46); Sassoli 'Seriously' (n42); William Schabas, 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26(4) *Fordham International Law Journal* 907; Moir (n91).

Despite the burgeoning literature on the difficulties encountered by the international legal community in regulating, engaging and enforcing binding obligations on ANSGs, in an era where cultural relativism is progressively integrated within international discourse, the value of non-state law, indeed non-law, as an intermediary regulator of ANSGs is for the most part consigned to rhetoric.¹⁰⁴ However, there is a great deal that does not happen, and may not happen because of the law, and there is great difficulty construing this absence. Barely visible in the international legal framework, ANSGs' 'existence and influence is deduced by observing their effects.'¹⁰⁵

ANSGs, by their very definition would not be armed groups engaged in an armed conflict if they were in the practical reach of the law of the land and the law enforcement systems of the state on whose territory they are fighting. International law, by virtue of its inherent bias towards the State, cannot provide either an appropriate playing field or referee to regulate parties engaged in NIAC. Yet the international legal landscape governing these conflicts should not be diluted or interpreted *ad absurdum* to account for ANSGs, whether it be through elimination of the distinction between IAC and NIAC, or transposing the obligations of state actors onto non-state groups engaged in asymmetrical warfare, as it is too oft 'having the perverse effect of seeming to reward non-compliance and paradoxically incentivizing further violations of law.'¹⁰⁶ If '...a departure from [the state-centric international paradigm] becomes unavoidable,' it should not be through academic and judicial creeping, encroaching on fundamental legal principles.¹⁰⁷

Even with the tenuous legal transpositions affording an abundance of international law to govern NIAC, its 'existence...as a practical element in the conduct of human affairs' is undermined by its inability to adapt within an environment it was never designed to inhabit. Precepts claimed to be fundamental in that law are 'daily set at nought by belligerents in...

¹⁰⁴ 'Relativistic notions of right and wrong...have achieved...a disturbingly high level of prominence...both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal' *Parker v Levy*, 417 US 733, 765 (1974) (Blackmun J., concurring). Cultural relativism is a 'doctrine that holds hat (at least some) variations are exempt from legitimate criticism by outsiders, a doctrine that is strongly supported by notions of communal autonomy and self-determination.' Jack Donnelly, 'Cultural relativism and Universal Human Rights (1984) 6 Hum. Rts. Q 400; Cultural relativists see all values as socially constructed.' Binder (n6) 241. Zegveld, (n46); Sassoli 'Seriously' (n42).

¹⁰⁵ Daniel Bethlehem, 'The Secret Life of International Law' (2012) C.J.I.L 36.

¹⁰⁶ Charles Dunlap 'The Mottled Legacy of 9/11: A Few Reflections on the Evolution of the International Law of Armed Conflict' (2011) 14 Y.B Int'l Hum. L 431-432.

¹⁰⁷ Robert Jennings & Arthur Watts, (eds), *Oppenheim's International Law* 9th edn., vol I (Longman 1996)1265.

conflict.¹⁰⁸ Far from advocating the removal of international law from the NIAC equation, it is proffered that it would be better partnered with sub-state *law* which is less constrained, not just from bureaucracy but through proximity to ANSGs.¹⁰⁹ Rather than explore ANSGs in terms of binding obligations they should or could possess in abstract regulatory regimes, the focus should be on examining the *law* and regulation that exists in reality as evidenced in ANSG practice.¹¹⁰

Most academic texts on international law state the founding event of modern international law to be the Peace of Westphalia, 1648.¹¹¹ These treaties exemplify legal agreements legitimizing the ‘dawning of a new society of legal subjects (states) and a system of laws to regulate those subjects.’ Establishing the law of nations, it recognized the existence of ‘nascent, territorial states comprising their own legal and religious jurisdictions.’¹¹² Pre-Westphalia, non-state sources, including the universal common law of *ius gentium*¹¹³, were more important than state generated norms.¹¹⁴ Post Westphalia, the legal universe comprised two guiding principles. ‘First, law was deemed to reside only in the acts of official, state-sanctioned entities. Second, law was seen as an exclusive function of state sovereignty.’¹¹⁵ Framed as the ‘sum total of obligations consented to by states and binding upon those states,’ international law was derived from the consent of those it governed,¹¹⁶ whether express through treaties, or tacit as with

¹⁰⁸ Gordon Sherman, ‘Jus Gentium and International Law’ (1918) 12(1) *The American Journal of International Law* 56.

¹⁰⁹ For example, it is evident that third States can exert influence on the Taliban, with suggestions the Taliban are ‘Pakistani puppets’ under the effective control of this third State. William Dalrymple ‘This is No Nato Game But Pakistan’s Proxy War With Its Brother in the South’ *The Guardian* (London, 1 July 2010) It is also believed that the Taliban are largely financed by Saudi Arabia and the UAE. International law can flex its muscles to pressure these States to encourage Taliban compliance with international norms.

¹¹⁰ See Hägerström on legal realism. Hägerström, founder of the Uppsala school of jurisprudence. A. Hägerström ‘The Concept Declaration of Intent in the Sphere of Private Law’ in *Inquiries into the Nature of Law and Morals* (Ed. Karl Olivecrona, Stockholm 1953), 299 in Marie Sandström, ‘Law – Fact, Fiction or In Between? Axel Hägerström’s Quest for Legal Realism’ (1957-2010) *Stockholm Institute for Scandinavian Law* 329.

¹¹¹ Croxton (n88) 569.

¹¹² Beard (n88) 18.

¹¹³ The term first appears in European literature in Cicero’s writings. The conception of law as eternal and controlling, existing independently of human permission or enactment. Unwritten law evidenced by custom or the conscience of mankind. Sherman (n108) 57.

¹¹⁴ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press 2010) 22

¹¹⁵ Paul Berman, ‘From International Law to Law & Globalization’ (2005) NELLCO Legal Scholarship Repository University of Connecticut School of Law Articles and Working Papers University of Connecticut School of Law, 486. Berman concedes this is an ‘over-simplified vision of international law’ and recognizes ‘nonstate sources—including the idea of natural law itself—have long played a key role in the development of international legal principles.’

¹¹⁶ Anthea Roberts & Sandesh Sivakumaran, ‘Law-making by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law (2012) 37 *Yale J Int’l L* 113.

custom.¹¹⁷ Accordingly, this state-centric subject exclusivity meant that states could be the only entities capable of creating the laws by which they were bound.¹¹⁸ This traditional narrative of international law, comprising state sovereignty with its concomitant monopoly on legal personality, and claim to exclusivity in international law creation, has been subjected to a persistent and systematic challenge from globalization since the latter half of the twentieth century.¹¹⁹

Globalization's impact on state sovereignty functions as a decentralizing influence, diminishing the importance of sovereign states *vis a vis* other non-state actors which are exercising increased influence in the creation, implementation and enforcement of international law. While at times complementing or supplementing the law it still at no stage replaces the state in law creation.¹²⁰ Although sovereignty is described as 'perforated, defiled, cornered, eroded, extinct, anachronistic, even interrogated',¹²¹ it continues to remain central to understanding the state and international system.¹²²

Historically, non-state entities such as individuals and armed groups were considered to be objects rather than subjects of international law.¹²³ International law's limited subject base is no longer defensible. It has evolved and is now concerned with individuals who have international rights, obligations and enforcement capabilities.¹²⁴ Yet, no link is made between having these rights, duties and enforcement capabilities, and the capacity of non-state actors

¹¹⁷ Bruno Simma & Andreas Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 *Am. J. Int'l L.* 303, 305.

¹¹⁸ Steven Ratner & Anne-Marie Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers' (1999) 93 *Am J Int'l L* 291, 293; The 'Law of Nations [as] a law between states only and exclusively, [vests] states only and exclusively [as] subjects of the Law of Nations.' Lassa Oppenheim *International Law: A Treatise* 25-26 (Hersch Lauterpacht ed. 1948) 341 in Roberts & Sivakumaran (n116) 111.

¹¹⁹ Globalization recognizes the 'expansion of the global normative system from those promulgated by nation-states and those promulgated among nation-states.' Cassese 'International Law' (n49) 81 (Clarendon Press, 1986) 74; Christiana Ochoa, 'The Individual and Customary Law Formation (2007) 48 *VA J Int'l L* 121; See, e.g., Restatement (Third) of Foreign Relations Law of the United States § 102 (1987); Berman 'From International Law to Law and Globalization' (n115) 486.

¹²⁰ Duncan Hollis, 'Why State Consent Still Matters – Non-State Actors, Treaties, and the Changing Sources of International Law (2005) 23(1) *Berkeley J Int'l Law* 138; Roberts & Sivakumaran (n116) 115.

¹²¹ Michael Fowler & Julie Bunck, *Law, Power, and the Sovereign State: The Evolution and Application of the Concept of Sovereignty* (University Park 1995) 2.

¹²² However, 'sovereignty is not a fact. Authority and power are facts. [Sovereignty] is an assumption on authority.' FH Hinsley, 'The Concept of Sovereignty and the Relations between States' in *In Defence of Sovereignty*, (ed.) W.J Stankiewicz (OUP 1969) 275

¹²³ 'Not only did individuals not hold international rights or obligations, but any wrongs against them were cast as injuries to their state of nationality, resulting in that state having complete discretion over whether, when and how to pursue international claims on their behalf.' Roberts & Sivakumaran (n116) 111-2.

¹²⁴ Clapham 'Rights' (n71) 3.

(NSA's) to play a role in international law making.¹²⁵ While individuals may have obligations and capacities under international law, they do so only to the extent recognized by states.¹²⁶

The state-centric international system restrains a formal position for ANSGs. This is necessary from the State's perspective of preservation, and logical from the ANSGs position, potentially viewing international law as 'inimical or even hostile to the aims of the armed group at issue.'¹²⁷ State resistance in sharing their law-making role with non-state actors is amplified in the context of sharing this role with an armed group who challenges their authority. This seems rational given the State's necessary 'perception of the illegitimacy and threat of such groups.'¹²⁸ Although there is evidence of States indirectly conferring some legal status upon ANSGs,¹²⁹ such a law making role could not transpire without state consent.

Whether 'the monopoly of the state as a political actor in the international system has been entirely broken' and international reality is less state centred, international law remains very much state-centric.¹³⁰ Not only are most of its rules exclusively addressed to States, its implementation mechanisms and law creation capacity is even more state-centred.¹³¹ This construct mirrors process legal theory arguments, 'view[ing] law as an on-going process of authoritative decision making by various actors,'¹³² however, conceding that the 'authorized decision makers' remain predominately, if not wholly, state actors.¹³³

The doctrine of sources as enunciated in Article 38(1) of the Statute International Court of Justice (ICJ) is the conventional starting point for discussions on law-making in the

¹²⁵ Roberts & Sivakumaran (n116)112.

¹²⁶ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge Studies in Int'l Comparative Law 2011)

¹²⁷ Clapham 'Rights' (n71) 3.

¹²⁸ Roberts & Sivakumaran (n116) 108.

¹²⁹ For example, the Palestine Liberation Organization (PLO) was granted observer status at the General Assembly. GA Res 3327 (xxix) UN GAOR 29th sess., supp no. 31, UN doc. A/9631 Nov 22 1974. Peace agreements have also been signed between States and belligerents and between belligerents themselves. The dissolution of the FYR saw various sub-state entities enter into peace agreements with each other. Roberts & Sivakumaran (n116) 120-121; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations GA Res 2625 (XXV) UN GAOR 25th Sess Supp No 28 UN Doc. A/RES/25/2625 Annex (Oct 24 1970); Ian Brownlie *Principles of Public International Law* (OUP 2008) 62-3.

¹³⁰ Jost Delbruck 'Prospects for a 'World (Internal) Law? Legal Development in a Changing International System' (2002) 9 *Indiana Journal of Global Legal Studies* 402, 410.

¹³¹ Sassoli 'Possible legal Mechanisms' (n96) 2.

¹³² Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (Clarendon Press 1994) 39-55.

¹³³ Roberts & Sivakumaran (n116) 113.

international community. A hybrid naturalist-positivist doctrine, it accounts for the ‘path from morality to law[,]’¹³⁴ distinguishing legal obligations from non-legal practice.¹³⁵ Article 38 recognizes three sources of international law: treaties; customary international law; and general principles of law. In this doctrine, it falls under the exclusive remit of states to make international law. It also articulates two subsidiary means of law determination, deferring to ‘judicial decisions and the writings of the most highly qualified publicists of all nations.’ This latter concession acknowledges that a limited range of actors other than states may play a role in identifying, codifying and progressively developing international law.¹³⁶ However, ‘such development will unlikely extend to law creation,’¹³⁷ relegating this role as ‘evidence of law rather than dispositive statements of what the law actually is.’¹³⁸ Influencing international law rather than instigating it maintains the core structure of international law without ‘inappropriately legitimizing the relevant non-state actors.’¹³⁹

In an age of legal pluralism, logically non-state actors (NSAs) can and do set legal norms. Such a view however cannot be reconciled absent state consent. A more tempered approach recognizes a role for NSA in influencing or shaping international law that does not necessitate a role in direct law creation. As State can confer rights, obligations and enforcement capacities on NSAs, they can also confer discrete law-making roles on NSAs, based on the notion of delegated law-making powers. A bilateral agreement between a state and NSA is tantamount to consenting, at least implicitly, to that NSA having some role in law creation, at least for the limited purpose of entering into and being bound by that agreement. However, accounting for the state-centric international legal order, if NSGs have any international legislative competence, it is only, arguably *must* only, exist through some form of state consent. Such delegated law-making capacity is compatible with the statist doctrine of sources framework.¹⁴⁰

¹³⁴ Hollis (n120) 143.

¹³⁵ Simma & Paulus (n117) 111.

¹³⁶ Klabbbers, ‘Constitutionalization’ (n63) 111.

¹³⁷ Simma & Paulus (n117) 306-7.

¹³⁸ Bethlehem (n105); Sassoli ‘Seriously’ (n42) 7.

¹³⁹ There is no debate that international law has moved from pure state regulation and increased its subject base to include a variety of non-state entities, such as individuals (especially under international human rights and criminal law) and international organisations (such as the International Committee of the Red Cross and the United Nations). Clapham ‘Rights’ (n71) 29

¹⁴⁰ Roberts & Sivakumaran (n116) 116, 120.

1.1 International Law in Non-International Armed Conflict

Conventional laws of armed conflict (LOAC) or IHL, consists of two theoretically different legal systems: Hague Law and Geneva Law. Hague Law concerns the rights and duties of belligerents while Geneva Law is concerned with protecting those not, or no longer, taking direct part in hostilities ensuring their humane treatment. Hague Law is best captured in the Hague Convention 1907,¹⁴¹ its regulations include provisions proscribing the wounding or killing of surrendered combatants; killing and wounding ‘treacherously’; provisions protecting property, churches, hospitals, historic monuments as well as enemy property unless ‘imperatively demanded by the necessity of war.’ It extends LOAC protections to public and private property, establishing rules of combat and attempting to limit through arms control, ‘weapons of horror’.¹⁴²

A restatement of traditional rules of war, the articles of the Geneva Conventions 1949 and its two Additional Protocols (AP) 1977 claim universality and house minimum standards for conflict conduct by appealing to innate humanity.¹⁴³ Its foundation principles are distinction and proportionality which must be weighed against military necessity. It reflects a concern for the need to protect the life of those *hors de combat* and those not taking part in the conflict and to ensure that they are treated humanely.¹⁴⁴ The Conventions house specific protections for the sick and wounded combatants whether on land or sea; prisoners of war (POW) and civilians in occupied territory. The APs extend protections to proscribe acts of war that cause ‘superfluous injury...unnecessary suffering or widespread, long term and severe damage to the environment.’¹⁴⁵

Since 1945, the majority of armed conflicts have been internal in nature, involving domestic hostilities between ANSGs and States.¹⁴⁶ The decline of IACs was the result of fear over

¹⁴¹ International Conferences (The Hague), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <http://www.refworld.org/docid/4374cae64.html> [accessed 8 January 2017]

¹⁴² Abdel-Haleem (n4) 136.

¹⁴³ The Geneva Conventions 1949 and Addistional Protocols.

¹⁴⁴ Rule 147 CIHL, ‘Attacking person who are recognized as hors de combat is prohibited. A person *hors de combat* is (a) anyone who is in the power of an adverse party; (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.

¹⁴⁵Abdel-Haleem (n4) 136.

¹⁴⁶ Steinhoff ‘Talking to the Enemy’ (n38) 299; Buckley (n39) 794; Paul Collier, Anke Hoefflert & Dominic Rohner, ‘Beyond Greed and Grievance: Feasibility and Civil War’ (2009) *Oxford Economic Papers* 61; Sandesh Sivakumaran ‘Binding Armed Opposition Groups’ (2006) 55 *Int’l & Comp. L. Q* 369. In 2010, according to the

nuclear war, with medium and larger powers fighting wars by proxy in the territory of third States who were suffering fragile political infrastructure, and often ‘beset with tribal or other conflicts.’¹⁴⁷ Accounting for this change in modern warfare, there is a disproportionate legal focus on IAC with its detailed body of IHL regulating conduct therein. Regarding NIAC, there are only minimum humanitarian norms constituting the positive rules on the conduct of hostilities, and in the absence of other regulatory mechanisms, parties have been evading humanitarian regulation of their conflict conduct.¹⁴⁸ Commonly referred to as civil wars, legally defined as ‘armed conflicts not of an international character,’¹⁴⁹ such conflict, ‘triggered by the absence of effective formal and informal channels for resolving...social and political grievances,’ represents a threat to the international equilibrium and to the state from within.¹⁵⁰

The regulation of civil war dates to the 19th Century, where simultaneous reluctance on the part of States to regulate NIAC through international law emerged. This reluctance was stimulated by sovereign claims to war making authority and internal conflicts being within the *domaine reserve* of states and thus a matter for the affected state alone.¹⁵¹ The international community treated internal conflicts as a matter for domestic security in which third states had no right to interfere.¹⁵² Third state recognition and support of ANSGs was tantamount to a declaration of war by that state on the state in which the ANSGs were fighting. Such co-belligerency had the effect of, at very least, internationalizing the conflict.¹⁵³

The changing nature of conflict over the last 50 years has dictated international legal attempts to make inlets in the regulation of NIAC, with regulatory patterns spanning *ad hoc* to systemic; treaty based to customary. The common aim, to make the legal landscape and protections relating to NIAC akin to that offered in IAC.¹⁵⁴ This phenomenon is traced to the 1936 Spanish

Stockholm International Peace Research Institute (SIPRI), all major armed conflicts waged worldwide were intrastate. SIPRI, *SIPRI Yearbook 2011: Armaments, Disarmament and International Security* (OUP 2011).

¹⁴⁷ Bert Roling, ‘The Legal Status of Rebels and Rebellion’ (1976) 13 *Journal of Peace Research* 149-151 in Antonio Cassese, ‘The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) 30 *Int’l & Comp. L.Q* 416.

¹⁴⁸ Steinhoff ‘Talking to the Enemy’ (n38) 297; Buckley (n39) 794.

¹⁴⁹ Article 1, AP II 1977.

¹⁵⁰ John Keene *Reflections on Violence* (Verso 1996)

¹⁵¹ Sivakumaran *Law* (n28) 9.

¹⁵² Leslie Green, *The Contemporary Law of Armed Conflict* (3rd ed. Manchester U. Press 2008) 343. The UN Charter enshrined this concept stating that its members could not intervene in the domestic affairs of a state except to counter threats to peace, breaches of peace, or acts of aggression (Article 2(7) UN Charter; Article 39 UN Charter).

¹⁵³ Dieter Fleck, ‘The Law of Non-International Armed Conflicts’ in *The Handbook of International Humanitarian Law* (Dieter Fleck ed., 2nd ed. 2008) 606; Steinhoff ‘Talking to the Enemy’ (n38) 309- 310.

¹⁵⁴ Schabas (n103) 907.

Civil War, where despite international law barely featuring during that conflict, jurisprudence reveals it still applied.¹⁵⁵ ‘State practice revealed a tendency to disregard the distinction between international and internal wars and to apply certain general principles of humanitarian law, at least to those internal conflicts that constituted large scale civil wars.’¹⁵⁶ With a stroke of judicial ‘creativity’, international law thus rooted the origins of the international regulation of NIAC, or at least the right to regulate, to the Spanish Civil War,¹⁵⁷ pioneering the idea that rules governing IAC also applied in NIAC. This idea was however qualified with the concession that the Spanish Civil War had elements of both an internal and international armed conflict.’ As modern conflicts increasingly have *defacto* state co-belligerents, parallels can be drawn.¹⁵⁸ Whether grounding international regulation of NIAC on these facts is an overreach, the approach was endorsed by a majority of states in negotiations leading to the Rome Statute of the International Criminal Court (ICC).¹⁵⁹

Irrespective of the blanket applicability of international law to all armed conflicts, actually discerning the point at which internal troubles or disturbances transform into armed conflict, remains unclear.¹⁶⁰ There is no settled definition of the term, but the International Criminal Tribunal for the former Yugoslavia (ICTY) definition in the *Tadic* case is most frequently cited as authoritative. The Tribunal held that ‘armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’¹⁶¹

After establishing the existence of an armed conflict, the next hurdle is clarification of the temporal application of the law and agreeing on a definition of an ‘armed conflict not of an international character’. Both these aspects continue to lack consensus and are couched in vague terms, ‘[e]very armed conflict which ‘does not involve a clash between nations’ is not

¹⁵⁵ Schabas (n103) 907, 914.

¹⁵⁶ *Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction at para 100.

¹⁵⁷ Schabas (n103) 907.

¹⁵⁸ *Tadic* para 100.

¹⁵⁹ Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90 [hereinafter Rome Statute] Schabas (n103) 917.

¹⁶⁰ Natasha Balendra, ‘Defining Armed Conflict’ (2008) 29 *Cardozo L. Rev* 2461, 2468-70, 2475.

¹⁶¹ *Tadic* para 70 This dictum was endorsed by the Rome Statute which defines NIAC as ‘armed conflicts that take place in the territory of a state when there is a protracted armed between governmental authorities and organized armed groups or between such groups.’ Article 8(2) Rome Statute. See Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts* (OUP 2012) for understanding how classification of conflicts works in theory and practice.

of an international character...’,¹⁶² and the law regulating NIAC ‘extends beyond the cessation of hostilities until...a peaceful settlement is achieved.’¹⁶³

IHL applies whenever a *de facto* armed conflict exists, irrespective of whether the party to the conflict accepts this conflict classification.¹⁶⁴ The objective legal question of the existence of an armed conflict is determinative, but the state must accept the decision, importing an element of subjectivity into conflict classification.¹⁶⁵ With this retention of control in accepting the existence of such conflicts, states will likely disregard international law unless it is in its own interests to apply it.¹⁶⁶ Compounding this situation is the absence of any body capable of compelling a state to account for its refusal to accept a decision regarding the existence of an armed conflict.¹⁶⁷ States have, and continue to deny the existence of an armed conflict and have subsequently prevented the application of the minimum standards applicable in NIAC.¹⁶⁸

The status of combatants and subsequent punishment of actors actively involved in the hostilities is an important distinction in the classification of a conflict.¹⁶⁹ Since there is no combatant status in NIAC, members of armed non-state groups captured in NIACs are not entitled to prisoner of war (POW) status. States maintain asymmetry between POW status of state and non-state fighters in efforts to deny their ANSG opponents combatant legitimacy.¹⁷⁰ In IACs POWs are ‘released and repatriated after the cessation of active hostilities.’¹⁷¹ In internal armed conflicts, the Government will retain a degree of discretion with regard to the release of captured rebels, with ‘...those who have taken up arms...not in principle enjoy[ing]

¹⁶² See Judgment *Hamdan, Salim v Rumsfeld, Donald (Secy. Of Defence)*, No. 05-184, US Supreme Court 29 June 2006, 67.

¹⁶³ *Tadic* para 70.

¹⁶⁴ International Committee of the Red Cross (ICRC), ‘Improving compliance with IHL’, Background paper prepared for informal high-level expert meeting on current challenges to international humanitarian law, Cambridge, 25–27 June 2004

¹⁶⁵ International bodies such as the ICJ, the UN Security Council and the UN Commission on Human Rights have provided jurisprudence as to whether an armed conflict exists under CA3, however the views of some of these bodies are not binding on States. See the UN Commission on Human Rights Resolution on El Salvador, 1991/71, preambular para 6 and operative para 9; See also GA Res 45/172 and 46/133 on El Salvador. Zegveld, (n46), 275.

¹⁶⁶ M Cherif-Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (1997-8) 98 *J. Crim L & Criminology* 730; Moir, (n91) 45; Steinhoff ‘Talking to the Enemy’ (n38) 313.

¹⁶⁷ Alex Peterson, ‘Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict’ (2002) 171 *Mil. L Rev* 1, 67.

¹⁶⁸ Conference of Government of Experts on the Reaffirmation and Development of IHL Applicable in Armed Conflicts (Geneva, 24 May – 12 June 1971): Submitted by the ICRC (1971) Part V: Protection of Victims of Non-International Armed Conflicts, 43; Sivakumaran *Law* (n28) 163; Clapham *Obligations* (n44), 275.

¹⁶⁹ Schabas (n103) 916.

¹⁷⁰ Cherif-Bassiouni ‘New Wars’ (n168) 729.

¹⁷¹ Article 118 of Geneva Convention III 1949.

POW status and consequently subject to penal sanctions imposed by the State, since they are not legally entitled to fight or to take up arms. In doing so they are guilty of an offence, such as rebellion or sedition, which is punishable under domestic legislation...'¹⁷² Hence, a person who would qualify as a lawful combatant in an IAC becomes a common criminal in a NIAC.¹⁷³ This status determination is further complicated when innovative terms like 'unlawful combatant' are used in difficult cases to circumvent IHL obligations. 'Unlawful Combatants' are not a category referenced in the Geneva Conventions or recognized in international law.¹⁷⁴ By using this term, individuals 'orbit outside criminal justice, float[ing] about, unmoored, in their capacity as sub-defendants.'¹⁷⁵ Difficult cases should avoid making bad law.

The current tendency of international criminal tribunals, humanitarian and human rights institutions, and scholars to bring NIAC closer to that of IAC may have a negative side effect. The ICTY states in *Tadic* 'that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.'¹⁷⁶ It forgets that law governing NIAC fundamentally differs from that governing IAC as far as it addresses are concerned.¹⁷⁷ The law of NIAC seeks to bind both state and ANSGs, the latter lacking the capacity to adhere to several of the provisions legitimately expected by States and applicable in IAC.

According to the definition of a NIAC, the ANSG in question must have a certain degree of organization, command and discipline, and thus a capacity to enforce rules. If IHL requires ANSGs to comply with such standards it must also enable them to comply with it, *inter alia*, by establishing courts to prosecute violations. Indeed, there are several examples of 'revolutionary' courts in practice, however these courts have faced a barrage of criticism in relation to their failure to adhere with due process requirements. Little of this criticism is 'aimed at helping armed groups to improve the quality of justice meted out,'¹⁷⁸ however, it is difficult to imagine a criminal court constituted by any entity other than a State. Although there are

¹⁷² Ruling No. C-225/95, Re Dile No. L.A.T.-040, unofficial translation in Clapham '*Human Rights Obligations*' (n44) 278.

¹⁷³ Cherif-Bassiouni 'New Wars' (n168) 743.

¹⁷⁴ Clare Dyer, 'POWs or Common Criminals, They're Entitled to Protection,' *The Guardian* (Manchester, 30 Jan 2002)

¹⁷⁵ Drumbl (n99) 66.

¹⁷⁶ *Tadic* para 97.

¹⁷⁷ Sassoli 'Seriously' (n42) 16.

¹⁷⁸ *ibid* 34.

instances where non-state courts are sought by civilians as the preferred mechanism for justice, this is generally when the state court system is ineffective, corrupt or expensive.¹⁷⁹

In NIAC, at best, only one of the parties has participated in the creation of the law that is meant to govern all parties to the conflict.¹⁸⁰ By definition these conflicts are fought as much by ANSGs as by state forces. If only the needs, difficulties and aspirations of the latter are legally accounted for, the law will be less realistic and effective. While some rebel groups seeking to become the government of a state may be looking for international legitimacy, and could perhaps be convinced of the need to accept the application of norms accepted by the international community of states, other groups may have no such aspirations, being content with the control of certain natural resources and the opportunity to run an alternate governance outside the Westphalia system.¹⁸¹ Furthermore, the combat style of ANSGs and state actors vary, the former adopt tactics of a hit and run nature, using ‘clandestine methods, seeking shelter and intelligence from sympathizers.’¹⁸² They do not have sophisticated logistics and will rely on foreign supplies or captured stocks for weapons and ammunition.¹⁸³

The international community is riven with discord, dissension and dissonance. Its lack of foresight in accounting for the practical distinctions of ANSGs and states is illustrated in *Hadzihasanovic* where the ICTY concluded that command responsibility must necessarily apply in NIAC as in IAC.¹⁸⁴ This pronouncement implies that command responsibility also applies to ANSGs which may have much less factual control over their members than commanders of governmental armed forces and which may not have the legal capacity to punish its members who commit violations. To suggest ANSG commanders hand over their violating subordinates to the government or international tribunals is unrealistic.¹⁸⁵

¹⁷⁹ See ‘Why Many Afghans Opt for Taliban Justice’ BBC News (London, 2 Dec 2013). It is important to be aware that there are already different thresholds for courts under differently bodies of law. There is disparity in due process guarantees under AP II and IHRL in relation to what ‘regularly constituted’ entails. See Article 6(2)(c) AP II; Article 3(1)(d) GC’s and Article 14(1) ICCPR.

¹⁸⁰ Roberts & Sivakumaran (n116) 109

¹⁸¹ Clapham *Obligations* (n44) 287

¹⁸² Rogers (n102) 5

¹⁸³ *ibid* 5

¹⁸⁴ Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Prosecutor v Hadzihasanovic* ICTY, Appeals Chamber 16 July 2003.

¹⁸⁵ Sassoli ‘Seriously’ (n42) 16.

The international law governing NIAC continues to be created asymmetrically, holding individual ANSGs responsible for violations, imposing binding obligations as a group, yet excluding participation in the formation of law which specifically targets them. ‘A legal system which treats actors as second- rank citizens should not be surprised that those...citizens aim to upgrade their status, and the shortest route to being heard and...taken seriously is through violence,’¹⁸⁶ a logical unfolding of Hegels ‘master-slave’ dialectic.¹⁸⁷

The extension of the international community’s role in the regulation of NIAC, has manifested as stretching and testing the law, and through transposing obligations. ‘The history of international humanitarian law shows that states have consistently rejected any form of binding supervision of their conduct in... non-international conflicts.’¹⁸⁸ Judicial transposition of the existing law of IAC in the regulation of NIAC circumvented the arduous task of getting states to formally legislate for increased protections during internal conflicts.¹⁸⁹ Modelling the underdeveloped NIAC instruments on the highly regulated IAC provisions sees the court and tribunals applying protections by analogy. The appropriateness of transposition by analogy is not self-evident, and leaves largely unregulated situations in NIAC that yield no analogy to IAC.¹⁹⁰ While it is uncontroversial to claim that ANSGs are bound by certain international humanitarian rules it remains highly contested exactly how they are bound.¹⁹¹ The explanation behind the binding nature of the rules may influence the degree of compliance with the rules by ANSGs. Many of the explanations are not sufficient, and a theoretically pleasing approach must not come at the ‘expense of an unacceptable explanation to the armed opposition group.’¹⁹²

1.2 Binding Armed Non-state Groups in International Law

Different legal constructions have been put forward by scholars, international organizations and military manuals reflecting different conceptions of the legal status of ANSGs explaining

¹⁸⁶ Klabbers ‘Recognition’ (n66) 54-5.

¹⁸⁷ See Georg Hegel, *Phenomenology of Spirit* (OUP 1979)

¹⁸⁸ As Romania stated at the 1974-7 Diplomatic Conference ‘[t]here [is] a fundamental difference between international and non-international armed conflicts, and it would be a mistake automatically to transpose the provisions of ... [IAC instrument] to [those governing NIAC].’ *Official Records of the Diplomatic Conference on the Reaffirmation and Development of IHL Applicable to Armed Conflicts, Geneva (1974-1977)* (Federal Political Department, 1978) Vol 8, 221 para 33 (Romania). Toni Pfanner, ‘Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims’ (2009) 91 (874) *IRRC* 307.

¹⁸⁹ Sivakumaran, *Law* (n28) 76.

¹⁹⁰ Sandesh Sivakumaran, ‘Re-envisioning the International Law of Armed Conflict’ (2011) 22 *EJIL* 219.

¹⁹¹ Sassoli ‘Seriously’ (n42) 4.

¹⁹² Sivakumaran ‘Binding’ (n146), 371.

their obligations under interstate treaties.¹⁹³ In a NIAC, ANSGs will, if they reach the threshold to qualify as a party to the conflict, be bound at a minimum by Common Article 3 (CA3) of the Geneva Conventions.¹⁹⁴ As such CA3 implicitly confers (despite expressly articulating the contrary) a limited international legal personality to armed groups.¹⁹⁵ The question remains whether ANSGs should be bound by the same rules as states. One approach is to look at the *opinio juris* of ANSGs, or claim that there is a rule of customary international law according to which ANSGs are bound by obligations accepted by the government of the state on the territory of which they fight.¹⁹⁶ Alternatively, one can consider ANSGs bound by IHL under the general rules governing the binding nature of treaties on third parties.¹⁹⁷ This presupposes that these rules are the same for States as they are for non-state actors, and more importantly, that a given armed group has actually expressed its consent to be bound by them.¹⁹⁸

Consistent with the statist paradigm of international law, arguments positioning ANSGs within a state-like structure form the basis for the theoretical justifications underpinning the way international law comes to bind these groups, that is, viewing ANSGs as proto-state; pre-state; or sub-state actors.¹⁹⁹

When ANSGs display state-like characteristics,²⁰⁰ there is debate about the potential of such entities to engage in law creation as a '*proto-state*'. However, pre-conditioning a potential for law-making capacity on the basis of state like characteristics privileges only ANSGs attaining that threshold, possibly incentivizing other armed groups to use violent means to gain equivalent state-like qualities so as to be afforded a similar role in law-making.²⁰¹ ANSGs as proto-state implies that any effective power on the territory of a state is bound by that State's obligations.²⁰² This proto-state argument, recurring in international human rights law (IHRL), sees ANSGs bound as *de facto* authorities in a particular territory and want to exist in the

¹⁹³ Sivakumaran 'Binding' (n146), 369.

¹⁹⁴ It is known as 'common' as it is common to the four Geneva Conventions. For the full provision see Annex 1.

¹⁹⁵ Sassoli 'Seriously' (n42) 13.

¹⁹⁶ Michael Bothe 'Conflicts armes internes et droit international humanitaire' (1978) 82 *RDGIP*, 91-93 in Sassoli 'Seriously' (n42) 13.

¹⁹⁷ Cassese 'Status' (n147) 423-429.

¹⁹⁸ Sivakumaran 'Binding' (n146) 378-9.

¹⁹⁹ *ibid* (n146); Jann Keffner, 'The Applicability of IHL to Organised Armed Groups' (2011) 93 *IRRC* 443.

²⁰⁰ To qualify as a state depends on whether it possesses a 'permanent population, a defined territory, a government, and a capacity to enter into relations with other states or is recognized as a state by other states.' James Crawford, *The Creation of States in International Law* (OUP 2006) 48-74.

²⁰¹ Roberts & Sivakumaran (n116) 121

²⁰² Zegveld (n46) 15, 17

Westphalian system.²⁰³ ANSGs are then regarded as independent entities that exist along-side the established authorities. It abandons the traditional conception of the state as an impermeable whole. This argument can, however, only apply to those groups which actually exercise *de facto* authority over persons or territory. It is unable to explain the obligations of groups lacking such authority, but which are nonetheless bound by CA3.

Interconnected but distinguished in nuance is the justification of ANSGs as pre-State, premised on the groups intention to become the government of the State, but not necessarily reaching the proto-state threshold. Once in government such a group is bound by the international obligations of that state. The argument follows that the group must comply with these obligations even before it reaches this aim.²⁰⁴ While innovative, conditioning current obligations on potential performance, this idea typifies the convoluted rules at play, effectively binding ANSGs in abstraction, crystallizing on gaining power, disappearing if remaining in armed opposition but losing the intensity to trigger CA3.

ANSGs as sub-state actors considers groups bound because a state incurring treaty obligations has legislative jurisdiction over everyone found on its territory, including ANSGs.²⁰⁵ Such undertakings then become binding upon the ANSG through the incorporation of international rules into national legislation or by the direct applicability of self-executing international rules.

‘International bodies have generally considered the ratification of the relevant norms by the territorial state to be sufficient legal basis for the obligations of armed opposition groups. The conception of international law as a law controlled by states, means states can simply decide to confer rights and impose obligations on armed opposition groups.’²⁰⁶

Once the territorial state has ratified the Geneva Conventions (GCs) and/or AP II, ANSGs operating on its territory become automatically bound by the relevant norms laid down therein. This explanation views the relationship between the established government and the ANSG as

²⁰³ Richard Baxter ‘Jus in Bello Interno: The Present and Future Law’ in J Moore (ed.) *Law and Civil War in the Modern World* (John Hopkins Press 1974) 518

²⁰⁴ Jean Pictet, (ed.) *The Geneva Conventions of 12 August 1949: Commentary III Geneva Convention Relative to the Treatment of Prisoners of War* (ICRC 1960) 37

²⁰⁵ Sivakumaran ‘Binding’ (n146) 381-7.

²⁰⁶ Zegveld, (n46), 15

hierarchical in nature. However, this view is difficult to uphold. ANSGs seek to exercise public authority, and in doing so they question the authority of the established government, including the governments laws.²⁰⁷

From a pragmatic and humanitarian point of view, it is preferable to give ANSGs the possibility to respect IHL rather than exclude them from the outset. However, it is more difficult for ANSGs than governments to implement IHL, as they lack an appropriate infrastructure to facilitate implementation.²⁰⁸ For all existing, claimed and newly suggested rules of IHL, or whenever IHL is interpreted, there needs to be an evaluation of whether the ANSG possess the necessary will and capacity to comply with the rule found and whether compliance makes sense.²⁰⁹ For example, ANSG are expected to comply with international Criminal Law while simultaneously being told they lack the competence to administer criminal justice.²¹⁰

CA3 and AP II do not expressly oblige the parties to the conflict to ensure respect for its norms, and international practice generally provides little support for the obligation of ANSGs to ensure respect for the applicable law. The translation of such practice means international bodies have done little to make the applicable law effective.²¹¹ Yet the general opinion is that violations of IHL stem from an unwillingness to respect the rules contained therein, from insufficient enforcement mechanisms, and lack of awareness from the parties concerned of the rules, not from an inadequacy of its rules.²¹² The behaviour of ANSGs is difficult to influence through international mechanisms because they are often denied political legitimacy.²¹³

The architecture of international law exposes the underregulated position of ANSGs. Falling in a regulatory gap, the law is unwilling to commit to whether these groups and the use of force against them should be regulated through a criminal law or an international law paradigm.

²⁰⁷ Zegveld, (n46) 16.

²⁰⁸ Sassoli 'Seriously' (n42) 33-36.

²⁰⁹ *ibid*' (n42) 16.

²¹⁰ Saul 'Enhancing' (n6) 42.

²¹¹ Common Article 1 refers to the obligation to ensure respect for the norms in the GCs. Zegveld, (n46) 93.

²¹² However, there is an increasing pool of commentators that suggest that IHL is no longer fit for purpose in modern conflicts and should be revised. Effective revision would entail engagement with *all* the parties involved. In the present international environment, it is difficult to imagine consensus on new rules governing NIAC. Sassoli 'Seriously' (n42) 21; Cassese 'Rebels' (n147) 416; Jean Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Conflict' (2005) 87 (857) *International Review of the Red Cross* 176.

²¹³ Saul 'Enhancing' (n6) 39

When examining ANSG conflict conduct, what is really being considered is the regulation of their use of force.

The scope of applicable international obligations which attach to ANSGs is underdeveloped in law and practice. While state responsibility is largely codified in a sea of treaties, the international responsibility of ANSGs, as a group, remains largely unchartered.²¹⁴ Existing international courts allow only cases to be brought against individuals or states. Yet armed non-state groups have an abundance of obligations in international legal rhetoric. The tangible translation of these obligations, in relation to enforcement, continues to cage these obligations in abstraction.

ANSGs challenge many sources of legitimacy. They ‘often develop [and thrive] in states in which there is a power vacuum or in which states already fail to provide economic and physical security for some portion of the population.’²¹⁵ A state’s willingness to engage an armed group is likely bounded by the degree to which it considers the group a threat to its territorial integrity, not the potential impact engagement would have on the groups legal status. State fear of legitimizing insurrection has resulted in a near absence of rules intended to limit violence. The situation remains relatively static, the laws applicable to NIAC remain rudimentary and applicable only in limited situations.²¹⁶

An inclusive approach to law-creation represents an unprecedented shift in the traditional paradigm of sources and law-making. As the legal framework currently exists, such creation can only ever involve indirect participation of NSAs in the process; that is one pre-conditioned on state consent.²¹⁷ Despite the support for modifying the frame of reference from the doctrine of sources and to look at who is actually making the law,²¹⁸ Article 38 continues to represent a ‘common denominator’ of international legal source. ‘[I]nternational law was by definition formed by states, and no noble aspirations or sentiments, love of progress or anxiety for the

²¹⁴ Sassoli ‘Seriously’ (n42) 7

²¹⁵ Harvard Univ. Program on Humanitarian Policy and Conflict Research & Geneva Graduate Inst. Of Int’l Studies, Empowered Groups, Tested Laws And Policy Options (2007) 24 http://www.hpcrresearch.org/sites/default/files/publications/Report_Empowered_Groups_Nov2007.pdf

²¹⁶ Bugnion (n69) 167, 168; Steinhoff ‘Talking to the Enemy’ (n38) 310

²¹⁷ NSA role in law making could be recognized based on express or implied state consent, with states explicitly agreeing certain NSAs could play a role in treaty negotiations or unilaterally undertake to be bound by particular treaty commitments. If the ICTY formed through re-delegated power the ICRC could re-delegate to have an ANSG forum. Roberts & Sivakumaran (n116) 119-120.

²¹⁸ Hollis (n120) 139

well-being of the peoples of the world could be embodied in international instruments without the collective assent of the international community.’²¹⁹

There is an alternative to traditional international law, one that does not require the assent of states to not only apply but bind individuals through international borders. The next chapter will trace the evolution of Islam and Islamic law to show how, and to what extent Islamic law can bind Islamic ANSGs.

²¹⁹ Statement by the representative from Brazil UNCLOT I, 317 in Gennady Danilenko, ‘International *Jus Cogens*: Issues in Law-Making’ (1991) 2 *Eur. J. Int’l L.* 46.

Chapter 2 Tracing Conflict in Islam *

*'Religious discourse can recode virtually any content as sacred, ranging from the high-minded and progressive to the murderous, oppressive, and banal, for it is not any specific orientation that distinguishes religion, but rather its meta-discursive capacity to frame the way any content will be received and regarded.'*²²⁰

In countering the radical methodology advanced as a foundation by militants who proclaim an Islamic base, Ehrlich's premise, that 'the centre of gravity of legal development [and legal deviancy lay]...in society itself' is resurrected as the regulatory formula to be addressed to ameliorate the increasing friction between fringe radical groups and international law.²²¹ The first hurdle is reconciling this formula with classical Islamic theory which proffers itself as 'a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society.'²²² Examining the theological discourse of Islamic ANSGs requires an understanding of Islamic legal sources and the interaction between these sources in shaping Islamic humanitarian rules and laws of war.²²³ This chapter contextualizes Islam within the international legal order. It considers its evolution to provide a frame of reference from which Islamic LOAC can be traced.

Competing discourses from various regions are engaged in a battle for legitimacy within Islam and the global community.²²⁴ One dimension of this discourse manifests in advocating individual interpretation of the *Qur'an*, ignoring the robust Islamic jurisprudence that has

* Almost all the Islamic tradition is oral and all is in Arabic, many agree that the *Qur'an* is only intelligible in that tongue which is itself subject to innumerable idiomatic and regional inflections. The variegated nature of Islamic legal discourse coupled with the fluid nature of Islamic law necessitates the caveat that any analysis will be relatively superficial, and for the purposes of the examination, limited to Sunni Islamic theory. This chapter serves as a contribution. It does not claim to be either definitive nor complete. This is not a thesis presented in a department of Islamic or Arabic Studies.

²²⁰ Bruce Lincoln, *Holy Terrors: Thinking About Religion After September 11* (Chicago University Press 2003) 6.

²²¹ This legal development attaches the caveat that it evolves from a stable law that is not to say that it needs be 'imprisoned in a code.' Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, (Harvard University Press 1936) 193, 390. While Ehrlich claims living law dominates life itself, he is criticized for romanticizing the law creating role of customs and practices on small scale rural communities. Teubner argues the global world relies on 'cold technical pressures not warm communal bonds.' Gunther Teubner, 'Global Bukowina Legal Pluralism in World Society in *Global Law Without a State* (G Teubner edn., Dartmouth Aldershot 1997) 3; David Nelken, 'Eugen Ehrlich, Living Law, and Plural Legalities' (2008) 9(2) *Theoretical Inquiries in Law* 443.

²²² Coulson (n12) 1.

²²³ Andrew March & Naz Modirzadeh, 'Ambivalent Universalism? Jus ad Bellum in Modern Islamic Legal Discourse' (2013) 24 *EJIL* 367 368

²²⁴ Islam literally means surrender. The origin of the word is *salaam*, meaning peace. There is a common misconception espoused by many Muslims today that Islam means peace. Islam means 'submission', '*Salaam*' means 'peace'. Begg, '*Jihad*' (n8)

evolved since the 7th century common era (CE)²²⁵ and failing to acknowledge the historical context in which Revelation was received.²²⁶ The ‘chaos theory’ which results from such an approach renders prediction of individual conduct within the collective impossible, even the slightest deviation in interpretation yielding diametrically opposed behaviours. This leads to a fractured Hobbesian ‘state of nature’ where each decides for themselves how to act, and is judge, jury and executioner in their own case whenever disputes arise; a state of perfectly private judgment, in which there is no agency with recognized authority to arbitrate disputes and effective power to enforce its decisions.²²⁷ While exploring the ‘law’ these insurgents claim regulate their conduct, the possibility exists that certain militants espousing an Islamic base, absent collective interpretation, consensus or tempering through legal tools, are theoretically and operationally irreconcilable with both Islamic international law and the *ius gentium*.²²⁸ Distinguishing these groups and their views on the wider international community, those not recognizing the *defacto* provisional legitimacy of the sovereign nation-state system of the globalized world and its international legal system must be considered when exercising leverage to persuade or coerce compliance with humanitarian norms.

From the outset, it is important to pre-empt two criticisms. First, there is the view that a comparative analysis with Islam and IHRL/IHL will be susceptible to hermeneutical criticism of which interpretation of *Shari'a* will be compared to the conventional legal norm.²²⁹ This research focuses on popular conceptions of fundamentalist interpretations which make

²²⁵ This thesis will, when necessary for context, use a dual system of dating, the Gregorian (CE) and the Muslim Hijri (AH) calendar. The reason being that it provides a historical relativity for Islam.

²²⁶ ‘The notion that historical context should play no role in the interpretation of the Quran – that what applied to Muhammad’s community applies to all Muslim communities for all time – is simply an untenable position in every sense.’ Max Rodenbeck, Sunday Book Review: ‘Reza Aslan, *No God but God: The War Within Islam*’ *The New York Times* (NY, May 29 2005). Shaheen Ali, ‘The Conceptual Foundation of Human Rights: A Comparative Perspective’ (1997) 3(1) *European Public Law* 261, 278. See Human Rights Committee Summary record of the 1251st meeting (Iran) UN. Doc. CCPR/C/SR.1252 (29 July 1993); Hashemi (n6) 12.

²²⁷ S Lloyd *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature* (Cambridge University Press 2009)

²²⁸ ‘To the Romans the term *ius gentium* signified in the wide sense the law common to civilized peoples and included both public and private law; in the narrow sense it meant the principles governing the relations of the Roman people regarded as a whole with foreign peoples similarly regarded.’ Dietrich Ompfeda, *Litteratur des gesammten sowohl naturlichen als positiven Völkerrechts* (Regensburg 1785) 169 in James Scott, *Preface in Francisco Vittoria, De Indis et De Iure Belli: Relectiones, Being Parts of Relectiones Theologicae XII*, E Nys edn., (Oceana Publications 1964)

²²⁹ See for example, Heiner Bielefeldt, "Western" versus "Islamic" Human Rights Conceptions: A Critique of Cultural Essentialism in the Discussion on Human Rights, (2000) 28(1), *Political Theory* 90; Andrew Rippin, *Defining Islam: A Reader* (Routledge 2007); Mahmoud Hussein, *Understanding the Qur'an Today* (Saqi 2013); Mahmoud Ayoub, *The Qur'an and Its Interpreters* (Vol.1) (State University of New York Press 1984); Marie Juul Petersen ‘Islam and Human Rights: Clash or Compatibility?’ *Religion and the Public Sphere* (26 Oct 2016). Blog.

permissible in Islam that which is prohibited in IHL and therefore is not constrained to a particular interpretation. The second criticism is the risk of legitimizing the incorporation of Islam in the international legal order.²³⁰ The separation of religion and government has been recognized by the majority of states as a necessary principle for the effective functioning of individual state institutions, deference given to the historical precedent of the problems directly resultant from fusing religion or ideology with state foreign policy and action.²³¹ It would however be a gross misrepresentation to posit either International, or state law and justice as being divorced completely from religious principles. Additionally, such a position fails to account for the role [religion] has played in legitimizing state building along secular-nationalist lines, or has had against the state, or as a ‘legitimator of political reform at a level below the state.’²³²

Attempts to implement one law, revealed by a ‘Divine Legislator’ to uphold His sovereignty *vis a vis* other world orders, is a recurring theme in history. In the early centuries of the Common Era, religion was citizenship.²³³ Religious based morality provided an ‘effective and pervasive mechanism of self-rule and did not require the marked presence of coercive and disciplinarian state agencies.’²³⁴ Culminating in the Peace of Westphalia, state sovereignty displaced transcendental law. States conceded their ability to maintain a Divine monopoly in favour of a new world order based on reciprocity and mutual interest for the collective benefit of nations.²³⁵

²³⁰ That is, the impropriety of the targeted inclusion of a single religion in an international system which espouses universal rights and values consented to by all states. While in the Western tradition the state is viewed as a territorial and political body, based on ‘temporal elements such as shared memory, language, race, or the mere choice of its members.’ Khomeini rejected this view, seeing the secular, political state and nationalism as Western constructs of imperialistic design to damage the cohesion of the *umma* and impede the ‘advancement of Islam.’ Farhang Rajaee, *Islamic Values and World View: Khomeyni on Man the State and International Politics* (University Press of America 1983) 7, 67-71

²³¹ The majority of states have seen the separation of the sacred and the political not greatly curtailing religious freedom or worship. ‘All religions are inextricably bound to the social, spiritual, and cultural milieu from which they arose and in which they developed. It is not prophets who create religions. Indeed, it is most often the prophet’s successors who take upon themselves the responsibility of fashioning their master’s words and deeds into unified, easily comprehensible religious systems. Aslan (n29) 17; Ali Mazrui, ‘The Ethics of War and the Rhetoric of Politics: ‘The West and the Rest’ (2002) 2 *Islamic Millennium Journal* 1, 3-4; Khadduri *Islamic Law* (n13) 69

²³² The separation of Islamic law and state law is completely inimical to puritanical Islam. Abdalla (n30) 5.

²³³ It ‘defined ethnicity, culture, social identity, politics, economics, and ethics.’ Thus, ‘the Holy Roman Empire had its officially sanctioned and legally enforced version of Christianity, just as the Sasanian Empire had its officially sanctioned and legally enforced version of Zoroastrianism. Aslan (n29) 80.

²³⁴ Hallaq *Introduction* (n13) 57.

²³⁵ Khadduri *Islamic Law* (n13) xi.

The 'law' that subsequently evolved to satisfy this mutual interest and deference to sovereignty appeared adequate to manage inter-State conflict relationships. However, continuing western hegemony and geopolitical exclusionism has fostered resentment among the 'others'.²³⁶ International law's posture towards legacies of colonialism has created a 'legalized hegemony'.²³⁷ '[T]he founding conception of late nineteenth-century international law was not sovereignty but a collective (European) conscience.'²³⁸ Constructions of sovereignty predictably evolved to mirror the Eurocentric scale of 'civilization' attendant to colonialism.²³⁹

Islam challenges this dominant world view yet 'remains peripheralized [which] simply heightens [its] sense of marginalization.'²⁴⁰ Recognition of legal inequality coupled with both the changing nature of warfare and colonial emancipation, (which factored neither the 'enslaved' population's cultural nuances nor its customary law in the evolution of the *droit des gens*²⁴¹ questions whether international law is able to satisfy a truly inter-national legal mandate.²⁴²

Whether the fragility of international law is a necessary by-product of the tension between state egoism and the recognition of community interests in pursuit of a common good, it is the responsibility of a true and progressive law of nations to reflect a standard of justice governing the relationship among nations as determined by the united interest of all nations. Only then will international law be emancipated from the orientalist defects that continue to undermine it.²⁴³ 'The future of the international legal order rests ultimately on its ability to identify and

²³⁶ Abdel-Haleem (n4) 208.

²³⁷ Gerry Simpson, *Great Powers And Outlaw States: Unequal Sovereigns In The International Legal Order* (Cambridge University Press 2004), x; R. W. Tucker, *The Inequality Of Nations* 3 (Basic Books, 1977).

²³⁸ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise & Fall of International Law 1870–1960* (Cambridge University Press 2001) 98-178.

²³⁹ Geret Gong, *The Standard Of 'Civilization' In International Society* (Clarendon Press 1984) 44.

²⁴⁰ Drumbl (n99),92.

²⁴¹ In Vattel's, *Le Droit des Gens* (1758) 'The Law of Nations', he applied a theory of natural law to international relations. It was the first time the term was coined. Jeremy Bentham shortly after coined the term international law, *J. Bentham An Introduction to the Principles of Morals and Legislation* (1780) (Dover Publications Inc 2007).

²⁴² 'The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating [colonised people], presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission[,]—the discharge of the white man's burden.' Anghie, *Peripheries* (n3) 7. It is contended that the laws governing secession and self-determination also reflect euro-centric imperialism. Khadduri *Islamic Law* (n13) 1.

²⁴³ 'The Muslim masses have lost their confidence in the international system as Neutral Problem-solver after the experiences of the last [three] decade[s].' Ahmet Davutoglu, *Civilizational Transformation and the Muslim World* (Mahir Publications 1994) 103-104.

reflect in its prescriptions and procedures the common interests of all members of the world community.²⁴⁴

Navigating the relative absence of Islamic law in colonialist discourse reveals not only shortcomings in conventional law as it relates to the modern law of nations but also betrays the imperialist preference to weight Roman law over *Shari'a*.²⁴⁵ Engaging the premise that while Grotius is recognized as the father of a Euro-centric *droit des gens*, the failure to account for what Euro-centric scholars refer to as his Islamic 'counterpart', the eighth century Islamic jurist *Shaybānī* (d. 804), whose jurisprudential contribution to the law of nations is neither recognized nor reflected in contemporary international law or legal discourse, constrains the order in its current form from having universal application or arguably even legitimacy.²⁴⁶

Exhibiting orientalism in parts where the West is taken as the baseline and Islam relegated to the 'other',²⁴⁷ comparative analysis between the West and Islam is not intended to reduce these traditions to static constructs. Rather, what is intended is a historical approach with a

²⁴⁴Sarvenaz Bahar, 'Khomeinism, The Islamic Republic of Iran and International Law: The Relevance of Islamic Political Ideology' (1992) 33 *Harv. Int'l L. J* 145, 189-190.

²⁴⁵ *Shari'a*, unlike Canon law, does not simply represent religious laws but covers a wide range of secular laws and ordinances. These include areas as diverse as international commercial law, criminal law, constitutional and administrative law, humanitarian, and human rights law. The root Arabic word of *Shari'a* is the verb '*shara'a*', meaning 'to open upon a street. From *shara'a*, comes *mashra'a* which means path to watering place. Legally, *Shara'a* means to make or establish laws. '*sirah*' (pl) *siyar* means the attitude adopted by the rulers towards aliens in the state of war and peace. Youseff Aboul-Enein & Sharifa Zuhur, 'Islamic Rulings On Warfare' (Carlisle Barracks: Strategic Studies, 2004), 6; Hallaq *Origins* (n6) i.

²⁴⁶ This feeds into the increased resentment of continuing Western hegemony, arrogance and geopolitical exclusionism. Prior to 1856, European international law treated those who fell outside the European state system as 'passive objects of the law' rather than as active subjects. Cockayne, (n12) 599. Although Western scholars have intermittently referred to *Shaybānī* as the 'Grotius of the Muslims' it is opined that such reductionist rhetoric continues to perpetuate a western biased, Manichean world-view construct. The choice of *Siyar* scholar is limited to *Shaybānī* as it relates to the laws of war and therefore will search for points of convergence and divergence with *ius in bello*. This necessary limitation is based simply on the fact that when *Shaybānī* was interpreting 'prior teachings and traditions, incorporating his own opinions through juridical analogy and pure juristic reasoning it was through a conflict context, *Shaybānī* living in an era where the 'normal relationship between Islam and other peoples was [*jihad*] [or as European jurists would have referred to it, *bellum justum*].' Phillip Jessup in Khadduri *Islamic Law* (n13) viii- x; Christopher Weeramantry, *Islamic Jurisprudence: An International Perspective* (Macmillan 1998) 149-158. Although there were precursors to Grotius, none before his treatise *De jure belli ac pacis* (Paris, 1625) had considered the law of nations in its entirety. Scott (n228)

²⁴⁷ See Edward Said, *Orientalism* (Random House 1978) which provides a classic critique of the Western view of Islam. He posited that 'because of Orientalism the Orient was not (and is not) a free subject of thought or action.' This Orientalism has been somewhat reversed by radical Islamists of the 20th century, where Western discourse first read Muslims as 'lethargic, child like, feminine and devoid of energy and initiative' Muslims are now depicted as 'overly aggressive and violent.' Where Western stereotypes of Muslim Orient centred on 'its backwardness, its silent indifference, its feminine penetrability, supine malleability' the dominant contemporary stereotype sees Muslims as 'intrinsically prone to violence.' Bruce Lawrence, *Shattering the Myth: Islam Beyond Violence* (Princeton University Press 1998) 4; Albert Bergesen, *The Sayyid Qutb Reader* (Routledge 2008) 13. Both orientalists and occidentalists are guilty of generalisation and reductionism.

comparative flavour employed to illuminate the parallels between western jurisprudence and the *madhahib*²⁴⁸ within *usul al-Fiqh* ('*fiqh*');²⁴⁹ sources of contemporary international law and sources of *siyar*;²⁵⁰ IHL as codified in the Geneva Conventions and Islamic legal restrictions on conflict conduct.

Although fully formed Islamic law was established seven centuries before the emergence of Grotian philosophy, the evolution of the legal framework that forms the basis of *ius gentium* and *Siyar* has followed a similar trajectory.²⁵¹ This is not to equate Islamic law 'to the notion of law as found...in common law or civil law systems,'²⁵² indeed its differences *vis a vis* other legal systems makes its study indispensable to 'appreciate the full range of possible legal phenomena.'²⁵³ Yet it is evident there are points of confluence, neighbourly cohabitation compelling moral and legal obligations which over time form a system of international law.²⁵⁴ There is one glaring distinction. Irrespective of how various legal orders have evolved, in Islam the overarching supreme law remains the *lex dei*. This is a uniting factor in Muslim history and identity which has enabled the Islamic community to overcome vicissitudes that have presented over fourteen centuries.

²⁴⁸ The *madhhab* (pl. *madhhahib*) meaning 'school of jurisprudence' is one of two devices used in Islamic law to instil order in a sea of differing translations. Scholars who could trace their doctrine back to the same seminal authority would consider themselves as followers of that discrete 'school'. There are four main recognized Sunni schools, Hanafi, Shafa'i, Maliki and Hanbali.

²⁴⁹ 'The word '*fiqh*', when used in the form of '*faqih* ya *faqihu*' means 'to know, to understand.' Asifa Quraishi 'On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Constitutional Law' (2009) Michigan State L Rev. 339, 342.

²⁵⁰ The Statute of the ICJ, Article 38(1) although concerned primarily with the composition and functioning of the Court, incidentally lays out the sources of international law which can be divided into primary and secondary or subsidiary sources. Similar to article 38 (1) (c) and (d), there are additional recognized sources of Islamic law: *urf* (custom) and *maslaha mursala* (*Maslaha* is public interest and *Mursala* is public welfare), which also lack universal acceptance. The sources of the Islamic law of nations conform generally to the same categories as those stipulated in article 38(1) Statute of the International Court of Justice. To achieve an effective conceptual confluence of Western and Islamic international law, contemporary state or proto-state practice of Islamic jurisdiction must be viewed as the 'operative' Islamic law, thus comparing practice of legal norms as well as abstract ideological or rhetorical precepts. Tauseef Parry, 'The Legal Methodology of '*Fiqh* al-Aqalliyat' and its Critics: An Analytical Study' (2012) 32(1) *Journal of Muslim Minority Affairs* 88, 92; Shaheen Ali & Javid Rehman 'The Concept of *Jihad* in Islamic International Law' (2005) 10(3) *Journal of Conflict & Security Law* 321, 343.

²⁵¹ Parry, 'Legal Methodology' (n250) 92.

²⁵² 'Nor has it come into being the way conventional law has. It has not had to undergo the same process of evaluation as all the man-made laws have done. The case of the Islamic law is not that it began with a few rules that gradually multiplied or with rudimentary concepts refined by cultural process with the passage of time; nor did this law originate and grow along with the Islamic community.' Aslan (n29) 167.

²⁵³ Joseph Schacht, *An Introduction to Islamic Law* (OUP 1982) 2.

²⁵⁴ Rudolph Peters *Crime and Punishment in Islamic Law* (Cambridge University Press 2005); I; Sythoff Korff, 'An Introduction to the History of International Law' (1924) 18 *American Journal of International Law* 246, 248.

Mainstream Islam has adjusted to the Grotian formulation of international law by harmonizing Islamic with Conventional Law. The integration of Islamic countries into the community of nations has seen Islam's conception of justice on the international stage evolve and undergo significant changes.²⁵⁵ Yet shifts from globalization to a 'cold war nationalism' has the effect of 'othering' which is in turn incentivizing radicalisation.²⁵⁶ This radicalisation has manifested in some areas returning the practice of Islam to its seventh century context.

2.1 The Jahiliyya

In the pre-Islamic era, *jahiliyya*, the Arabs in the Peninsula and adjacent areas were a primitive enmeshment of disjointed tribes whose nomadic nature was inconsistent with the social and economic hierarchies prevalent in sedentary societies.²⁵⁷ Polytheistic animism dominated Arabia, with only a scattering of Christians, Jews and Zoroastrians. These seventh century Arabs venerated courage and kinship and strictly adhered to ancestral customs. A tribal ethic founded on the principle of individual responsibility and obligation, maintained stability and unity. Survival in the nomadic tribal system, which was logistically resistant to material accumulation dictated maintenance of tribal solidarity through resource sharing.²⁵⁸ This social egalitarianism was essential in preserving the tribal ethic.

Inter-tribal relationships were maintained through a network of allegiances. The tribal leader or *Shaykh* was tasked with ensuring neighboring tribes were aware that any act of aggression against the tribe would be equally avenged. However, crimes committed against those outside of the tribal system 'were not only unpunished, they were not really crimes. Caravan raiding (*ghazi*) was a legitimate means of wealth distribution and provided no blood was shed, there was no need for retribution.'²⁵⁹ Stealing, killing or injuring another person was not considered a 'morally reprehensible act *per se*', and such acts were punished only if they negatively

²⁵⁵ See for example the doctrine of *fiqh al-aqaliyyat* developed in the 1990s to assist Muslims living in Muslim minority countries to reconcile tenets of Islam and the country of residence. Khadduri *Justice* (n26) 229.

²⁵⁶ Said popularized the term 'other' in discussions on culture and society. He criticized Western writings on the East as being subjective in their depiction of the East as weak, feminised, backward 'other', contrasted against the strong and masculine West in order to justify continued inequalities. 'Othering', is any action by which an individual or group become classified in somebody's mind as different. This psychological tactic may have had its uses in our tribal past, a form of evolutionary psychology or social contract. Said, *Orientalism* (n247)

²⁵⁷ The Arabian Peninsula or *jazeera* is largely what is now Saudi Arabia.

²⁵⁸ Aslan (n29) 27.

²⁵⁹ Aslan (n29) 82.

impacted the tribal dynamic. The honour and prosperity of the tribe was paramount.²⁶⁰ There was no shared codified moral code, the law of these ancient Arabs was ‘decidedly profane... even their penal law...reduced to questions of compensation and payment...This system implied...the absence of a developed concept of criminal justice and the reduction of crimes to torts...[collective punishment], and therefore blood feuds, mitigated by the institution of blood money...’²⁶¹ In a ‘society with no concept of an absolute morality as dictated by a divine code of ethics’ the *Shaykh* had only one effective avenue of legal redress for regulating intra-tribal order; *lex talionis*.²⁶²

As primitive as these laws were, the Arabs developed a hybrid separation of power doctrine. Concerned at divesting absolute authority in one person, namely the *Shaykh*, important decisions were made through ‘collective consultation with other individuals in the tribe who had equally important roles: the *Qa'id*, who acted as war leader; the *Kahin*, or cultic official; and the *Hakam*, who would settle disputes.’²⁶³

Mecca was positioned between two centers of empire of the ancient and Near East: Byzantine to its north-west and Sasanid in the north-east.²⁶⁴ A series of conflicts between these powers forced trade routes to be diverted through Arabia, which remained largely independent.²⁶⁵ Lying on the ancient trade route ‘from Indonesian Archipelago and India to Syria, Mecca was a trading superstore,’ attracting an array of cultures and influences. It also housed animist shrines, and devotees would petition particular deities through sacrifices and other rituals.²⁶⁶

²⁶⁰ The Animist Arabs did not subscribe to the idea of a Day of Judgment and saw death as the end of the individual which would have no impact on the continuance of the tribe. Jeffry Halverson, H. Lloyd Goodall, Steven Corman, *Master Narratives of Islamic Extremism*, (Palgrave Macmillan 2011) 39; Aslan (n29) 30.

²⁶¹ Schacht *Introduction* (n253) 6-7

²⁶² While orientalist pejoratively reduce *lex talionis*, or the law of retribution, to ‘an eye for an eye’, the object of this law was to limit barbarism so that retribution was permissible only to an equal extent of the initial wrong. Aslan (n29) 30.

²⁶³ Although there was no formal law enforcement or judicial system in either Bedouin or sedentary Arab society, in situations where negotiation was required a *Hakam* would act as arbiter. The accumulation of the *Hakam*'s declarations became the foundation of a normative legal tradition, or *Sunna*, which in turn served as a discrete tribal legal code. Problematic in *Hakam* dispute resolution was that each tribe had its own arbiter and *Sunna* which meant the laws and traditions of one tribe did not necessarily conform nor apply to another. Aslan (n29) 30-31. Similarly, the authority of the *Shaykh* was recognized by their own clan, every chief considered himself the equal of any other, so there was no overall commander whose authority could compel the obedience or tactical direction of the army as a whole. Richard Gabriel, Muhammad: *Islam's First General* (Oklahoma University Press 2007)

²⁶⁴ The lesser Yemenite to the south was less of a superpower of the ancient and Near East. Hallaq *Origins* (n6), 9

²⁶⁵ Although pockets of the peninsula were controlled by the empires at certain times. Halverson (n260) 41

²⁶⁶ Hallaq *Origins* (n6) 9

In the fourth century CE, the city became controlled by a collective of Arabian tribes known as the Quraysh. The Quraysh were united into a single dominant tribe under Qusayy, who recognized the source of Mecca's power lay in its sanctuary. This sanctuary owed its status to 'the *Ka'aba*: The Cube, a small, nondescript...roofless edifice made of unmortared stones and sunk into a valley of sand.'²⁶⁷ After Qusayy captured the *Ka'aba* from rival clans, and installed the idols venerated by neighbouring tribes within it, he guaranteed control over the city.'²⁶⁸ Its sanctity like all Semitic sanctuaries concentrically radiated to the surrounding areas, with a prohibition on inter-tribal fighting and weapons within Mecca. The combination of this prohibition coupled with the caravan route diversion through Mecca facilitated a lucrative trade economy and a new level of wealth not previously enjoyed.²⁶⁹ As a concentration of wealthy Quraysh trading families began to rule Mecca economic disparity and competitive materialism sounded the death knell for the social egalitarianism that once flourished in this tribal Peninsula.

Muhammad *ibn* Abdullah was born into the *Banu Hashim* clan of the Quraysh tribe in 570 CE,²⁷⁰ and was invariably influenced by the religious and political landscape.²⁷¹ He suffered the temporal defect of being born in Mecca when the tribal ethic had all but disappeared and Meccan society had become severely stratified. Orphaned as a small child, he fell outside the Meccan religio-economic system, however, as nephew of the *Shaykh*, Abu Talib, he avoided the slave fate of most orphans.²⁷² Muhammad worked in his uncle's employ as a trader, eventually leaving to work for a successful businesswoman, Khadija, whom he subsequently wed.²⁷³ Although this marriage facilitated Muhammad's ascension through the ranks of

²⁶⁷ Orthodox Muslims believe that the *Ka'aba* was built by God in the time of Adam or by the prophet Abraham (*Ibrahim*) and his son Ishmael but was over the centuries corrupted for pagan worship. There is no archaeological evidence to confirm its origin. Aslan (n29) 3, 25; Halverson (n260) 39.

²⁶⁸ In all, there are said to be three hundred sixty idols housed in and around the *Ka'aba*, representing every god recognized in the Arabian Peninsula, each venerated in its own right. Allah was not the central deity in the *Ka'aba*. That honour belonged to Hubal, the Syrian god who had been brought to Mecca centuries before the rise of Islam.' Although non-Arabic texts would indicate Mecca was not an international trading hub. Aslan (n29) 3-4; 8, 25, 28.

²⁶⁹ Halverson (n260) 41; Aslan (n29) 26.

²⁷⁰ A 'small...yet prestigious clan within the...Quraysh.'. 'Clans in the Arabian Peninsula were primarily composed of large extended families that called themselves either *bayt* (house of) or *banu* (sons of) the family's patriarch.' 570 CE is neither the correct year of Muhammad's birth nor of the Abyssinian attack on Mecca; modern scholarship has determined that momentous event to have taken place around 552 C.E' Aslan (n29) 18, 25, 32.

²⁷¹ Aslan (n29) 17.

²⁷² As an orphan, Muhammad had lacked even the most rudimentary military training typically provided by an Arab father. Later in life, he compensated for this deficiency by surrounding himself with experienced warriors. Gabriel (n263)

²⁷³ Pre-Islam, women had few human rights. Trading offered increased opportunities. When Khadija became widowed, her husband left her a strong business which she managed with great acumen. Khadija and Muhammad

Meccan hierarchy, He was deeply affected by the extremes of Arab society. This ontological anxiety was remedied, or at least somewhat abated, through spiritual retreat to the mountains with his family.²⁷⁴

It was in this context the illiterate Muhammad received his first Revelation in 610 CE.²⁷⁵ These Revelations, the revealed law of *Allah*, were subsequently codified in the *Qur'an* as the positivist embodiment of a natural law theory, crafted as a joint enterprise between revelation and reason. Revealed by the Archangel Gabriel to Muhammad (*Salla allahu 'alayhi wa Salam*)²⁷⁶ in Arabic so that the peoples of his region could understand its message; reasoned through human agency to construct and fulfil the *maqasid al-ahkam al Shari'a*²⁷⁷ according to the need of time and circumstance.²⁷⁸ Muhammad would see the interpretations of these Revelations reform the Peninsula: socially, economically and politically. He would see his belief in Islam and his own role as 'Messenger' revolutionize Arabian warfare, the result of which saw the creation of the ancient world's first army motivated by a coherent system of ideological belief.²⁷⁹

2.2 Building Islamic Law: Revelation, the Shahada, & the Umma

*'Words can be relied upon only if one is sure that their function is to reveal and not to conceal.'*²⁸⁰

Social identity in pre-Islamic Arabia was derived solely from tribal membership based on *ius sanguinis* principles. As procreation was determinative for the continued existence of the tribe, there was a limited capacity for growth. In contrast, membership into Islam required no blood line, ethnic or kinship relationship. Rather, it required only the simple declaration or

were married for twenty-four years, until her death. Although polygamy was the norm in this era, Muhammad never took another wife in her lifetime, nor did he ever prohibit her from working.

²⁷⁴ The mountain where Muhammad reflected is known as Jebel Nur. Carl Brown, *Religion and State: The Muslim Approach to Politics* (Columbia University Press); Carl Ernst, *Following Muhammad: Rethinking Islam in the Contemporary World* (University of North Carolina Press 2003)

²⁷⁵ It is important to emphasize the illiteracy of Muhammad as it supports the idea that he was free from Christian and Jewish influences. However, it is unrealistic to posit that His exposure to Christian, Jewish and Arabian tribal world views would not impact his own perspective. Aslan (n29).

²⁷⁶ Henceforth 'The Prophet' or 'Muhammad'.

²⁷⁷ *Maqasid* translated as the purpose or objective of *Shari'a*

²⁷⁸ By his own admission, Muhammad's message was an attempt to reform the existing religious beliefs and cultural practices of pre-Islamic Arabia so as to bring the God of the Jews and Christians to the Arab peoples. '[God] has established for you [the Arabs] the same religion enjoined on Noah, on Abraham, on Moses, and on Jesus,' the Quran 42:13. Razi (n26) 18

²⁷⁹ Gabriel (n263) xix

²⁸⁰ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace Jovanovich 1973)

shahādah.²⁸¹ Islamic conversion however, did require extrication from tribal activities and from the tribe itself, dual membership was *prima facie* mutually exclusive.²⁸² Attaching such preconditions on membership meant that the community or *umma*²⁸³ had an unlimited capacity for growth through conversion.²⁸⁴ This faith based membership at first blush created a greater source of group cohesion than blood or clan ties, the precepts of Islam providing a framework for discipline.²⁸⁵ All adherents of Islam constitute the *umma* yet this community is subsidiary to the ultimate monotheistic reference point and the message of the Prophet.²⁸⁶ Under this exclusive definition of *umma* only its members can serve as subjects of the Islamic legal and ethical system, leaving the remaining community as objects of Islam.

By transcending clans and tribes, Muhammad could forge a common identity among the Arabs for the first time.²⁸⁷ The *umma*'s transformation of the social composition of Arabian society altered fighting loyalties. Blood kin allegiances became subservient to this new body of religious believers united under the command and governance of Muhammad.²⁸⁸ Muhammad's first recitations tackled the demise of social egalitarianism and the tribal ethic in Mecca.²⁸⁹

²⁸¹ *lā 'ilāha 'illā-llāh, muḥammadur-rasūlu-llāh* (*There is no god but God, and Muhammad is God's Messenger.*) Contrast with position of ibn Taymiyya and Abdul alWahhab who claim that the double creed does not suffice to make a person a Muslim. Daniel Benjamin & Steven Simon, 'Ibn Taymiyya and His Children' in Daniel Benjamin *The Age of Sacred Terror* (Random House 2002) 52

²⁸² This point becomes pronounced when there are competing older tribal rules in majority Muslim countries. For example in Afghanistan, *Pashtunwali* and Islam. Aslan (n29) 46; RB Serjeant, 'The Constitution of Medina.' (1964) 8 *Islamic Quarterly* 3, 4

²⁸³ The problem with this term, however, is that no one is certain what it meant or where it came from. It may be derived from Arabic, Hebrew, or Aramaic; it may have meant 'community' 'nation,' or 'people'. The word *umma* inexplicably ceases to be used in the Quran after 625 CE, when, as Watt notes, it is replaced with the word *qawm*, Arabic for 'tribe' 'Despite its ingenuity, Muhammad's community was still an Arab institution based on Arab notions of tribal society... Indeed, there are so many parallels between the early Muslim community and traditional tribal societies that one is left with the distinct impression that, at least in Muhammad's mind, the Umma was indeed a tribe, though a new and radically innovative one.' Aslan (n29) 57.

²⁸⁴ While monotheism was implicit from the beginning of the Revelation, it was not until 613 CE that this profession of faith dominated the theology and defined the mission and principles of Islam. 'Proclaim to them what you have been commanded, and turn away from the polytheists' *Qur'an*, 15:94. Serjeant (n282) 4.

²⁸⁵ Gabriel (n263) xix

²⁸⁶ Monotheism is referred to as Tawhid/ *Tauhid/Tawheed*. In Islam, the oneness of God as manifested in the *shahada* formula: 'There is no god but God and Muhammad is His prophet.' *Tawhid* further to the nature of that God-that he is a unity, not composed, not made up of parts, but simple and uncompounded. <<http://dictionary.reference.com/browse/tawhid>> accessed 27/01/15

²⁸⁷ 'The rapid growth of Muhammad's insurgent army is evident from the following figures. At the Battle of Badr (624 CE), Muhammad could only put 314 men in the field. Two years later at Second Badr, 1,500 Muslims took the field. By the 628 battle at Kheibar, the Muslim army had grown to 2,000 combatants. When Muhammad mounted his assault on Mecca (630) he did so with 10,000 men. And at the Battle of Hunayn a few months later the army numbered 12,000 men. Gabriel (n263) xix.

²⁸⁸ This is an important policy in the development of the small group of Muslims in Medina to the larger Muslim community and empire. Barakat Ahmed, *Muhammad and the Jews*. (Vikas Publishing House 1979) 46-7.

²⁸⁹ The animist and merchant society controlled by the Quraysh was a harsh and unforgiving one, which explains in part the emergence of Islam as a radical restructuring of the existing social order and a reaction to its serious socioeconomic shortcomings. Halverson (n260) 38; Aslan (n29) 40.

These recitations advocated against the mistreatment and exploitation of the vulnerable, and imported social responsibility on the wealthy to provide for the underprivileged and oppressed. This message was wholly welcomed by the disenfranchised segment of Arabian society who then became his early followers.²⁹⁰ This was an innovative message in Mecca. ‘Muhammad was not yet establishing a new religion; he was calling for sweeping social reform. He was not yet preaching monotheism; he was demanding economic justice.’²⁹¹ These reform initiatives would eventually extend to governance, turning the pre-Islamic division of powers structure into an autocracy.

2.3 The Hijra: Moving a Movement

In 622CE Yathrib, an oasis settlement approximately 400 kilometres from Mecca, *lex talionis* was failing. Designed to deter ongoing tribal conflict, the law of retribution could no longer cope with the longstanding conflict between the two largest Arab tribes in Yathrib, the *Aws* and *Khazraj*.²⁹² Muhammad was sourced as *hakam* to act as an arbiter within this feud which had escalated when several other clans entered the fracas.²⁹³ The invitation was timely. As Muhammad’s following increased so did the threat it posed to the Quraysh monopoly over Mecca. The resultant hostility against Islam reached a sufficient threshold that the new Muslim community, supported through Revelation, were compelled to flee Mecca. This pivotal event is known as the *hijra* or ‘migration’ and marks year one of the Islamic calendar. Neighbouring Yathrib welcomed the migrants from Mecca, the *muhajirun*, in its entirety and while not necessarily believing Muhammad was a ‘Prophet’ believed he was a man of judicious character and well placed to resolve its protracted tribal dispute.

Shortly after settling in Yathrib or Medina as it was subsequently known, Muhammad drafted the *Sahifat al-Madinah* (Charter/Constitution of Medina), ‘a series of formal agreements of nonaggression among Muhammad, the Emigrants, the Ansar, and the rest of Yathrib’s clans,

²⁹⁰ ‘Do not oppress the orphan...and do not drive away the beggar’ *Qur’an* 93:9–10.

²⁹¹ There are several examples of Muhammad’s reforms; he outlawed usury (The *Qur’an* 3:130), instituted a mandatory tithe called *zakat*, which was means tested and applicable to every member of the *umma*. Once collected, the money was redistributed as alms to the community’s neediest members. Aslan (n29) 41, 60. The *Qur’an* also prohibited the practice of female infanticide and changed the way marriage dowry was distributed – efforts referenced by Muslim scholars when defending the status of women in Islam. Some have challenged the historicity of such accounts. See for example Leila Ahmed, *Women and Gender in Islam: Historical Roots of a Modern Debate* (Yale University Press 1993) 39-40.

²⁹² While Revelation supported *lex talionis*, it tempered its rigidity, providing a platform to end blood feuds, see The Holy *Qur’an* 2:178; 4:92 and 5:45. Peters *Crime* (n254) 40.

²⁹³ Muhammad was well placed to arbitrate because of His divinely sanctioned authority and impartiality.

both Jewish and pagan.²⁹⁴ Whether a unilateral proclamation or a social contract, the Constitution of Medina was not crafted under a Rawlsian veil.²⁹⁵ Encompassed in the Constitution were solutions to unite the tribes it sought to bind under the sovereignty of monotheism, with peaceful methods of dispute resolution.²⁹⁶ The Constitution divested absolute authority in Muhammad over the entire Yathrib population consolidating all pre-Islamic power positions unto himself, so that he was the *shaykh* of his community, its *hakam*, its *qa'id*, and, as the only legitimate connection to the Divine, its *kahin*.²⁹⁷ The corollary of this absolute authority was absolute responsibility for the protection of the entire community.

Within the context of early Islam and the Charter of Medina, the entire community was included under the *umma* banner: that is both Muslims and non-Muslims.²⁹⁸ According to early Islamic doctrine, so that decisions by the Muslim community were infallible, the entire community participated in the decision-making process. This became untenable as the community grew and consensus of the whole was no longer practical.²⁹⁹ While preferring forgiveness over retribution, Muhammad recognized the utility of *lex talionis*,³⁰⁰ however,

²⁹⁴ The Charter of Medina set the precedent for the treatment of *mua'ahids* (*dhimmīs* are those non-Muslim subjects who become subjects after a war. If there is no war and there is a negotiated settlement, then they are called *mua'ahids*). When Prophet Muhammad was popularly appointed Medina's ruler, he entered into a pact with the Jewish communities of Medina. Through this pact, he granted equal political rights to non-Muslims. They were ensured complete freedom of religion and practice. SG Vessey-Fitzgerald, 'Nature and Sources of the *Shari'ah*' in Majid Khadduri & Herbert Liebesny (eds.) *Law in the Middle East*, Vol 1, *Origin and Development of Islamic Law* (The Middle East Institute 1995) 87; Aslan (n29) 56. See **Annex 2**, Charter of Medina.

²⁹⁵ Contrast Bernard Lewis, *The Arabs in History* (OUP 2002) 42 and Ali Khan 'Commentary on the Constitution of Medina' in Ramadan (n13)

²⁹⁶ 'The constitution reveals his Muhammad's great diplomatic skills, for it allows the ideal that he cherished of an *umma* based clearly on a religious outlook to sink temporarily into the background and is shaped essentially by practical considerations.' AT Welch, *The Encyclopaedia of Islam*, vol. 5 (E.J. Brill 1960) The *Sahifat al-Madinah* is regarded as the first codification of human rights in Islam. A unilateral agreement between the Prophet and those who followed him to Medina as well as those non-Muslim tribes who lived in and around Medina, it advocated equality and freedom of religion for all those resident in Medina at the time of the charter's drafting. M Cherif Bassiouni, *Shari'a and Islamic Criminal Jurisprudence in the Time of War and Peace*, (Cambridge University Press 2014) 159-160.

²⁹⁷ Aslan (n29) 58.

²⁹⁸ This variance in lexicon has had ramifications on subsequent use of legal tools with far reaching consequences. The term has subsequently deviated from this original inclusive intent to be restricted exclusively to the Muslim community. There is much contention on this point, as well as the egalitarian status of the '*dhimmīs*'. See 'The Status of Non-Muslim Minorities Under Islamic Law' <http://www.dhimmitude.org/> < accessed 02/02/15>; 'Islamic Teaching On *Dhimmī* Status Creates An Atmosphere Of Intolerance' <http://www.archons.org/pdf/issues/DHIMMī.pdf> < accessed 02/02/15>;

²⁹⁹ Harold Rhode, 'Can Muslims Reopen the Gates of *Ijtihād*?' (Gatestone Institute, 2012) <<http://www.gatestoneinstitute.org/3114/muslims-Ijtihād>>

³⁰⁰ 'The retribution for an injury is an equal injury, but those who forgive the injury and make reconciliation will be rewarded by God.' The Qura'n 42:40.

Muhammad's version of the law of retribution deviated from pre-Islamic conceptions, revealing the weight he attached to moral rather than utilitarian principles.³⁰¹

Reflecting what is now considered a Clausewitzian position; Muhammad emphasized use of force as a tactical means to achieving larger strategic objectives, a fact not lost on modern *jihadists* in their citation of Muhammad's use of violence to justify their own. Tracing the evolution of Islam and the contexts in which it evolved establishes the platform for examining Islamic law within a *salafi* construct. The following chapter examines the Islamic legal sources and tools that can be invoked to make permissible conflict conduct that would otherwise be prohibited in Islam.

³⁰¹ While the Constitution of Medina sanctions retribution as a deterrent for crime, it has the 'unprecedented stipulation' that the entire community has equal blood worth, an innovation in the Arabian legal system. Importantly, while all Muslims are equal, the value of a Muslim in Islamic law is greater than that of a non-Muslim, hence a Muslim may not be executed for killing a non-Muslim. See The *Qur'an* 8:65; Aslan (n29) 59.

Chapter 3 *Allahu a'lam*, God Knows Best

3.1 The Epistemological Foundation of Islamic law

The Islamic tradition is guaranteed by a theo-political system: theologically through the institution of *fuqaha* or *ulema*; politically through the system of *Caliphate* or Islamic governance.³⁰² The acceptance from inception that Muslim behaviour would be regulated through Revelation enumerated in the *Qur'an* (literally meaning 'the recitation') and *Sunna* (the actions and words of the Prophet) provided the framework for Islamic law to transcend Westphalian division. So deeply embedded in the Islamic way of life, *Shari'a* is described by Orientalists and Muslims alike as the 'core and kernel of Islam itself'.³⁰³

The purpose of this chapter is to examine the role Islam plays as a regulatory mechanism, highlighting its position within the conventional international legal order. It will consider how Islamic law is deduced and the tools which facilitate such deduction.

All Muslims are subservient to the absolute sovereignty of *Allah*, therefore any idea of Islamic nationalism is entirely eclipsed by Islamic internationalism.³⁰⁴ While state law is bound to respect the principle of sovereignty and only in extreme circumstances will concern itself with how individuals behave outside its sphere of concern, Islamic law has an omnipresent interest in human acts irrespective of territorial and jurisdictional demarcation.³⁰⁵ Regardless of subsequent division into competing political entities, Islam and its law unified Islamic communities through this common frame of reference allowing civil society to operate through political borders.

As with all legal systems, Islamic law has its sources (*al-masadir*) and guiding principles (*al-usul*) which dictate the nature of its 'evidence' (*al-adilla*). In completing the structure of its legal theory Islamic law utilizes both legal maxims (*al-qawa'id*) and objectives (*al-maqasid*).³⁰⁶ *Shari'a* is the overarching normative framework of the Islamic legal tradition, developed 'with rudimentary concepts refined by cultural process with the passage of time,' a

³⁰² Cherif-Bassiouni *Jihad* (n19) 61.

³⁰³ Schacht *Introduction* (n253) 1. *Shari'a* is distinguished from *siyasa*, which deals with administration or governance: duties like building infrastructure; collecting taxes; raising armies; keeping the peace. Reza, (n 25), 26. Westbrook (n26) 823.

³⁰⁴ '[T]raditional Islamic legal personnel were not subject to the authority of the state, simply because the state as we know it did not exist.' Hallaq *Introduction* (n13) 7; Marmaduke Pickthall, 'Islamic Culture' (1927) <http://muslimcanada.org/pickthallculture.html> last accessed 14/02/15, x.

³⁰⁵ Hallaq *Introduction* (n13) 19.

³⁰⁶ Gavin Picken, *Islamic Law* (Routledge 2010).

process influenced by custom and both Talmudic and Roman law.³⁰⁷ Somewhat misleadingly translated as ‘Islamic law’, *Shari’a* literally means ‘way’ or ‘road’.³⁰⁸ It indicates Divine law, ‘a sort of Muslim rule of law’³⁰⁹ illuminating the distinct relationship Islamic law has as a regulatory mechanism on the Muslim population as well as Islamic identity. *Shari’a* is not motivated by control or discipline. Rather it seeks to provide a blueprint for peaceful relations both internally and with the greater community provided they are aligned with the purpose or *maqasid al-ahkam al Shari’a*, namely the preservation of religion; life; progeny; intellect and property.³¹⁰ To achieve the *maqasid*, anything necessary for its realization may serve as an independent basis for a legal decision. The interpretation of what constitutes preservation, and the methods (aggressive or defensive) employed to achieve the *maqasid al-ahkam al Shari’a* will be discussed in chapter 4.2 on ‘Unapologetic Jihad’

3.2 Sources of Islamic Law

Shari’a comprises primary sources: the *Qur’an* and *Sunna*³¹¹, the latter compiled in *Hadiths*³¹² and secondary sources: derivatives from the interpretation of these sources: *ijma* and *qiyas*.³¹³ All acts are regarded as *shar’i*, subject to *Shari’a* regulation and therefore pronounced as law

³⁰⁷ ‘With the exception of the Quran, every single source of Islamic law was the result of human, not divine, effort.’ There are points of convergence with the conventional *ius gentium vis-à-vis* the Islamic law of nations. Aslan (n29) 167.

³⁰⁸ Islamic law as an expression does not exist in Classical Islam. Hallaq *Origins* (n6), I; Hallaq *Introduction* (n13) 19; March & Modirzadeh (n233) 368.

³⁰⁹ Quraishi, (n248) 340.

³¹⁰ Comparisons are made between the *Qur’an* as the Muslim Bible. This is misleading, especially on a structural level. The *Qur’an* was revealed as *rahma* (mercy/compassion) to man. *Rahma* manifests in three aspects: educating the individual; establishing justice and realizing public welfare. This represents the commonly understood conception of *maqasid* developed by the 12th century Islamic scholar Al-Ghazali (d. 1111 CE). Al-Ghazali posited that the ‘objective of *Shari’a* is to promote the well being of all mankind, which is safeguarding their faith (*din*), their self (*nafs*); their intellect (*aql*); their posterity (*nasl*); and their wealth (*mal*). The most extensive discussion in classical scholarship is found in al-Shatibi’s (d. 1388) *Al-Muwafaqat fi’usul al-Shari’a*. Halverson (n260) 2.

³¹¹ The *Sunna* is a compilation of Prophetic traditions. It is divided into: *Sunna* with legal implications and *Sunna* without legal implications. When reading hadith reports, their value must be distinguished from that of the *Qur’an* as the former has a different epistemological standing, and careful analysis must be undertaken to delineate between Prophetic statements and those mistakenly attributed to him.

³¹² The memorisation and transmission of the *Sunna* in a literary form is characterised as *ahadith* and represents the ‘report of the Prophet’s *Sunna*. Hadith meaning ‘occurring’ or taking place. Ali & Rehman (n250), 325. The most authoritative hadith are attributed to the ninth century scholar’s al-Bukhari (d. 870) and Muslim ibn Hajjaj (d. 875). Halverson (n260) 4. Weiss, (n25), 200; Cherif-Bassiouni *Shari’a* (n296) 53; Syed, ‘Islamic Law and the Apologetics Of Jihad’, (n10), 156; M. Şaghîr Hasan Ma’şûmi ‘Ijtihād Through Fourteen Centuries’ (1982) 21(4) *Islamic Studies*, 45; Abdel-Haleem (n4) 60.

³¹³ *Ijma* means consensus. Generally taken to mean consensus of jurists of each of the four *madhahib*. Ironically there is no consensus on whether the consensus must be from the umma entire or just the *ulama* (learned Muslim scholars). *Qiyas* means to reason by analogy; Analogical deduction derived from *Qur’an/Sunna*.

in its construction as a moral-legal commandment.³¹⁴ The Islamic tradition places great emphasis upon the centrality of *Shari'a*, yet the tradition acknowledges that Revelation was never intended to be 'passively received and applied; rather, it is to be actively constructed on the basis of those sacred texts which are its acknowledged sources.'³¹⁵ The triangular formulation of the *Qur'an*, *Sunna* and *Hadith* evolved into foundational dogma which has 'provided the ligament binding Islam, the Muslim *umma*, and individual Muslims together through fourteen centuries.'³¹⁶

The *Qur'an* is the divinely preserved Revelation of *Allah* to humanity, miraculously dictated through the angel Gabriel (*Jibril*) to Muhammad over twenty-two years in the Hijaz region of Arabia. As the recipient of the message, Muhammad is considered the last in a series of Prophets that include Noah, Abraham, Moses and Jesus.³¹⁷ The *Qur'an* constitutes the supreme law of Islam, a paradox considering it 'does not profess to be a code of law or even law book.'³¹⁸ A framework for debate, it is divine in source as opposed to divinely inspired. Consisting of 114 chapters or *sura* of varying length and diverse subject matter, the chapters are further divided into verses or *ayat*, comprising speeches of *Allah*, metaphors, allegories, and *rulings* (*ahkam*).³¹⁹ Where narrative content is provided by the *Qur'an* it is fragmented, relying on a range of exegetical materials and supplemental sources for coherency.³²⁰ Neither linear nor explicit, the *Qur'an* was taught by the Prophet who elaborated its meaning and explained its

³¹⁴ Both Sunni and Shi'ite sects subscribe to this pyramidal order of sources determining normativity in Islam and while agreeing the primary sources, the weight the different sects, and within the sects, attach to secondary sources is variable. Eg Hanbali and Malik preference the *Sahaba* for *ijma* not the entire *umma*. Hallaq *Introduction* (n13) 20.

³¹⁵ Weiss, (n25), 199; Javid Rehman *Islamic State Practices, International Law and the Threat from Terrorism: A Critique of the 'Clash of Civilisations' in the New World Order* (2005) Ali & Rehman (n250), 324-326.

³¹⁶ Cherif-Bassiouni *Shari'a* (n296) 53.

³¹⁷ Some accounts state Revelation occurred over 23 years. Abdel-Haleem (n4) 2.

³¹⁸ The impetus of *Qur'anic* legislation was an appeal to faith and the human soul over a classification of legal prescriptions. Khadduri & Liebesny (n300), 87. Indeed, there is an argument that *Allah* does not have a legislative function, rather Allah establishes values as opposed to laws. See Mojtabah Shabestari, *Hermeneutic, the Scripture and the Tradition* (Tarh-e 2000) 114; Ali & Rehman (n250), 325. Similarly, it is argued that just war theory was never intended to be a legal code but was rather a 'proposal'. Oliver O'Donovan, 'The Just War Revisited' (Cambridge University Press 2003) 14

³¹⁹ Halverson (n260) 2. Only a minimal amount of *Qur'anic* verses are in the form of explicit rules. Sometimes extremely specific and detailed, their revelation corresponds to concrete events. The Revelation has been transmitted to subsequent generations us through an authentic continuous narration without doubt. Al-Bazdawi, Abdul Aziz al-Bukhari, *Kashf-al Asrar 'an Usul al-Bazdaw* (Dar l-Kutub al-'Ilmiyyah, 1997)1:22. When the Prophet died in 632 CE 'the *Qur'an* had barely been organized in chapters and verses and the hadith and *Sunna* had not yet been compiled. The transcription of the *Qur'an* started about 40 years after the Prophet's death, and the compilation of authentic hadith took a total of 132 years to come about. Cherif-Bassiouni *Shari'a* (n296) 53-4.

³²⁰ The *Qur'an* has a literary structure and reads as sermon-like; a unilateral conversation that invokes narratives to illustrate imperatives to the audience. Halverson (n260) 2.

injunctions and prohibitions ‘to be followed by the [companions of the Prophet] *sahaba* in the manner the Prophet demonstrated by his words, deeds, approvals and gestures.’³²¹ The *sahaba*, therefore, considered the *Sunna* as binding as the *Qur’an*, and only next to it in importance.

The *Qur’anic* legislation that evolved through Revelation reflected the social exigencies confronting Islam during a specific time. As such, the *Qur’an* can be characterized as incremental Revelation, its verses generally revealed to solve problems which confronted the *umma*.³²² It can be divided into two distinct phases: the Meccan and Medinan, or the religious and social. The Meccan phase revolved around implementing monotheism and an Islamic notion of morality. During this phase, there was a prohibition to fight (despite the unrelenting persecution by the Quraysh of the Prophet and his followers).³²³ The Medinan component paralleled the *hijrah* and ended at Muhammad’s death in 632 CE. It was in this phase, the Muslim community was born, and ‘Muhammad’s Arab social reform movement transformed into a universal religious ideology.’³²⁴ The subsequent *Qur’anic* legislation that evolved during this period focused on the organization of the Muslim state and the regulation of its inhabitants.³²⁵ Notably, this phase saw a fortuitous revelation rescinding the prohibition on fighting which allowed the persecuted Muslims to defend themselves against an increasingly violent Qurayshi offensive.³²⁶

Although credited with creating a successful egalitarian regulatory framework in the Medinan years enabling various religions to peacefully co-exist, the Prophet was not a lawgiver in any Western sense’ nor did ‘law’ appear a major preoccupation.³²⁷ However, an Islamic ‘law’ did

³²¹ In the third century after the *hijra* the traditions which had been relayed orally were codified and the subject material was systemized. Rules that could not be traced back to the *Qur’an* were cast into the forms of the *Sunna*. Rudolph Peters (trans) *Jihad in Mediaeval and Modern Islam* Vol 5, Nisaba Series, (E.J. Brill 1977) 1, 3; M. Şaghîr Hasan Ma’sûmî ‘Ijtihād Through Fourteen Centuries’ (1982) 21(4) *Islamic Studies* 45

³²² By tracking the incremental Revelation, early *Qur’anic* interpreters were able to create a chronology of its verses. This chronology is meant to indicate that ‘God was rearing the *Umma*, instructing it in stages and making alterations when necessary, from the first Revelation in 610 to the last in 632.’ Aslan (n29) 168.

³²³ Other transliterations include Qureish, Quraish, Quresh, Qurish, Kuraish, and Coreish. Muhammad Shalabi, *Al-Madkhal fi al-T’arif bil-Fiqh al-Islami* (Beirut: Dar alNahdah al-‘Arabiah,1969), 51-56.

³²⁴ Aslan (n29) 52.

³²⁵ Taha argued that the *Qur’anic* verses revealed during the Meccan era were more egalitarian and democratic in spirit while the Medinese verses display a hierarchical trend. See Mahmoud Mohamad Taha, *Second Message of Islam* trans. Abdullahi Ahmed An-Naim (Syracuse University Press 1987).

³²⁶ *Qur’an*,2:190 ‘Fighting is prescribed for you, and ye dislike it. But it is possible that ye dislike a thing which is good for you, and that ye love a thing which is bad for you. But God knoweth, and ye know not.’ *Qur’an* (2:216). Indeed 2:216 is used as the basis for the compulsory nature of *jihad*. Intertribal warfare in the stateless polity coupled with resistance to the Prophet’s monotheistic revelations, makes ‘sociological sense’ that the *Qur’an* would contain permissions concerning the use of violence. Bergesen (n247) 12.

³²⁷ The Royal Aal al-Bayt Institute for Islamic Thought, *Jihad and the Islamic Law of War* (Jordan 2009) 5.

evolve before his death and an Islamic polity ‘guided by both...*Qur’anic* legal ethic and the customary laws of the Peninsular Arabs’ was fashioned after his death.³²⁸

The sacred texts do not enumerate the law in a strictly legal sense, rather they contain the Law.

‘Because the Law is buried, as it were, within the (legally) imprecise and sometimes ambiguous language of the sacred texts, it is said to be extracted from the texts; and it is for this reason that the texts are to be considered sources of the Law rather than the Law itself.’³²⁹

Thus the development of Islamic law is more properly attributed to Muslim jurists and their use of juridical methods.³³⁰ In principle, the Muslim jurist never invents rules, he formulates rules which God has already decreed and which are concealed in the sources.³³¹ These rules, which constitute the ideal Law of God, exist objectively above and beyond all juristic endeavours.³³² Similarly, while ‘[t]he Islamic state upholds the Law and enforces it, [it] has no right to make law.’³³³ Because jurists are supposed to discover not create the law of God, no individual jurist was considered authoritative. Placing oneself in a school of thought was one way of garnering authority for a particular interpretation.³³⁴

³²⁸ Viewed in the larger context of the existing legal landscape of Jewish and ancient Semitic-Mesopotamian legal traditions, the legal contours of the *Qur’an* provide ample evidence of an Islamic conception of law. Hallaq *Origins* (n6) 3 -4

³²⁹ Weiss (n25) 199

³³⁰ The ‘corpus of Islamic law as it developed over the ages is ‘manmade’ in the sense that it resulted from the efforts of the jurists of the various schools of law.’ It is important to understand that Islam never tried to remove all existing laws of a society, rather, it aimed to remove the evils of those laws and to make them beneficial for all. Shah Waliullah, *Hujjat Allah Baligha* (Tijarah al-Kutub 1978) in Razi (n26) 20; Hashemi (n6) 6; ‘If civil law can be described as a legislator’s law as to its source, and common law as a judge’s law, then Islamic law is a jurist’s law,’ developed through theoretical juristic discourse. Javid Rehman and Susan Breau, *Religion, Human Rights and International Law* (E.J. Brill 2007) 92; G.M Badr, ‘A Survey of Islamic International Law’ (1982) 76 *Proceedings of the American Society of International Law* 56. Schacht argues that ‘Islamic law represents an extreme case of ‘jurist’s law’. Legal science and not the state, plays the part of a legislator, and scholarly handbooks have the force of law. Schacht *Introduction* (n253) 5; Yet it would not be acceptable to speak of those who interpret the sources as in any sense creating law. It is much more appropriate to refer to the interpreter as one who discovers the law. Weiss, (n25) 200

³³¹ There is evidence however that early Muslim jurists extrapolated rules absent positive doctrine founded in the Quran or Sunna. Rather these jurists, particularly through the 16th centuries based their interpretation on natural law inclination, subsequently fortified through assumption that these rules were necessary for the social good and to give ‘substantive content to their legal determinations.’ Anver Emon, ‘Huquq Allah and Huquq Al-Ibad: A Legal Heuristic for A Natural Rights Regime’ (2006) *Islamic Law and Society* 325 ,326

³³² Weiss, (n25) 200

³³³ In the classical Sunni theory of the caliphate, the ideal caliph was envisaged as a qualified jurist; and as such was simply first among equals. He had no exclusive right to expound law or to delegate a law- making function to others. Weiss (n25) 201

³³⁴ Natana DeLong-Bas, *Wahhabi Islam: From Revival to Global Jihad* (OUP 2004) 53

The third source of Islamic law is *ijma*, or consensus. While this source is not directly enumerated in the *Qur'an* or *Sunna*, its weight as a source is derived from solitary reports speaking of the impossibility of the *umma* as a whole ever agreeing an error, the idea that consensus would guarantee the infallibility of a legal ruling or opinion.³³⁵ To add gravitas to this source, jurists departed from the perspectives of grouping solitary reports verbally, and began consolidating the reports along thematic lines. In this way, a single recurrent theme was found in the *hadith*.³³⁶ In areas where the Islamic position is unclear, the 'conclusion is sought in the debate (*ikhtilaf* or legitimate disagreement) and the interpretation of the *Shari'a* by legal scholars.'³³⁷ *Ijma* by Islamic scholars (*ulama*) on an issue would create binding legal decisions, irrespective of whether such consensus contradicted *Qur'anic* prescriptions.³³⁸

Interlinked with *ijma* is the interpretative tool *Qiyas*, which although characterized as the fourth source of Islamic law, is distinguished from other sources in that it was not a 'material source on the substance of which a jurist could draw'. Rather it 'provide[d] a set of methods, [most commonly analogy] *through* which the jurist arrives at legal norms.'³³⁹ Islamic conquests coupled with rapid social changes created situations that lacked a clear solution in either the *Qur'an* or *Sunna*. The jurists resorted to free interpretation of the sources which generally manifested through *qiyas*, where it was assumed the *ratio legis* of the separate cases was comparable.³⁴⁰ *Ijma* provided authority for this human interpretation adding weight to the authority of the *ulama* as sole dictators of acceptable Muslim behaviour.³⁴¹

³³⁵ Hallaq *Introduction* (n13) 21

³³⁶ To group solitary reports verbally would not have provided as strong a base as grouping thematically. This doctrine is thus justified on the grounds that 'if consensus on probable evidence is attained, the evidence cannot be subject to error inasmuch as the community cannot err in the first place.' The cases or rules in which there was *ijma* are limited constituting less than 1 percent of the total body of law. Hallaq *Introduction* (n13) 21-22. *Ijma* may also be regarded as an essentially textual source as it is expressed in the statements of learned persons, as such it is considered sacred to the extent that it is the product of special divine guidance bestowed upon the Community, safeguarding it against error. Weiss, (n25), 201; 'Ali al-Khafif, *Muha* in M. Şaghîr Ḥasan Ma'sûmi *Ijtihād Through Fourteen Centuries* (1982) 21(4) *Islamic Studies* 47

³³⁷ Nagamine (n71) 53.

³³⁸ Aslan (n29) 165.

³³⁹ Hallaq *Introduction* (n13) 22

³⁴⁰ *Qiyas* operates for the sole purpose of providing legal determination and classification into one of the five legal norms in such novel cases, however for it to be invoked there must exist a case already settled through either the revealed text or *ijma* which shares a common attribute, or *ratio legis*, with the new case. The legal norm in the original case is then able to be transposed due to similar features with the novel case. Much analysis is dedicated by jurists in finding the *ratio legis*, agreeing the common attribute between cases pivotal in the application of *qiyas*.

³⁴¹ Weight was attached to the Prophet's saying that 'my community will never agree on an error.' Aslan (n29) 165, 168.

The absence of positive doctrine articulating the history of Islamic law during the first three or four centuries of its life increases the scope for unrestrained interpretation. There are no known court records or any other source that can reveal the operating procedures of the judiciary in the formative period. Nor is there evidence of the types of cases litigated; doctrines applied; representation in proceedings; the accessibility of the courts to women; or how judges used social/tribal ties to negotiate and solve disputes.³⁴² Hallaq describes the evolution of *Shari'a* in terms of identifying its 'essential attributes': 'the evolution of a complete judiciary; the full elaboration of a positive legal doctrine; the full emergence of [both] a science of legal methodology and interpretation [and] doctrinal legal schools...' He posits the latter two attributes remained in gestation until the middle of the 10th century CE.³⁴³

Islamic methodology dictates that the scholar must first search for precedent in the works of renowned jurists. If no precedent is found; he may look to factually analogous cases. The subsequent ruling will fall into one of five legal norms: *wajib*, the obligatory which attracts punishment upon omission of an act whose performance is deemed necessary; *haram*, the forbidden which will attract punishment upon commission of an act deemed prohibited; *mandub*, the recommended; *mubah*, the permissible or neutral; and *makruh*, the disapproved.³⁴⁴

3.3 'Ilm Usul al-*Fiqh*: the Central Role of the Islamic Jurist

The broader Islamic legal system comprises *Shari'a*, the schools of *fiqh* and methods of interpretation. *Usul al-Fiqh* differs from *Shari'a* in that *Shari'a* refers to the revealed religion as a whole; it covers the entirety of Allah's prescriptions in the regulation of human conduct. *Fiqh* refers to how the rules of *Shari'a* are to be applied; a science where scholars refer to scriptural sources to identify and define a methodology of extraction.³⁴⁵ Absent a final

³⁴² Hallaq *Origins* (n6) 1- 2.

³⁴³ This is problematic in relation to a Salafi construct. (see 3.7) Hallaq *Origins* (n6), 3.

³⁴⁴ Wael Hallaq, 'Was the Gate of *Ijtihād* Closed?'(1984) 16 *Int J Middle East Stud*, 4; Hallaq *Introduction* (n13) 174.

³⁴⁵ Muslims live according to *Shari'a* as embodied in *fiqh*. A scholar in *fiqh* is called a *faqih*. *Qadis* performed a form of 'applied *ijtihād*'; responsible for 'determining the truth of the facts and then applying the *fiqh* to those facts. Where *faqih*s considered hypothetical *fiqh*, *qadis* animated the *fiqh* to resolve actual disputes. Quraishi, (n248) 345. There are several categories of *fiqh*, for example '*ilm al-fiqh* deals with the actions which people should do and those which they should not do. Juristic literature has generated two major literary genres. One, known as *usul al-fiqh* (roots of jurisprudence), deals with hermeneutical principles that can be used for deriving rules from revelation. The other, dominant genre, *furu' al-fiqh* (branches of jurisprudence), is an elaboration of rules which govern ritual and social activities. An overall philosophy of law in Islam can only be discovered through consideration of both genres, such a stance not fully articulated in the pre-modern tradition. Parry, *The Legal Methodology* (n250); Al-Mawdudi describes *fiq* as 'Detailed law derived from the *Qur'an* and the Hadith covering the myriad of problems that arise in the course of man's life.' M Ishaq Zahid, "Glossary of Islamic Terms", [Online Document], 1998, [cited 2015, Apr 27]; Peters *Jihad* (n321) 1

ecclesiastical authority which has a monopoly on *Qur'anic* interpretation, '*ilm usul al-fiqh*, the science of discovering the law of *Allah*, is of crucial significance. *Fiqh's* development was an organic response to discover the 'right' answers, its classical legal methodology is identical to that of *Shari'a*.³⁴⁶

As Islamic law is not a uniform formulation, and interpretation of the *Qur'an* and Prophetic *hadith* lack universal consensus, the institution of *madhahib* was introduced to provide order, coherency and consistency to the different interpretations.³⁴⁷ It is intended that adherents of each respective school would be 'bound to follow the opinions of the school's respective *Imam's*.'³⁴⁸ Crudely described, a *madhhab* is a pervasive doctrinal legal school that follows a methodology of equations when determining ambiguities within the *Qur'an* by establishing conceptual juristic boundaries of a set of cases. The legal opinions stemming from these schools were *primi inter pares*.³⁴⁹

The rapid expansion of Islam paralleled the proliferation of Islamic legal schools, which at its peak numbered over 500. Although most of these schools either disappeared or merged by the ninth century, the majority of Sunni scholars decided that all essential jurisprudential questions had been answered by the four main *madhahib*; this was in part a way to redress suspicions of ongoing corruption. With the institutionalization of the *madhahib* within the Muslim world, the binding legal decisions created through *ijma*, also became institutionalized. This created the situation where decisions of one generation of *Ulama* were blindly accepted as judicial precedent for subsequent generations. This blind imitation is known as *taqlid* and those that

³⁴⁶ *Fiqh* is divided into two branches: *fiqh ibadah* and *fiqh mu'amalat*. 'For '*ibadah*, humans should look to the *Qur'an* or the Sunna for answers, but regarding the relationship between humans, *mu'amalat*, humans should look for the best public solution.' Parry, 'Legal Methodology' (n250) 95- 96.

³⁴⁷ When prominent jurists began to have a loyal and large following that exclusively applied their doctrine in courts of law these 'personal schools' emerged. Only a handful of jurists were elevated to the status of founder of a doctrinal school including Abu Hanifa; Ibn Abi Layla; Abu Yusuf; *Shaybānī*; Malik; Awza'i; Thawri and Shafi'i. Hallaq *Introduction* (n13) 3; Hallaq *Origins* (n6), 153, 156; Peters *Crime* (n254) 1; Centre for International Peace Operations (ZIF), 'Conference Report,' *Islamic Law, The Rule of Law and International Peace Operations*, Cairo: ZIF, 2011

³⁴⁸ The importance of understanding these various schools is that it provides insight into the customary practices and law of a particular country. For example: the Hanbali School of Ahmad ibn Hanbal (d. 855), the most traditionalist of the legal schools; *Maliki* jurisprudence, which was founded by Malik ibn Anas (d. 795); The Shafii School, founded on the principles of Muhammad ash-Shafii (d. 820); The Hanafi School of Abu Hanifah (d. 767). *Peters Crime* (n254), 1

³⁴⁹ Hallaq *Origins* (n6) 150, 156

practice it are known as *muqallid*.³⁵⁰ Although *taqlid* can be seen as a form of intellectual decline, some posit it as an attempt to create a stable rule of law.³⁵¹

The four surviving Sunni *madhahib* agree the sources of Islam, that is the *Qur'an* and *Sunna Mutawatir*,³⁵² *Ijma* and *Qiyas*, but there is divergence in methodology after that.³⁵³ Within Islamic States, rulers historically directed adjudication along the lines of a particular *madhhab*, however the *madhhab* was not judicially prescriptive.³⁵⁴ Militant non-State Islamic groups have claimed Islamic legitimacy by citing their violent actions are supported within these four schools of Sunni thought; others who adopt an anti-*madhahib* position legitimate violence through their own reading of the *Qur'an*.³⁵⁵

3.4 The Islamic Jurists & His Tools

The authority of the Muslim jurist is derivative in nature; derived entirely from the authority of God. To position the jurist hierarchically, they 'intervene between God and the State.' It seems then a paradox that the weight attached to the jurist in Islamic law is not met with equivalent enforcement powers. In fact, the Islamic jurist has no enforcement powers.³⁵⁶

The description of the Islamic jurist is distinguished from his Western counterpart, he is not circumscribed by the ongoing legislative activity of the state and his authority has completely

³⁵⁰ The consequence of this interpretation is it portrays Islam as lacking a process to derive rules for modern problems. *Ijtihād* is contrasted to *taqlid* a term which refers to the acceptance of a rule, not on the basis of evidence drawn directly from the sources, but on the authority of other jurists. Weiss (n25) 200; Hallaq *Origins* (n6) 147.

³⁵¹ Mohammed Fadel, 'The Social Logic of Taqlid and the Rise of the Mukhatasar, (1996) 3 *Islamic L & Soc.* 193, 197.

³⁵² Depending on the number of the reporters of the hadith in each stage of the *isnad*, i.e. in each generation of reporters, it can be classified into the general categories of Mutawatir ('consecutive') or Ahad ('single') hadith. A Mutawatir hadith is one which is reported by such a large number of people that they cannot be expected to agree upon a lie, all of them together, along the lines of the doctrine of *ijma*. T al-Jaza'iri, *Taujih al-Nazar ila Usul al-Nazar* (Maktaba 'Ilmiyyah, Madinah, N.D.), 33.

³⁵³ Despite having a main school under which *Qur'anic* and *Sunna* interpretations occur, there is often mixing permitted for the sake of necessity. (*Darura* (doctrine of necessity) makes permissive something that would otherwise be prohibited.). The *Madhahib* will use an alternate formula for *maslaha* when its own formula is untenable. The *madhahib* accept *hadiths* as a source for legal decisions. The greater number of *hadiths* accepted by a particular school would dictate the rigidity of the school. T Aslan (n29) 170; Rhode (n299).

³⁵⁴ As there are differing opinions even within the schools, a hierarchy of authority was developed to deal with situations of conflicting norms. Yet if a ruler wanted to adopt a following of a different school he could direct the *qadis* that were appointed to follow the preferred school. Yet even if a certain *madhhab* was followed, it would not exclude a conflict of opinion within the school, leading to jurists within the distinct schools developing a hierarchy of norms. Wael Hallaq *Authority, Continuity and Change in Islamic Law* (Cambridge University Press 2001).

³⁵⁵ Rashad Ali and Hannah Stuart 'A Guide to Refuting *Jihadism* Critiquing Radical Islamist Claims to Theological Authenticity' (Henry Jackson Society 2014) 10.

³⁵⁶ Reza (n 25) 26

monopolized Islamic jurisprudence.’ The supreme weight attached by the Islamic jurist to hermeneutics means the Islamic jurist derives authority from his skills as interpreter rather than any inherent wisdom. He is guided, not by intuition, but by *dalil*, by textual evidence.³⁵⁷ This text-oriented approach is regarded as the only true means by which Islamic law historically developed. Muslim jurisprudence goes to great lengths to delineate opinion from knowledge in matters of law: knowledge correlating with certainty, opinion with probability.

The authority of the jurist rests upon the intrinsic validity of what he declares. The subsequent declaration is authoritative not because it is the jurist who declares it, but because the declaration has been validly derived from the textual sources and is therefore an acceptable expression of the Law of God. Irrespective of the authority of these declarations they are not characterized by absolute definitiveness. At most they are ‘approximations or understandings of God’s law rather than definitive statements of it.’³⁵⁸ As a result, no jurist can claim greater authority in the *Shari’a* than another.³⁵⁹ The jurist is however guided by certain rules: for example, harm must be removed but should not be removed by a greater harm; and removing harm comes before acquiring benefit.³⁶⁰ As there is no uniform definition or exhaustive list on what constitutes ‘harm’ or ‘benefit’ this imports subjectivity around its understanding as well as necessary methods of its removal.

Islamic jurists employed different types of legal reasoning to discover the law. Some fell under the general head of *qiyas*, others under additional sources such as *istislah* or *maslaha* (public interest); *istihsan* (juristic preference), and *darura* (necessity).³⁶¹

As a tool, *maslaha* has been consistently invoked to manipulate *Shari’a* interpretation to satisfy a reformist agenda.³⁶² Seminal twentieth century Islamist Rashid Rida was an effective

³⁵⁷ The Sunni jurist in particular is bound more to the formal texts despite orientalist ascribing an amplified weight to the role of individual discretion in the historical development of Islamic law. The Sunni jurist declares the will of God as revealed in the sacred texts; he does not proclaim the dictates of his own intuition. An essential characteristic of Islamic jurisprudence is that it eventually set aside the relatively unrestricted, discretion in favour of a constrained, text-oriented approach to the exposition of law. Weiss (n25) 201- 205

³⁵⁸ Reza, (n 25) 26

³⁵⁹ Contrast this position with the use of *takfir* in chapter 3.7 and 4.5.

³⁶⁰ Abdel-Haleem (n4) 61

³⁶¹ *Maslaha, istihsan* and *istislah* are subjective legal methodologies invoked when reasoning based on texts produces extreme hardship. *Darura* is derived from the lexical root *darur* which signifies harm or damage.’ Hallaq *Origins* (n6) 144; Ian Netton, *Encyclopaedia of Islamic Civilization and Religion*, ‘Darura’ (Routledge 2008) 134-135

³⁶² Using public interest or welfare to determine the permissive or prohibitive nature of an action, considering public interest in *Shari’a* is considered a basis of law, there is argument that rather than tools for determining the

protagonist of the use of *maslaha* as a source of legal and political reform. Rida developed the concept of *maslaha* as the primary means of effecting religio-legal change and a platform to allow reinterpretation of the *Shari'a*.³⁶³

Long before other nations of the world considered necessity a legal tool, the scholars adopted the doctrine of *darura*, (*al-darura tubih al-mahzurat*), 'necessity makes permissible the prohibited.'³⁶⁴ In case of necessity, a prohibited thing becomes permissible to the extent of removal of that necessity.³⁶⁵ This doctrine becomes pivotal in justifying conflict conduct in Islamic LOAC.

3.5 *Ijtihād* and Its Role in Modern Warfare

*'Draw your knowledge from whence the Imams drew theirs, and do not content yourself with following others, for that is certainly blindness of sight.'*³⁶⁶

Since the formative stages of *Shari'a*, the process for discovering the Revealed law within Islam has followed a strict formula: if the *Quran* and *Sunna* are silent on an issue, *qiyas* and *ijma* may be employed. However, if all these components failed to provide a solution to the problem, a qualified legal scholar, a *mujtahid*, could through his own independent juristic reasoning, issue a ruling, a *fatwa* which could be accepted or rejected by the *umma*.³⁶⁷ The process of extracting or deriving legal rules from the sources is termed, 'with reference to its

law, *maslaha* and *istislah* are a basis of law. For example, Al-Wahhab (d. 1792) used *maslaha* as a tool to achieve his reformist agenda. Different madhahib refer to this public benefit in alternate terms and rate its value as a source differently *Maslaha mursala* is *maslaha* without textual base. Parry 'Legal Methodology' (n250) 95- 96.

³⁶³ Malcom Kerr *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida* (University of California Press 1996) 187-90. See Rashid Rida *al-Khilafa, aw al imama al-uzma (The caliphate or the Supreme Authority)* (Cairo:1341) in Parry 'Legal Methodology' (n250) 96

³⁶⁴ *Darura* is invaluable to the moderate doctrines of *fiqh al-aqalliyat*. There are several *fatwa*-based examples of how the *darura* doctrine has been used to reconcile traditional *Shari'a* with Muslims living in a western context; whereby the Quran is frustrated by the national law where the Muslim resides. An example is the case of burials, if necessity demands, Muslims can be buried in non-Muslim cemeteries. Parry 'Legal Methodology' (n250) 95-97; Ali & Stuart, (n363), 12. Al-Zuhayli claimed that necessity would occur when the state of danger or extreme hardship affects the life, body, honour, mind or property of the human being. Al-Zuhayli, *Nazariyat al darura al-shar'iyya*, (Beirut 1995) in Nagamine (n71) (fn99) 223.

³⁶⁵ For example, keeping fast of Ramadan is an obligation for Muslims (*Qur'an* 2:183). Yet, if it causes excessive hardship the obligation circumscribed.

³⁶⁶ Thomas Hughes, *Dictionary of Islam* (Kazi Publications 2007)

³⁶⁷ *Fatwa* (pl. *Fatawa*) is a ruling given by the scholar. A *fatwa* is given on the understanding of the text and the context. When a *fatwa* is creating problems, scholars will use *maqasid* to make it *maslaha*. A *mujtahid* or *mufti* cannot be outsourced as decisions are context specific and based on *urf* in that culture. Every *fatwa* issued by a *mufti* should have methodological process that is agreed. A *mufti* possesses the same qualifications as a *mujtahid* with the additional characteristics of being 'pious, and of just character and must take the religion and law seriously.' Hallaq *Origins* (n6) 147

character as a human activity,' *ijtihād*.³⁶⁸ The principle of *ijtihād* is considered to have roots in a *hadith*.³⁶⁹

'Except for a... few *Qur'anic* and Prophetic statements which were unambiguous and...contained clear and specific normative rulings, the rest of the law was a product of *ijtihād*.' Its theory presupposes that the process of producing rules is one of elucidating that which is present but not self-evident. In the standard Islamic metaphor, the rules themselves are 'branches' (*furu'*) or 'fruit' (*thamara*), which grow out of 'roots' (*usul*), that is, from the sources. Only the roots are given; the branches, or fruit, are not. [T]hey must be made to appear, and for this to happen ..., human husbandry is required.'³⁷⁰

Ijtihād is a medium for the jurist to master and apply the rules of *usul al-fiqh* for the purposes of discovering the Divine law and to interpret the legal corpus of *Shari'a*. It is an Islamic instrument used to render a rational meaning to religious texts by the believer.³⁷¹ Seminal scholars of *usul al-Fiqh* (*usuli* scholars), when discussing *Shari'a* rules. Seminal *usuli* scholars defined it as 'the total expenditure of effort made by a jurist in order to infer, with a degree of probability, the rules of *Shari'a* from their detailed evidence in the sources;³⁷² the exertion of 'mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort.'³⁷³ Whether legal reasoning can be performed apolitically

³⁶⁸ 'In the pre-Islamic period, the words *jihad*, *mujahid* (the one who actually struggles), and *mujtahid* were used for physical and intellectual effort and were not necessarily associated with warfare or religion.' Nagamine (n71) 54; Weiss (n25) 200; Sobhi Mahmassani, 'The Principles of International Law in the Light of Islamic Doctrine' (1966) 117 *Recueil des Cours*, 221 in Badar 'Ius in Bello' (n25) 596

³⁶⁹ In a discourse between the Prophet and a *qadi* on his way to al-Yaman, the Prophet asked him how he would decide matters coming up before him. 'I will judge matters according to the *Qur'an*, if the Book of God contains nothing to guide me, I will act on the precedents of the Prophet of God, and if it is not in that either, then I will make a personal effort [*Ijtihād*] and judge according to that'. The Prophet is said to have been approving of this reply. Cyril Glasse, *The Concise Encyclopaedia of Islam* (Rowman & Littlefield Publishers 2008) 182. See also Shafi'i, *al-Risalah*, ed. Ahmad Muhammad Shakir, 1358/1940, First Edition, (Mustafa al-Babi al-Halabi Press, Cairo) 404 in M. Şağhîr Hasan Ma'sûmî *Ijtihād Through Fourteen Centuries* (1982) 21(4) *Islamic Studies*, 39

³⁷⁰ Weiss (n25), 199, 200; Hallaq *Introduction* (n13) 27

³⁷¹ The word *ijtihād* is derived from the three letter Arabic verbal root of j-h-d (*jahada*) which means 'to endeavour'. '*Jihad*', another derivative from the same expression, means utmost effort. Rhode (n299); Hallaq *Ijtihād* (n344) 3

³⁷² See for example Abu al-Husayn 'Ali otherwise known as al-Amidi (d. 631 A.H.) and Mohammad ibn Ali Al-Shawkani (d.1255A.H.).

Islamic System Blog Spot (December 12, 2005) <http://islamicsystem.blogspot.com.au/2005/12/Ijtihād-applying-islam-in-21st-century.html>

³⁷³ This *Usuli* definition of *Ijtihād* was derived from the evidences which discuss *Ijtihād* and establish its obligation. Hallaq, *Ijtihād*, (n344), 3; Parry 'Legal Methodology' (n250), 93. Durrani (n15) 114; The Royal Aal al-Bayt Institute for Islamic Thought (n333), 1

and free of substantive value choices has been an issue grappled with by Western legal scholars.³⁷⁴

Where questions arose but there were no plain answers, the Prophet would convene the *umma* and through *shura*, as per *Qur'anic* injunction, there was a collective exercise of *ijtihad*.³⁷⁵ When *ijma* was reached, it would be applied to the problem.³⁷⁶ *Ijtihad* in legal matters was confined to the grey areas of the law, where textual certainty was absent but where human reasoning on the basis of the texts might uncover the law as intended by God.³⁷⁷

In relation to Sunni jurisprudence, this jurist's tool was accepted and encouraged during the first centuries of Islam.³⁷⁸ Legal theory played a supporting role in favour of *ijtihad*, its practice was the primary objective of the methodology and theory of *usul al-fiqh* throughout Islamic history evolving with Islam, arguably allowing Islam to evolve.³⁷⁹ As a legal tool, it distinguishes itself from other tools as it is conditioned on intellectual independent interpretation *vis a vis fatwas*, permitting the scholar to not only rule on the basis of precedent, but also his own understanding of the texts.³⁸⁰ However, because *fatwas* are the result of

³⁷⁴ For example, Jerome Frank, Karl Llewellyn, Morton Horwitz, *The Transformation of American Law: 1870-1960: The Crisis of Legal Orthodoxy* (OUP 1992) 170

³⁷⁵ It is, however, to be noted that the Prophet preferred to consult the well-known devotees to Islam like the first Four Caliphs, Ubayy ibn Ka'b, Mu'adh ibn Jabal, Abu 'Ubaydah, the chiefs of clans and prominent companions.' M. Şaghîr Hasan Ma'sûmî, 'Ijtihad Through Fourteen Centuries' (1982) 21(4) *Islamic Studies*, 43; 'The scope of *ijtihad* does not include matters of *Aqeeda* (belief). This is because '*aqeeda* is definite and decisive and cannot be taken except from the definite *dalil* (evidence) and it is prohibited to take it from the speculative evidence. Hallaq, *Introduction* (n13) 27.

³⁷⁶ To clarify, *ijthad* and *ijma* while related are distinct. *Ijtihad* is 'the logical deduction on a legal or theological question by a learned and enlightened doctor [whereas] *ijma*, is the collective opinion of a council of divines.' Furthermore, *ijtihad* excluded those cases that had become the subject of *ijma*, such cases not subject to further juristic interpretation. Yet *ijma* and *Ijtihad* are not necessarily partners. Indeed, it is difficult if not impossible to reach consensus on an ambiguous issue by the very nature of ambiguity. Rather it is posited that *ijma* is only possible in situations where there is specific evidence explicit in the *Qur'an*. Aznan Hasan 'An Introduction to Collective *Ijtihad*: Concept and Applications' (2013) 20(2) *The Am J Islamic Social Sciences* 26, 30.

³⁷⁷ There is a phrase in Islamic jurisprudence that states '*ijtihad* against the text is not allowed' similar to the phrase *expressum facit cessare tacitum* ('if something is expressed in the text, there is no room for implication). Mojtabeh Shabestari, *Faith and Freedom* (Tahr-e No Publisher 2000) 160. Hashemi argues that a more correct articulation of this phrase is that *ijtihad* against the essential principles provided by the text is what is not allowed. Hashemi (n6), 14; Muslim jurisprudence insists very strongly that the results of *ijtihad* be classified as *zann*, or opinion/knowledge and that *zann* be carefully distinguished from '*ilm*, or knowledge. Weiss (n25) 203.

³⁷⁸ Rhode (n299).

³⁷⁹ As a derivative from the revealed sources, Islamic legal theory is sanctioned by divine authority. Hallaq *Ijtihad*, (n344), 5

³⁸⁰ See for example Averroës, born Abu al-Walid Muhammad Ibn Muhammad Ibn Rushd, (d. 1198 CE) seminal legal work, *Bidayat al-Mujtahid wa Nihayat al Muqtasid* (the beginning for him who interprets the sources independently and the end for him who wishes to limit himself.) The book belongs to the genre of *ikhtilaf* works, treatise in which the opinions of the different schools are juxtaposed and in which the legitimate disagreement between the early lawyers are discussed. Averroës usually reduces the debate to a disagreement about the question of how two conflicting *Qur'an* verses or Traditions are related to each other. This often manifests as either

humanly fallible *ijtihad* and therefore a probable articulation of Divine Law, they cannot be binding.³⁸¹ As there is more than one jurist capable of exercising *ijtihad*, a single set of facts will yield multiple opinions.

‘[There is no] single legal stipulation that has monopoly or exclusivity...Islamic law is thus characterized by legal pluralism (both in hermeneutics and legal doctrine), not only because it acknowledges local custom and takes it into serious account, but also because it offers an array of opinions on one and the same set of facts.’³⁸²

As Islam spread, the Islamic intellectual tradition relied upon *ijtihad* to compensate for its lack of centeredness, to enable it to expound an Islam that could be localised into indigenous traditions.³⁸³ As *ijtihad* was the only means Muslims could determine the extent their acts aligned with *Allah's* intent, it was at one point indispensable in legal matters, its practice incumbent on all *ijtihad* practitioners whenever a novel case required erudition.³⁸⁴

Those with capacity to exercise independent interpretation of the sources are forbidden by his conscience to adopt the opinion of others through *taqlid*, for such a person the opinion of another is not a valid legal rule.³⁸⁵ ‘[However,] if an individual knows himself to be incapable of deriving rules for his own conduct from the sacred texts, as presumably is the case with the vast majority of believers, he turns to those who are more capable of understanding the sacred texts.’³⁸⁶ The reality is that it is not exclusive personal reasoning of an individual; rather it is an extraction of the *hukm* (ruling or decision) of Allah from the sources of *Shari'a*. It has been argued that personal reasoning alone is dangerous as it infers that it is a product of the mind

questioning one as the rule, and the other as the exception or whether one rule has abrogated the other. Peters, *Jihad* (n321) 6; Parry ‘Legal Methodology’ (n250) 93.

³⁸¹ Quraishi (n248) 345.

³⁸² Hallaq *Introduction* (n13) 27; Khaled Abou El-Fadl, ‘Speaking in God’s Name: Islamic Law, Authority, and Women (One World Publishers 2001) 39.

³⁸³ Abdalla (n30) 14; Hallaq *Ijtihad* (n344) 3–41.

³⁸⁴ The legislative portion of *Qur'an* presents a principle of *ijtihad* for amendments and legislation to accommodate new issues based on the public interest for the sake of *umma*. Razi (n26) 5

³⁸⁵ ‘Because the positions taken by jurists regarding a particular legal question are all opinions, one cannot know which opinion happens to be correct. If one could know an opinion was correct, erroneous opinions would necessarily be eliminated. In such case, knowledge would be existent and would prevail over opinion because opinion is only binding where knowledge is lacking. Where knowledge is lacking, error may go unheeded; where it is present, error necessarily comes to light.’ Weiss (n25) 204-5; 207

³⁸⁶ See for example Abu al-Husayn 'Ali otherwise known as al-Amidi (d. 631 A.H.) and Mohammad ibn Ali Al-Shawkani (d.1255A.H.)

Islamic System Blog Spot (December 12, 2005) <http://islamicsystem.blogspot.com.au/2005/12/Ijtihad-applying-islam-in-21st-century.html>

alone as is the case in Western legislation. Islam differs from Western methodology in that the mind is a source or conduit to discover Revelation.³⁸⁷

Opinion distinguishes Divine Law from jurists' law. With every opinion of a jurist, the possibility of error arises, and in such instance the Law of God becomes clearly distinguishable in substance from the law conceived by the jurist. Even an erroneous opinion (provided that it has not been identified as such by supervening knowledge) carries weight as long as the jurist has been duly sincere and diligent in his scrutiny of the sacred texts. A jurist who has unwittingly proffered an erroneous opinion is excused for his error and exonerated of all taint of sin.³⁸⁸ The correctness of *fiqh* is grounded in the process of *ijtihād* that generates it. So long as the *fiqh* is the result of sincere *ijtihād*, any conclusion qualifies as a possible articulation of God's law, and none can claim with certainty that their understanding of the Divine Law is correct, nor that another's is incorrect. Muslims accept that a level of uncertainty in legal conclusions, with all *ijtihād* efforts sharing equal legitimacy.³⁸⁹ This inevitable presence of error in law should not be unduly exaggerated. Sunni Islam places a great amount of confidence in the capabilities of its great jurists and regards their opinions as being generally reliable. Both doctrines, *ijtihād* and *taqlid*, can be manipulated to promote a self-serving agenda, especially because determination of the capacity to exercise such interpretation is between the individual and the divine. Despite Islam creating individual responsibility to Allah which should encourage self regulation in interpretation, parameters evolved to establish preconditions for the practice of *ijtihād*. *Usuli* scholars preconditioned its exercise on three criteria: first, exerting effort in a manner until he feels unable to exert anymore; secondly, this exertion should be in search for a precedent about an already deduced issue from the *Shari'a* rules; finally, the opinion formed should be sourced from the *Shari'a* texts as the only basis from which *Shari'a* rules may be derived.³⁹⁰ The fulfilment of the condition that the jurist makes a 'total expenditure of effort' in his search for an opinion can only be verified by the jurist himself. 'Such subjective verification entails an exercise of conscience.'³⁹¹

³⁸⁷ This is contentious. See al-Amidi argument cited in Hallaq *Ijtihād* (n344) 7

³⁸⁸ Weiss (n25) 204- 205.

³⁸⁹ Quraishi (n248) 342.

³⁹⁰ See for example Abu al-Husayn 'Ali otherwise known as al-Amidi (d. 631 A.H.) and Mohammad ibn Ali Al-Shawkani (d.1255A.H.).

Islamic System Blog Spot (12 Dec 2005) <http://islamicsystem.blogspot.com.au/2005/12/Ijtihād-applying-islam-in-21st-century.html>

³⁹¹ Weiss (n25) 207.

At the end of the tenth century traditionalist *ulama* who had a stronghold on the *madhahib* proscribed *ijtihād* as a legitimate tool of exegesis.³⁹² As the interaction between reason and revelation is the *raison d'être* of *ijtihād*, absent *ijtihād*, Islam is a rigid immutable system, unable to be modified by any legislative authority and which has no flexibility to produce law based upon human reason in the context of the local circumstances and the particulars needs of the given community. Considering its modern role in resuscitating Sunni revivalist movements, the controversy surrounding the closure of the Gates of *Ijtihād* (*insidad bab al- ijtihād*) as well as qualification of those permitted to practice it warrants exploration.³⁹³

3.6 *Mujtahid* Qualification

Depending on the scholar informing the debate, the controversy about *ijtihād* started in its primitive form between the ninth and fourteenth century CE.³⁹⁴ The underlying rationale for the closing of the gates of *ijtihād* is traced to the idea that the critical thinking involved in its practice led to questioning authority, potential insurrection, and *ijtihād's* use as a tool to invoke the immunity of *Shari'a* from governmental interference.³⁹⁵ It is alleged that through the ninth and eleventh centuries, *ijtihād* was rejected by several groups, largely extreme legal theological sects that preferred purist *taqlid* and condemned *qiyas*, which as an indispensable tool in the practice of *ijtihād* sounded its death knell. When extremists (*ghulāt*) were accused of invoking *ijtihād* to justify dissent, somewhere around the eleventh century saw the active closing of the 'Gates' by Islamic authorities to quash dissent and maintain an autocratic regime.³⁹⁶

After centuries of *ijtihād* having a contentious status, the nineteenth century saw 'the widespread abandonment of *taqlid* of the *madhahib* in favour of various forms of *ijtihād*.'³⁹⁷ A

³⁹²Aslan (n29) 165.

³⁹³ The expression was only used as a majority view among Islamic scholars. There was also always a minority that claimed that the closing of the door is wrong, and a properly qualified scholar must have the right to perform *Ijtihād*, at all times, not only up until the four schools of law were defined.

³⁹⁴ None of these scholars provide historical evidence for a consensus of Muslim scholars on the point that the gate of *ijtihād* was closed. See Hallaq *Ijtihād* (n344) 4

³⁹⁵ Montgomery Watt, *Islam and the Integration of Society* (Evanston, 1961), 206-207, 242-243; Herbert Liebesny, 'Stability and Change in Islamic Law,' (1967) *Middle East Journal* 16, 19; Coulson (n12) 80-81; Schacht *Introduction* (n253) 75; Fazlur Rahman, *Islam* (University of Chicago Press 1966) 77-78

³⁹⁶ *Ijtihāds'* catalyst for dissent and resultant encouragement for its abandon by Muslim rulers meant that Muslim intellectual innovation slowed. Europe, with no such restriction was able to flourish using new discoveries in science and technology to improve their governance and weapons. The Ottoman Empire (circa 1389-1918) survived through taking advantage of European developments in warfare, buying weapons and technology. Rhode (n299)

³⁹⁷ Mark Segwick, 'In Search of a Counter-Reformation: Anti-Sufi Stereotypes and the Budshishiyya's Response' 125-146 in Bergesen (n247) 8

‘prerequisite for the survival of Islam in a modern world’ constituting the foundation of Sunni legal doctrine, *ijtihād* has also enabled the resuscitation of revivalist movements.³⁹⁸ With the advancement of technology in warfare and no analogous cases to draw from, self-proclaimed orthodox Islamic groups must use *ijihad* to justify certain violent conduct and legitimize such conduct under Islam. As a method of legal reasoning *ijtihād* does not rely on the traditional *madhahib* which amplifies its value exponentially considering the most extreme Islamic groups reject the institution of *madhahib* altogether. However fundamentalist Muslims also contend that modern *ijihad* has liberalised under colonial domination to such an extent it has lost the virtue of Islamic law.³⁹⁹

Jurists recognize as a sacred purpose of *usul al-fiqh*, the role of suitably qualified jurists to extract rulings for novel cases. The task of *Qur’anical* exegesis, that is the *ulama* who engage in intellectual *ijtihād*, are known as *mujtahid*.⁴⁰⁰ Only *mujtahids* can determine whether an act is analogous and proceed in giving it a *haram* or *halal* status.⁴⁰¹ To produce *ijtihād* it must be shown that the interpretation is acceptable in terms of Arabic language; that the *mujtahid*, has an exhaustive mastery of all the primary texts as it relates to each question as well as the principles of inference (*istidlal*), and *qiyas*; and that the *mujtahid* is familiar with the methodology of *usul-al-fiqh* needed to join between the primary texts. Logically, the more detailed requisite *mujtahid* qualification paralleled the evolution of Islamic legal jurisprudence.⁴⁰² At one point *mujtahid* qualification became so ‘immaculate and rigorous and were set so high that they were humanly impossible of fulfilment.’⁴⁰³

³⁹⁸ Knut Vikor, ‘The Development of *Ijtihād* and Islamic Reform., 1750-1850’ (paper presented at the Third Nordic Conference on Middle Eastern Studies: Ethnic Encounter and Culture Change, Joensuu, Finland, 19-22 June 1995) <http://org.uib.no/smi/paj/Vikor.html> accessed 20/03/15; Al- Alwani, founder of the *fiqh* al-aqalliyat doctrine, champions the use of *Ijtihād* especially in cases where account for modern Western knowledge is unavoidable. For the use of *Ijtihād* in contemporary Islam see Dr Muzammil Siddiqi response to a question on artificial insemination on *Islamonline* in Parry ‘Legal Methodology’ (n250) 94

³⁹⁹ Abdel-Haleem (n4) 110

⁴⁰⁰ Schacht *Introduction* (n253) 1-5; Hallaq *Ijtihād* (n344) 5; Nagamine (n71) 54.

⁴⁰¹ In Sunni Islam the closing of the gates of *ijtihād* made unlimited interpretation of *Shari’a haram*. This means, if a Sunni adherent subscribes to the doctrine that the gates of *ijtihād* were closed, in a Sunni context wars are waged according to ancient interpretations of Islam. There will be a discussion as to whether such an interpretation aligns with contemporary IHL. S Zuhdu Pasha *Al-majmu’at az-Zuhdiyya* in Ahmet Paşa, *The Sunni Path* (Hakikak Kitapevi 2013) 45. In reality, Islamic militant groups could rely on either *taqlid* or *ijihad* depending on their agenda.

⁴⁰² Hallaq *Ijtihād* (n344) 5

⁴⁰³ The eleventh century text of al-Başrī is the first reference to *mujtahid* qualification. Central tenets of al-Başrī’s doctrine included: *mujtahid* knowledge of the principles’ or ‘*usul*’ (Namely the *Qur’an*, *Sunna*, *Ijma* and *Qiyas*) emphasising the credibility of *hadith* transmission; *mujtahid* familiarity with *urf* as necessary to tailor extrapolation of rulings to meet the exigencies of Muslim life in specific contexts; positioning *qiyas* as indispensable in the practice of *Ijtihād*; and adherence to the doctrine purporting the infallibility of the *umma*. This means that, according to al-Basri, once a case has been determined a *mujtahid* has no right to re-investigate.

Because ability varies from jurist to jurist; from generation to generation; classical theory presumes levels or ranks of *ijtihād*. These levels range from *ijtihād* directed at questions of law, to *ijtihād* confined solely to the limits of one's particular *madhhab*, and to the 'absolute' *ijtihād* exemplified by the founders of the great schools. The very existence of Islamic law as a body of positive law capable of regulating an entire society presupposes that the great majority of men will leave *ijtihād* to the few and act in accordance with what these few decide. 'If every man were a *mujtahid* there would be no law in the ordinary sense: every man would be a law unto himself.'⁴⁰⁴ In the interest of social order only certain men should acquire the qualifications needed to practice *ijtihād*. Those who do must decide, through introspection, how far they will pursue their *ijtihād*.

In the seventh century CE, when the corpus of Islamic law was in its infancy, the threshold requirements to exercise *ijtihād* expected from the Prophet's companions, His followers and those after the followers, the *salaf's*, was in stark contrast to that required when it was fully evolved.⁴⁰⁵ Initially, only a negligible amount of legal knowledge was required to practice *ijtihād*, and those *mujtahid* who did exert themselves to formulate legal decisions through this tool were entitled to otherworldly rewards irrespective of the correctness of the result of his *ijtihād*.⁴⁰⁶ This lower threshold requirement was simply because such *mujtahid's* were not exposed to the developed law or jurisprudence of contemporary Islam. This line of reasoning lends weight to the argument that revivalist puritanical groups would also only require a level of erudition expected of *mujtahid's* of the 7th through to the 11th century CE.

Lutz Wiederhold, 'Legal Doctrines in Conflict The Relevance Of Madhhab Boundaries To Legal Reasoning in The Light of An Unpublished Treatise On Taqlid And Ijtihad' (1996) 3(2) *Islamic Law and Society* 234, 238. For a discussion on the different approaches to mujtahid qualifications see Aaron Spevack, *The Archetypal Sunni Scholar: Law, Theology and Mysticism in the Synthesis of of Al-Bajuri* (SUNY Press 2014) 107; HA Minhaji, *Islamic Law and Local Tradition: A Socio-Historical Approach*, (Kurnia KAlam Semesta, 2008) 190; Hallaq *Ijtihād* (n344) 6- 7.

⁴⁰⁴ Weiss (n25) 207

⁴⁰⁵ Salaf is an Arabic noun which translates to 'predecessor', or 'forefather'. The term '*Salafi*' comes from the Arabic phrase, '*as-salaf as-saliheen*', which refers to the first three generations of Muslims, otherwise known as the Pious Predecessors. Salafi Islam is not a new thing because the label "*Salafiyya*" existed from the first few generations of Islam and that it is not a modern movement. According to Prophet Muhammad, the Sahabah ('Companions'), Tabi'un ('Followers'), and Tabi' al-Tabi'un ('Those after the Followers') are among the best generation of Muslims on Earth, and are therefore seen by the vast majority of today's Muslims as a model for how Islam should be practiced. Salafis (or "*Wahhabis*") are not a part of a deviant Islamic sect, but strict orthodox followers of the Qur'an and Sunna. http://wikiislam.net/wiki/Salaf_%28definition%29 accessed 20/03/15.

⁴⁰⁶ Hallaq *Ijtihād* (n344) 33.

As the qualification, practice, and result of *ijtihād* is dependent on the social construct in which the *mujtahid* exists, the 7th century-styled contemporary *mujtahid* would have few limitations in rationalising military *jihad* as well as accepting what would under IHL be prohibited conduct in war. It is for every Muslim to choose between following the *ijtihād* of a *mujtahid* who satisfies the qualification requirements, or the *ijtihād* of another ‘movement leader’, whose qualifications may be purely a matter of reputation.

Ijtihād or neo-*ijtihād*, is likely the key concept that has allowed *Islamiyyun*, the Islamists, ‘to expound a thoroughly modern conception of what it means to be a Muslim in the contemporary Muslim world through a more politically sensitive lens’ largely free of traditional legal interpretation.⁴⁰⁷

‘This trend is mostly manifest in the rich panoply of religious discourse and counter-discourse in Muslim and non-Muslim countries. What is most specific about the return of *ijtihād* is the phenomenon of Islam as a shared terrain for all discourses. All claimants of *ijtihād* deploy Islam to legitimate their thought and practice to delegitimise opponents.’⁴⁰⁸

The significance of this tool in radical discourse is tempered with a blanket warning by scholars of attaching too much weight to non-State armed group’s reference to discrete aspects of Islamic law, ‘Muslim fighters are for the most part no more able to read al-Sarakhsi or Ibn Rushd [Averroes], than an American soldier is able to read *Summa Contra Gentiles* in the original Latin.’⁴⁰⁹

3.7 The Importance of Being *Salaf*

Manichean constructs of good and evil, savages and saviours dominate the Abrahamic religions and provide a platform for extremism to flourish. In Christianity, this manifests in the utopian Garden of Eden corrupted by the sin of Adam and Eve. In Sunni Islamic thought, the ‘evil’ is seen as the time of ignorance, and barbarism before Revelation, the *jahiliyya*. Islam remedied *jahiliyya* and quashed all the evils that stemmed from this period of ignorance.⁴¹⁰ Extremist

⁴⁰⁷ Abdalla (n30) 13; Hallaq *Introduction* (n13) 117.

⁴⁰⁸ Abdalla (n30) 4-5.

⁴⁰⁹ Reinhart (n23) 171.

⁴¹⁰ Halverson (n260) 37.

discourse has positioned only those who replicate the actions of the Prophet and the *sahaba* in the seventh century as ‘true’ Islam. The remaining world, including those Muslims who do not subscribe to this extremist view, have diluted and corrupted the purity of the Divine message and have reverted to *jahiliyya* and are thus enemies of Islam. The only cure is armed struggle to purify the *apostates* that do not subscribe to the extremist idea of the absolute sovereignty of God and the creation of an Islamic State.⁴¹¹

Literally, ‘*salaf*’ means ‘predecessor’ or ‘ancestor’. In relation to a movement, there is no unanimously agreed upon definition of a ‘*salafist*’, however it is the *salafist* position that ‘no one has understood Islam properly except the Prophet and early Muslims.’ Traditional Islamic scholarship would refer to someone who died within the first four hundred years after the Prophet’s death as ‘*salafi*’. This includes the founders of the *madhahib*: Abu Hanifa, Malik, Shafi’i, and Ahmad ibn Hanbal’.⁴¹² The logic behind the reverence attached to a *salaf*, especially in its transformation over the last century into an Islamic methodology, is the same as that attached to the *sahaba*: that the *salaf* had proximity to the teachings of the Prophet, the *amal ahl al-Madina*,⁴¹³ the period of Revelation that would embody a pure Islam.⁴¹⁴ The *Salafi* movement advocates a return to a *Shari’a*-minded orthodoxy that would purify Islam from unwarranted accretions. The criteria for judging adherence to this orthodoxy is the *Qur’an* and Sunna relying on *ijtihad* and *qiyas* to determine the Prophet’s position on modern issues not imagined in the 7th century CE.⁴¹⁵

The generic nature of the term ‘*salaf*’ has resulted in several groups identifying or being labelled as such. This is problematic as each group considers the application of the term exclusive to itself. *Salafism* exists on a continuum.’ It represents a diverse community although

⁴¹¹ The writings of Pakistani Islamist Abu ‘Ala Mawdudi (d. 1979) on the Principle of God’s sovereignty influenced Sayyid Qutb’s (d. 1966) *jahiliyya* narrative in extremist discourse which in turn influenced al-Qaeda doctrine through Zawahiri. See Sayyid Qutb, *Milestones (Ma‘alim fil Tariq)* English Translation, (American Trust Publications 1990) Mawdudi and Qutb are seen as the two architects and ambassadors of the offensive theory of *jihād* in the 20th century. The weight attached to the *sahaba* in extremist discourse should not be understated. Many believe they had only one source of guidance, the *Qur’an* and therefore were pure. However misguided (the *sahaba* were surrounded by other cultures) it rationalises their status. Halverson (n260) 44. It is the extent and degree of the implementation of *Shari’a* which is often cited as the litmus test for the Islamic credentials of an Islamic state. Lau ‘Islamic Law’ (n78)

⁴¹² Any Muslim who dies after this period is referred to as ‘latter-day Muslims Yasir Qadhi ‘On Salafi Islam’ (2014) <http://muslimmatters.org/2014/04/22/on-salafi-islam-dr-yasir-qadhi/> last accessed 08/02/15

⁴¹³ *Amal ahl al Madina* : Prophetic custom and local practices of the people of Medina.

⁴¹⁴ This is similar to the rationale for weighting *amal ahl al-Madina*

⁴¹⁵ Quintan Wiktorowicz, ‘A Genealogy of Radical Islam’ (2005) 28 *Studies in Conflict & Terrorism* 75, 77.

there are individuals and movements that cannot be positioned on the scale.⁴¹⁶ At one end there is the mainstream Saudi salafism which adhere to a *madhhab* (generally Hanbali), are pacifists, and denounce extremist *jihad* groups. At the other end of the spectrum, the radical *salafists* that advocate violence to achieve a return to first principles.⁴¹⁷ Militant *salafists*, while articulating some semblance of *salafi* methodology, are generally rejected by other *salafi* groups not just because of the militancy but also the weight they attach to their version of *jihad vis a vis* other issues mainstream *salafis* would prioritize. Indeed, the weighting attached to *da'wa* (proselytization) or *jihad* will distinguish Islamic groups on the *salafi* spectrum.⁴¹⁸ 'Although all *jihadist* movements which give priority to *jihad* are *salafist*, the reverse is not true. Many *salafist* movements are opposed to armed *jihad*, either tactically or by conviction, and advocate the *da'wa*... as a preferred form action.' Yet there is no clear demarcation between these groups, with a flow from *da'wa* to *jihad* linked to a 'strategic and political context.'⁴¹⁹

All *salafis* share a puritanical approach to the religion intended to eschew religious innovation (*bid'a*) by strictly replicating the model of the Prophet Muhammad, each believing they correctly espouse the teachings and beliefs of *salaf al-salih*. *Salafī's* 'ardent rejection of human reason, logic, and desire intends to eliminate the biases of human subjectivity and self-interest, thereby allowing them to identify the singular truth of God's commands. From this perspective, there is only one legitimate religious interpretation; Islamic pluralism does not exist.'⁴²⁰ Further commonalities between *salafists* is an absolute rejection of metaphoric or symbolic interpretation of the Divine Names and Attributes; a categorical imperative affirming God's exclusive right to be worshiped; an opposition to all reprehensible or potentially reprehensible *bid'a*; and a respect for the theological and legal opinions of Taqi al-Din Ahmad Ibn Taymiyya

⁴¹⁶ Wiktorowicz 'Genealogy' (n415) 75; Quintan Wiktorowicz, 'Anatomy of the Salafi Movement' (2006) 29 *Studies in Conflict & Terrorism* 207.

⁴¹⁷ Michael Doran, 'Somebody Else's Civil War' (2002) 81(1) *Foreign Affairs* 22–42.

⁴¹⁸ 'The degree of emphasis on *jihad*, or *da'wa* allows groups engaged in violent action to be distinguished from others. For the *jihadists*... *jihad* is the way by which Muslims can be united and recalled to the true practice of Islam. The view is that *jihad*, even if it should fail, is instructive and sets an example as it allows the Muslim masses to be aroused to consciousness, and a distinction to be drawn between true Muslims and the rest.' Mariam Abou-Zahab & Olivier Roy, *Islamic Networks: The Afghan-Pakistan Connection* (Columbia University Press 2004) 3.

⁴¹⁹ Abou-Zahab & Roy (n418) 3–4.

⁴²⁰ Holding an uncompromising *salafist* position appears untenable. The *Madkhalī* strand of *salafism* has fallen out of favour as it proved so intolerable and caused such tangible damage to the entire *salafī* movement that most other *salafī* clerics not associated with the movement were forced to clarify the extremism inherent in it. Furthermore, it seems the longevity of such intolerance is limited with many *Madkhalī* adherents eventually rejecting the sub-movement due to what has been coined '*salafī* burnout'. The *Madkhalī* trend is sub-sect of the Saudi Salafis. The *Madkhalīs* are continuously splintering amongst themselves. Qadhi (n418); Wiktorowicz 'Anatomy' (n416) 207–8. Contrast with & Abou El-Fadl discussion on *ijtihad* in chapter 3.4.

(1263-1328).⁴²¹ Taymiyya has more authority than any other orthodox jurist in sharpening the Muslims' consciousness of the excruciating choice they have to make between anarchy and injustice each time they feel oppressed by authority. A devout religious scholar advocating Muslim interests, Taymiyya warned against the evils of anarchy in favour of enduring the *status quo*.⁴²² However he stressed the need for all Muslims, both rulers and ruled, to follow the obligations of their faith. No one was to be free from the obligation to encourage virtue and condemn vice. Taymiyya claimed the right of *ijtihād* and used his *ijtihād* to rearticulate the general principles provided by the *Qur'an* and the Sunna. He helped define the intellectual's alternative to the stable *ulama* establishment that was emerging in the thirteenth century, advocating strict application of the Quran and Sunna.⁴²³

The *salafi* community also distinguishes itself on various issues. These differences can be divided into six distinct elements. The first is the status of the *madhahib* and subsequent adherence within *salafi* movements. Certain *salafi* movements allow subscription to a *madhhab* in times of necessity, so while discouraged it is, within strict parameters, permissible. On the extreme end, there are *salafi* movements which prohibit adherence to a *madhahib*.⁴²⁴ Secondly, is the dissociation from *ahl al-bid'a*. This dissociation on religious innovation is a cornerstone of *salafi* ideology. While some *salafist*'s are willing to cooperate with certain non-*salafi* communities, the majority position is complete dislocation. The pragmatic implementation of this dissociation varies with the strictest salafists tarnishing a person as 'deviant' should they have even the most tenuous association with another who engages in *bid'a*.

Thirdly, *salafists* hold divergent views on the requirements associated with '*īmān*' (faith) and whether actions are a requisite element of faith or are subsidiary to it. Fourthly, *salafists* lack consensus on the question of permissible political dissent and activism toward an Islamic ruler, with contention as to right authority in calling for *jihād* against apostate rulers; the nature of a 'defensive' and global *hirabah*; the permissibility of targeting civilians; and the legitimacy of suicide bombings (what radicals call 'martyrdom operations').⁴²⁵ Some factions adopt the

⁴²¹ However, Ibn Taymiyya is not considered a progenitor for the modern Salafi movement. There is no single founder after the Prophet. Wiktorowicz 'Anatomy' (n416) 207-8

⁴²² Hamid Enayat, *Modern Islamic Political Thought* (IB Tauris 1982) 73

⁴²³ Esposito & Voll (n26) 10

⁴²⁴ Qadhi (n418)

⁴²⁵ Wiktorowicz 'Genealogy' (n415) 75-77

position that any criticism of a ‘legitimate’ ruling authority is *haram*⁴²⁶ while others would insist on dissent and activism, by force if necessary, based on the illegitimacy of certain rulers of Muslim lands.⁴²⁷ This feeds into the fifth point of difference, the issue of *takfīr* (deeming the belief of a Muslim to be invalid) and in particular *takfīr* of the rulers who do not judge according to *Sharī‘a*.⁴²⁸ Some *salafists* would subscribe that rulers of Muslim lands who govern with secular laws maintain legitimacy; others would feel such governance equates to *kufir*, and their rule is illegitimate. Finally, the *salafi* movements’ relationship to *jihād* has proven divisive. A vocal minority have adopted a militarist position. This *jihad* manifests in cumulatively or individually ‘removing secular rulers from Muslim lands’ [or] maintaining perpetual conflict against non-Muslim governments that have militarily intervened in Muslim lands.⁴²⁹

Radical Islamic militants use the same texts, quotes, and religious evidence as other *salafis*, but they have developed new understandings about context and concepts such as ‘belief,’ ‘defence against aggression,’ and ‘civilians.’ The evolution of *jihadi* thought is less about changing principles embedded in the religious texts than the ways in which these principles are operative in the contemporary period.⁴³⁰ The divergent ideological trends are attributable to a large extent, in the inherently subjective process of *Qur’anical* exegesis whereby immutable religious texts and principles are applied to new circumstances and issues, often stretching their logical conclusion in a way that increased the scope of permissible violence.

Building on the previous two chapters, the following chapter will consider Islamic conflict relations and the obligations which flow from Islamic conflict classification. It will focus on who can rightfully declare war and the reasons for such declaration.

⁴²⁶ Using the oft cited *Qur’anic* verse ‘It is not for a believer to kill a believer unless (it be) by mistake.’ 4:92

⁴²⁷ An extension of the Islamic principle *al-amr bi’l-ma’rūf wa’l-nahy ‘an al-munkar* (‘advising the good and forbidding evil’). Qadhi (n418)

⁴²⁸ Iftikhar Malik, *Pashtun Identity and Geopolitics in Southwest Asia: Pakistan and Afghanistan Since 9/11* (Anthem Press 2016) 5

⁴²⁹ Qadhi (n418)

⁴³⁰ Wiktorowicz ‘Genealogy’ (n415) 75-6

Chapter 4 Islamic International Law and the Right to War

4.1 Siyar and the Islamic Framework for Conflict Relations

‘A Muslim has no country except that part of the earth where the Sharia of God is established and human relationships are based on the foundation of relationship with God; a Muslim has no nationality except his belief, which makes him a member of the Muslim community in Dar al-Islam; a Muslim has no relatives except those who share the belief in God...A Muslim has no relationship with his mother, father, brother, wife and other family members, except through their relationship with the Creator, and then they are also joined in blood.’⁴³¹

Traced to 630 CE the international law of Islam pertains to *Shari’a* sanctioned relations between Islamic states and non-Islamic States.⁴³² Known as *Siyar*, this body of law on one hand crystallized the Islamic effort to promote a stable and ordered global society,⁴³³ and on the other was an acknowledgment of the failure of Islam to ‘win the whole world.’⁴³⁴ This branch of *Shari’a* establishes fundamental principles regulating various forms of warfare and encompasses the attitude adopted by the rulers towards aliens in the state of war and peace.⁴³⁵ *Siyar* manifests from the same scriptural sources as the *Shari’a*, the *Sunna* of the Prophet elaborates these rules as do the conduct and statement of the rightly guided Caliphs (*rāshidūn*). *Siyar* ‘applie[s] as part of an Islamic State’s domestic legal order, whether or not non-Muslim States accepted it as binding.’⁴³⁶ This chapter purports to examine justifications for war within an Islamic framework.

⁴³¹ Qutb, Milestones 118-119

⁴³² ‘To each among you, We have prescribed a law and a clear way...’The *Qur’an*, 5:48. While the law of war and peace in Islam is as old as the Quran itself. [in] Islamic international law this conduct [war and peace] is, strictly speaking, regulated between Muslims and non-Muslims, and not in actuality between states.’ Malik, The *Qur’anic* Concept of War (n304), x; AM Khoja, *Elements of Islamic Jurisprudence* (Mirror Press Ltd 1977) 145; Muhammad Tallat Al Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff 1968) 96

⁴³³ *Siyar* is the plural form of the Arabic *sirah* which is derived from the verb *sara-yasiru* (to move). ‘Sirah is technical term in the Islamic sciences meaning the bibliography of the Prophet while...Siyar refers to legal matters.’ Siyar is not mentioned in the Quran, however its singular form, *sirah* is found 27 times in the *Qur’an*. Badar ‘Ius in Bello’ (n25) 600

⁴³⁴ Majid Khadduri, *War and Peace in the Law of Islam* (Johns Hopkins Press 1955) 43-44

⁴³⁵ Although it originally pertained to the Prophet Mohammad's conduct in war, *siyar* was later formalized to encompass laws on the conditions for peace and neutrality. Hamidullah, (n584), 61-72,88.

⁴³⁶ Islamic legal thought dictates that States can never be sovereign and are always subordinate to God’s will. Further, the Muslim jurist does not distinguish between the ordinary laws of the land and interstate conduct. Joseph Schacht, ‘Islamic Law in Contemporary States’ (1959) 8 *American Journal of Comparative Law* 133, 144; Malik, The *Qur’anic* Concept of War (n304), x; Hamidullah, (n584) 4-5.

Credited with formalizing and codifying these laws are the *salafi* Islamic scholar *Hanafi* and his pupil *Mohammad bin Hasan al-Shaybānī*.⁴³⁷ Structured as a dialogue, *Shaybānī's Kitab al-Siyar* posits a question about a point of law and answers it in the format of his opinion. There are only glimpses of *ahadith* used as evidence to support this personal opinion (*ra'y*) with the majority of the work relying on his exercise of *ijtihad*.⁴³⁸

Siyar incorporates *ius ad bellum* and *ius in bello* principles within its scope with passages relating to regulation of 'the conduct of warriors..., what is incumbent upon them and for them[,]'⁴³⁹ as well as 'the conduct of the Islamic state in its conflicts with apostates and rebels.'⁴⁴⁰ Although captured under an umbrella legal head, conflict conduct and legitimate use of force are distinguished. The two realms 'coexist independently...[,] the legitimacy of waging war does not affect the rules for the conduct in war' akin to the demarcation of contemporary *ius ad bellum* and *ius in bello*.⁴⁴¹

Classical Islam divides the world into the dualistic *dar al-Islam* (Abode of Islam; Peace or Submission) and *dar al-harb* (Abode of War). However these concepts are better attributed to a human attempt to provide the Muslim community with a 'geopolitical scheme' that seemed

⁴³⁷ *Siyar* has been recognised as an integral part of Islamic law and Islamic jurisprudence, maturing into a fully functional body of the *Shari'a* several centuries before parallel developments in the Western world. Ali & Rehman (n250), 323; Abu Hanifah al-Nu'man b. Thabit (699–767 CE) also developed the law of *baghy*, a response to the several instances of rebellion during his lifetime. M. Rashid Ahmad Khan, *Islamic Jurisprudence* (Lahore, Pakistan: Sh. Mohammad Ashraf, 1978), 199; Al-Sarakhsi, Muhammad b. Ahmad, *Kitabal-Mabsut* (Misr: Matb'a al-Sa'adah, 1327 A. H.), 456; Hamidullah, (n584), 88; Abdel-Haleem (n4) 74.

⁴³⁸ This body of law is further bolstered through juristic tools such as *ijma*, *istihsan*, *maslaha*. Khadduri *Islamic Law* (n13) 230-254; Khadduri, *War* (n434) 36; Anke Bouzenita 'The *Siyar* – An Islamic Law of Nations?' (2007) *Asian Journal of Social Science* 24; Abdel-Haleem (n4) 74.

⁴³⁹ While within western scholarship and discourse there continues to remain substantial debate over the acceptance of international law as a distinct field of law and its relationship with domestic laws, Islamic international law adopts a different approach from its western counterpart. MN Shaw *International Law* (2004) 120-174 in Ali & Rehman (n250), 323. Only when the prohibition on the use of force appeared did the *ius ad bellum/in bello* terminology appear. Robert Kolb, 'Origin of the Twin Terms *Ius ad Bellum-Ius in Bello*' (1997) 320 *IRRC* 553, 561-2

⁴⁴⁰ Daniel Thuerer, *International Humanitarian Law: Theory, Praxis, Context*, (Hague Academy of International Law 2011) 233. M al-Sarakhsi, *Kitab al-Mabsut*, Beirut: Dar al Ma'rifah, n.d., Vol 10, 2 in Ahmed Al-Dawoody, *War in Islamic Law: Justifications and Regulations* (Palgrave MacMillan 2011) 198.

⁴⁴¹ Roughly defined as the right to war (*ius ad bellum*) and the laws of war (*ius in bello*). Immanuel Kant stressed the necessity of distinguishing the branches of law, and modern jurists would see the demarcation as critical for the effective protection of civilians and war victims and for the survival of IHL. Immanuel Kant, *The Philosophy of Law, An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, trans, W Hastie (Edinburgh 1887) para 597-604; Christopher Greenwood, 'The Relationship Between *Ius ad Bellum* and *Ius in Bello*' (1983) 9 *Review of International Studies* 234. A. Rahim *The Principles of Islamic Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools* (Kitab Bhavan 1994), 393. *Ius ad bellum* has no impact on the applicability of IHL and may not be used to interpret a provision of IHL Marco Sassoli, 'Ius ad Bellum and Ius in Bello' in Michael Schmidt & J Pejic (eds.) *International law and armed conflict: Exploring the Faultlines* (Martinus Nijhoff Publishers 2007) 241

appropriate to the exigencies of the time.⁴⁴² This ‘Two Nation Theory’ interpreted and developed from Revelation states ‘Who has created you; so some of you are non-believers and some of you are believers.’⁴⁴³ This text presents a clear dichotomy interpreted by some to unequivocally support this divide, where Muslims of the whole world constitute one nation and non-Muslims another competing nation perpetually struggling with the former.⁴⁴⁴ Muslims living outside the *dar al-Islam* can only obey domestic laws when there is not a conflict with Islamic law.⁴⁴⁵ While this Manichean construct is traced to the primary sources it is better attributed to a ‘paralegal description of the reality of medieval international relations.’⁴⁴⁶

Dar al-Islam comprises the Muslim community, the *umma* and the *dhimmīs*, people of the book within an Islamic state subjected to *jizya* (poll tax) payable to the Islamic authority.⁴⁴⁷ The remaining world constitutes the *dar al-harb*, the inhabitants of such territory known as *harbi*. Similar to the Roman law doctrine, where the *ius civile* applied only to Roman citizens, within the *dar al harb*, *harbi*’s lacked both rights and duties.⁴⁴⁸ In classical Islamic law, the killing of a person is permissible if he lacks legal protection (‘*isma*). The categories of persons that lack ‘*isma* in classical Islamic doctrine include: apostates (*murtadd*); and those *kafir* that

⁴⁴² Z Badawi, *Introduction*, in Taha Jabir al-Alwani, *Towards a Fiqh for Minorities: Some Basic Reflections*, (The International Institute of Islamic Thought, 2003) 69; Abdel-Haleem (n4) 71.

⁴⁴³ The *Qur’an* 64:2. Certain neo-classical Muslim scholars, who interpret Islam to be fundamentally at war with the non-Muslim world, see Islamic law and international law as inherently irreconcilable. Syed Hassan, *The Reconstruction of Legal Thought in Islam* (Law Publishing Company 1974) 157

⁴⁴⁴ While non-believing nations were considered to be operating under a ‘state of nature’ this did not equate to a legal void, Islamic law recognized only the fact of possession, whether by conquest or otherwise. Malik, *The Qur’anic Concept of War* (n304), Preface; Cherif-Bassiouni *Shari’a* (n296) 158 There appears a threshold within the state of war that existed between the *dar al-harb* and *dar al-Islam*. When hostilities ceased the status of the enemy territory would be downgraded to one of simple non-recognition. This non-recognition did not frustrate an ability to conclude binding treaties. Khadduri *Islamic Law* (n13) 13-14 ; M. Khan, *Islamic Jurisprudence* (n445), 204. Zawati deconstructs Khadduri’s assertion that the default state between an Islamic polity and a non-Islamic state is hostility, by showing that the juristic distinction between *dar al-Islam*, *dar al-harb*, was not interpreted as static, unchanging definitions by classical jurists. In other words a ‘territory can be considered *dar al-Islam* even if it is not under Muslim rule as long as a Muslim can reside there in safety and freely fulfil his religious obligations’ Hilmi Zawati, *Is Jihad a Just War?: War, Peace, and Human Rights Under Islamic and Public International Law* (The Edwin Mellen Press 2001) 211

⁴⁴⁵ Abdel-Haleem (n4) 140

⁴⁴⁶ Ali & Stuart (n363) 10.

⁴⁴⁷ (*Dhimmīs*) – those who, by virtue of a *Dhimmah* pact, acquire the right to permanent residence in Islamic territory and to the protection of Islamic law under certain conditions such as payment of a tribute and performance of certain conventional or customary duties. Mahmassani (n368) 250-263. ‘In the early and medieval Islamic periods, Jews and Christians were, for the most part, treated relatively well. They were ‘people of the book’-monotheists whose beliefs were drawn from sacred scriptures, even if they did not accept Muhammad’s prophecy. They benefited from certain privileges, in return for paying a *jizya*, keeping their religious practices out of sight, abstaining from proselytizing, and, in the case of Jews, wearing distinctive clothing in public.’ Benjamin & Simon (n281) 66; Abdel-Haleem (n4) 77

⁴⁴⁸ Cherif-Bassiouni *Shari’a* (n296)159; Khadduri *Islamic Law* (n13) 11, 359

live in the *dar al-harb*.⁴⁴⁹ In practical terms this means that killing an apostate will only attract discretionary punishment for not following the proper procedure, there will be no blood money or retaliation.⁴⁵⁰

The categorization of a territory dictated applicable law. Normative Islamic law governed the *dar al-Islam* and all those lawfully present in Islamic territory while the law of conquest was applicable to the *dar al-harb* irrespective of whether the conduct related to non-Muslims exclusively or whether as individuals or States.⁴⁵¹ Conceiving the world in this dualistic sense, the ‘damned and the elect’ has polarized and heightened the level of hostility between a movement and host social order.⁴⁵² This two nation construct is the most fundamental concept in Islamic international law and central to the violent campaign of *jihadists*, manipulated as an obligation to fight against those not falling under *dar al-Islam*.⁴⁵³

Although subject status within the *dar al-Islam* dictated the extent of civil liberties enjoyed, (the *umma* enjoying the full complement of rights while the *dhimmīs* enjoyed only partial rights), the *Imam* or *Caliph* was charged with ensuring all subjects received protection in relation to internal security and foreign attack. The *Caliph* regulated the relationship between the *umma* and *dhimmīs* and other non-Islamic communities within the Islamic state through bilateral agreements.⁴⁵⁴ The *dar al-harb* was considered an object rather than subject of Islamic law, and Muslim rulers were compelled to subsume these apostate nations under Islamic sovereignty if they had adequate resources.⁴⁵⁵ The Islamic position on *dar al-harb* provided that anyone present in such territory, could ‘imprison, seize the personal property of, enslave, or even kill other persons’ within this territory without legal sanction from the Islamic State, ‘Islamic law...silent as to the legal [not moral] consequences of conduct in the *dar al-harb*

⁴⁴⁹ Peters *Crime* (n254) 38

⁴⁵⁰ Mohammad Mahdi, *al-Fatawa al-Mahdiyya fi al-waqa I al-Misriyya*, (Cairo: Matba ‘at al-Azhar, 1884(1301H)) cited in Peters *Crime* (n254) 38.

⁴⁵¹ Cherif-Bassiouni *Shari’a* (n296) 159

⁴⁵² Bromley (n16) 145

⁴⁵³ This construct sees good and evil; right and wrong; *Haq* (truth) and *Na Haq* (untruth); *Halal* (legitimate) and *Haram* (forbidden). Ali & Stuart, (n363), 10; Ali & Rehman, (n250) 328-330.

⁴⁵⁴ These particular charters enumerated Islamic tolerance for each religious community in relation to their matters of personal status. Non-believers could also avail of the Islamic justice system if desired, despite lacking a Muslim conviction.

⁴⁵⁵ Historically, Islam has revealed a paradox in its relations with apostate nations. Depending on the forefront regulatory incentive that the religious doctrine sought to achieve, whether as a basis for state regulation with external actors or as a foundation for moral sanction, has in turn dictated whether the religious doctrine is used to promote conflict or tolerance. Khadduri *Islamic Law* (n13) 69.

unless it involved Muslims exclusively[,]’ and unless the *dar al-Islam* had made an agreement with the *dar al-harb* altering its enemy status.⁴⁵⁶

4.2 Binding Islamic Groups: Pacta Sunt Servanda and ‘*al ‘aqd Shari’at at al-mut’aqidin*’

‘Believers, fulfil your bonds[,] covenants should not be broken because one community feels stronger than another.’⁴⁵⁷

‘Muslims anywhere are like parts of a single body, so that the pain of one part affects the others.’ It is a duty to intervene when called upon to help others ‘except against a people with whom there is a treaty.’⁴⁵⁸ The binding nature of treaties under *Shari’a* is congruent with the brocard *pacta sunt servanda*.⁴⁵⁹ Its Islamic legal articulation grounded in the *Shari’a* principle ‘*al ‘aqd Shari’at at al-mut’aqidin*, ‘the contract is the law of the parties’.⁴⁶⁰ This principle is derived both from the *Qur’an* and the Sunna,⁴⁶¹ as well as the practices of the first *Caliph*, and holds that a treaty takes precedence over all other laws except when a specific verse of the *Qur’an* or hadith prohibits the act in question. Not only must all Muslims adhere to the spirit and intendment of the concluded treaty, the observance of the agreement is more than political necessity, *Qur’anic* prescription transforming it into a religious duty.⁴⁶² A binding agreement in Islamic law is ‘not merely a matter of secular law between contracting parties, but a covenant

⁴⁵⁶ Cherif-Bassiouni *Shari’a* (n296) 159.

⁴⁵⁷ The *Qur’an* 5:1 and 8:91-2.

⁴⁵⁸ Hadith: Bukhari.

⁴⁵⁹ Latin ‘agreements must be kept’. Reflected in the Vienna Convention on the Law of Treaties, see in particular article 26, March 23 1969, 1155 U.N.T.S. 331.

⁴⁶⁰ Cherif-Bassiouni *Shari’a* (n296) 150.

⁴⁶¹ The *Qur’an* 17:34 ‘And fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning); The *Qur’an* 2:177 ‘...it is righteousness...to fulfil the contracts which ye have made...Such are the people of truth, the Allah-fearing.’ The Prophet said, ‘The Muslims are bound by their obligations, except an obligation that renders the lawful unlawful and the unlawful lawful.’ Cherif-Bassiouni *The Shari’a* (n296) 154; Malik, *The Qur’anic Concept of War* (n304), Preface.

⁴⁶² *Shari’a* compliant treaties are self-executing in theory, however post World War II, international law dictated treaty execution a matter for national discretion. The *Qur’an*, 8:72 ‘Those who believed, and adopted exile, and fought for the Faith, with their property and their persons, in the cause of Allah, as well as those who gave (them) asylum and aid, these are (all) friends and protectors, one of another. As to those who believed but came not into exile, ye owe no duty of protection to them until they come into exile; but if they seek your aid in religion, it is your duty to help them, except against a people with whom ye have a treaty of mutual alliance. And (remember) Allah seeth all that ye do.’

The *Qur’an*, 16:91 ‘Fulfil the Covenant of Allah when ye have entered into it, and break not your oaths after ye have confirmed them; indeed, ye have made Allah your surety; for Allah knoweth all that ye do.’ Cherif-Bassiouni *Shari’a* (n296) 154

with God.⁴⁶³ Breaking treaties puts the offending party on a status lower than animals, only when the other party breaks their obligation can a Muslim rescind theirs.⁴⁶⁴ All kinds of treachery, breaking treaties or agreements are outlawed in Islam, regardless of how powerful the Muslim is. The exception is if the other party breaks the pact first and then only after due warning is given.⁴⁶⁵

Islamic jurisprudence supports the idea that a country governed by Muslim rulers can contract through peace treaty with a non-Muslim state or community. Such treaties are entered into with perceived enemies or illegitimate States if it is in the greater interest or *maslaha* of the *umma*.⁴⁶⁶ The single condition precedent attached to a treaty being a binding source of Islamic law is that its purpose and terms is *Shari'a* compliant.⁴⁶⁷ Early Muslim treaties addressed issues of peace and peaceful co-existence, as well as giving safe conduct to envoys. Jurist's subsequent interpretations of these treaties have formed the basis of *Siyar*. Entering into treaties with non-Muslim states is not only permitted but encouraged to prevent conflict.

The first Islamic state was founded by the Prophet through treaty in 622 CE. A social contract, the Constitution or Charter of Medina established a religiously tolerant '...Free State for a pluralistic community composed of Muslims, Jews, and Pagans.' Contrasted from the fictional, artificial and theoretical accounts of social contract theory derived from Hobbes, Rousseau and Rawls, the first Islamic state was founded on the reality of an actual agreement 'among real

⁴⁶³ UNODC, Combating Trafficking in Persons in Accordance with the Principles of Islamic Law (2010) 23 <https://www.unodc.org/documents/human-trafficking/Islamic_Law_TIP_E_ebook_18_March_2010_V0985841.pdf> accessed 09/06/2017

⁴⁶⁴ The *Qur'an* 9:3-4

⁴⁶⁵ International lawyers deployed the same line of reasoning to defang the classic doctrine of *rebus sic stantibus* (things thus standing), whereby a fundamental change of circumstances can justify unilateral termination of treaties. As now enshrined in Article 62 of the Vienna Convention, the doctrine of *rebus sic stantibus* stands confined within narrow limits as a legal question/ A treaty is terminable only when unforeseen changes in the circumstances underlying the conclusion of the treaty transform radically the extent of the obligations still to be performed. The ICJ has held that the changed conditions had to be 'so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed.' *Gabcikovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 64 (Sept. 25). In the end, *rebus sic stantibus* stands sacrificed at the altar of *pacta sunt servanda*. Abdel-Haleem (n4) 139.

⁴⁶⁶ For example, the Treaty of Hudaibiyya 627 CE, negotiated between Mohammad and the Meccans in the year 627 CE was the first treaty in Islam and is referenced as an authoritative source and precedent for international agreements between Muslims and non-Muslims. This treaty negotiated an end to the fighting between the two sects and called for a ten-year peace agreement. The Prophet's willingness to enter into an agreement with non-Muslims is an example of the correct interpretation of Revelation. Daniel Pipes, 'Lessons From the Prophet Muhammad's Diplomacy' (1999) *Middle E Q* 65

⁴⁶⁷ Cherif-Bassiouni *Shari'a* (n296)150

people of diverse ethnic and religious groups...The Medina Constitution offered a social contract in real time...space [and] people through a real agreement.’⁴⁶⁸

Whether a single contract or a compilation of multiple agreements, the Constitution addressed rules relating to mutual relations among Muslims as well as inter-communal relations between Muslims and Jews. The normative establishment of a pluralistic community, the Charter removed any distinction between Yathrib natives and the immigrants from Mecca. Part one of the Charter conceptually established a community of believers (*ummat-al mumunin*), articulating principles of equality and justice to all Muslims regardless of tribal connections. Part two of the Charter expanded these rights to non-Muslims, granting each tribe the right to be ‘one community with the believers.’ The significance of this expansive approach is that an Islamic Free state was never conceived as an exclusively Muslim nation. To reframe in modern terms, the idea of cleansing an Islamic state of non-Muslims is repugnant to the Charter of Medina.⁴⁶⁹ While not a distinct source of Islamic law, the Charter recognized lawful agreements are subject to supra-normative constraints, agreements contrary to state policies unenforceable. However, this construction of a constitutional theory implicit in the text ‘may have more to do with twentieth century politics in the Muslim world than with anything inherent in the text.’⁴⁷⁰

Of the landmark treaties between the *umma* and non-Muslims, the unilateral declaration made by the second *Caliph*, ‘Umar ibn al-Khatta, evidences the weight attached to the principle ‘*al ‘aqd Shari’at at al-mut’aqidin*. In 14 AH/636 CE the Battle of Yarmuk saw the defeat of the Roman army by Muslim forces who continued on to capture Jerusalem. Recognized by the ‘People of the Book’ as a Holy City, ‘Umar refrained from entering the city on horse, rather requesting the Christian Bishop and other religious leaders of the city meet him at the city’s gate. ‘Umar then pronounced that Jerusalem would from that moment be a city for all, and while not specifically mentioning the Jews, his declaration was interpreted as abrogating their previous expulsion by the Christians. After ‘Umar’s Declaration, the Jews returned to Jerusalem and along with the Christians and the Muslims resumed administration of their holy

⁴⁶⁸ Ali Khan, ‘Commentary on the Constitution of Medina’ in Ramadan (n13) 205-206

⁴⁶⁹ *ibid* (n13) 206

⁴⁷⁰ Anver Emon, *Reflections on the Constitution of Medina*, (2001-2002) 1 *UCLA Journal of Islamic and Near Eastern Law* 103, 133

sites. This policy of pluralism continued even after Israel seized the city from Jordan in 1967 CE.⁴⁷¹

The *dar al-sulh* is the Islamic law doctrine providing for contractual relations to be established between Muslim governments and non-Muslim residents of *dar al-Islam*. When a Muslim ruler concludes the contract, he guarantees to protect the life, property and freedom of religion to non-Muslims who contract to abide by the law of the land and pay *jizya*.⁴⁷² Certain Muslim jurists posit that if non-Muslims fail to accept Islam or pay the *jizya*, the male unbelievers may be killed.⁴⁷³

Those from *dar al-harb* could enter Muslim territory under an agreement known as an *aman* that provided temporary safeguard and entitled them to trade, or to enter for other peaceful purposes.⁴⁷⁴ One way to ensure safe passage for foreigners, including aid workers, is through *aman*. Under *aman*, there also a contract of protection known as quarter, which is provided during wartime to protect the person and the property of an enemy belligerent.⁴⁷⁵ ‘Both moderates and salafists agree that the concept is valid, but it is a question of negotiating it and making sure that other groups know you are protected by it, different groups may not respect the *aman*’s signed by others.⁴⁷⁶

Such jurisprudence is inimical to the *jihadist* ideology which consider these treaties as a ‘religious betrayal.’⁴⁷⁷ Yet the respect accorded non-Muslims did not equate to recognition of their status as equal under Islamic law as this would undermine the entire distinction between *dar al-harb* and *dar al-Islam*. The practical translation of this respect would mean that a Muslim entering enemy land would be obliged to respect the authority and laws of the non-

⁴⁷¹ By virtue of membership to the UN and being party to the Geneva Conventions 1949, Muslim States have contracted to be bound by both *ius ad bellum* and *ius in bello* principles. As part of the international community Muslim States are also bound by *ius cogens* peremptory norms. Cherif-Bassiouni *Shari’a* (n296) 151-155

⁴⁷² Sadia Tabassum, ‘Combatants, Not Bandits: The Status of Rebels in Islamic Law’ (2011) 93(881) *IRRC* 11

⁴⁷³ Khaled Abou El-Fadl, ‘The Rules Of Killing At War: An Inquiry Into Classical Sources’ (1999) 89(2) *The Muslim World* 151

⁴⁷⁴ *Aman* is based on the *Qur’an* 9:6 ‘And if anyone of the polytheists seeks your protection, then protect him until he hears the word of God. Then, afterwards, escort him to his place of safety.’ Aboul-Enein & Zuhur (n251), 6

⁴⁷⁵ Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (Mouton 1979) 29

⁴⁷⁶ Practically speaking, when groups like *Médecins Sans Frontières* and the International Committee of the Red Cross negotiate with armed groups for safe access to conflict zones, they are negotiating an *aman*, even if the specific terminology is not used. When humanitarian workers are targeted, Fadl says that these radical groups see them as ‘just another part of an invading army [arriving without] permission. They haven’t gotten any sort of *aman*.’ El-Fadl ‘Rules’ (n473).

⁴⁷⁷ For example, Al-Qaida, Hamas and Lashkar-e-Ta’iba refuse to recognize Israel arguing it is an illegitimate State. Ali & Stuart, (n363),11.

Muslim state for as long and in so far as these apostate laws did not conflict with Islamic law.

⁴⁷⁸ The issue of which jurist has competence to determine a conflict of laws, that is the Islamic jurist interpreting apostate laws or the converse is not settled in either domain.

If the ultimate aim of Islam is to convert the world in its entirety, then the *dar al-Islam* is in a constant state of conflict with the *dar al-harb*. If *Pax Islamica* dominated the world order, and non-Muslim communities were subsumed within the territory either as *dhimmīs* or autonomous entities contracting with it, the *dar al-harb* would disappear. Hence, *jihad* is often cited as the bridge to transform *dar al-harb* to *dar al-Islam*.⁴⁷⁹ This bridge gives rise to a liberation ideology where individual Muslims must return to the original teachings of the Quran, Muslim lands must be returned from foreign domination and apostate states must be replaced by Islamic law and tradition.⁴⁸⁰

Extremist groups maintain that lands formerly under Muslim control are now *dar al-harb*, and, as such, there is a religious necessity to fight in order to re-establish the Caliphate, a point contended among classical scholars who would consider attaching such gravity to the Caliphate an exaggeration.⁴⁸¹ Furthermore this extremist assertion does not correspond to a definitive reading of religious scripture, both traditional scholarship and Islamic jurisprudence recognizing that lands have frequently exchanged authority, hence the normative values exhibited in *dar al-Islam*, that is the right to practise Islamic rules and the free exhibition of the symbols of Islam.⁴⁸²

⁴⁷⁸ ‘Questions of international law arose largely in connection with their analysis of the law governing international wars (*jihad* and *siyar*) and treaties... These rules represented a pre-political baseline upon which the Islamic state was authorized to enter into binding agreements with non-Muslims both as individuals and as States. Mohammed Fadel, *International Law, Regional Developments, Islam* in Max Planck Encyclopaedia of Public International Law (OUP 2010); Khadduri *Islamic Law* (n13) 13

⁴⁷⁹ ‘This text presents a clear definition of a nation, and according to which the Muslims of the whole world constituent one nation, while non-Muslims are another nation. The international relations of the Muslims being one with other nations of the world can be set up only by declaring the oneness of mankind on the basis of equality.’ *Shaybānī* was the first who wrote a comprehensive book on this subject, named as *Kitab Siyar al-Saghir* Al-Sarakhsi, Muhammad b. Ahmad, Kitabal-Mabsut (Matb’a al-Sa’adah 1327 A. H.) 456; Hamidullah, (n584), 88; Khadduri, *War* (n434) 53, 229.

⁴⁸⁰ Mowatt-Larssen, (n18).

⁴⁸¹ Fadel *International Law* (n478)

⁴⁸² Ali & Stuart (n363) 10

4.3 Unapologetic *Jihad*

*‘Those nations who have engaged in jihad have won the blessings of sovereignty and independence. Conversely, those nations who have put their swords in their sheaths, they have not won anything except the chains of slavery around their necks.’*⁴⁸³

Islam evolved in an era where ‘religion explicitly sanctioned the state, [and] territorial expansion was identical to religious proselytization, [making] every religion... a ‘religion of the sword.’⁴⁸⁴ It matured in an environment where armed violence, actual or threatened, with some degree of organization and planning was an activity and expectation of daily life. Portraying Islam as ‘a military religion, [with] fanatical warriors engaged in spreading their faith and their law by armed might,’ to a warrior religion steeped in ‘bloody borders’ and a religion not concerned with ‘salvation’;⁴⁸⁵ both the crusaders and colonialists created a moral justification to plunder the resources of the Middle East and North Africa. This Middle Ages propaganda continues to be echoed in contemporary scholarship and stereotypes on Islam, and in particular in narratives on *jihad*.⁴⁸⁶

Accounting for the historical context in which *jihad* evolved, it is difficult to reconcile these traditions with the modern caricature of *jihad*, that is the ‘global *jihad*’ or ‘holy war’, where the violent wing of fundamentalists gives the impression that the point is ‘simply violence and killing, while care for the unfortunate, generosity and socially and politically constructive activities in general, are all matters of indifference.’⁴⁸⁷ Understanding *jihad* as a ‘holy war’ in

⁴⁸³ Translation taken from Niaz Shah ‘The Islamic Emirate of Afghanistan (n72) 457.

⁴⁸⁴ Aslan (n29) 79- 80.

⁴⁸⁵ Aslan (n29) 78- 79 quoting Bernard Lewis, Samuel Huntington, *The Clash of Civilisations and the Remaking of World Order* (Simon & Schuster 1998) & Max Weber respectively.

⁴⁸⁶ *Jihad* is derived from the verb *juhd* or *jahada* which means ‘to exert’, ‘to struggle’ or ‘to strive’. The Arabic lexicon describes *jihad* as ‘making the utmost effort to attain something beloved or to save oneself from something disliked.’ Although in the West, *jihad* is often seen as ‘terrorism’ it is correct to describe it as ‘tourism’. The Prophet Muhammad (PBUH) said ‘the tourism of my nation is *jihad*’. This is one reason why many Muslims travelled to Palestine, Chechnya, Kashmir, Iraq and Afghanistan. Sunna Abu Dawood cited in Begg, ‘*Jihad*’ (n8). Western parlance translates *jihad* as ‘an armed struggle against the West.’ While the term is sometimes reduced to mean ‘holy war’ ‘the term holy war originated with Christian Crusaders who used it to theologically legitimate a battle for land and trade routes.’ Aslan (n29) 80. To translate ‘holywar’ back to Arabic it would be ‘*al-harb al muqaddas*’ a term which does not exist in the Islamic tradition. The Royal Aal al-Bayt Institute for Islamic Thought, (n333). The Islamic historical position on *jihad* can be viewed through a modernist, fundamentalist and conservative narrative. Modernists reduce *jihad* to its spiritual meaning; fundamentalists see *jihad* as the obligation of every Muslim to fight for Islam; and conservatives moderate the fundamentalist position by restricting the fight to self-defence against colonialism or to the armed resistance against attacks by enemy states. Gilles Kepel, *Jihad: The Trail of Political Islam* (IB Tauris 2002); Cherif-Bassiouni *Jihad* (n19) 61-62.

⁴⁸⁷ Michael Bonner, *Jihad in Islamic History: Doctrines and Practice* (Princeton University Press 2006) 173; Abdalla (n30) 25; Abdel-Haleem (n4) 67.

a purely military sense ‘strips away the spiritual, intellectual and social substance of *jihad*,’ and allows the doctrine to become ‘shorthand for all war, and war by any means, including terrorism.’⁴⁸⁸ When tackling this militarized narrative, deconstructing what is deemed radical rhetoric serves to illuminate its substantive content. Firstly, there is no word corresponding to ‘holy war’ in classical Arabic. War according to the *Qur’an* is either just or unjust. It is never ‘holy’.⁴⁸⁹ Reductionism by orientalist on the *jihad* doctrine ‘perverts and distances [it] from its godly and intended meanings, none of which support terrorism.’⁴⁹⁰ Yet it is evident that the historical development of *jihadi* thought has been one of increasingly expansive violence, not one of limitations, ‘...one hour in the path of *jihad* is worth more than 70 years of praying at home’⁴⁹¹

The *jihad* doctrine has deep normative, intellectual and historical roots in Islamic law. With its foundations in both the *Qur’an* and *hadith*, it references external and internal struggles.⁴⁹² Its purpose is to protect not oppress.⁴⁹³ A merge of ‘the archaic and medieval religious references with modern technologies, internet and globalised media, the panoply of interpretations of *jihad* demands a brief overview of the doctrines evolution.’⁴⁹⁴ Whether an intentional prohibition or just an unnecessary right at that time, the initial years of the Prophet’s campaign in Mecca saw any use of force, even in self-defence impermissible.⁴⁹⁵ It was only in the context of the unrelenting threat from the *Quraysh* that use of force was sanctioned through Revelation grounding *jihad* in a narrative on legitimate violence in defence of religion.⁴⁹⁶ Of the 24 verses

⁴⁸⁸ Abdalla (n30), 25

⁴⁸⁹ Distinctions must also be made between the Arabic words for ‘war’ (*Harb*) and ‘fighting’ (*Qital*). Aslan (n29) 81.

⁴⁹⁰ Sohail Inayatullah & Gail Boxwell (Eds), *Islam, Postmodernism And Other Futures – A Ziauddin Sardar Reader* (Pluto Press 2003)

⁴⁹¹ Wiktorowicz ‘Anatomy’ (n416) 94; Abdul Azzam, Ummah Forum. “Sheikh Abdullah Azzam - the 20th century Mujahid Imam.” 12 September 2004. <http://www.ummah.net/forum/printthread.php?t=43451>

⁴⁹² *Jihad* in its primary religious context means the ‘struggle of the soul to overcome sinful obstacles that keep a person from God. This is why the word *jihad* is nearly always followed in the Quran but the phrase ‘*di sabil Allah*’ ‘in the path of God. Aslan (n29) 81; Cherif-Bassiouni *Jihad* (n19) 61.

⁴⁹³ Begg, ‘*Jihad*’ (n8)

⁴⁹⁴ Amna Guellali, ‘Understanding the Discourses on *Jihad* in Islam through Classical and Modern Narratives,’ in Cherif-Bassiouni, *Jihad* (n19) 82; Mirza Ahmad *Murder in the Name of Allah* (Lutterworth Press 1989) 105,110.

⁴⁹⁵ Even when Muhammad and the *Sahaba* were persecuted by the Quraysh to the extent they were forced to seek refuge in Abyssinia and then Medina, the exclusive propagation of Islam through *da’wa* remained intact as per Revelational instruction. ‘So wait patiently (O Muhammad) for thy Lord’s decree, surely thou art in Our sight’ (52:48); ‘Then bear with them and say: peace. They will (eventually) come to know’ (43:89); ‘So forgive, with a gracious forgiveness’ (15:85). Mohammad Hashim Kamali, ‘*Jihad* and the Interpretation of the *Qur’an*’ in Cherif-Bassiouni *Jihad* (n19) 42

⁴⁹⁶ The defensive theory of *Jihad* is compatible with the 1945 UN Charter. Art. 2(4) prohibits the use of force, but Art. 42 allows the Security Council to authorize the use of force for maintaining or restoring peace and security. Art. 51 allows the use of force in self-defence as an exception. Patricia Crone, *God’s Rule Government and Islam*.

which reference *jihad*, many verses on defensive *jihad* were revealed shortly after the Prophet made the *hajj* to Medina.⁴⁹⁷

From the first through to the final Revelation, the Islamic community and its understanding of *jihad* passed through three distinct stages. The first stage, 610-622 CE, Revelations commanded restraint from use of force, focusing on ‘piety and inner strength in the face of social exclusion and oppression.’⁴⁹⁸ Through the *hijra* and in the initial resettlement in Medina approximately 623-626 CE, Revelation permitted Muslims only defensive *jihad*. This period sees the recurrent use of the phrase in relation to *jihad* to ‘those who fight you’ affording the reasonable conclusion that not only could Muslims not be aggressors, but permission to use force is predicated on ‘wronging’ Muslims.⁴⁹⁹ The final phase 626-632, reveals the divinely sanctioned aggressive *jihad*, ‘initially against the polytheists and then against monotheists like the Jews of [Khyber].’⁵⁰⁰ These three stages of *jihad* form one of the main arguments used to justify an offensive *jihad* approach, that is, that offensive *jihad* was an organic incremental progression on the use of force,⁵⁰¹ from ‘the first *jihad* – the *hijra* [to Medina] (a non-violent *jihad*) – to the permission to fight...and then to the *fard* or obligatory duty to fight.’⁵⁰²

The fully developed doctrine of *jihad* did not find ideological expression until long after Muhammad’s death, when Muslim conquerors began absorbing the cultures and practices of

Six Centuries of Medieval Islamic Political Thought (Columbia University Press 2004) 12; Muhammad Asad, *Message of the Qur’an* (Dar al-Andalus 1993) 512; Cherif-Bassiouni *Jihad* (n19) 61

⁴⁹⁷ In 2:190 there is reference to the duty of Muslims to ‘fight in the cause of God those who fight you and be not aggressors, God loveth not those who are aggressors.’ Malik *The Qur’anic Concept of War* (n304) Preface. This defence involves not only self defence but also defence of oppressed and defenceless Muslims, *Qur’an* 4:75. ‘And what is [the matter] with you that you fight not in the cause of Allah and [for] the oppressed among men, women, and children who say, ‘Our Lord, take us out of this city of oppressive people and appoint for us from Yourself a protector and appoint for us from Yourself a helper’ This revelation does not limit such defence to Muslims and there is no reason such defence could not be extended infinitely on humanitarian grounds. Shah, ‘Force’ (n71), 344- 345; Nagamine (n71) 54.

⁴⁹⁸ ‘Therefore listen not to the Unbelievers, but strive against them with the utmost strenuousness, with the [*Qur’an*] (25:52); ‘...that ye believe in Allah and His Messenger, and that ye strive [your utmost] in the Cause of Allah, with your property and your persons: That will be best for you, if ye but knew! (69:11) Yusuf, *The Holy Qur’an*; cited in Nagamine (n71) 54-55.

⁴⁹⁹ *Qur’an* 2:190 (n326)

⁵⁰⁰ James Robson, trans., *Mishkat al-Masabih*, vol. 2 (M. Ashraf, 1963-5), book XV, chap. 5, 752-5, book XVIII, chap. 1, 806-16; *Mishkat al-Masabih*, vol. 3, book XVIII, chap. 5, 836-9; L Veccia Vaglieri, *The Encyclopedia of Islam* (Brill 2012) 1137-43.

⁵⁰¹ In the last year of the Medinan period (9 AH) the argument goes, all the verses relating to self-defence were repealed by verses 9:5 and 9:29, making *jihad* a continuous obligation for Muslims of all ages. Shah ‘Force’ (n71), 346; As Muhammad and the *umma* strengthened their position in society, the scope of *jihad bi’l sayf* extended. To suggest however that the Muslim community was not permitted to fight in the Meccan period purely because they were outnumbered is to overlook the fact that the Muslims were outnumbered three to one at the Battle of Badr which occurred in the Medinan phase. The Royal Aal al-Bayt Institute for Islamic Thought (n333) 6

⁵⁰² See Al-Shafi’i *Kitab al-Umm* (The Mother of Books) in Abdel-Haleem (n4) 75

the Near East. While the origin and precise meaning of *jihad* is open to interpretation, ‘the Muslim conquests of the seventh century, and the juridical writing of the eighth century, began to apply the term to military action.⁵⁰³ Sunni and Shi’ite *madhahib* developed a variety of similar doctrines on *jihad* between the 7th and 12th century CE with a penchant to focus on *jihad*’s warlike features over its spiritual aspects.⁵⁰⁴ Resurrection of this position has resulted in *jihad* becoming a catalyst for armed insurrection as the preeminent enactment of individual Muslim piety.

Islamic jurisprudence has distinguished four different ways in which a believer may fulfil *jihad* obligations: with faith in his heart; by preaching and proselytizing with his tongue; by good deeds with his hands; and by confronting enemies with the sword.⁵⁰⁵ An individual as well as collective duty extending to civilians and soldiers alike, *jihad* was a political obligation imposed on the *umma* as subjects of Islamic law, the instrument to achieve Islam’s overarching *maqasid*: the universalization of the faith and the establishment of God’s sovereignty over the world.⁵⁰⁶ *Shaybānī* suggests *jihad* to be a struggle both to improve and expand Islam.⁵⁰⁷ The obligation of every Muslim, the internal struggle, or *jihad al-nafs*, is a pillar of the Muslim quest for morality, and a holistic world view for the greater sake of a humane existence for Muslim and non-Muslim alike.⁵⁰⁸ *Jihad al-nafs* is the foundation for all *jihad*, fighting an external enemy preconditioned on succeeding in mastering this internal struggle.⁵⁰⁹

⁵⁰³ Bergesen, 12

⁵⁰⁴ Kamali (n506), 45

⁵⁰⁵ Khadduri, *War* (n434), 56-7; Khadduri *Islamic Law* (n13) 16; Mahmoud Ayoub, ‘*Jihad: A Source of Power and Framework of Authority in Islam*,’ *Bulletin of the Institute of Middle Eastern Studies*, 6 (1992); Reuven Firestone, *Jihad: The Origin of Holy War in Islam* (OUP 1999) 37, 84; Moulavi Cheragh, *The Critical Exposition of Popular Jihad* (Karinsons 1977) 62-6, 51-5, 123-5.

⁵⁰⁶ There are several *Qur’anic* verses and Hadith literature rendering *jihad* obligatory on every Muslim male, yet it is only a general duty which, if accomplished by a sufficient number, the rest will not be condemned for the neglect of that duty – this fact renders administration of *jihad* entirely in the hands of the government. Those sections of society exempted from *jihad* include children, the blind, sick and very poor. Khadduri ‘International Law’ in Khadduri & Liebesny (n300) 353, where it stated that *jihad* was a required duty of the whole Muslim community, binding the Muslims *en masse* rather than individually. Kasani, VII, 97 in Mahmassani (n368) 280. Ali & Rehman (n250) 332-3.

⁵⁰⁷ While the inner *jihad* has become demarcated and marginalized in contemporary Islamic literature, early scholars did not see the two forms of *jihad* as mutually exclusive. Nagamine (n71) 56.

⁵⁰⁸ Abdalla (n30) 25

⁵⁰⁹ *Jihad al-nafs* is *jihad* in relation to self-discipline. Kamali (n506) 44. Also called *jihad bin-nafs* (striving within oneself). There are four categories of *jihad* generally accepted by scholars: *jihad* of the *nafs* (self); *jihad* against the *shaytan* (devil) [desires]; *jihad* against unbelievers and hypocrites; *jihad* against oppressors and evil doers. Limiting *jihad* to a singular interpretation can be misleading. Begg ‘*Jihad*’ (n8)

Fighting on behalf of the wider community, *jihad bi'l sayf*,⁵¹⁰ is generally considered the lesser *jihad*, the struggle against 'evil in one's soul' taking precedence.⁵¹¹ However, this apologetic emphasis on the aspect of moral improvement has been attributed by critics to both orientalist, desperate to portray Islam as a peaceful religion, or to 'modernists who promote Islam as an irenic religion that respects international law and that does not stand in the way of modernization of Muslim countries.'⁵¹² The reality is that the overarching doctrine dictates neither peaceful nor violent means in achieving this aim,⁵¹³ there are certain Revelation verses more difficult to understand whether a physical element is involved.⁵¹⁴

4.3.1 Right Authority

The typology of Islamic warfare (*qital*) is divided into four discrete areas: tribal warfare; feuds and raids characteristic of primitive people; wars prescribed by sacred law and war against rebels and dissenters.⁵¹⁵ There is some consensus in condemning as unjustified tribal warfare and feuds for their material motivations, only the latter two types of conflict constituting the Aristotelian idea of 'just war' as their objective was in pursuance of maintaining a religio-ethical standard.⁵¹⁶ Hence *jihad b'il sayf* was the Islamic *bellum justum*. Implicit in the *Qur'anic* teaching is the justification that war is to prevent evil from triumphing.⁵¹⁷ 'Just wars' were the only exception to Islam's prohibitive rules on engaging in conflict whether within an Islamic territory or outside, while the contemporary concept of *jihad* has changed, there remains little divergence among Islamic scholars and jurists, orthodox or heterodox, on this fundamental duty.⁵¹⁸ The idea of waging war only when it was in accordance with the *lex dei* and the *bellum justum* is a key and continuous theme in Islam.⁵¹⁹ *Ad bellum* conditions for

⁵¹⁰ Translated (Arabic) *Jihad* of the sword.

⁵¹¹ Upon his return from the last known raid in Islamic history, Prophet Muhammad said: 'We have returned from the lesser *jihad* to embark on the greater *jihad*,' describing the latter as the fight against inner demons controlling one's ego. Aly, (n618). Although this hadith is disputed for reliability. Benjamin & Simon (n281) 55; The Royal Aal al-Bayt Institute for Islamic Thought (n333) 7-8; Bonner (n487) 51; Durrani (n15) 322.

⁵¹² The peace like objectives of *jihad* and respect for the freedom of religion is evident in the Constitution of Medina 622 CE which guaranteed freedom of religion for the *dhimmīs* and Muslims. Islam views religion as a bilateral pact between man and God. On this basis there can be no compulsion or force used in religion. Ali & Stuart, (n363), 12; Guellali, 'Understanding the Discourses' in Cherif-Bassiouni *Jihad* (n19) 74.

⁵¹³ *Jihad b'il sayf* was equivalent to the Christian concept of Crusade. M. Khan, *Islamic Jurisprudence* (n455) 204

⁵¹⁴ Shah 'Force' (n71) 344-345

⁵¹⁵ Abdel-Haleem (n4) 4.

⁵¹⁶ A al-Rahman Ibn Khaldun, *al-Muqqadima* ed. W. M. de Slane (Paris, 1858), Vol II, 65-79; Eng trans F Rosenthal (1958), Vol II, 73-88 in Khadduri *Islamic Law* (n13) 16

⁵¹⁷ The *Qur'an* 2:251. War in Islam is 'controlled by one master desire...pleasing the Lord and defending the lawful interests of those who, having believed in Him, are not being allowed to carry on. the obligations imposed on them by their religion.' Malik The *Qur'anic* Concept of War (n304), Preface

⁵¹⁸ Khadduri *Islamic Law* (n13) 16 -17

⁵¹⁹ Aboul-Enein & Zuhur (n251) 5

Islam's just war is similar to those employed by St Augustine: right intention; right authority; reasonable prospect of success; last resort and proportionality.⁵²⁰ In line with Augustine and Aquinas, Islam considers the right intention to pursue good and avoid evil, righting a wrong with the ultimate aim of establishing peace, the *dar al Islam*.

Before addressing whether the right authority exists to declare *jihad*, the 'right intention' must be established. This essential condition for fighting is prescribed in the *Qur'an*, that intention for fighting must be *fi sabil Allah*, in the way of God. Self-aggrandizement, fighting for material gain or lust for power were rejected by the Prophet as possessing the right intention to fight.⁵²¹ Where it is generally believed that *jihad* may only be waged when directed by the 'right authority' fragmentation of the 'right authority' has splintered the meaning of *jihad*. Declared with proper authority, *jihad* creates a 'legal state of hostilities' as the collective duty of the Islamic polity.⁵²² As discussed, war must be initiated by the right authority. While internationally and conventionally the right authority would be, subject to the United Nation Security Council (UNSC) as defined in Articles 42 and 51, sovereign states only, it is clear that fundamentalist Islamic ANSGs do not share the same vision of the right authority.⁵²³

There is discord in Islamic legal theory on who can, with political and religious legitimacy declare *jihad*; whether the declaration needed to come from a Caliph or whether individuals and non-state actors can make a legitimate declaration. While the right authority to declare *jihad* generally rests with the Imam or Caliph heading the Muslim polity⁵²⁴ there are

⁵²⁰ Abdel-Haleem (n4) 113-115. Contrast with Alfonso Tostado the 15th century theologian and jurist whose works concerned the relationship between canonical rules relative to war and hybrid in bello ad bellum requirements. According to Tostado, 'in a just war everything that a man can seize becomes the property of the captor, both by divine law and by the Law of Nations, and it is just to kill; but an unjust war does not differ from public brigandage... Wars are just when they are undertaken in order to obtain redress for injuries, restitution of property, or recompense for wrongs done. Once commenced, a just war may be continued until the wrongs done, the property seized, and the expenses incurred have been made good.' Totado maintained the thesis that ecumenical councils were of higher authority than the popes. Scott (n228); Ivan Shearer, 'A Revival of the Just War Theory?' in Michael Schmidt *International law and armed conflict: Exploring the Fault Lines* (Martinus Nijhoff Publishers 2007) 5.

⁵²¹ Al-Bukhari. Abdel-Haleem (n4) 66.

⁵²² Right authority generally being the first four Caliphs. Cherif-Bassiouni *Jihad* (n19) 61-2; Khadduri *War* (n434) 95. 'In its classical interpretation it was left to the Imam or Caliph who was the head of Muslim polity to declare *Jihad*.' A.Y. Ali, *The Meaning of the Noble Quran* (1989), 390. Shah, 'Force' (n71) 358; Nagamine (n71) 57.

⁵²³ Abdel-Haleem (n4) 115.

⁵²⁴ In all jurisdiction, it is assumed that *Jihad* is organized and conducted by the imam who is also regarded as the chief military commander (*amir*), The imam or his deputy, has the exclusive powers to call for *Jihad*.[...] *Jihad* is therefore conceived as taking place under the leadership of the imam, even though he may be deemed unjust or lacking in ethical or moral conduct.' W Hallaq, *Shari'a: Theory, Practice, Transformation*, 327; Ali, *The Meaning of the Noble Quran* (n530), 390; Ali & Stuart, (n363), 12.

exceptional circumstances where individuals or a group of individuals may differ with a given government on the issue of declaring *jihad*. Certain Muslim armed groups may rebel against the rulers of a Muslim state. ‘In such a situation, the test is public support. If the public trusts and believes that the government is Islamic, then it is for the government to decide on the declaration of *jihad*. In this case any opposing individuals or groups have no authority. However, if the given government loses public support and trust because it is considered un-Islamic then those who have the support and trust of the public can, after being put in a position of authority, take decisions on declaring *jihad*. This indicates a potential situation where individuals not in government may by consensus, be able to legitimately declare *jihad*.’⁵²⁵

Jihad is an inseparable component of Islam which embodies the very highest principles of faith, morality and rules of war time engagement.⁵²⁶ Selective appropriation of *Qur’anic* verses and historical precedents to interpret narrow militant constructions of *jihad* minimize this complex subject matter.⁵²⁷ While the *Qur’anic* justification for an offensive *jihad* approach is contentious and difficult to justify without the abrogation doctrine, more dangerous is how arguments are being crafted by Islamic groups to increase the scope of defensive *jihad*, broadening it to subsume what should be rightly considered offensive.⁵²⁸ Former Advocate-General of Pakistan, A.K Brohi, draws an explicit distinction between *dar al Islam* and *dar al harb*. He accepted the redefinition of defensive *jihad* to include the removal of any obstacles and countering any resistance to the spread of the message of Islam and the institutionalization and governance according to *Shari’a*. In this view, even passive resistance to the advancement of Islam is legitimate grounds for attack.⁵²⁹

Puritanical ideologues like *ibn Taymiyya* and *bin Abdul Wahhab* planted seeds for radicals like *Sayyid Qutb*, and *Osama bin Laden* to resuscitate the theory of ‘proactive *jihad*’, that is the

⁵²⁵ Individuals or groups may declare *jihad* on three cumulative grounds: Muslim land is being attacked, the ruler is on the side of the invader, and there is a well-founded fear that the ruler will not protect the lives and properties of Muslims. The *locus classicus* of this exception, that is legitimate defensive *jihad* not declared by a Muslim ruler, is the 1979 Russian invasion of Afghanistan, where Afghan leaders declared *jihad* against both the invading Russians as well as the pro-communist ruling People’s Democratic Party of Afghanistan. Muslims around the world answered the call to join the Afghan *jihad*. Shah ‘Force’ (n71) 358

⁵²⁶ Begg, ‘*Jihad*’ (n8)

⁵²⁷ Syed (n10) 158

⁵²⁸ Shah ‘Force’ (n71) 346; Abdalla (n30) 25

⁵²⁹ Mark Poole & Mark Hanna, Publishers Preface: SK Malik *The Qur’anic Concept of War* (Adam Publishers & Distributors 1992)

idea of using *jihad* as a means to create a universal Islamic community.⁵³⁰ Fundamentalist Islamic groups centre ‘methodologically, [on] examining the theory of *jihad* [with absolute reliance on] the *Qur’an* and the Prophetic Traditions as law.’⁵³¹ This results in such groups ignoring robust jurisprudence that has developed over the centuries citing this evolution as polluting pristine Islam. Such a position reveals a formulaic conundrum: whether *Qur’anic* verses or Prophetic traditions can, without more, be considered ‘law’ or if they must be ‘appropriated and given legal import by a juristic tradition to be properly considered as at least relevant to legal hermeneutics.’⁵³²

There have been many apologetic attempts to defend the doctrine of *jihad* and even assert its superiority above modern theories governing the conduct of war.⁵³³ Rather than trying to make seventh century Islamic law fit into contemporary conventional law, focusing on the actual law root is more illuminative. While apologetics argue that there ‘is considerable support for the belief that the norms of international humanitarian law adopted in more recent international agreements were in fact endorsed by Islamic international law fifteen centuries ago,’ this is not historically correct or academically honest. That is not to say there is no confluence. The fact remains that the law was primitive as Islam was evolving, and the wars adopted a more private flavour than a public one.⁵³⁴

4.4 The Doctrine of Abrogation in Justifying Aggressive *Jihad*

*‘None of Our revelations do We abrogate or cause to be forgotten, but We substitute something better of similar.’*⁵³⁵

There are numerous verses in the *Qur’an* advocating peace and compromise over violence.⁵³⁶ Interpretative difficulties arise when different verses are afforded inconsistent weighting which

⁵³⁰ ‘Allah does not forbid you from those who do not fight you because of religion and do not expel you from your homes – from being righteous towards them and acting justly toward them. Indeed, Allah loves those who act justly.’ The *Qur’an*, 60:8 Bergesen, 12

⁵³¹ Zawati (n444) 6

⁵³² For instance, in the beginning of al-Ghazali’s (d. 505/1111) theoretical jurisprudence there is emphasis on the distinction between the *dalil* (the indicator) and the *hukm* (the rule). By explicitly distinguishing between the *dalil* and the *hukm*, al-Ghazali is implying that the *dalil* cannot be considered, in and of itself, a rule or law. Syed, (n10) 157

⁵³³ Ibid 162

⁵³⁴ Zawati (n444) 108

⁵³⁵ The *Qur’an* 2:216

⁵³⁶ Nowhere in the *Qur’an* exists a verse permitting Muslims to fight non-Muslims solely because they refuse to become Muslim. See the Quran: 2:256; 2:285; 3:64; 4:134; 5:5; 5:8; 5:48; 11:118; 29:46; 49:13; 60:8-9. All

is further complicated by the chapter size over chronological order in which the *Qur'an* is composed.⁵³⁷ This ordering of the *Qur'an* has great repercussions in light of Islam's acceptance of a doctrine of abrogation (*naskh*), whereby subsequent pronouncements of Muhammad nullify earlier prescriptions.⁵³⁸ Alternatively, abrogation may result when one text stipulates the specific abandonment of a matter articulated in another text.⁵³⁹ The doctrine is grounded in the *Qur'an* and is critical to understanding *jihad*.⁵⁴⁰ Cognisance must be had that the doctrine is not unanimously recognized or accepted, some sects arguing against the doctrine as it infers the *Qur'an* is fallible,⁵⁴¹ and certain scholars refuting the doctrine in its entirety, claiming it 'has no basis in historical fact, and must be rejected.'⁵⁴²

Jurists and individuals who accept the doctrine bypass negative arguments by simply asserting the historical context of the Revelation. While acknowledging the *Qur'an* read as a whole would reveal inconsistencies, these inconsistencies can be explained by dividing Revelations into those received in Mecca, when Muhammad and his small community were more inclined to compromise to facilitate the growth of the religion, and those revealed in Medina, when Muhammad and his growing community were stronger. Understanding the timing of Revelations is crucial to resolving apparent inconsistencies.⁵⁴³ The *Qur'an* itself indicates that irrespective of the message being eternal, it was revealed in response to very specific historical situations.

references are from Ahmed Ali, *Al-Qur'an: A Contemporary Translation* (Princeton University Press 2001); David Bukay 'Peace or *Jihad*? Abrogation in Islam' (2007) 4(4) Middle East Quarterly 3

⁵³⁷ Richard Bell, *Introduction to the Qur'an* (Edinburgh University Press 1953) 57-61; Welch (n296) 409-11.

⁵³⁸ This appears to be a negative *lex posterior* doctrine. According to Article 30(2) of the 1969 Vienna Convention on the Law of Treaties (VCLT) '[w]hen a treaty specifies that it is subject to or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331, 23 May 1969 'Abrogation is not an accurate translation of the word *naskh* as, according to some interpretations, an abrogating verse does not actually cancel out abrogated one, but 'supersedes' it. The Quran'ic verses used to justify the use of *naskh* actually refer to the revelations of the successive religions.' Al-Shafi'i position on abrogation in Abdel-Haleem (n4) 75; Hallaq *Introduction* (n13), 19; Bell (n537) 66.

⁵³⁹ Hallaq *Introduction* (n13) 171

⁵⁴⁰ For example, Quran, 16:101 'When we replace a message with another, and God knows best what he reveals, they say: You have made it up. Yet, most of them do not know'; *Quran*. 13:39 'God abrogates or confirms whatsoever he will, for he has with him the Book of the Books.' A. al-Kasim Hibat-Allah Ibn Salama, *An-Nasikh wal-Mansukh* (Cairo: Dar al-Ma'arif, 1966), 4-5, 123. On pages 142-3 listing the abrogated verses.

⁵⁴¹ For example, the The Ahmadiyah sect in Pakistan. Muhammad Ali, *The Religion of Islam* (The Ahmadiyya Anjuman Isha'at Islam 2005) 32; Ahmad bin Muhammad al-Nahhas, *An-Nasikh Wal-Mansukh* (Cairo: Maktabat 'Alam al-Fikr, 1986), 2-3

⁵⁴² Some Sunni theologians dispute whether *sunna* can abrogate the *Qur'an*. The Maliki and Hanafi schools suggest that the *sunna* and the *Qur'an* can abrogate each other while Shafi'is do not.' On the Shafi'i school, see Majid Khadduri, *Islamic Jurisprudence. Shafi'i's Risala* (Baltimore: Johns Hopkins University Press, 1961) 123-7, 195-205. Asad *Message of the Qur'an* (n496) 22-3, fn. 87

⁵⁴³ Bukay 'Peace?' (n536) 3; A. al-Hassan Ali Ibn Ahmad al-Wahidi al-Naisaburi, *Kitab Asbab nuzul al-Qur'an* (Cairo, Dar al-Kitab al-Jadid, 1969) 4.

‘Indeed, during the twenty-two years of Muhammad’s ministry, the Quran was in an almost constant state of flux, sometimes altering dramatically depending on where and when a verse was revealed, whether in Mecca or Medina, whether at the beginning or the end of Muhammad’s life.’⁵⁴⁴

Those who minimize abrogation see the doctrine as evidence of the *Qur’an’s* flexibility, interpreting the verses revealed by Muhammad in Mecca to ‘address spirituality and see those revealed later in Medina not as abrogation but rather as expanding context to understand the whole.’⁵⁴⁵ So complicated an area of hermeneutics, an entire subset of theological study is dedicated to the determination of verses which abrogate and those which are abrogated.⁵⁴⁶

4.5 The Sword Verse 9:5

*‘But when the forbidden months are past, then fight and slay the Pagans wherever ye find them, and seize them, beleaguer them, and lie in wait for them in every stratagem [of war].’*⁵⁴⁷

Aggressive or proactive *jihad* can only exist if the doctrine of abrogation is accepted. This would permit the understanding that initially in Islam ‘aggressive fighting was forbidden; it later became permissible and subsequently obligatory.’⁵⁴⁸ The so-called ‘verse of the sword’ is

⁵⁴⁴ Aslan (n29) 167.

⁵⁴⁵ ‘Classical scholars also examined the pattern in which Muhammad engaged in abrogation during revelation because *Qur’anic* laws were brief and insufficient for the needs of the huge Muslim community. Muhammad changed his rules according to the circumstances.’ Ali Dashti, *23 Years: A Study of the Prophetic Career of Mohammad* (Mazda 1994) 54; Fakhr al-Din al-Razi, *At-Tafsir al-Kabir*, vol. 1 (Cairo: Maktabat ‘Alam al-Fikr 1956) 446.

⁵⁴⁶ This doctrine of abrogation is not restricted to the *Qur’an* but applies to all revelations for example those passed to Jesus or Moses. See for example Sura 2:106. A al-A’la al-Mawdudi, *The Meaning of the Qur’an*, vol. I (Lahore: Islamic Publications, Ltd., 1967), p. 102, fn. 109; Ali, *Al-Qur’an* (n536) 24.

⁵⁴⁷ The verse also calls for leniency ‘*But if they repent, and establish regular prayers and practice regular charity, then open the way for them; for Allah is oft forgiving, Most Merciful.*’

⁵⁴⁸ The *Qur’an*, 2:190 & 9:5 respectively. M Khan, "Introduction," xxiv-xxv. Suyuti said that everything in the *Qur’an* about forgiveness and peace is abrogated by verse 9:5, which orders Muslims to fight the unbelievers and to establish God’s kingdom on earth. Proponents of the argument claiming the rules of *jihad* progressed from a state of patience to the use of force in self-defence followed by an obligatory *jihad* against the polytheists and People of the Book, accept that verses 9:5 and 9:29 abrogated verses 22:39 and 2:190. ‘If this interpretation is accepted, it would simply mean that verse 9:5 obliges Muslims to forcefully convert polytheists to Islam or kill them, which would amount to a rule for genocide. It would also mean that verse 9:29 obliges Muslims to subjugate the People of the Book.’ Moderates dismiss such an argument as untenable when accounting for the historical context in which verses 9:5 and 9:29 were revealed. Niaz Shah, ‘The Use of Force Under Islamic Law’ (2013) 24 *EJIL*, 347

often cited as a justification for military *jihad*.⁵⁴⁹ Contemporary parlance would see the sword verse under the head of pre-emptive attack.

Shortly before Muhammad's death, a Revelation, titled 'Ultimatum' was received. In context, the verse was revealed six years after the *hijra* at the time when the Treaty of Hudaibiyah 6AH/627 CE was signed between Muhammad and the Qurayshi oligarchy. The Treaty, one of the most important precedents for *Siyar*, provided for non-aggression, the protection of life and property and prisoner exchange between the idolaters of Mecca and the Muslims of Medina.⁵⁵⁰ It was when the Quraysh violated the terms of the pact that the verse was revealed.⁵⁵¹ Positioning the 'verse of the sword' within the historical framework clearly directs the act of aggression against those that initiate an attack on Muslims and the idolatrous tribes that broke treaties with Muslims and initiated attack.⁵⁵²

The chronology of the sword verse means it displaces earlier Revelation.⁵⁵³ Practically, this means that the violent passages contained within this chapter abrogate the peaceful content contained in earlier verses. It is often held as the dualist justification for war in Islam: the protection of Muslim land against invasion or 'consolidation of the Islamic religion lest it should be wiped out,' both forming part of the *maqasid al-Shari'a*.⁵⁵⁴

The verse has been invoked to justify the killing of women and children apostates who refused to either convert to Islam or live under Muslim rule and pay a tax.⁵⁵⁵ The sword verse

⁵⁴⁹ *Qur'an*, 9:5

⁵⁵⁰ Imran Hosein, 'Diplomacy in Islam, Treaties and Agreements. An Analysis of the Treaty of Hudaibiyah' (1986) 3 *Muslim Educational Quarterly* 67-85; Cherif-Bassiouni *Shari'a* (n296) 159-160

⁵⁵¹ The text goes on to state that if the enemy forces repent and mend their ways, violence must be brought to an end. *Qur'an*, 9:5

⁵⁵² See *Qur'an* 9:13 and 8:56. Khadduri *War* (n434) 540-41.

⁵⁵³ 'It is the only chapter that does not begin 'in the name of God, most benevolent, ever-merciful.' It is argued this omission is due to the fact that the compilers of the *Qur'an* were not sure if they were separate chapters. Chapter 9 follows the argument of Chapter 8 so closely it is difficult to delineate whether it warrants a new chapter. Shah, 'Force' (n71) 348; Bukay 'Peace' (n536) 7. Alfred Guillaume, *The Life of Muhammad* (OUP 1955) 617-9.

⁵⁵⁴ Peters *Jihad* (n321) 3; Surah 8:39 '...[F]ight them until there is no *fitna* [persecution] and the religion, all of it, is for Allah.'

⁵⁵⁵ A contemporary Al-Azhar University scholar posited that 'the (sword) verse does not leave any room in the mind to conjecture about what is called defensive war.' This verse asserts that holy war, which is demanded in Islamic law, 'is not a defensive war because it could legitimately be an offensive war. That is the apex and most honourable of all wars. Its goal is the exaltation of the word of God, the construction of Islamic society, and the establishment of God's kingdom on earth regardless of the means. It is legal to carry on an offensive holy war.' Muhammad Sa'id Ramadan al-Buti, *Jurisprudence in Muhammad's Biography* (Dar al-Fikr 2001) 323-4.

abrogated, cancelled, and replaced at least 114 verses spread into 54 *suras* of the *Qur'an* that called for tolerance, compassion, and peace.⁵⁵⁶

The manipulation of the doctrine of abrogation in Islamic theology is a favourite tool and rationale for acts of aggression and use of force by Islamic militants. It is important to remember that Sunni Islam does not recognize human intuition as a valid source of law. Consequently, it maintains an absolute dependence upon the sacred texts. Among Sunni jurists, God alone is the ultimate determiner of all rules of human conduct. The obverse of this is that the human intellect, without revelation, is incapable of distinguishing between right and wrong. This incapacity exists because right and wrong exist solely by virtue of divine command, and because divine command is considered to be beyond the reach of the unaided human intellect. The problem is that no text, however sacred, is so unambiguous that it does not require some interpretation.⁵⁵⁷

While some scholars credit the *jihad* doctrine with being responsible for converting *dar al-harb* into a *dar al-Islam*,⁵⁵⁸ the way in which the doctrine has been interpreted and embraced by certain movements, in particular the 'sword verse' imports on the *umma* an obligation to 'take up arms against idolaters until the unbelievers convert or submit.'⁵⁵⁹ This warlike interpretation of *jihad* has in some instances eclipsed the meaning of *jihad* in the sense of a lifelong struggle to control the ego and internal caprice and a striving for *ilm*.⁵⁶⁰ The *Qur'an* does however provide several references using the language 'kill them'.⁵⁶¹ These references are contingent upon those whom the 'kill' reference is attached acting or failing to act.⁵⁶² 'The rule of killing for specific reasons is not confined to non-Muslims only. Islamic law allows the killing of Muslims in certain cases, such as in rebellion.'⁵⁶³

⁵⁵⁶ Cherif-Bassiouni *Jihad* (n19) 45

⁵⁵⁷ Weiss (n25) 211- 212

⁵⁵⁸ Khadduri *War* (n434) 53

⁵⁵⁹ Rudolph Peters, *Jihad in Classical and Modern Islam* (Markus Wiener Publishers 1996) 5.

⁵⁶⁰ *Ilm* is Arabic for knowledge. 'Islamic *jihad* is directed to the securing of essential human liberties' which is not tantamount to a defensive war. The *Qur'an* ordains fighting tyranny and suppression of liberties until persecution stops and people are free to believe and act in accordance with their true conscience.' Mazheruddin Siddiqi *Modern Reformist Thought* (Islamic Research Institute 1982) 91

⁵⁶¹ See for example The *Qur'an* 2:191; (4:89); (4:91).

⁵⁶² Eg, verse 2:191 is about expelling non-Muslims from where they had expelled Muslims. Verse 4:89, the killing is contingent on 'if they turn away', whereas in verse 4:91 it is conditional upon 'if they do not stay away from you'. The 'kill them' language has been used on specific occasions for specific groups of people. Shah, 'Force' (n71), 350

⁵⁶³ Shah, 'Force' (n71), 350

‘[A] primary concern of Islam, given its impetus to conversion by the sword, is the conduct of war... [T]he study of the law of war, the *Siyar*, so encompasses the attitude of Islam to the non-Muslim world that it has taken on the connotation of Islamic international law in general.’⁵⁶⁴

Islam emerged in the 7th Century as a conquering power with world domination as its goal, its notion of international law was bound to be in keeping with its mission of proselytization of the whole of humankind.⁵⁶⁵

4.6 Dar al Baghy

Within the *Harb/Islam* dichotomy there exist several subsets each dealing with nuanced relationships in turn providing corresponding rights and obligations.⁵⁶⁶ Classical Islamic discourse delineates *harb al- bugha* (war against Muslims) and *harb al-kuffar* (war against unbelievers).⁵⁶⁷ The general law of armed conflict applies when the insurgency consists wholly or in part of non-Muslims, however a different set of laws apply, the law of *baghy*, when Muslims engage in armed conflict with a Muslim ruler irrespective of the justness of the conflict.⁵⁶⁸ This law does not apply to all fighting that may happen between Muslims, rather it applies only to fighting that may occur between Muslims and a specific category of Muslims called the *bugha*, the exception to the general rule that Muslims are prohibited from fighting

⁵⁶⁴ James Busuttill, ‘Humanitarian Law in Islam’ (1991) *the Military Law and Law of War Review* 113

⁵⁶⁵ Majjid Khadduri, ‘Islam and the Modern Law of Nations’ (1956) 50 *AJIL* 358-9; Khadduri, *War* (n434) 51-54.

⁵⁶⁶ *Dar Al-'Ahd* (Abode of Covenant), *Dar Al-Sulh* (Abode of Truce), *Dar Al-Maslubah* (Abode of Pillaged Land), *Dar Al-Baghy* (Abode of Usurpation), *Dar Al-'Adl* (Abode of Justice), *Dar al-Kufr* (Abode of Unbelief). In relation to international law, it is the *dar al-ahd* or *dar al-sulh* which carries weight to the enforcement of international treaties, however this subset is contested within the *madhahib*. *Dar al-Sulh* refers to states with which the Muslim nation has a formal treaty, or at least non-belligerent relations. Duncan Macdonald & Armand Abel, ‘Dar al-Sulh’, *Encyclopedia of Islam* (Brill 2012). The rationale for the law of rebellion and its exclusive application to inter-Muslims conflict is traced to the *Qur'anic* reference to rebels as ‘believers’. The rules of rebellion apply only when both the warring factions are Muslims. The *Qur'an* calls the rebels ‘believers’ (The *Qur'an*, 49: 9) and ‘Ali is reported to have said regarding his opponents: ‘These are our brothers who rebelled against us’. From this, jurists derive this fundamental rule of the Islamic law of *baghy*. Tabassum, (n472) 2.

⁵⁶⁷ El-Fadl ‘Rules’ (n473) 144

⁵⁶⁸ *Baghy* literally means disturbing the peace and causing transgression. The word *baghy* comes from the root *bagha*, which means ‘to desire or to seek something’, ‘to cause corruption’, ‘to envy’ or ‘to commit injustice’. Edward Lane, *Arabic-English Lexicon*, (Cambridge 1984), 231. In Islamic legal parlance, it denotes rebellion against a just ruler. The term *khuruj*, (lit. ‘going out’), was used for just rebellion against unjust rulers. As the justness of war is subjective Muslim jurists developed the code of conduct for rebellion irrespective of whether the rebellion is just or unjust. As a result the two terms *khuruj* and *baghy* came to be used interchangeably. Tabassum, (n472).

each other. Once *bugha* status was acquired the majority of jurists agree that this category of persons were not criminals.⁵⁶⁹

Rebellion was commonplace in early Islam, with two of the four Caliphs immediately succeeding the Prophet martyred by rebels. While an Islamic government would generally deem rebels to be bandits and robbers, the Muslim jurists forcefully asserted that rebellion stands distinct and as such, rebels are not governed by the general criminal law of the land even if punitive action could be taken against them for disturbing the peace and taking the law into their own hands.⁵⁷⁰ As such jurists were conscious of developing a distinct doctrine recognizing the obligations of both factions when each party to the conflict was Muslim.⁵⁷¹ As with *Siyar*, the *Qur'an* provides principles on rebellion elaborated through the *Sunna* and exemplified in the conduct of the Caliph's who succeeded the Prophet.⁵⁷² In relation to *baghy*, rebellion is 'just' provided that it is kept within the bounds of proportionality, that the harm caused by the rebellion is not greater than the harm caused by an unjust ruler.⁵⁷³

The Battle of Jamal in 36 AH/656 CE is regarded as the first armed conflict (*fitna*) between Muslims. The conflict saw forces loyal to Ali ibn Abi-Talib, the fourth *Caliph*, fight the forces loyal to Aisha *bint* Abu-Bakr, the wife of the Prophet.⁵⁷⁴ The rules of engagement employed by Ali in this battle provided the historical foundation for Islamic laws of armed conflict relative to Muslim on Muslim fighting.

'[Ali] forbade his men to kill the enemy wounded or captives. These were not apostates but good Muslims, he declared; they should be accorded the utmost respect...All

⁵⁶⁹ El-Fadl 'Rules' (n473) 145

⁵⁷⁰ For Sunni scholars, the *baghy* were political rebels and remained Muslims, therefore a separate set of rules applied to conflict with these rebels within the *Dar al Islam*. For Sunni's, the central focus is on *jihad* against non-believers. Howard Hensel, *The Prism of Just War and Western Perspectives on the Legitimate Use of Force* (Ashgate 2010)

⁵⁷¹ 'Uthman, the third caliph, was *martyred* by rebels in 35 AH (655 CE). 'Ali had to fight several wars with his opponents among Muslims and was *martyred* by a rebel in 40 AH (660 CE). His son al-Husayn was *martyred* by the government troops in Karbala' in 61 AH (681 CE). The idea of rebellion against a Muslim ruler was 'not readily acceptable to traditional Sunni political theory,' a throwback to the trauma caused by the civil wars that affected the Islamic community in the mid-seventh century. Sivan (n9) 91; Tabassum (n472) 2.

⁵⁷² 'Ali, laid down the norms that were accepted by the Muslim jurists who in time developed detailed rules. The Hanafi jurist Abu Bakr Muhammad b. Abi Sahl al-Sarakhsi, in his analysis of the Islamic law of *baghy*, asserts in many places that 'Ali is the imam in this branch of law.' See Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, al-Mabsut, ed. Muhammad Hasan Isma'il al-Shafi'i, Dar al-Kutub al-'Ilmiyyah, Beirut, 1997, Vol. 10, 132.

⁵⁷³ Abdel-Haleem (n4) 123.

⁵⁷⁴ It is sometimes referred to as 'The Battle of the Camel' because Aisha rode into battle on a red camel from which she directed her forces. Khadduri, *The Shari'a and Islamic Criminal Justice in Time of War and Peace*, xiii

prisoners were to be set free after pledging allegiance to him, and the usual spoils of war...were to be returned... The enemy dead were buried as honourably as those who had fought for Ali. The hundreds of severed limbs were gathered together and placed with ceremony in one large grave.’⁵⁷⁵

The following year there was another challenge against the leadership of ‘Ali. The Battle of Siffin 657 CE, saw the Kharijites (*khawarij*) rebel against ‘Ali culminating in his assassination in 661 CE. The Kharijites practice of *takfir*, declaring certain Muslims infidels, distinguished this group from mainstream Sunni Muslims who reject the practice as heresy. However contemporary extremists have revived this practice and used it as a platform to engage in revolution and violence.⁵⁷⁶

As with IHL, Islamic law has developed indicia to help with conflict classification and status of parties. In Islamic law, rebellion can be defined as ‘the act of resisting or defying the [social, political or religious] authority of those in power’, occurring either in the form of ‘passive non-compliance with the orders of those in power’ or in the form of ‘armed insurrection’.⁵⁷⁷ Internal violent opposition to government can be positioned on a sliding scale. When opposition to Government is directed towards certain acts of government officials it can be classed as insurrection; when this insurrection increases to the extent that the opposing party has some territorial control within the state it becomes rebellion.⁵⁷⁸ At the stage when rebels control territory in defiance of government and have capacity to act as proto-State, it is known as *dar al-baghy*.⁵⁷⁹ *De facto*, the *dar al-baghy* enjoys many of the prerogatives reserved for States. It can enter into treaties with other States;⁵⁸⁰ it can impose taxes when crossing borders between the *dar-al ‘adl* and *dar al-baghy*; and its court decisions are not necessarily or automatically reversed even if the central government reclaims control over the rebel territory.⁵⁸¹ The belief of the Muslim rebels in the justness of opposition to Government is determinative in classifying

⁵⁷⁵ Lesley Hazleton *After the Prophet; The Epic Story of the Shia-Sunni Split* (Random House 2010) 122

⁵⁷⁶ Halverson (n260) 203- 204

⁵⁷⁷ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 4

⁵⁷⁸ Muhammad Hamidullah, *The Muslim conduct of State* (M. Ashraf 1977) 168

⁵⁷⁹ Hanafi jurists consider falling outside the jurisdiction of the *dar al ‘adl* central government of the Islamic State. *Dar al- ‘adl* (Territory or House of Justice) is the antonym of *dar al baghy* (Territory of Rebels). Tabassum (n472) 5

⁵⁸⁰ Provided such a treaty will not permit unfair terms towards the central authority. Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, al-Mabsut, ed. Muhammad Hasan Isma‘il al-Shafi‘i, *Dar al-Kutub al-‘Ilmiyyah*, Beirut, 1997, Vol. 10, 141 in Tabassum (n472) 16

⁵⁸¹ However, the courts of *dar al-baghy* have no legal authority to bind the courts of *dar al- ‘adl*. Ibid (n497) 5

the existence of *baghy*. The rebels must consider themselves ‘to have *ta’wil*, legal justification for their struggle.’⁵⁸² The cumulative requirements of territorial control or resistance capability, *mana’ah*, and a challenge to the legitimacy of government are hence the indicia of *baghy*.

Up until the point the rebels attain *mana’ah*, even if they possess *ta’wil*, they are subject to the full force of the criminal law of the State.⁵⁸³ As with IHL, there exists in the law of *baghy* cumulative prerequisites before a group can trigger certain protections that would distinguish the group from common criminals. In practical terms this means that when a group qualifies as rebels under the law of *baghy*, the criminal law that would usually regulate their conduct is suspended. This does not equate with recognition that the acts of the rebels are lawful.⁵⁸⁴ Once the threshold is reached to qualify as rebellion, the rules governing the rebels’ conduct alters completely. Shaybānī asserts that ‘when rebels repent and accept the writ of the government, they should not be punished for the damage they caused [during rebellion]’.⁵⁸⁵

International law, including IHL, has difficulty regulating NIAC. State reluctance in acknowledging the conflicts’ existence within their borders leads to many conflicts mislabeled as internal strife or unrest and beyond the purview of international supervision.⁵⁸⁶ States also fear that affording equality to belligerents will affect the latter’s legal status, elevating the status of the group which are fighting the Government to being equal with the Government.⁵⁸⁷ Under the law of *baghy*, belligerents are equal in Islamic law simply because both parties are Muslim. Arguments regarding the binding authority of these laws which are rife in traditional IHL are moot under the law of *baghy*, as this law is divinely sanctioned. Muslim rebels cannot deny its

⁵⁸² Tabassum, (n472) 6

⁵⁸³ ‘When those who revolt lack *mana’ah*, and only one or two persons from a city challenge the legitimacy of the government and take up arms against it, and afterwards seek aman [peace], the whole law will be enforced on them’. Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, al-Mabsut, ed. Muhammad Hasan Isma’il al-Shafi’i, Dar al-Kutub al-‘Ilmiyyah, Beirut, 1997, Vol. 10, 141 cited in Tabassum (n472) 8

⁵⁸⁴ At the time of fitnah [war between Muslims] a large number of the Companions of the Prophet were present. They laid down by consensus that there is no worldly compensation or punishment for a murder committed on the basis of a *ta’wil* of the *Qur’an*, for a sexual relationship established on the basis of a *ta’wil* of the *Qur’an* and for a property damaged on the basis of a *ta’wil* of the *Qur’an*. And if something survives in their hands, it shall be returned to its real owner. Abu Ishaq Ibrahim b. ‘Ali al-Shirazi’s al-Muhadhdhab *Kitab Qital Ahl al-Baghy* (Al Muhadhdhab fi *Fiqh* al-Imam al-Shafi’i, Dar al-Ma’rifah, Beirut, 2003) Vol. 3, 406 in Tabassum (n472) 10

⁵⁸⁵ Abu Bakr Muhammad b. Ahmad b. Abi Sahl al-Sarakhsi, al-Mabsut, ed. Muhammad Hasan Isma’il al-Shafi’i, Dar al-Kutub al-‘Ilmiyyah, Beirut, 1997, Vol. 10, 136 cited in Tabassum (n472) 8

⁵⁸⁶ See Cherif-Bassiouni *Shari’a* (n296); Clapham *Obligations* (n44)

⁵⁸⁷ Conventional IHL binds ‘each party to the conflict’. Equality of belligerents is a fundamental principle of IHL. Hersch Lauterpacht ‘The Limits of the Operation of the Law of War’ (1963) 30 *BYIL* 206. It results from the fundamental distinction between *jus ad bellum* and *jus in bello* which holds that all parties to the conflict have the same rights and obligations as a matter of law irrespective of the ‘justness’ of their cause. Sassoli ‘Seriously’ (n42) 16 - 17

binding nature and cannot make the plea that the law has been laid down through treaties to which they are not party.

This discrete law acknowledges important rights for those engaged in *baghy*.⁵⁸⁸ So while both Muslim and non-Muslim rebels are treated as combatants and the law of war is applicable, when some or all the rebels are Muslims the law imposes further restrictions on the authority of the government and an extension of rights on rebels. This enhanced status incentivizes rebels to comply with the law of war, as the rebel status suspends the general criminal law, meaning rebels can only be punished for violations of the laws of war.⁵⁸⁹

The alternate argument is that Muslims are not supposed to fight other Muslims unless they oppose Muslim rulers because of a ‘diverging, but plausible, interpretation of religious texts.’⁵⁹⁰ If the Muslim is considered an apostate, as many Muslim governments are labelled by rebels in today’s conflicts, none of these exceptions apply. There is speculation as to whether this doctrine is purely abstract and in reality ‘modern Islamic law would make no distinction between Muslim and non-Muslim: [rather] the overriding principles...of justice and public welfare’ would take precedence.⁵⁹¹

The next chapter will look at the basis for Islamic conflict conduct through the lens of seventh century war campaigns and the dicta of the first Caliphs. It will make a comparative analysis between Siyar and IHL focusing on points of difference.

⁵⁸⁸ Hamidullah, (n584) 167-8

⁵⁸⁹ Tabassum, (n472) 12

⁵⁹⁰ Aly (n618); El-Fadl ‘Rules’ (n473) 145

⁵⁹¹ Usama Hasan Cited in Aly (n618).

Chapter 5 Islamic Laws of Armed Conflict

*‘To understand war, one has to study its philosophy; the grammar and logic of [the parties]. Only then are you approaching strategic comprehension. To understand the war against Islamist[s] one must begin to understand the Islamic way of war, its philosophy and doctrine, the meanings of jihad in Islam—and one needs to understand that those meanings are highly varied and utilitarian depending on the source.’*⁵⁹²

Ancient civilizations created rules that would govern hostilities. Agreement on certain conflict conduct and abstention from certain practices in an effort to avoid retaliation were in the common interest.⁵⁹³ Through religious sources like the Old Testament considering Israelite relations with its neighbours; the Greeks in their relationship with Rome and other nations; or Islam and its doctrine of *Siyar*, a law of nations based on some form of natural law can be traced throughout history.⁵⁹⁴ So too can unbridled ferocity.

When Grotius was exploring classical just war theory subject to *temperamenta belli*, classical Islamic legal doctrine had already developed safeguards for the limitations of war.⁵⁹⁵ *Usul al-fiqh* provides rules or doctrines pertaining to conduct in warfare, however there is no ‘Islamic analogue to the Geneva conventions.’⁵⁹⁶ ‘Despite its many overlaps with Islamic law, Muslim scholars maintained IHL is a man-made law and only acceptable to Muslims so long as it does

⁵⁹² S.K. Malik claims ‘[r]esearch into the Holy Quran is not one man’s job. It is the collective and continuous responsibility of the entire [community]. It takes a lifetime of research to extract a drop out of this never-ending reservoir of knowledge and wisdom; and it is only by pooling such drops that we can derive the maximum benefit from it.’ (Authors note); also Malik, *The Qur’anic Concept of War* (n304) 108-9.

⁵⁹³ There is evidence that the ancient Egyptians and Babylonians had agreements signed with their neighbours dealing with problems like water usage, exchange of prisoners and dispute resolution mechanisms for frontier disputes. Khadduri *Islamic Law* (n13) 4

⁵⁹⁴ See for example Baron de Montesquieu *The Spirit of the Laws*, trans. Th. Huent (1900) Vol I, 5; Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (Macmillan 1911)

⁵⁹⁵ *Temperamenta Belli* means moderation in the conduct of war. This term is used in Hugo Grotius’s work *De jure belli ac pacis* (1625). M. Sassoli, ‘Ius ad Bellum and Ius in Bello’ in M Schmidt *International law and armed conflict: Exploring the Faultlines* (Martinus Nijhoff Publishers 2007) 243; It is argued that just war theory was never intended to be a legal code, rather it was meant to be a ‘proposal’. O’Donovan (n318) 14

⁵⁹⁶ The Prophet is heralded for advocating ‘humanity, tolerance, equality and mutuality for the greater sake of coexistence and shared knowledge [and ultimate peace]...for all peoples.’ Cherif-Bassiouni *Jihad* (n19) 62. The caveat is attached that the Islamic humanitarian laws or rules on warfare while not synonymous are generally congruent with many rules of modern international humanitarian law. Abdullahi An’Na’im, ‘Islamic Law, International Relations and Human Rights: Challenge and Response’ (1987) 20 *Cornell International Law Journal* 317, 326. Syed (n10) 160; Aboul-Enein & Zuhur (n251) 2. M de Taube, ‘Etudes sur le developement historique du droit international dans l’Europe orientale’ 393-394 in Elawa Badar (n25) 594. Sheikh Wahbeh alZuhili, ‘Islam and International Law’ (2005) 87(858) *IRRC* 275, 282.

not conflict with the *Shari'a*[,]’⁵⁹⁷ which supersedes any international treaty; *Qur’anic* prescriptions trump any contract; and the *lex piium* is the basis for an Islamic *bellum justum*.⁵⁹⁸ Added to which, the *Shari’a* does not provide for the enumeration of individual rights, ‘[w]here Westerners speak a language of rights and entitlements, Arabs speak a language of context and relationship...’⁵⁹⁹

This chapter will examine the evolution of Islamic LOAC providing a framework for the actions of certain *salafi*-styled Islamic groups. It will analyse the robust narratives and practical application of Islamic LOAC as it developed through the *salafi* era, distinguishing *siyar* from modern IHL with a focus on the principle of distinction. It will begin by briefly speaking to *ad bellum* comparisons before moving into *in bello* considerations.

In the pre-Islamic traditions of Northern Arabia, ‘aggrieved parties would look to larger, powerful pastoral nomadic groups for revenge and protection.’⁶⁰⁰ A quasi-Hobbesian platform of ‘ritualized raiding and conflict was a normal state of affairs,’ clearly distinguished from larger scale conflict.⁶⁰¹ *Ghazi* raiding typifies this normal state of affairs as it avoided confrontation with a greater emphasis on looting. There appears definite rules in this type of raiding with a primitive form of equality of belligerents, ‘attacking non-combatants with lethal intent...was...generally avoided,’ as was a general prohibition on violence against women and children.⁶⁰² These pre-Islamic traditions act as a reservoir from where early Islamic notions of laws of war flow. As the Muslim conquerors developed the meaning and function of war in Islam, they subsumed the already developed and ‘imperiallly sanctioned ideals of religious warfare as defined and practiced by the Sasanian and Byzantine empires.’⁶⁰³

⁵⁹⁷ ‘Humanitarian Law and Islam’ (2005) *The Magazine of the International Red Cross and Crescent Movement* http://www.redcross.int/EN/mag/magazine2005_1/24-25.html accessed 25/06/15

⁵⁹⁸ ‘Islamic rules of warfare are complex, appear to be contradictory and require careful analysis.’ Aboul-Enein & Zuhur (n251), 1. While the Islamic law of war is not dependent on treaties, ratification of treaties may impose additional restrictions on conflict conduct. For the importance of keeping agreements see chapter 4.1 Binding Islamic Groups: *Pacta Sunt Servanda* and ‘*al ‘aqd Shari’at at al-mut’aqidin*. Hamidullah (n584), 229.

⁵⁹⁹ Rosen (n13) 173

⁶⁰⁰ Fred Donner, *The Early Islamic Conquests* (Princeton University Press 1981) 34.

⁶⁰¹ For example, Hobbes elaboration of a state of Nature in Thomas Hobbes, *Leviathan* (Michael Oakeshott ed., 1957); Bergesen (n247) 11.

⁶⁰² Donner (n606) 35; Bergesen (n247) 11.

⁶⁰³ See John Rich, ‘The Fetiales and Roman International Relations’ in James Richardson & Federico Santangelo *Priests and State in the Roman World* (Franz Steiner Verlag Stuttgart 2011) 187; Abdalla (n30) 25. The UN Security Council is a modern equivalent of the fetiales. Shearer (n520) 7. Aslan (n29) 80.

A first reading on Islamic rulings on war does not clearly distinguish whether they promote war or peace.⁶⁰⁴ The *Qur'an* does not order war, rather it permits it when certain conditions are met.⁶⁰⁵ Consistent with all Islamic methodology, scholars provide *Qur'anic* verses and Prophetic traditions as evidence of the existence of certain rules governing combat during war.⁶⁰⁶ Of the 6666 verses in the *Qur'an* approximately 70 address the conduct of hostilities, which early Islamic scholars have extrapolated to form a coherent doctrine subject to interpretation. As with conventional IHL, the Islamic law of *qital* balances the principles of military necessity, unnecessary suffering, distinction, and proportionality to guide conduct in conflict. These rules, though originating in the seventh and eighth century are still relevant.⁶⁰⁷ 'Islam has always handcuffed its fighters' hands,' the primary sources of Islamic law imposing limits on the means and methods used during actual combat.⁶⁰⁸

Islamic rules of war evolved from the 27 battles in which Prophet Muhammad played a direct or indirect role. Scholars who seek to harmonize Islamic LOAC with conventional IHL rely on three seminal figures in Islamic history with supporting *ahadith*: a Directive from the first and second Caliph's and, although not temporally satisfying the *salafi* criteria, the documented conflict conduct of Salah al-Din Yusuf ibn Ayyub.⁶⁰⁹

⁶⁰⁴ Aboul-Enein & Zuhur (n251), 3.

⁶⁰⁵ A. Abou-El-Wafa, *Islam and the West: Coexistence or Clash/* (Dar Al-Nahda, Cairo, 2006), 249-262 in Badar (n25) 604

⁶⁰⁶ Zawati (n444) 41-42.

⁶⁰⁷ 'By affirming the principle of humanity in the midst of war, *al-Shaybānī*... helped pioneer the modern law of armed conflict.' However religious influence on the laws of war is not a settled subject. 'As regards war, much is borrowed from the Etymologiae of St. Isidore 636 AD of Seville, whose influence on Mussulman law is clear.' Scott (n228); Heba Aly 'Islamic law and the rules of war' (IRIN, April, 2014) <<http://www.irinnews.org/report/99987/islamic-law-and-the-rules-of-war>>; J Busuttil, 'Humanitarian Law in Islam' (1991) 30 Military law and Law of War Review 113 (Appendix) J Busuttil, 'Humanitarian Law in Islam' (1991) 30 Military law and Law of War Review 113 (Appendix). Ali & Rehman (n250), 338; Karima Bennouna, 'As-Salāmu `Alaykum? Humanitarian Law in Islamic Jurisprudence', (1994) 15(2) Mich. J. Int'l L. 605, 620-621.

⁶⁰⁸ Cockayne, (n12), 599.

⁶⁰⁹ Several *hadiths* prohibit the attack of specific categories of enemy non-combatants who do not participate in hostilities including: women and children, the old and infirmed, the blind, the incapacitated, the clergy and *al-asif* (farmers, craftsmen and traders). See for example *Hadith* 17932, 17933, 17934, 17935, 17936, 17937, 2613 and 2614 in Ahmad Ibn Al-Husayn Ibn Ali Ibn Musa Al-Bayhaqi, *Sunan Al-Bayhaqi Al-Kubra*. Badar (n25) 620. A similar provision is found in Article 3(a) of the Cairo Declaration on Human Rights in Islam, which provides that 'in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children.' Cairo Declaration (1990). While religious personnel (the clergy) are protected persons under Islamic LOAC, this is not a blanket protection and distinguishes certain clergy. Aboul-Enein & Zuhur (n251); Roger Algate, 'Protection Of Civilians Lives In Warfare: A Comparison Between Islamic Law And Modern International Law Concerning The Conduct Of Hostilities.' (1977) 16 *Military Law and Law of War Review* 245-261.

5.1 Directives of Abu Bakr and ‘Umar

The directive of Abu Bakr to Muslim troops before engaging in the Syrian campaign of 12 AH/634 CE reflects the spirit of moderation and the humanitarian approach of the law of Islam. Its requirements serve as an important precursor to conventional IHL.⁶¹⁰ Abu-Bakr gave the following instructions to Usama, the Muslim commander in chief leading the campaign:

‘Do not betray or be treacherous or vindictive. Do not mutilate. Do not kill the children, the aged or the women. Do not cut or burn palm trees. Do not slay a sheep, a cow or camel except for your food. And you will come across people who confined themselves to worship in hermitages... Leave them alone to what they devoted themselves for.’⁶¹¹

Four years later Caliph Umar ibn Al-Khattab extended this Directive, when his army laid siege to Jerusalem:

‘I grant them security of lives, their possessions, their children, their churches, their crosses, and all that belong to them... Their churches shall not be impoverished, nor destroyed; neither endowments, nor their dignity... Neither shall the inhabitants of Jerusalem be exposed to violence in following their religion; nor shall one of them be injured.’⁶¹²

The Islamic conduct in hostilities exemplified by Abu Bakr and Umar continued through the seventh and twelfth centuries. The Ayyubid Caliph Salah al-Din Yusuf ibn Ayyub evidenced the values exhibited by the first two Caliph’s in their dealings with the Christian Crusaders. Moderates claim this indicates a continuous ‘recognition of [certain] values and proscriptions of the *Shari’a* and what would be modern IHL...’⁶¹³ It is contended that claiming a ‘continuous

⁶¹⁰ While these commandments are invoked in every text which seeks to reconcile Islamic LOAC with modern IHL, some assert the motive for Abu Bakr’s commandment on keeping enemy property in tact was that he knew would win the wars and wanted the property to be useful spoils of war. Saqr, *Al-Alaqaq Al-Dawliyyah*, in Hamidullah, (n584), 253-256.

⁶¹¹ Another iteration in the form of ‘commandments’ see Abu-Bakr instructing Yazid ibn-Abi Sufian for observance and adherence by the Muslim combatants. Maher Hathout, *War Ethics in Islam* (Minaret Publishing House 1989) 9; Al Watha’iq Al-Dawlia Wa Al-Iqlimiyya Al-Macniyyaa Bi Huquq al-Isnan (M. Cherif-Bassiouni & K Mohey El Din eds., 3 vols., Cairo, Egypt: Dar al-Nahda, 2011). A M Cherif Bassiouni, (ed.), *A Manual on International Humanitarian Law and Arms Control Agreements*, (Transnational Publishers 2000); Alternate interpretation Abu Bakr al Siddiq in Maliks Muwatta Book 021, Hadith 010 under section on Prohibition against Killing Women and Children in Military Operations, cited in Wiktorowicz ‘Genealogy’ (n415) 86.

⁶¹² S Imad-Ud-Din Asad *Islamic Humanitarian Law*, Dawn, (24 February 2006).

⁶¹³ Cherif-Bassiouni *Jihad* (n19) 161; Amin Mallouf, *The Crusades Through Arab Eyes* (Schocken Books 1989)

recognition' is an overstretch and undermines a robust and honest comparison of Islamic LOAC and IHL.

'[I]t is the mistaken idea that the proper way to do history is to prune away the dead branches of the past, and to preserve the green buds and twigs which have grown into the dark forest of our contemporary world.'⁶¹⁴

Learned academics defend Islam as a moderate religion claiming the targeting of civilians including women and children, *hors de combat*, the destruction of religious property and torture are prohibited in Islam. They continue, that no amount of doctrinal rationalization by 'insufficiently informed' Muslim theologians and political activists can change this prohibition.⁶¹⁵ Yet the recurrent flagrant disregard by certain Islamic groups of the *ius in bello* codified in the Geneva Conventions coupled with a quasi-uniform interpretation by these groups in their approach to Islamic LOAC casts doubt over this blanket opinion. It is suggested that rather than ignoring modern IHL, these groups, in the first instance, define the conflict theatre differently through the *harb*/Islam dichotomy. Further, they have different conceptions of distinction and what constitutes a legitimate target; different interpretations of what constitutes military necessity, what elements are weighed when measuring proportionality, as well as what is regarded as defensive.

'Islamic law assumes that the lives and property of non-believers are legitimate targets, except by virtue of a peace treaty (*sulh*), a safe-conduct (*aman*), or a covenant of protection (*dhimmah*); for the land of the enemy is a land of fighting, plunder, and legitimate targets.'⁶¹⁶

The urge to reconcile Islamic LOAC with modern IHL has led many publications to focus on conduct that aligns with conventional LOAC, avoiding acknowledging Islamic conflict conduct that would be prohibited under IHL. Aspects of modern IHL do not reflect *salafi* Islamic LOAC. Rather than move the chess pieces to make all of Islam fit into modern conceptions of IHL, a more intellectually honest approach would be to acknowledge that the chessboard moved in the nineteenth century and as a result some practices became violations

⁶¹⁴ David Hackett, *Historian Fallacies: Toward a Logic of Historical Thought* (Harper & Row 1970) 135

⁶¹⁵ Cherif-Bassiouni *Shari'a* (n296) 3; Cockayne (n12), 599; Aly (n618)

⁶¹⁶ Mowatt-Larssen (n18) 144

of the laws and customs of (Christian) war.⁶¹⁷ Historical narratives in Islamic extremist discourse illuminate the exegetical differences and make clear there are aspects of Islam that are inherently irreconcilable with modern IHL. Table 1 begins to unpack such distinctions.

⁶¹⁷ See the Battle of Solferino, the trigger for Henry Dunant to codify laws in war in a treaty. Both sides were Christian fighters: Franco-Sardinian Alliance against the Austrian Army. Although conventional IHL claims to be codification of universal LOAC.

Table 1. Protections of Specific Categories of Persons (✓ denotes protections)

	Salafi Usul on Qital			IHL
	Sunna	Abu Bakr & Umar	<i>Madhahib Examples</i>	
Distinction:				
Women	✓	✓	Shafi'i No one is immune in the <i>dar al-harb</i> (kitab al-Umm 4:257)	GC IV
Children	✓	✓	Maliki Ibn Rushd Women and children may be captured in war time. ⁶¹⁸	A.50 G IV
Elderly	✓	✓		GC IV
Prisoners			Hanafi	GC III
- Kill	Execute, enslave or ransom	Can Kill Male POW	Shaybānī Can kill male prisoners if not enough transport to take them away	<i>Ius Cogens</i>
- Slavery				
Religious Places	✓	✓	<i>Musnad</i> of ibn Hanbal 'Do not kill the people sitting in places of worship.'	A. 24 GC I A.36 GC II

5.2 Distinction in Islamic Extremism

'Since the basis for permissible fighting is jihad which strives to uphold religion, and make the word of God Supreme, whoever obstructs [these purposes] must be fought.'

⁶¹⁸ Ibn Rushd (1126-1198) opines there is consensus among classical jurists that non-believers may be captured in war time including women and children. Ibn Rushd and I Nyazee, *The Distinguished Jurist's Primer*, Ithaca Press (2000) cited in Nagamine (n71) 226.

[S]ome have argued that the status of unbelief in itself merits execution, but they exempted women and children because they may be useful for Muslims.’⁶¹⁹

The dualistic principle of distinction in conventional IHL requires parties to distinguish at all times between civilians and combatants as well as between military and civilian objects. ‘Civilians enjoy their protection from direct attack unless and for such time as they take a direct part in hostilities. Only military objectives may be attacked.’⁶²⁰

‘Warre be so managed that the innocent may be as little damnified as possible.’⁶²¹ The concept of innocent in early English discourse means ‘unoffending’, ‘not deserving of the suffering inflicted.’ In a conflict context, it means those whose life and work ‘in no way contribute to the prosecution of war, whose manner of life is ‘opposed to war’, for example farmers, nursing mothers, the infirmed, writers and children.’⁶²² Gaps have been identified in this construct regarding the vast cohort of people who sustain war operations from the shadows and cannot claim a ‘moral’ innocence. Where military engagements in puritanical Islamic discourse distinguishes between the innocent and the guilty,⁶²³ conventional IHL has moved the distinction brackets from questions of who is innocent to who qualifies for protection. It is difficult to keep the moral legal lines separate.

Neo-classical interpretations of *hadiths*, jurisprudence and legal text extend the status of protected persons under Islamic law to include: women; children; peasants; and religious personnel; relative of fighting persons; craftsmen; traders; farmers; hermits and servants cannot

⁶¹⁹ Ibn Taymiyya, *al-Siyasa*, 106 in El-Fadl ‘Rules’ (n473) 152.

⁶²⁰ The principle of distinction is codified in A. 44(3), 48, 51(2) and 52(2) of API; A. 13(2) AP II prohibits making the civilian population as well as individual civilians the object of attack. See also Rule 1 CIHL https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule1; ICJ Nuclear Weapons Case; Article 3 (a) Cairo Declaration on Human Rights in Islam. In the conduct of hostilities, Art. 50(1) of Protocol I defines civilians as all those who are not ‘referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol’. Once they have fallen into enemy hands, Art. 4 of Convention IV defines as protected civilians all those who fulfil the nationality requirements and are not protected by GC III. This would mean that any enemy who is not protected by GC III falls under GC IV.

⁶²¹ William Ames, 17th Century Puritan Divine cited in Abdel-Haleem (n4) 133.

⁶²² Abdel-Haleem (n4) 137.

⁶²³ John Kelsay, *Islam and War* (John Knox Press 1993) 36

be targeted.⁶²⁴ This is not to say that these protected persons are immune from capture, enslavement or exchange.⁶²⁵

The practice of the Prophet Muhammad was to make a clear distinction between combatants and non-combatants' although qualification for protected status is unclear.⁶²⁶ Two distinct categories of persons similar to conventional IHL were developed, one protected, the other a legitimate target: *Al-muqatilah*, *ahi Al-qital*, *al-muharibah* (combatants, fighters, warriors) and *Ghayr al-muqatilah*, *ghayr al-muharibah* (non-combatants, non-fighters and non-warriors).⁶²⁷ It also distinguishes combatant status along identity lines, 'Muslim vs. non-Muslim. In some cases, it distinguishes further between fellow 'scripturaries', Jews and Christians, and other non-Muslims, such as pagans.'⁶²⁸

Non-combatant Immunity in Islamic law is typically determined by the capacity of the target country or individual to fight against Muslims.⁶²⁹ '[T]he Islamic position is clear: there is no justification for warfare directed intentionally against non-combatants in *jihad*.'⁶³⁰ Violence directed towards civilians, Muslim or non-Muslim is contrary to Islam, however the definition of civilian is highly varied in Islamic jurisprudence.⁶³¹ In Islam, the restriction around protected

⁶²⁴ Aly (n618); See also Al-Zuhili who refers to the Islamic principle of distinction between legitimate military objectives and civilian objects as an important one in an Islamic law of war, as well as prohibitions of the killing of priests, women, and children. alZuhili (n596) 289-81; Sohail Hashmi, 'Saving and Taking Life in War: Three Modern Muslim Views' (1999) 89(2) *Muslim World* 158, 169; Hamidullah, (n584) 59; Abu Dawud Book 008, Chapter unknown, Hadith No. 2608; ibn 'Umar Book 052, Hadith No. 258; Malik Mwatta Book 021, Hadith No. 009, section 293 cited in Nagamine (n71) 221.

⁶²⁵ '[Islamic] literature on who may or may not be targeted in war indicates that non-combatant immunity was a full-blown doctrine developed by the second/eight and third/ninth century Muslim jurist.' Al-Dawoody (n440) 116, 205

⁶²⁶ In early Islamic times tribal conduct in conflict included using children as human shields by holding them over the walls of the fort so that the enemy would stop shooting them with arrows. M. Al-Shaybānī, *The Islamic Law of Nations: Shaybānī's Siyar* (trans. Khadduri 1966), 103. When Muslim fighters inquired whether it was acceptable to hit the children with their arrows Muhammad advised they distinguish to the best of their ability between combatants and non-combatants. A.H. Al-Mawardi, *The Islamic Law of Governance* (trans. A. Yate, 2005), 65; Shah, 'Force' (n71), 360. A *mujahidin* would be considered a professional soldier; his proto-State recognized as an Islamic State so long as, and to the extent that all his activities took on the 'colour of Allah.' General M. Zia ul-Haq, Foreword to Malik, *The Qur'anic Concept of War* (n304).

⁶²⁷ Hamidullah defines combatants as 'those who are physically capable of fighting'. Hamidullah, (n584), 59

⁶²⁸ If distinction is frustrated to the extent it is near impossible to distinguish between military from non-military targets or if every effort is made to distinguish between them, then any resulting collateral damage is acceptable. Collateral damage is allowed, but distinction remains one of the basic principles of the Islamic law of *qital*. Aly, (n618); Sobhi Mahmassani 'International Law in the Light of Islamic Doctrine' (1966) 117 RdC, 301 cited in Ali & Rehman (n250) 335.

⁶²⁹ Chaiwat Satha-Anand, 'Nonviolent Crescent: Eight Theses on Muslim Nonviolent Actions,' in G Paige, C Satha-Anand & S Gilliat (eds), *Islam and Nonviolence* (University of Hawaii Press 1993); Charles Lindholm, *Generosity and Jealousy: The Swat Pukhtun of Northern Pakistan* (Columbia University Press 1982) 10

⁶³⁰ James Johnson, *Morality and Contemporary Warfare* (Yale University Press 1999) 186

⁶³¹ Cherif-Bassiouni *Shari'a* (n296) 3

categories of person centre on whether the person is ‘fit for fighting.’⁶³² Children could not directly participate in hostilities until the age of fifteen.⁶³³

In the waging of *jihad*, all adult males, except for slaves and monks, are considered legitimate military targets and no distinction is made between military and civilians the same way that within the *umma* there was no distinction between the citizen and the soldier. Women and children may not be targeted directly, unless they act as combatants by supporting the enemy in some manner. The extent to what constitutes the Islamic equivalent to direct participation in hostilities (DPH) is unclear. The enemy may be attacked without regard for indiscriminate damage, and it is permissible to kill women in night raids when Muslim fighters cannot easily distinguish them from men.⁶³⁴

The verse ‘Fight in the cause of Allah’ [or more befittingly ‘for the sake of Allah’] those who fight you’ limits the target to the actual aggressor.⁶³⁵ Weighting engagement in active fighting over profession as a determinant of combatant status has received support from many scholars.⁶³⁶ Rationale for the Islamic law principle of distinction being action based over status based is credited to the period in which the principle evolved. The *Qur’an* and Sunna of the Prophet Mohammed are replete with enjoinders against killing civilians. However, civilians can lose their protected status if they take part in the fighting. As in IHL, the definition of DPH is contentious and subject to differing opinions.⁶³⁷

Distinction under Islamic law was developed when professional armies did not yet exist and *ad hoc* recruitment of fighters met the needs of a particular battle. While moderates would

⁶³² Muhammad Al-Ghazali, *Al-Wasit Fi Al-Madhhab*, ed. Abmad Mahmud Ibrahim and Muhammad Tamir, 7 Vols. (Dar Al-Salam, Cairo 1997/1417) Vol.7, 19, in Al-Dawoody, (n440) 112.

⁶³³ The figure stemming from when the Prophet is said to have stopped a fourteen-year-old Muslim boy named Ibn Umar from fighting in the Battle of Uhud, but one year later allowed him to fight in another war. Khadduri *War* (n434) 54

⁶³⁴ It was after encountering the body of a non-Muslim woman killed in battle that the Prophet (PBUH) said ‘She is not one who would have fought.’ He then said to one of his companions ‘Catch up with Khalid [Ibn al-Waleed, the foremost Muslim general] and tell him not to kill women, children and prisoners.’ Sunan Abu Dawood and Ahmed cited in Begg, ‘*Jihad*’ (n8). The protective status of women is expounded from the Sunna where ‘[t]he Messenger of Allah...saw the corpse of a woman who had been slain in one of the raids, and he disapproved of it and forbade the killing of women and children.’ Malik, *Al-Muwatta*, 21:3:9

⁶³⁵ The *Qur’an* 2:190. Nagamine (n71) 61.

⁶³⁶ ‘Force should be used only against those ranks that are engaged in fighting or at the most against those from whom you fear some evil. All others should be safeguarded from the effects of war.’ Mawdudi, *al-Jihad fi al-Islam*, 217

⁶³⁷ ‘Once they carry weapons for fighting, or contribute intelligence, war strategies or suggestions to the army, their status changes from civilians to combatants,’ according to more extreme interpretations, supporting the enemy even by opinion, propaganda or moral support makes someone a combatant. Aly (n618).

crudely align with conventional IHL, albeit including a much broader concept of DPH,⁶³⁸ more extreme views would pre-empt a combatant as ‘anybody who is physically capable of fighting’.⁶³⁹ Proponents of offensive *jihad* would see all unbelievers as permissible targets. The *Qur’anic* concept of war applies to both soldier and civilian alike. *Jihad fi-sabil Allah* is not the exclusive domain of the professional soldier, nor is it restricted to the application of military force alone.⁶⁴⁰

In a situation of invasion or occupation, all those associated with the effort, even if not carrying arms, are considered legitimate targets and all Muslim civilians are under obligation to fight to defend the homeland. Al Qaeda reasons that because a democratically elected government reflects the will of the people, a war against Islam of this magnitude must have popular support. So while the *Qur’an* states that ‘God does not forbid you to show kindness to unbelievers who do not fight you because of your faith or drive you from your homes,’⁶⁴¹ extremist circumvent this call for peaceful relations seeing citizens of countries with foreign policy they find inimical as combatants, and aggressors.

Radicals emphasize that alleged ‘civilians’ are not really non-combatants.⁶⁴² One example is in the case of conscription where the entire country must perform mandatory military duty. Such states, through a radicalized lens, can be viewed as a ‘completely military’ societies that do not include any civilians, thus all inhabitants are legitimate targets, without exception.⁶⁴³

5.2.1 Distinction and Apostasy

‘When your Lord revealed to the angels: I am with you; therefore make firm those who believe. I will cast terror into the hearts of those who disbelieve. Therefore strike off their heads and strike off every fingertip of them.’⁶⁴⁴

⁶³⁸ For example, al-Zuhayli includes inter alia: heads of state, military leaders, military medical personnel, and military postal carriers – anyone who would direct or support the war effort. Al-Zuhayli, *Athar al-harb fi al-fiqh al-islami:dirawa muqarana*, 505 cited in Hashmi ‘Saving’ (n624) 169.

⁶³⁹ Hamidullah (n584) 59.

⁶⁴⁰ A different puritanical take on targeting non-believer civilians is submitted by Abdel Kishek, a prominent Sufi sheikh during the *jihadist* attacks on nightclubs and bars in Egypt in the late 1980s and 1990. He argued this ‘kill the infidel’ mentality had no basis in Islamic logic: Satan, he told Salafists that Islam’s purpose was to show people the light. By killing the so-called ‘infidels’ and sending them to Hell, Salafists were not helping God; they were helping Satan. Aly (n618).

⁶⁴¹ The *Qur’an* 60:8-9.

⁶⁴² Wiktorowicz ‘Genealogy’ (n415) 93- 94.

⁶⁴³ “Stop Terror Sheikhs, Muslim Academics Demand.” Arab News. 30 October 2004. <http://archive.arabnews.com/?page=4§ion=0&article=53683&d=30&m=10&y=2004>

⁶⁴⁴ The *Qur’an* 8:12

Where IHL distinguishes between combatant and non-combatant, prisoners of war and those *hors de combat*,⁶⁴⁵ fundamentalist Islamic LOAC distinguishes primarily between those subordinating themselves to God's will and those who intend to usurp the sovereignty of God; those who follow in the path of God and those who do not. Put crudely, good is distinguished from evil. This good-evil polemic is exemplified in the *hadd* offence of apostasy which creates in Islam another category of combatant or class of people that have lost their civilian status.⁶⁴⁶

The institution of the *hadd* offence serves to deter Muslims from crimes harmful to humanity.⁶⁴⁷ There are fixed punishments attached to each offence ranging from flogging and amputation escalating to death by crucifixion or stoning.⁶⁴⁸ Although purification from sin is an important element in the *hadd* cycle, the 'universal application of *hadd* offences in its application makes expiation a secondary consideration.'⁶⁴⁹ *Hadd* crimes, while few, are 'notoriously harsh' and for the most part 'irreconcilable with contemporary human rights norms.'⁶⁵⁰ Apostasy, or *ridda*, is considered a *hadd* offence by most schools of Islam.⁶⁵¹

There were competing trends within Classical Islam concerning the penalty for failing to adopt Islam. The first believed this offence warranted execution. The second trend was more lenient, seeing apostasy as a grave crime but not sufficient to warrant death.⁶⁵² Scholars disagreed over whether apostates could be killed simply for their disbelief or only if they posed a danger to

⁶⁴⁵ See GC III protection for prisoners of war. IHL also protects other persons deprived of liberty as a result of armed conflict. See also Rule 47 CIHL 'Attacking persons who are recognized as hors de combat is prohibited.' In IAC see Article 41(1) and 85(3)(e); in NIAC see CA3; Article 4 AP II; ICC Statute, Article 8(2)(b)(vi). Rule 87 CIHL It is unclear the value added by the word 'especially'.

⁶⁴⁶ While it is tempting to equate the IHL principle of direct participation in hostilities (DPH) such comparison would be lazy. Better aligned with the doctrine of DPH, Islamic jurists provide that if women and children are involved in fighting during the war, by direct participation, physically or in an advisory role their protective status is forfeited. Mahmassani (n368) 221 in Badar (n25) 607- 608.

⁶⁴⁷ Scholars generally agree between four and seven such crimes: adultery; false accusation of adultery; wine drinking; theft; brigandage; and apostasy.

⁶⁴⁸ The fixed nature of the punishments is designed to act as a deterrence to would be offenders. MS El-Awa, *Punishment in Islamic Law (Am Trust, 1982)* cited in Reza (n 25) 23

⁶⁴⁹ *Peters Crime* (n254) 53

⁶⁵⁰ The declaration of a person as an apostate has serious repercussions, and the vast majority of Muslims are conservative in their approach to such a pronouncement, congruent with 'Qur'anic cautionary notes and stories about the Prophet.' It appears from various reports that provided a leader has a 'mustard seed of faith' and implements prayer, he should be considered Muslim. If a Muslim calls another *kafir* [unbeliever], then if he is a *kafir* let it be so; otherwise, he [the caller] is himself a *kafir*. (saying of the Prophet from Abu Dawud, Book of Sunna, edition published by Quran Mahal, Karachi, vol. iii, 484) (saying of the Prophet from Bukhari, Book of Ethics; Book 78, ch. 44) Wiktorowicz 'Genealogy' (n415) 77; Reza (n 25) 22.

⁶⁵¹ *Peters Crime* (n254) 53.

⁶⁵² After 4AH/10CE the lenient strand became dominant eclipsed the harsher position. El-Fadl 'Rules' (n473) 152

Muslims.⁶⁵³ One interpretation of apostasy finds the non-believer guilty of treason in Islamic law following the logic that every human is a slave to God and when that slave acts in a defiance of God's authority he becomes guilty of an offence and should be treated as a 'cancerous growth on the organism of humanity.'⁶⁵⁴ Insurrection against apostate regimes was used as a religio-politico justification for armed revolt against infidel rulers and the imperative of Muslims.⁶⁵⁵ There remains minority juristic opinion that subscribes to the 'moral guilt incurred when one fails to adopt Islam justif[ying] their execution.'⁶⁵⁶

Contextualizing *ridda* in the 7th century positions the offence in an era where war was recognized 'as a lawful means of conquering territories' and subduing a population by Caliphs, Monarchs, Khans and like rulers. Apostasy features throughout Islamic narratives providing contemporary fundamentalists with a reservoir of examples from which to base their extremist rhetoric. Counterarguments cite *Qur'anic* verses that show Islam clearly advocating that there is no compulsion in religion,⁶⁵⁷ which in turn means 'waging *jihad* against non-Muslims on account of their denial of Muhammad's mission is at variance with *Qur'anic* teachings.'⁶⁵⁸

'[E]mphasis on non-violence is not the pattern in the Muslim culture. To the contrary, violence has been a central, accepted element, both in Muslim teaching and in the historical conduct of the religion. The religious bias in the Middle Eastern Culture has not been to discourage the use of force, but to encourage it,'⁶⁵⁹ with Islam as 'a religion of the sword...glorify[ing] military values.'⁶⁶⁰

For militant Islamists, the problem is defined by religion, the conflict flows from religion, and the solution is derived from religion. In their view, the root of the problem is essentially

⁶⁵³ By the 10th century, according to Abou El Fadl, the predominant view was that only those who fought could be killed.

⁶⁵⁴ Malik The *Qur'anic* Concept of War (n304), Preface; The apostate delineation between Muslim and non-Muslim within Islamic law is comparable to the crusade doctrine within *ius ad bellum* legitimizing war against Islam as a 'just war', 'a manifestation of God's disapproving judgment' against the infidels. Cockayne, (n12), 600.

⁶⁵⁵ Al-Mawardi, a leading Shafi'i jurist teaching in Basra and Baghdad in the 11th century, divided armed conflict in the Islamic nation into two general categories: wars of public interest and wars against polytheists and apostates. Ramadan (n13) 68, 157; Durrani (n15) 324.

⁶⁵⁶ See El-Fadl 'Rules' (n473) 144, 152.

⁶⁵⁷ The *Qur'an* 2:256.

⁶⁵⁸ Syed (n10) 158.

⁶⁵⁹ James Payne, *Why Nations Arm* (Blackwell 1989) 121.

⁶⁶⁰ Huntington (n485) 263.

mankind's alienation from God, the need to be reconciled with God, and Islam's role in bringing mankind back to God's good graces.⁶⁶¹

Apostasy has from its inception aligned with grand narratives of Islam. The *Qur'an*, Sunna and *hadiths* provide many examples of good triumphing over evil. These binary oppositions play an important role in guiding extremism, whereby extremists source these narratives, ignoring 'inconvenient details', to rationalize their conduct and rally support for their cause (see table 2). Binary themes of Nobel sacrifice and betrayal, deliverance and revenge with characters including the tyrant, martyr, saviour and traitor are recurrent features in extremist propaganda.⁶⁶² These narratives provide greater understanding into conflict conduct that was permissible in the time of Muhammad and permits comparison with the conflict conduct of contemporary extremist groups who claim to be aligned with these practices.

5.2.2 Distinction and Jahiliyya

Islamist ideologue and most prominent theoretician of militant Islamist ideology Sayyid Qutb premised his discourse on the ills of the world being a symptom of a reversion to *jahiliyya*. Man, through his self-deifying systems like communism, socialism and nationalism had attempted to usurp the sovereignty of God on earth.⁶⁶³ Qutb claimed that once the *sahaba* died out, the purity of Islam lost its way and that the whole world was steeped in the symptoms of the *jahiliyya* disease.⁶⁶⁴ Qutb resurrected the heretical doctrine of *takfir* or excommunication, articulated by ibn Taymiyya, claiming that the Egyptian regime, Nasser and his supporters were in fact apostates. Islamic extremists following the doctrine of *takfir* would see as part of their role the determination of who is and is not Muslim. Taymiyya claimed that anyone who did not rule according to *Shari'a* should be fought as they are apostates. Ruling with mixed laws is also tantamount to usurping Gods sovereignty, the Mongols who used customary Mongol law (*Yasa*) instead of *Shari'a* were subjected to military *jihad* against them. Qutb favoured the idea of all-out war against the forces of *jahiliyya*.⁶⁶⁵ By manipulating interpretations of verses

⁶⁶¹ Mowatt-Larssen (n18).

⁶⁶² The late nineteenth century saw the rise of the discipline of geopolitic-knowledge claims about the impact of geography on the conduct of foreign policy. A geopolitical vision is 'any idea concerning the relation between one's own and other places, involving feelings of (in)security or (dis)advantage (and/or) invoking ideas about a collective mission or foreign policy [which] requires at least a Them-and-Us distinction.' Gertjan Dijkink, *National Identity & Geopolitical Vision: Maps Of Pride & Pain* (Routledge 1996); Halverson (n260) 184, 189, 201.

⁶⁶³ Qutb's treatise *Milestones (Ma'alim fi'l-Tariq)*, written during his imprisonment under the regime of Gamal 'Abdel-Nasser (d.1970) is the most famous and influential of his radical works.

⁶⁶⁴ S Qutb, *Milestones*, trans Anonymous (New Delhi: Islamic Book Service, 2002), 10-11,82.

⁶⁶⁵ Halverson (n260)43.

of the *Qur'an*, Qutb was able to sanction action to dismiss rulers who failed to comply with the divine law.⁶⁶⁶ Echoing the 'Marxist treatises of Lenin and Trotsky' Qutb's posited an idea of a revolutionary vanguard to lead the struggle for a new social order.⁶⁶⁷

The Pharaoh: The Qur'anic Personification of the Fallen Man.

*'The Pharaoh of the time sends arrows everywhere
These arrows will finally strike Washington's chest'*⁶⁶⁸

The Torah claims Moses was reared as an Egyptian prince. As Moses grew up he 'encountered the god of his ancestors, Yahweh, in the desert [as told through the story of the burning bush].'⁶⁶⁹ Moses used the threat of divine retribution to champion the emancipation of the Hebrew people. When the Pharaoh refused Moses' request, Yahweh punished him by drowning. Although there is no archeological evidence of either the existence of Moses or the enslavement of Hebrews, nor does the Torah identify the Pharaoh in the story by name, the Pharaoh-Moses narrative was resuscitated in the seventh century in the *Qur'an*.⁶⁷⁰

Akin to the Torah, the identity of Moses' Pharaoh is unnamed in the *Qur'an* although it is believed to be Ramses II (d. ca. 1213 BCE). The Pharaoh is the most prominent archetype in the *Qur'an*, with references scattered throughout the non-linear *Qur'anic* structure. Portrayed as an arrogant, authoritarian obsessed with material gain, this obstinate tyrant that rejects the Word of God revealed by His Prophet is punished and his body is preserved as a divine warning for future nations to submit to Gods Will. The narrative of the Pharaoh is used by Islamic extremists as a mirror of their own struggles against anti-Islamic rulers.⁶⁷¹

The Pharaoh in extremist discourse is evidenced throughout the Islamic world. In Egypt it was used by the assassin of Anwar Sadat in 1981. After shooting Sadat thirty-seven times the assassin, Lieutenant Khalid al-Islambouli, a member of an Islamic extremist group *Tanzim al-*

⁶⁶⁶ Shahrough Akhavi, 'Sayyid Qutb' The Oxford Encyclopedia of the Modern Islamic World, Vol 3, ed J L Esposito (OUP 1995) 402

⁶⁶⁷ Halverson (n260) 45.

⁶⁶⁸ Example of Pashtun Poetry in Alex Strick Van Linschoten & Felix Kuehn, *Poetry of the Taliban*, (Hurst and Company 2012) 44

⁶⁶⁹ Halverson (n260) 28.

⁶⁷⁰ The Arabic word for Pharaoh in the *Qur'an* is *fir'aun* which gave rise to the verb *tafar'ana* meaning 'to behave like a tyrant.' Joseph Campbell, *The Power of Myth* (Anchor 1991).

⁶⁷¹ Halverson (n260).

Jihad exclaimed ‘I have killed the Pharaoh!’⁶⁷² Former Israeli President Ariel Sharon was also compared to the Pharaoh in 2006. Having enraged the Muslim community with his right-wing actions regarding Palestine, amplified after he toured *al-Asqa* Mosque and asserted Israeli sovereignty over the Nobel Sanctuary to the Muslims and Temple Mount to the Jews. When Sharon fell into a coma after a stroke, Islamic (and Jewish) extremists attributed his fate to divine retribution. Propaganda began appearing on the internet, cartoons of Sharon in a vegetative state with a photo on his side table of Ramses II.⁶⁷³ The US Presidents are favorites of the Pharaoh narrative in Islamic extremism. Bin Laden referred to President George W Bush as the ‘Pharaoh of the century’⁶⁷⁴ while the Taliban published an article in its online Arabic language magazine *Al-Sumud* in 2009 which equated President Bush to the Pharaoh and the *mujahidin* to Moses and his people.⁶⁷⁵ The designation of Pharaoh extends to Western leaders as a whole, and there is a recurring theme that the West are Pharaoh and Islamic extremists take the role of Moses charged with delivering divine retribution.⁶⁷⁶ Through this narrative, extremists position themselves as having a prophetic role as Allah’s agent on earth and create a framework for violent revolutionary action.

5.3 Battles

The conflict typology of the Prophet’s campaign consisted of Muslims fighting non-Muslims, yet the battles could not properly be classified as tribal or religious. These battles were not tribal since members of the same tribe, even the same family could be found on opposing lines; nor were they religious in the sense that the fighting against non-Muslims was not based on religious identity. Rather, this early fighting was simply for the protection of life, property, honour and the right to believe and practice their faith.⁶⁷⁷ Using case studies of Muhammad’s military campaign and understanding the historical conflict narrative contextualizes the conflict conduct that contemporary Salafi-styled Islamic groups subscribe. These battles have remained a normative reference point for contemporary *mujahid* and Islamic extremists alike.

⁶⁷² The designation of Pharaoh extends to all rulers not just those of Muslim countries, and any political ruler deemed to be hostile to Islam is a worthy Pharaoh to be opposed. Gilles Kepel, *Muslim Extremism in Egypt: The Prophet and Pharaoh*, (University of California Press 1993); Halverson (n260) 33.

⁶⁷³ Halverson (n260) 35.

⁶⁷⁴ In an audio statement released November 2002 Bin Laden quoted in Henry Shuster, ‘Al-Qaeda-Linked Web Site Posts Bin Laden Tape Text,’ CNN (NY, 14 Nov 2002)

⁶⁷⁵ Opensource cited in Halverson (n260) 35.

⁶⁷⁶ See also Shaykh Faisal ‘Rejecting the *Taghut* (False Idols), ‘The Propoganda War: War of Words’ (2009) *Islamist Magazine* <<https://www.scribd.com/document/10101469/Islamist-Magazine-Final-Muharram-1430-January-2009>> accessed 08/05/2014

⁶⁷⁷ The Royal Aal al-Bayt Institute for Islamic Thought (n333) 9.

5.3.1 The Battle of Badr (624 CE)

Triumph against all odds, the tales of epic battles where the righteous conquer evil are recurrent legends of the ancient world. The Battle of Badr is arguably the most famous of these battles in Islamic history. Comparable to an Islamic David and Goliath parable,⁶⁷⁸ the conflict saw a small and ill-equipped army of three hundred Muslim believers triumph over a superior pagan army of one thousand animist warriors. Aided by the support of Allah and His angels, Muhammad's small army of believers defeated the *jahili*.

The battle stemmed from a *ghazi* raid gone awry. When the *muhajirun*, the Muslim migrants, left Mecca they arrived in Yathrib without any assets. There was one viable traditional avenue for revenue open to these migrants, *ghazi* raiding. *Ghazi* raids fell within the traditional cultural norms of Arabia, and the Muslim community launched raids against pagan caravans for booty. The idea was to avoid physical confrontation and focus on the goods to be confiscated. *Ghazi* raids were not only expected, they were morally justified through revelation.⁶⁷⁹

In 624 CE Muhammad planned such a raid against a gold carrying Quraysh caravan. On sighting the caravan, Muhammad, the Muslims and some of Medinese 'Aws and Khazraj tribe began to strategically manoeuvre. The Meccan caravan became aware of Muhammad's plan and was rerouted to safety. When the Meccan forces subsequently positioned themselves in attacking distance of Medina, the Muslims mounted their defence. This consisted of crystallizing the loyalty of the tribes that were present through a pledge of obedience; cutting off the water supply that would have sustained the advancing Meccans.⁶⁸⁰ The Prophet is said to have distinguished himself during through the Battle of Badr 624 CE and it was recorded that the Muslim warriors wore for the first time a special sign made from wool. When the battle began to escalate, and the Muslim fighters assumed their position, Muhammad prayed for Divine assistance. The response was Allah sending a thousand angels to reinforce Muhammad's men.⁶⁸¹ While the majority of the Meccan's retreated at the sight of the angels joining the struggle against them, some Meccan's remained. 'Amir ibn Hisham pejoratively known as Abu Jahl ('father of ignorance') was one of the military leaders who stayed.⁶⁸² Two young Islamic

⁶⁷⁸ See 1 Samuel 17:1-54.

⁶⁷⁹ The *Qur'an* 22:39- 40

⁶⁸⁰ S ur-Rahman al-Mubarakpuri, Ar-Raheeq al-Makhtun (The Sealed Nectar): Biography of the Nobel Prophet (Riyadh, SA: Maktaba Dar-us-Salam, 1995), 210 in Halverson (n260) 51.

⁶⁸¹ The *Qur'an* 8:9 'I will reinforce you with a thousand angels following in ranks.'

⁶⁸² Abu Jahl has been immortalized in the Islamic community for insulting Muhammad at the Ka'aba in the early days of Islam.

converts managed to disarm ‘Amir, and as he lay on the ground taking his last breath he was beheaded by a *sahaba* (‘Abdullah ibn Masud) announcing ‘This is the Pharaoh of this nation.’ Of the seventy Meccan captives, two were executed.⁶⁸³ The Battle of Badr narrative, the deliverance, has resonated with current conflicts, most notably, the Soviet-Afghan War giving extremists a popular David and Goliath platform. Citing the Battle of Badr, Ayman al-Zawahiri (Al-Qaeda) argued that it was forbidden for Muslims to show any kindness towards unbelievers even if they were in their own families.⁶⁸⁴

5.3.2 Battle of the Trench/ Battle of Confederates 627 CE

In conjunction with the elect and damned polemic that manifests in Islam through the Badr and Jahiliyya narratives is the triangular construct of treachery and betrayal with its consequent vengeance. In Christianity, this construct is best expressed in the archetypal form of Judas of Iscariot who betrayed Jesus to the Romans. This betrayal laid the platform for centuries of anti-Semitism, which by the fourth century CE became entrenched in the writings and teachings of the Church.⁶⁸⁵ While in Christianity the betrayal is by an individual, in Islam the betrayal is collective and the entire group is condemned.⁶⁸⁶

The Battle of the Trench also known as the Battle of the Confederates was a 27-day-long siege of Medina by Arab and Jewish tribes. Through the Charter of Medina, Muhammad formed alliances with the different tribes including the Bani Qaynuqa, Bani Nadir and Bani Qurayza. Through its affirmation of the mutual rights and protections between Muslims Jews and Arab tribes (‘Aws and Khazraj) the Charter and these alliances were invariably tested through various offensives between the Meccans and the Muslims. The first test came through the Bani Qaynuqa. One of their tribe killed a Muslim after an altercation. The Jewish tribe had expected the Muslims to revert to ‘the old Arab tribal system of honour, revenge, and blood feuds.’⁶⁸⁷

⁶⁸³ ur-Rahman (n680) 229 in Halverson (n260) 52.

⁶⁸⁴ ‘The verse containing God almighty’s words ‘even though they were their fathers’ was revealed after Abu Ubaidah killed his own father during the Battle of Badr...But God knows best’ Abdul al-Zawahiri, ‘Allegiance and Disavowal’ (December 2002) in Halverson (n260) 54.

⁶⁸⁵ See for example the Gospel of Matthew 27:25 where there was a declaration made by a Jewish mob to Pilate: ‘His [Jesus’] blood be upon us and upon our children!’ From St Augustine (d. 430CE) who decreed all Jews were responsible for the killing of Christ; St Jerome (d. 420) who saw all Jews as ‘Judases’; St Chrysostom (d. 407 CE) regarded all Jews as fit for slaughter. Robert Michael, *History of Catholic Antisemitism: The Dark Side of the Church* (Palgrave Macmillan 2008) 14-15.

⁶⁸⁶ Other examples of the ‘us’ and ‘them’ in radical narratives include those posited by Sayyid Qutb who posited that if you are not Muslim you are a Jew, framing justification for conflict conduct in the Islam v Zionist-Crusader paradigm. Wiktorowicz ‘Genealogy’ (n415) 92.

⁶⁸⁷ Halverson (n260) 70.

Pre-empting such action and ignoring the role arbitration was meant to play under the Charter of Medina, the Bani Qaynuqa ‘withdrew to their fortified settlements...and summoned their old tribal allies to defend them.’⁶⁸⁸ When they eventually surrendered Muhammad banished them to Syria for breaching the Pact.

This disregard of the Charter was closely followed by another betrayal, this time from the Bani Nadir. Tensions already existed following the Battle of Badr and were exacerbated following a subsequent act of treason. When Muhammad discovered a member of the Bani Nadir had attempted to poison him he banished the entire tribe. When they refused to leave a small battle ensued and after the Bani Nadir surrendered the majority settled in the northern town of Khaybar.

While in exile, the Jews of Bani Nadir aligned with the Quraysh and other enemies of the Prophet. On discovering a ten thousand strong army descending on Medina, the Muslims built a trench around the city to fend off Meccan cavalry. One of the Bani Nadir was adamant he could convince the remaining Jews from the Bani Qurayza tribe still inside the fortification of Medina to join the confederates. Although not unanimous the Bani Qurayza that supported betraying the Muslims outweighed the loyalists and they joined the confederates. The narrative sees bad weather orchestrated by the Divine making combat conditions unbearable for those outside the trench and they retreated, leaving the Bani Qurayza alone inside the trench. Revelation sanctioned the Muslims to besiege the Bani Qurayza fortress which, after twenty-five days, left the Jewish tribe defeated and subject to a fate prescribed by the ‘Aws tribe. This included death to men who could potentially fight and enslaving the women and children.⁶⁸⁹ A new trench was dug in the marketplace and for hours between six and seven hundred Bani Qurayza were beheaded and cast into the makeshift grave.⁶⁹⁰

5.3.3 The Battle of Khaybar (629)

One year after the Battle of the Trench, Muhammad signed a peace accord with the Quraysh, the Treaty of Hudaibiyyah 628 CE. A strategic arrangement, by securing peace to the south,

⁶⁸⁸ Daniel Peterson, *Muhammad: Prophet of God* (William B Eerdmans 2007) 109.

⁶⁸⁹ Sahih Muslim, Book 19, No 4370.

⁶⁹⁰ Martin Lings, *Muhammad: His Life Based on the Earliest Sources* (Islamic Texts Society 1997) 232

Muhammad could focus on the Jewish threat of Khaybar and their agenda of ‘exterminating the Islamic State.’⁶⁹¹

‘The Prophet set out for Khaybar and reached it at night...when day dawned, the Jews came out with their bags and spades. When they saw the Prophet the said: ‘Muhammad and his army!’ The Prophet said ‘Allahu Akbar! (Allah is greater) and Khaybar is ruined, for whenever we approach a nation (i.e. enemy to fight) then it will be a miserable morning for those who have been warned.’⁶⁹²

Muhammad had discovered a water supply servicing the Bani Qurayza and to gain advantage, turned it off, forcing the Jews into combat. Once again Muhammad and the Muslims were victorious.⁶⁹³

Al-Qaeda, Lebanon’s Hezbollah, the Baathists have used the Battle of Khaybar and protection of the Islamic state to rationalize anti-Semitism and the destruction of the Jewish State. The narrative proves convenient whenever there is an ‘archetypal traitor’ and provides ‘fodder for violent actions [and] a degree of persuasive power that discourages those who may otherwise be inclined towards peace...’⁶⁹⁴

Table 2 The Use of Narratives by Armed non-State Actors in Islamic Extremism

	Muslim Brotherhood	Afghan Taliban (1994-2001)	Al-Qaeda
Pharaoh	✓	✓	✓
Jahiliyya	✓	✓	✓
Badr		✓	✓
Trench		✓	

⁶⁹¹ ur-Rahman (n680) 349 in Halverson (n260) 74.

⁶⁹² Narrated Anas, Sahih al-Bukhari Vol 4, Book 52, No 195; <http://cmje.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/bukhari/052.sbt.html#004.052.195>

⁶⁹³ To balance this perspective, some claim that Muhammad went after the Jewish tribe to gain their wealth and land. Michael Cook & Patricia Crone, *Hagarism: The Making of the Islamic World* (Cambridge University Press 1976)

⁶⁹⁴ Halverson (n260) 78 – 80.

5.4 Prisoners Of War (POW)

‘So when you meet those who disbelieve [in battle], strike [their] necks until, when you have inflicted slaughter upon them, then secure their bonds, and either [confer] favour afterwards or ransom [them] until the war lays down its burdens. That [is the command]. And if Allah had willed, He could have taken vengeance upon them [Himself], but [He ordered armed struggle] to test some of you by means of others. And those who are killed in the cause of Allah - never will He waste their deeds.’⁶⁹⁵

Islamic tradition outlines clear standards of responsibility and accountability. The following hadith encourages fighters to refuse to commit war crimes on the battlefield: Aligned with the laws around *baghy*, ‘[i]t is obligatory for one to listen to and obey a Muslim ruler’s orders, unless these orders involve disobedience to God; but if an act of disobedience to God is commanded, it is not listened to or obeyed.’ In one example, the Prophet’s companion, Abdullah bin Umar, refused to comply with an alleged order from his commander Khalid bin Walid, one of Islam’s greatest generals, to kill all prisoners since bin Umar saw it as unjust. His decision was later vindicated by the Prophet.⁶⁹⁶

There is no *Qur’anic* prescription that says POWs must be held captive, although this was the practice of the time. Further, nothing in the *Qur’an* would prevent Muslim compliance with GC III.⁶⁹⁷ The *Qur’an* only mentions their treatment in two cases.⁶⁹⁸ Early Muslim scholars held it was an allowable option for the *Imam* to kill able bodied POWs, the other options were to enslave, ransom or release. Shaybānī believed logistical requirements dictated treatment of prisoners after battle. These views are *ra’y* (personal opinion) with no legal base in the *Qur’an* or Sunna.⁶⁹⁹

There is distinction in the treatment of Muslim and non-Muslim POWs. Muslim prisoners may not be executed or enslaved, post-conflict, Muslim prisoners must be released. The property of Muslims must not be taken as spoils of war and any property taken must be returned after

⁶⁹⁵ The *Qur’an* 47:4

⁶⁹⁶ Bennoune (n607).

⁶⁹⁷ Abdel-Haleem (n4) 72, 118.

⁶⁹⁸ The *Qur’an* 8:70 ‘O Prophet, say to whoever is in your hands of the captives, ‘If Allah knows [any] good in your hearts, He will give you [something] better than what was taken from you, and He will forgive you; and Allah is Forgiving and Merciful.’ 47:4 .

⁶⁹⁹ Abdel-Haleem (n4) 74, 118 -119.

fighting has ceased.⁷⁰⁰ Antiquarian logic rationalized the execution of male prisoners on their potential threat to the Muslim community if allowed to live. However executing prisoners was the exception in the battles fought by the Prophet with a total of 3-5 prisoners of war being executed.⁷⁰¹ Regardless, the fact that the Prophet did execute POWs in the course of a war is used as a legal base by proponents of execution.⁷⁰² After war, the release of prisoners is mandatory as stipulated in the *Qur'an* 47:4.⁷⁰³ Abu Bakr sent forces to suppress the secessionist tribes and restore the writ of Islamic government. According to al-Sari, he gave the following instructions to commander al-Muhajir before sending him as a reinforcement to the expedition of Kindah: '[i]f this letter of mine reaches you before you have achieved victory, then, if you conquer the enemy, kill the fighting men and take the offspring captive if you took them by force.'⁷⁰⁴

There is a difference of opinion among Muslim jurists regarding treatment of prisoners of war which they considered under the heading of 'spoils of war'. This distinction is based on two sets of *Qur'anic* verses, each enjoying a different course of action in the treatment of POWs. The first verse declares that there are only two options available for prisoners who do not embrace Islam or enter into a pledge of safeguard or pact of *dhimmah*. Otherwise, they are to be killed or enslaved. There are examples of the Prophet releasing prisoners freely; releasing prisoners for money or prisoner exchange and one unique example of the Prophet releasing prisoners after they taught Muslim children to read and write.⁷⁰⁵ These divergent practices led

⁷⁰⁰ Under Islamic rules in war, if the enemy embraces Islam before or after the capture, he cannot be treated as a prisoner of war. Equally, the convert enjoys immunity for his life, property and children. If a child is captured alone, they are considered Muslim and cannot be returned by ransom or otherwise. Mahmassani (n368) 306.; El-Fadl 'Rules' (n473) 144

⁷⁰¹ Regarding POWs in the Battle of Khaybar discussed above, the fate of the treacherous Jewish tribe ended in mass beheadings, 'they surrendered at the command of [Muhammad] but he referred the decision about them to 'Sa'd who said: 'I decide about them that those of them who can fight be killed, their women and children taken prisoners and their properties distributed (among Muslims). Sahih Muslim Book 19 No 4370 <http://cmje.usc.edu/religious-texts/hadith/muslim/019-smt.php>

⁷⁰² The executions occurred after the Battle of Badr. The remaining prisoners were given the option of paying ransom, converting to Islam, or teaching ten Muslims to read and write. Of seventy prisoners captured in the Battle of Badr, only one was executed for crimes against the Prophet and his umma. The second execution occurred after the Battle of Uhūd. A POW released after Badr on the condition he would not fight the Muslims again nor publish blasphemous poetry against Muslims broke his undertaking. When he was recaptured he was executed. The third executed POW had killed an innocent Muslim, reverted to his pre-Islamic faith, and joined the enemy, committing high treason. Munir 'Layha' (n72) 90.

⁷⁰³ 'Until the war lays down its burdens [The *Qur'an* 47:4] is interpreted as was meaning combatants, burdens meaning weapons. So when disbelievers lay down weapons or enter into treaty. In Hamza, Tafsir al-Jalalayn in Nagamine (n71) 227.

⁷⁰⁴ A.J. Ibn Jarir Tabari, *History of Al-Tabari (Tarikh al-Rusul wa'l muluk)* (trans. M. Ibrahim, 2003) 185 cited in Shah, 'Force' (n71) 351

⁷⁰⁵ Bennoune (n607) 634

jurists to develop three distinct approaches to POWs: releasing or exchanging as provided by *Qur'an* 47:4 abrogating the practice of enslaving or executing;⁷⁰⁶ giving the head of state wide discretionary powers to decide whether to execute, exchange, enslave or free POWs,⁷⁰⁷ or a complete prohibition on the execution of prisoners irrespective of reciprocity or *lex talionis* arguments.⁷⁰⁸ This rule was followed by 'Caliph Mu'awiyah Ibn Abi Sufyan (d. 60/680) when he refused to execute the Roman prisoners he held after the Roman emperor had broken the peace treaty with the Muslims by executing the Muslim hostages he held.'⁷⁰⁹ Most jurists prefer to base their rules on a later *Qur'anic* verse that provides for redemption or release of POWs. According to this interpretation of *siyar*, POW or hostages are never to be killed or enslaved.

While the prisoner is at the mercy of the Muslim captor, the *Qur'an*, Sunna and hadiths provide guidance on permissible treatment. 'And they feed, for the love of God, the indigent, the orphan and the captive'⁷¹⁰ Caliph Abu Bakr said: 'Treat the prisoners and he who renders himself to your mercy with pity, as Allah shall do to you in your need; but trample down the proud and those who rebel.'⁷¹¹ 'Prisoners are your brothers and companions... They are at your mercy, so treat them well as if you were treating yourself, with food, clothes and housing.'⁷¹² Muhammad Hamidullah in a detailed examination has listed nineteen practices expressly prohibited by Islamic law, including a ban on the abuse and maltreatment of prisoners and hostages.⁷¹³ Using prisoners as human shields, while accepted practice in the 7th century *jahiliyya* seems to have been prohibited in Islam.⁷¹⁴ Classical Islamic rules on prisoners distinguish treatment on sex

⁷⁰⁶ Ray Murphy and Muhammad El-Zeidy, 'Prisoners of War: A Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War' (2009) 9 *International Criminal Law Review* 629, 623-649; Al-Dawoodi (n440) 137.

⁷⁰⁷ Lena Salaymeh, 'Early Islamic Legal Historical Precedents: Prisoners of War' (2008) 26 *Law and History Review*, 530; Murphy & El-Zeidy (n706) 641-647

⁷⁰⁸ The four *madhahib* provide some guidance on the options a Muslim commander has at his disposal when an enemy combatant is captured. Common to each school are the following choices: captives, except for monks, may be enslaved and treated as spoils of war; redemption by exchange for Muslim prisoners; redemption by payment of ransom (real or personal); benevolent release of POWs. Muhammad Munir, 'Debates on the Rights of Prisoners of War in Islamic Law', (2010) 49(4) *Islamic Studies* 463-492. The Shafi'i jurist Abu Ishaq al-Shirazi says: 'If a prisoner among the rebels accepts the authority of the government, he shall be released. If he does not accept the authority of the government, he shall be imprisoned till the end of the hostilities after which he shall be released on the condition that he shall not participate in war.' Shirazi, Vol. 3, 404

⁷⁰⁹ Khaled Abou El Fadl, 'Islam and the Theology of Power' (2001) 221 *Middle East Report* 30

⁷¹⁰ The *Qur'an* 76:5

⁷¹¹ Rahman Doi, *Non-Muslims under Shari'ah* (Kazi Publications 1983) 95

⁷¹² Hadith quoted in M Ereksoussi, 'Le Coran et les Conventions Humanitaires', 503 *Rev Int Croix Rouge* (Nov 1960), 650 cited in Cherif-Bassiouni *Jihad* (n19) 143

⁷¹³ Hamidullah, (n584) 205-208

⁷¹⁴ Hamidullah states that '[i]t appears that in classical times of Islam, it was prevalent practice among non-Muslims to take shelter behind enemy prisoners. I have not found a single instance where Muslims were accused of this cowardly act when they forced their prisoners to fight against their own nation.' Hamidullah (n584) 419.

of the captive. Captured women and children are enslaved or exchanged for Muslim prisoners.⁷¹⁵ Captives be treated humanely, that the wounded and sick be medically cared for, and that the dead be buried with dignity.⁷¹⁶

Following Muhammad's own practice, a *jihadi* may execute, enslave, ransom, or release enemy captives. Although captured women and children were not supposed to be killed, they could be enslaved, and Muslim men could have sexual relations with female slaves acquired through *jihad* (any marriage was deemed annulled by their capture). Islamic law prescribes as permissible sexual intercourse between husband and wife or slave and master.⁷¹⁷ Outside of these relationships, irrespective of consent of the women, the man will be considered to have committed a tort and subjected to pay damages: a bride price if the woman is not married; damages to the owner of the slave. Depending on the *qadi*, the man may attract additional discretionary penalties, and in certain exceptional circumstances, where the parties hold particular legal status, persons who have had illegal sex can be punished with 100 lashes or death by stoning.⁷¹⁸ Imam Malik states 'if a Muslim is held as a prisoner of war...it is obligatory on others to secure his release, even if it requires all the Muslims' wealth.'⁷¹⁹ It is important not to expound as evidence of Islamic law what is more attributable to the acts of certain individuals (excluding the Prophet).

5.5 Distinction: Property

*'Do not destroy palm trees; do not burn dwellings or wheat fields; never cut down fruit trees; only kill cattle when you need it for food. When you agree upon a treaty take care to respect its clauses. As your advance progresses, you will meet religious men who live in monasteries and who serve God in prayer: leave them alone, do not kill them or destroy their monasteries.'*⁷²⁰

See also, Ahmed Yamani, 'Humanitarian International Law: A General Outlook', (1985) 7 *Michigan Yearbook of International Legal Studies* 189-215.

⁷¹⁵ Farhad Malekian, *The Concept of Islamic International Criminal Law: A Comparative Study* (Graham & Trotman/Martinus Nijhof 1994) 156-159.

⁷¹⁶ alZuhili (n596) 283; See M Cherif Bassiouni, 'Evolving Approaches to *Jihad*: From Defense to Revolutionary and Regime Change Political Violence,' Cherif-Bassiouni *Jihad* (n19) 139-41; Bennoune 'As-Salamu Alaykum?' (n607) 605.

⁷¹⁷ Peters *Crime* (n254) 59

⁷¹⁸ *ibid* (n254) 59-60

⁷¹⁹ Tafseer al-Qurtubi cited in Begg, '*Jihad*' (n8)

⁷²⁰ Malik *The Qur'anic Concept of War* (n304), Preface; Kamali, (n506), 45. '*Do not destroy the villages and towns, do not spoil the cultivated fields and gardens, and do not slaughter the cattle.*' Sahih Bukhari cited in Khadduri *War* (n434) 102-107

As with conventional international law, Islamic law elevates certain property with special protection. Islamic law notes a ban on the destruction of civilian objects and property,⁷²¹ with specific prohibitions on attacking religious sites.⁷²² The *Qur'an* adopts a strong position on the protection of the environment with six verses articulating specific protections.⁷²³

The prohibition on the destruction of enemy property is unsettled, some juristic opinion permitting such destruction using the legal base of the Prophets conduct during the *Battle of Uhud* in 4 AH. During this battle, the Prophet ordered the palm trees of the Banu Al-Nadir tribe be cut down to induce surrender during a bloodless siege that ultimately ended without fighting.⁷²⁴ It follows that the destruction of property loses its prohibitive status if it is can be justified on the grounds of military necessity, *maslaha* or is the only way to win the war.⁷²⁵ Other jurists counter this reasoning claiming the practice was abrogated by the Prophet as evidenced in Abu-Bakr's Commandments.⁷²⁶

5.5.1 Religious Property

The first and second Caliphs, Abu Bakr and Umar al Khattab made positive statements about protecting religious and cultural property in and after conflict.⁷²⁷ In his address to warriors, Caliph Abu-Bakr ordered the Muslims:

‘In your march through the enemy territory, do not cut down the palm, or other fruit trees, destroy not the products of the earth, ravage no fields, burn no houses [...] Let no destruction be made without necessity.’⁷²⁸

⁷²¹ Muhammad Munir, ‘Suicide Attacks and Islamic Law’, (2008) 90(869) *Int'l Rev. Red Cross* 82-88

⁷²² Bedjaoui, 289; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 vols, Vol I: Rules (ICRC and Cambridge University Press 2005) 763

⁷²³ The *Qur'an* 2:20; 2:30; 3:10; 7:56; 30:26; 30:41

⁷²⁴ Similarly, Deuteronomy ‘When you besiege a city for a long time, making war against it in order to capture it, do not destroy its trees by wielding an axe against them, because you can eat their fruit. Do not cut them down. Are the trees in the field men, that you should besiege them? However, you may cut down trees that you know are not fruit trees and use them to build siege works until the city at war with you falls. The laws of warfare captured in the passage of Deuteronomy reflect early Islamic thought indicating a common culture of conflict regulation ‘in the ancient Middle East shared between Jews Christians and Muslims.’ Abdel-Haleem (n4) 119-120.

⁷²⁵ Mohammad Dayem and Fatima Ayub, ‘In The Path of Allah: Evolving Interpretations of *Jihad* and Its Challenges’ (2008) 7 *UCLA Journal of Islamic & Near Eastern Law* 67-120.

⁷²⁶ These jurists include Al-Awza'i, Abu Thawr, Al-Layth Ibn Sa'd, and Al-Thawri. See Dayem and Ayub (n725) 67-120. Hadith 965 in Ibn Malik, Mutwatta. Badar ‘Ius in Bello’ (n25) 613-614.

⁷²⁷ Cherif-Bassiouni ‘Evolving’ (n716) 120-121

⁷²⁸ Abdur Rahman Doi, *Non-Muslims under Shari'ah*, (Kazi Publications 1983) 94-95, 222; Aly, (n618).

He reportedly went so far as to say that when Muslim armies ran out of food, they should only take food from civilians in enemy territory enough for one meal. Such a stance pivots on moral rather than utilitarian rationale as it is ‘preceded by encouragement to be a good Muslim.’ Interpretations shifted over time, with Abu Hanifa, concluding in the 8th century that everything which fighters could not conquer should be destroyed, including homes, churches, trees, and livestock. But the majority of scholars argued against the destruction of religious property.⁷²⁹

Table 3 Protections of Specific Categories of Property

<i>Salafī Usul on Qital</i>			
	Abu Bakr	‘Umar	Shaybānī
Distinction:			
Property			
Civilian	Houses	Personal possessions	If Muslim fighters cannot conquer, everything can be destroyed
Flora & Fauna	Fruit-bearing trees		
	Livestock (unless for food)		
Religious	Monasteries	Churches	

5.6 Means and Methods of Warfare

Presuming the *salafist* ANSG subscribes to one of the Sunni *madhahib*, the means of warfare can be distinguished in two distinct camps.⁷³⁰ In one camp, the Hanafi, Hanbali and Shafi’i allow all means ‘to break the enemy’s strength, whether they are stringent or lenient.’ Muslim armies are ‘free to subdue the enemy to use any means for example, weapons of steel and deadly agents, even to the point of poisoning the enemy with projected incendiaries and

⁷²⁹ Aly (n618).

⁷³⁰ It should be noted that Sunni Muslims do not subscribe unanimously or exclusively to one particular *madhhab* – adopting a pick and mix formula to back individual philosophy.

noxious gases.⁷³¹ The other camp houses the Maliki philosophy, a more rigid interpretation of means of warfare.⁷³² Enjoining and pervasive through the two camps is the common theme that if a less evil means exists, a Muslim should employ restraint.⁷³³

The inability to distinguish combatants from protected persons makes certain means and methods of warfare prohibited, for example using water to flood the enemy, or poisoning the water supply of the enemy. The Islamised *lex talionis*, ‘whoso commits aggression against you, then respond with the same degree of aggression waged against you,’ ‘if you punish, then punish with the same punishment which has been inflicted upon you’ displaces proportionality considerations and undermines IHL.⁷³⁴

In relation to burning combatants there is disagreement in classic literature regarding its prohibitive status.⁷³⁵ It is generally accepted that Muslims cannot ‘punish the creatures of God with the punishment of God,’⁷³⁶ that ‘the deliberate burning of persons, either to overcome them in the midst of battle or to punish them after capture, is forbidden.’⁷³⁷ Some assert the doctrine of *darura* can temporarily suspend its prohibitive status, for example if burning the enemy is the only way to overcome the enemy, the notion of a ‘supreme emergency’ to justify killings of civilians in order for a society to save itself from the ‘ultimate threat’ of annihilation.⁷³⁸ Attaching a heavy weight to the intention of breaking the enemies strength aligns with the doctrine of *darura* in that holding this intention, to break the enemies strength, will suspend normally prohibited acts, the idea that what cannot be avoided, must be pardoned. In one hadith, Shaybānī is quoted as saying:

⁷³¹ Al-Zuhayli *Athar al-harb fi al-fiqh al-islami: dirawa muqarana*, 46 cited in Hashmi, ‘Saving’ (n624) 171.

⁷³² Hamidullah, (n584) 207

⁷³³ 2:194; 9:36; 16:126; 16:127-16:128. The *Qur’an* 9:36 ‘So wrong not yourselves therein and fight the Pagans all together as they fight you all together.’ ‘..And if one has retaliated to no greater extent than the injury he received, and is again set upon inordinately Allah will help him: for Allah is One that blots out (sins) and forgives (again and again) [22:60] In Yusuf, *Qur’an*.

⁷³⁴ The *Qur’an* 2:194; 16:126 respectively.

⁷³⁵ Ibn Rushd, *Bidaya* vol.1, 281-2 cited in El-Fadl ‘Rules’ (n473) 156; Abdel-Haleem (n4) 94.

⁷³⁶ Hadith 2854 and 6524 in Al-Bukhari. Hadith 4351 in Abu Dawud, Sunan Abi Dawud. Hadith 1458 in Al-Tirmidhi, Sunan Al-Tirmidhi, Hadith 16597, 16635 and 17841 in Al-Bayhaqi, Sunan Al-Bayhaqi, cited in Badar ‘Ius in Bello’ (n25) 611

⁷³⁷ Sohail Hashmi, ‘Islamic Ethics and Weapons of Mass Destruction: An Argument for Non-proliferation’ in Sohail Hashmi and Steven P. Lee (eds.), *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* (Cambridge University Press 2004) 328.

⁷³⁸ Aly, (n618); Adil Salahi, *Mohammad Man and Prophet: A Complete Study of the Life of the Prophet of Islam*, Leicestershire, Islamic Foundation, 2002/1423, 659

‘there was nothing wrong with the Muslims’ burning the polytheists strongholds or flooding them with water; setting up catapults against them; cutting off their water; or putting blood, dung, or poison in their water to befoul it for them. This is because we have been commanded to subdue them and break their strength. All these things are military tactics that will cause their strength to break; they derive from obedience, not disobedience to what has been commanded. Furthermore, all these things damage the enemy, which is a cause for the acquisition of reward.’⁷³⁹

5.6.1 Unnecessary Suffering

Unnecessary suffering or superfluous injury refers to the effects of certain methods or means of warfare which uselessly aggravate suffering. IHL forbids such methods and means.⁷⁴⁰ The principle of unnecessary suffering claims ‘the necessities of war ought to yield to the demands of humanity’.⁷⁴¹

The concern for humanity runs through all Islamic principles, congruent with the *Qur’anic* concept that all mankind is one community.⁷⁴² The laws of *qital* state that ‘[f]airness is prescribed by God in every matter, so if you kill, kill in a fair way.’⁷⁴³ Permissible weapons under traditional Islamic laws of *jihad* were restricted to those that existed in the seventh century CE. The only clear prohibition is in a hadith that relates to punishment by fire, which the Prophet forbade ‘no one punishes with fire, save the Lord of the fire (Allah).’⁷⁴⁴ This

⁷³⁹ Al-Sarakhsi’s *Mabsut* is a commentary on the *mukhtasar* (epitome) by Muhammad b. Muhammad al-Marwazi, which in turn summarized some of the foundational texts of the Hanafi school written by Muhammad al-Shaybani. Al-Sarakhsi Al-Fahd: Page 13, 14 “Al-Sarakhsi, citing Muhammad ibn al-Hasan [al-Shaybani] (Sharh al-Siyar al-Kabir, 4:1467).

⁷⁴⁰ Verse 16:126 is invoked consistently to support this idea of doing no more harm than is necessary, including mutilation. See Article 35, AP I. Article 35 (1) ‘In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited (2) ‘It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. [...]’ Customary IHL Rule 70. Marco Sassoli, Antoine Bouvier & Anne Quintin, ‘How Does Law Protect in War: Glossary’ (ICRC 2012)

⁷⁴¹ See also The Martens Clause which places all mankind under the safeguards from ‘customs established between civilized nations, the laws of humanity and the demands of public conscience. There are many IHL instruments concerning iterations of unnecessary suffering: St. Petersburg Declaration 1868; A. 23(e) 1899 Hague regulations which talks of ‘superfluous injury’; A. 23(e) 1907 Hague Convention changes the language to ‘unnecessary suffering’ as does A. 35(2) AP I.

⁷⁴² The *Qur’an*, 2:213.

⁷⁴³ Hamidullah, (n584) and Noor Muhammad, ‘The Doctrine of *Jihad*: An Introduction’ 3 *J L & Religion* (1985) 204

⁷⁴⁴ Sunnan Abu Daoud, Book 14, Number 2667. Historical accounts allege that the practice of Muslim armies was to set enemy forts on fire while enemy fighters were hiding in them. ‘The Prophet later prohibited this practice saying that Allah alone could punish by fire.’ M. Bin Ismail Al-Bukhari, *Kashful Bari: Kitab Al-Maghazi* (Book of Ghazqat) (trans. S. Khan, 2008) 576; B.A. Al-Hasan Ali Marghinani, *The Hidayah* (trans. C. Hamilton, 2005), 457 in Shah, ‘Force’ (n71) 361.

prohibition has not been interpreted to apply to weapons like bombs as evidenced by the Taliban and other ANSGs continued use of incendiary weapons in their conflict conduct. Al-Sarakhsi, an 11th century CE Shafi'i jurist, interpreted Shaybānī's work and found '[t]here is nothing wrong with releasing water into the enemy's city, burning them with fire, or bombarding them with the catapult, even if there are children or Muslim prisoners of war or traders among them.'⁷⁴⁵ Contrast with the punishment for those who 'wage war against God and His Messenger and strive to cause corruption in the land' which attracted the punishment of crucifixion or cross-amputation.⁷⁴⁶ Such *hudud* applied in early Islam to the crime of brigandage or highway robbery, a crime that was particularly problematic in that era.⁷⁴⁷

Many methods used by Islamic ANSGs are 'gleaned from a number of non-Islamic sources, and show little more respect for Islamic, or any other, law than do those used by modern states.'⁷⁴⁸ Islamic law also prohibits persons from being maimed, 'starved, made to suffer thirst, tortured, severely abused, assaulted or [have] their property plundered, in violation of the sanctity of human brotherhood, except when necessity so requires and to ward off aggression'.⁷⁴⁹ *Hizb-i-Islami* upheld the prohibition against starving the population during the Afghanistan conflict in 1994 whereby justification for blocking aid convoys delivering food was justified on the grounds that several markets had opened in the area which would sustain the population without the humanitarian aid.⁷⁵⁰ Algerian extremists have sought to justify their preference of slicing throats over other forms of killing on economical and practical grounds (it does not require ammunition) as well as being closer aligned to Islamic practice, two verses referencing 'smite their necks'.⁷⁵¹

⁷⁴⁵ Al-Sarakhsi (al-Mabsut, 10:65)

⁷⁴⁶ The *Qur'an* 5:33

⁷⁴⁷ Abou El Fadl *Rebellion* (n627) 47-60

⁷⁴⁸ Abdel-Haleem (n4) 97.

⁷⁴⁹ alZuhili (n596) 273

⁷⁵⁰ Report on the practice of Jordan (1997), as cited in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, 2 vols, Vol II (ICRC and Cambridge University Press 2005) 1132. AFP, Press information, Islamabad, 15 February 1994. However, in a report addressed to the UN Secretary-General, Kuwait denounced Iraqi 'practices [violating] all the values of Islam and of civilization... [including] [c]learing of warehouses, and co-operative societies of foodstuffs with a view to causing starvation among citizens'. Kuwait, letter dated 5 August 1990 to the UN Secretary-General, UN Doc. S/214 3, 5 August 1990. Rule 53. The use of starvation of the civilian population as a method of warfare is prohibited.

⁷⁵¹ The *Qur'an* 8:12 and 47:4. Abdel-Haleem (n4) 97.

Torture

The answer to whether torture is permissible in Islam will vary according to who is answering and how it is defined.⁷⁵² There is no specific direction in the *Qur'an*. Some parts of the Sunna suggest a prohibition on torture; others clearly advocate ‘‘beating’ (*daraba*) suspected wrongdoers to extract [a] confession.’⁷⁵³ The Prophet is reported to have said: ‘God will torture those who torture people on earth.’ Some scholars say that while the Prophet opposed ‘treacherous killing and mutilation’, he allowed Muslims to retaliate in kind against such practices.⁷⁵⁴ There are clear examples of practices in the Islamic world, sanctioned by the state, that would be positioned on the continuum of cruel, inhumane or degrading treatment through to torture.⁷⁵⁵

Mutilation

In Islamic discourse, the era of *jahiliyya* is associated with mutilation of mortal remains, torture of captives and indiscriminate killings. The Prophet’s uncle Hamza ibn ‘Abdel-Muttalib (d.625) is said to have been brutalized and mutilated, along with other Muslims, after the Battle of Uhud. The animist women allegedly wore the severed ears around their necks and danced around the mutilated corpses as a celebration of the pagan victory. The Prophet and his followers vowed to do the same if they got the chance. However, following this, the Qur’anic verse on mutilation was revealed and the Prophet subsequently forbade the mutilation of mortal

⁷⁵² Using the definition from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), 85 UNTS 1465. Article 1 ‘[T]orture’ means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...when such pain or suffering is inflicted...by a public official or other person acting in an official capacity.’

⁷⁵³ Reza, (n 25) 21-22. See also Mohammad Hashim Kamali, *The Right to Personal Safety* (Haqq al Amn) and the Principle of Legality in Islamic *Shari’a*, in Abdel-Haleem, Adel Omar Sherif & Kate Daniels, eds, *Criminal Justice in Islam: Judicial Procedure in the Shari’a* (IB Tauris 2003) 84-89.

⁷⁵⁴ Bennoune (n607).

⁷⁵⁵ ‘[S]evere beatings that do not break the bones or cause lesions but cause intense pain and swelling are ‘classic’ forms of ‘torture,’ whereas ‘[p]erhaps beatings that are not severe or sustained...would be inhuman treatment but not torture.’ John Parry, *Escalation and Necessity: Defining Torture at Home and Abroad* in Sanford Levinson *Torture: A Collection* (OUP 2004) 147-148. Torture as an investigative method is distinguished from the torture as a punishment post-conviction, and there is an emphasis on the legal parameters around Conventional definitions of torture, ‘[n]o punishment however gruesome, should be called torture.’ Islam has not stood alone in state sanctioned torture and there is a revival in the West of the utilitarian case for torture where Bentham equivocates whether physical pain can exert irresistible control over its victims will. John Langbein, *Torture and the Law of Proof: Europe and England in the Ancient Regime* (University of Chicago Press 2006) 3

remains,⁷⁵⁶ including remains of the pagan animists.⁷⁵⁷ There is however some support that mutilation is permissible in a *lex talionis* framework.⁷⁵⁸

Operational practice shows some evidence of a contemporary prohibition against mutilation in a conflict context. For example, the Instructions to the Muslim Fighter of 1993 provide that ‘Islam ... forbids the mutilation of enemy wounded.’⁷⁵⁹ There are other examples clearly disregarding this principle, the Taliban treatment of Najibullah mortal remains where his dead body was dragged behind a driving car through the streets of Kabul, his penis dismembered.⁷⁶⁰

Suicide Attacks/ Martyrdom Operations

Those who engage in *jihad* are called *mujahidin* and those killed doing it are called *shuhada* (martyrs) who have obtained a rank unparalleled in the hierarchy of the Hereafter.⁷⁶¹ One Islamic tradition tells Muslim men that *Allah* will reward them with seventy-two virgins in heaven should they die waging *jihad* against the enemies of Islam.⁷⁶² This obscure *ahadith* has been transformed into a ‘topic of sensational public interest, as well as ridicule.’⁷⁶³

⁷⁵⁶ The Qur’an 16:126-127; Hadith 966 in Ibn Malik, Mutwatta’. Hadith 1408 and 1617 in Mohammad Ibn Isa Al-Tirmidhi, Al Jami’ Al-Sahih Sunan Al-Tirmidhi. Hadith 2613 in Abu Dawud, Sunan Abi Dawud. Hadith 1731 in Al-Qushayri, Sahih Muslim. Hadith 2342 (prohibition of mutilation) and 5197 in Al-Bukhari, Al-Jami’ Al-Sahih AlMukhtasar cited in Badar ‘Ius in Bello’ (n25) 620.

⁷⁵⁷ Never mutilate, for God purified Islam and the Muslims from rashness and excessive wrath’, and that Propeht never permitted the mutilation of his enemies.’ <https://www.thereligionofpeace.com/quran/muslim/019-smt.htm>. Al-Shaybānī in his *Kitab al-Siyar* (book of conduct), draws on a number of hadith in pronouncing that the Prophet forbade treachery, mutilation, and the killing of women and children. ‘nor should you mutilate or kill children, women, or old men.’ Muhammad ibn al-Hasan al-Shaybānī, as translated by Khadduri *Islamic Law* (n13) 59–60. Contrast with R. 113 CIHL ‘Each party to the conflict must take all possible measures to prevent the dead from being despoiled. Mutilation of dead bodies is prohibited’.

⁷⁵⁸ Ibn Taymiyah claims that ‘[a]s for cruel and exemplary punishments or mutilation, it is not permissible except as retribution. Imran Ibn Husayn ‘Never did the messenger of God... preach a sermon to us but that he commanded us to charity and forbade us to mutilate. Even when we killed non-believers, we did not mutilate them after killing them. We did not cut off their ears and noses or rip open their bellies, unless they had done that to us; and then we would do to them as they had done. However, abstaining from such things is better, as God has said: ‘And if you chastise, chastise even as you have been chastised; and yet assuredly if you are patient, better it is for those patient.’ ‘And be patient; yet is thy patience only with the help of God.’ Halverson (n260) 40; Subsequent interpretations state Islamic law prohibits the ‘mutilation of bodies in war’ (2005), 87(858) *IRRC* 275

⁷⁵⁹ Bosnia and Herzegovina, Instructions to the Muslim Fighter, 1993, para. c, as cited in Henckaerts and Doswald-Beck (n750) 2172

⁷⁶⁰ Human Rights Watch. ‘Blood Stained Hands’ (2005) <https://www.hrw.org/reports/2005/afghanistan0605/>

⁷⁶¹ The Nobel Quran, Surah al-Baqarah (1:54) And say not of those who are killed in the Way of Allah, ‘They are dead.’ Nay, they are living but you perceive (it) not. Cited in Begg, ‘*Jihad*’ (n8). The idea of instantaneous salvation is not isolated to Islam, and was likely appropriated from Jewish and Christian texts and practices that existed through the Revelation era. The influence of other Arabian cultures as well as monotheistic religions on Muhammad is evident through his doctrine on *Martyrdom*. Bonner, (n487) 72-83

⁷⁶² Especially appealing to young men from sexually repressed countries, the promise of seventy-two virgins cannot be seen as causal to *martyrdom* operations as women have also acted as suicide bombers. For example, the ‘Black Widows’ of Chechnya avenging the deaths of their husbands.

⁷⁶³ Halverson (n260) 165.

Like civilian targeting, the issue of suicide bombings or ‘martyrdom operations’ is relatively recent, emerging only in the final decades of the twentieth century. Unprecedented in both nature and use as a weapon, this relatively recent phenomenon falls to *qiyas* and *ijtihād* to determine its permissibility under Islamic law.⁷⁶⁴ Although such means have influenced Sunni ANSGs, it is doubtful whether this tactical influence extended theologically, the law as it is being confused with the law as it ought to be.⁷⁶⁵ Difficulty in agreeing a coherent position is compounded by the fact that discourse is often limited to geographical scope: Palestine, Iraq and Afghanistan.⁷⁶⁶ Furthermore acts which are condemned to prohibitive status in one area are permissible in adjacent areas.⁷⁶⁷

While the Islamic position on ‘suicide attacks’ is unclear, the *Qur’anic* position on suicide is settled.⁷⁶⁸ Islam forbids suicide. The objective of the *fidayin* is not to martyr themselves in their first operation. On the contrary, they aim to do as much damage as possible to the enemy to inspire fear in both present and future generations. ‘He who commits suicide kills himself for his own benefit, while he who commits martyrdom sacrifices himself for the sake of his religion and his nation.’ The *Mujahid* becomes a ‘human bomb’ that blows up at a specific place and time, in the midst of the enemies of Allah and the homeland, leaving them helpless in the face of the brave *shahid* [martyr] who . . . sold his soul to Allah, and sought the *Shahada* [Martyrdom] for the sake of Allah.’⁷⁶⁹ The claim that martyrdom purges the martyr of all his sins is based on numerous traditions according to which the martyr is admitted into paradise by virtue of his martyrdom in *jihad*. The martyr is absolved of all his sins and ‘is transported directly to Paradise without having to be interrogated within his body by the angels.’⁷⁷⁰

⁷⁶⁴ David Bukay, ‘The Religious Foundations of Suicide Bombing’ (2006) 13(4) Middle East Quarterly 172; Wiktorowicz ‘Genealogy’ (n415) 92

⁷⁶⁵ Aligned with the Latin maxim ‘*de lege lata de lege ferenda*’. Arguments for this method of warfare is derived from Shi’ite traditions of *martyrdom*. Wiktorowicz ‘Genealogy’ (n415) 9..

⁷⁶⁶ See Munir ‘Suicide Attacks’ (n721).

⁷⁶⁷ See the Barelvi scholar Mufti Muneeb who issued a fatwa ‘condemning the unjustified homicide in Pakistan but left open the legality of suicide attacks in Kashmir and Palestine’ cited in Nagamine (n71) 66.

⁷⁶⁸ For example, ‘And spend of your substance in the cause of Allah and make not your own hands contribute to [your] destruction; but do good; for Allah loveth those who do good.’ 2:195; ‘Nor kill (or destroy) yourself’ 4:29 in Yusuf Holy *Qur’an*. Also, hadith ‘None of you should make a request for death because of the trouble in which he is involved, but if there is no other help to it, then say: O Allah, keep me alive as long as there is goodness in life for me and bring death to me when there is goodness in death for me.’ In Sahih Muslim Book 035, Hadith No. 6480

⁷⁶⁹ See Al-Rayah, ‘Qaradawi Fatwa’s Middle East Quarterly (Summer 2004); Wiktorowicz ‘Genealogy’ (n415) 72

⁷⁷⁰ Most writings argue that the *martyr* has a seat in Paradise, avoids the torture of the grave, marries seventy black eyed virgins, and can advocate on behalf of seventy relatives so that they too might reach Paradise. Wiktorowicz

Scholars from all ideological persuasions agree on the virtues of martyrdom even though the concept of suicide is missing from earlier religious commentaries on war.⁷⁷¹ Islamic thought on warfare reveals suicide bombings are not part of this heritage.⁷⁷² Current *jihadi* arguments about suicide bombings pay scant attention to constructing a theological argument justifying such attacks; rather the focus is on extolling the virtues of martyrdom.⁷⁷³ Conferences of Islamic scholars pass declarations ‘condemning or supporting suicide attacks while rarely grounding them in legal arguments.’⁷⁷⁴

A number of fatwas quote early *mujtahid* who ruled that Muslims may give up his life intentionally in *jihad* if his act hurts the enemy, dispirits him, or encourages Muslims. But if he is not sure that such an act will kill the enemy, he is ‘discouraged from performing it.’⁷⁷⁵ Islamic history reveals instances where authorized army commanders have permitted Muslim warriors to storm the enemy, knowing the warriors had no chance of surviving. Importantly it was not permissible for the individual to decide for himself, such a decision could only be taken by the Muslim ruler or Caliph who was best placed to weigh the overall benefits and damages of such an act.⁷⁷⁶ Using the intent of the perpetrator as determinative of martyrdom allows the consequences of collateral damage to be ignored. Justifications of suicide missions will fall on the writings of Ibn Taymiyya who extolled the virtues of martyrdom over the Islamic obligations of fasting and pilgrimage.⁷⁷⁷

The suicide bombers’ failure to distinguish themselves as a combatant is perfidious, and under Islamic law such actions are forbidden. However, if it is deemed that the Muslim community

‘Genealogy’ (n415) 92; Shmuel Bar, *Warrant For Terror: Fatwas of Radical Islam and the Duty of Jihad* (Rowman & Littlefield Publishers 2006) 65

⁷⁷¹The family of a *martyr* acquires a privileged position since it receives material benefits and often money. These considerations should not be underrated and are especially relevant in the case of young men who were formally petty criminals, their sacrifice suddenly bestows upon the family a status which had previously seemed unattainable. Abou-Zahab & Roy (n418) 38.

⁷⁷² Wiktorowicz ‘Genealogy’ (n415) 92; Bar (n770) 63.

⁷⁷³ *ibid* (n415) 92; Nagamine (n71) 53.

⁷⁷⁴ Nagamine (n71) 65.

⁷⁷⁵ Nida ul-Islam, Dec-Jan 1996-1997 cited in Bar (n770) 6

⁷⁷⁶ Extremists invoke the conduct of the *Sahaba* to support the permissibility of suicide attacks, citing the example of when the Companions ‘charged into the ranks of the *kuffar* knowing they would be killed.’ Fatwa:: Imam Muhammad Naasir-ud Deen Al-Albaanee, ‘Suicide Bombings in the Scales of Islamic Law,’ in Abu Saalih, Muhammad Zorkane Al-Maghribee, *Al-Masjid al-Aqsa: The Path to Its Freedom* (SSNA, 2005) in Bar (n770) 62, 64

⁷⁷⁷ For Ibn Taymiyya fatwas see Qasim, *Majmu’ Fatawat Shaykh al-Islam Ibn Taymiyah* Vol 9 (Riyadh: Matba’at al Hukymah 1996) cited in Nagamine (n71) (fn 125), 225.

is at risk, arguments around the permissibility of martyrdom operations are moot: the doctrine of *darura* would be invoked to justify any acts that would in normal circumstance be prohibited.⁷⁷⁸ The critical issue with the ‘at risk’ argument is that there is scope that any unfavourable outcome of hostilities would lead to unfettered conflict conduct and violations of the laws and customs of war.

Consistent with IHL, Islamic law balances means and methods of warfare proportionate to the principle of necessity. While mainstream Islam prohibits the targeting of civilians certain extremists groups have manipulated an Islamic defence to allow such a violation, *al-darura tubih al-mahzurat*, necessity makes permissible the prohibited, and ‘advocate collective guilt on behalf of the perceived enemies of Islam to circumvent the prohibition.’⁷⁷⁹ More than its Western counterpart, the doctrine of *darura* ‘underlines the seriousness of threat to existence and sense of urgency to act.’ Focusing on the resultant harm has allowed Islamic jurists to avoid committing to rigid definitions of necessity.⁷⁸⁰ Weighing the expected harm against the expected benefit allows a broad discretion in interpretation of what is necessary. *Darura* can be used as an Islamic law justification to violate IHL. Three cumulative criteria must be met to ensure compliance with Islam, the derogation to the prohibited act must be: of vital necessity; of unambiguous certainty; its importance must be universal.⁷⁸¹

5.7 Proportionality

*‘I am the Prophet of a gentle compassion; I am the Prophet of a fierce battle.’*⁷⁸²

IHL defines the principle of proportionality as prohibiting attacks against military objectives which are ‘expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete

⁷⁷⁸ The *Qur’an* 8:58 ‘If thou fearest treachery from any group, throw back (their covenant) to them (so as to be) on equal terms: for Allah loveth not the treacherous; Shaybānī *The Islamic Law of Nations*, 77. See for example the Lebanese Grand Ayatollah Muhammad Hussein Fadlallah when talking about the use of suicide bombers by the Palestinians against Israel, ‘...There is no other way for the Palestinians to push back those mountains, apart from *martyrdom* operations.’ ‘We could provide a million suicide bombers in 24 hours,’ *The Telegraph* (London 4 Sept 2002)

⁷⁷⁹ Ali & Stuart, (n363) 12; Parry ‘Legal Methodology’ (n250) 97.

⁷⁸⁰ Nagamine (n71) 64.

⁷⁸¹ Hashmi ‘Saving’ (n624) 177.

⁷⁸² Ramadan (n13) 67.

and direct military advantage anticipated'.⁷⁸³ The principle seeks to limit damage caused by military operations by requiring that the effects of the means and methods of warfare used must not be disproportionate to the military advantage sought.⁷⁸⁴ Aligned with this conventional definition and supported by several *Qur'anic* verses is the proportionality doctrine enumerated in the Islamic law of *qital*.⁷⁸⁵ Muslim jurists advocate a balancing test, weighing the possible evils against potential good.⁷⁸⁶ Classical Islamic texts contain evidence of concern regarding collateral damage 'analogous to the *ius in bello* criterion of proportionality.'⁷⁸⁷

While the *Qur'an* does not rule out war; however, it does set limits to it. 'And fight in the way of God those who wage war on you, but do not transgress, for God loves not the transgressors.'⁷⁸⁸ In conflict, Islam prescribes Muslims must stay with the limits of not becoming cruel or vengeful. The general command to be just and fair is taken from the *Qur'an*: '...believe[rs] stand out firmly for God as witnesses to fair dealings... let not...hatred...make you swerve to wrong and depart from justice. Be just, that is next to piety. And fear God. Surely, Allah is aware of what you do.'⁷⁸⁹

Indiscriminate attacks are defined as those that are not directed at a specific military objective, or that employ a method or means of combat which cannot be directed at a specific military objective. Indiscriminate attacks 'which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.' This last is known as the rule of proportionality.

⁷⁸³The principle of proportionality demands restraint in response so that excessive force is not used. Excessive force includes the indiscriminate targeting of civilians and military personnel. John Head, *The United States and International Law After September 11*, (2001) 11 Kan. J. L. & Pub. Pol'y 1, 4.

⁷⁸⁴ See AP I Protection of the civilian population, Article 51(5)(b); CIHL Rule 14 '*Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited*' Sassoli, Bouvier & Quintin, (n740)

⁷⁸⁵ 'And if you were to harm (them) in retaliation, harm them to the measure you were harmed.

And if you opt for patience, it is definitely much better for those who are patient.' The *Qur'an*, 16:126; 'The one who does something evil will not be punished but in its equal proportion.' The *Qur'an*, 40:40; 'The recompense of evil is evil like it. Then the one who forgives and opts for compromise has his reward undertaken by Allah. Surely, He does not like the unjust.' The *Qur'an* 42:40.

⁷⁸⁶ El-Fadl 'Rules' (n473) 147.

⁷⁸⁷ John Kelsay, 'Arguments Concerning Resistance in Contemporary Islam', in Richard Sorabji and David Rodin, (eds.), *The Ethics of War: Shared Problems in Different Traditions* (Ashgate 2007) 65.

⁷⁸⁸ *Qur'an* 2:190 (n326)

⁷⁸⁹ The *Qur'an* 5:8.

The *Qur'an* permits only the extent and degree of force necessary to achieve a military objective.⁷⁹⁰ Success in achieving this goal invalidates further use of force; it also prescribes temporal and geographic limitations on the use of force.⁷⁹¹ The *Qur'an* reiterates this sentiment in several verses in various forms: that one should fight the attackers until they are defeated, restrained from mischief or choose peace instead of war.⁷⁹² Once the military necessity to fight has ceased to exist, the use of force is no longer permissible.⁷⁹³ As discussed in chapter four, the two nation theory, with the obligation on believers to convert the *dar al harb* into the *dar al Islam* could easily be seen as perpetual struggle until all lands fall under the *dar al Islam*.

In the seventh century, weapons were relatively limited in the damage they could cause and combat generally happened in short range, hand-to-hand.⁷⁹⁴ Still, there is evidence that certain weapons were considered an affront to human dignity and repugnant to divine law.⁷⁹⁵ Military necessity was given a greater weight in the seventh century than is accepted in contemporary targeting cycles of proportionality and precautions in attack.

Islamic laws of war balance military necessity with principles of distinction, proportionality and humanity. If it is universally accepted in Islam that '[i]t is the duty of individuals, societies and states to protect [the right to life] from any violation, and it is prohibited to take away a life except for a *Shari'a* prescribed reason' the broad interpretation of these reasons can be manipulated to serve a violent agenda.⁷⁹⁶

⁷⁹⁰ 'Military Objectives are limited to those objects which (a) by their nature, location, purpose or use make an effective contribution to military action, and (b) whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers an advantage. 'This definition of military objectives is set forth in Article 52(2) of Additional Protocol I; See also CIHL Rule 8.

⁷⁹¹ See the *Qur'an*, verses 2:191 and 2:194

⁷⁹² 'Fight them until there is no *fitnah* anymore, and obedience remains for Allah. But, if they desist, then aggression is not allowed except against the transgressors.' The *Qur'an* 2:193. 'Kill them wherever you find them and drive them out from where they drove you out, as *fitnah* ... is more severe than killing. However, do not fight them near Al-Masjid-ul-Haram (the Sacred Mosque in Makkah) unless they fight you there. However, if they fight you (there) you may kill them ...' The *Qur'an* 2:191; 'But if they desist, then indeed, Allah is Most-Forgiving, Very-Merciful' The *Qur'an* 2:192; 'The holy month for the holy month, and the sanctities are subject to retribution. So when anyone commits aggression against you, be aggressive against him in the like manner as he did against you ...' The *Qur'an*, 2:194' in Shah 'Force' (n71) 360

⁷⁹³ In IHL, the principle of military necessity 'permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by international humanitarian law. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict. Military necessity generally runs counter to humanitarian exigencies. Consequently, the purpose of humanitarian law is to strike a balance between military necessity and humanitarian exigencies.' Sassoli, Bouvier & Quintin (n740)

⁷⁹⁴ Mahmassani (n368) 292 in Badar 'Ius in Bello' (n25) 610

⁷⁹⁵ Weeramantry (n246) 138

⁷⁹⁶ Organization of the Islamic Conference (OIC), *Cairo Declaration on Human Rights in Islam*, 5 August 1990, available at: <http://www.refworld.org/docid/3ae6b3822c.html> [accessed 9 June 2017]

PART II

The following chapters will provide context to Part One, by examining a particular ANSG operating through the Afghanistan-Pakistan border. The part will consider the tribal code of one of Afghanistan's ethnic groups that comprised the original Taliban insurgency and compare certain norms of this code as well as '*salafi*' *Shari'a* and IHL against the conflict conduct of this group over the period 1994-2001. What follows is a crude form of reverse engineering, where certain of the most heinous documented war crimes, crimes against humanity and violations of the laws and customs of war will be measured against regulatory norms that were operational in that space.

Chapter 6 Afghanistan: Ethno-Political Dynamics and Conflict History

*'Afghanistan is ugly today...not because the people of Afghanistan are ugly. Afghanistan is not only a mirror of the Afghans; it is the mirror of the world.'*⁷⁹⁷

Understanding the background elements inherent in the evolution of the Taliban cannot be separated from understanding the elements that have shaped Afghanistan. The roots of the Taliban are entwined with the state's history of conflict and the ethno-regional bias and competition for power that has historically characterized Afghanistan.⁷⁹⁸ By providing background to Afghanistan's recent conflict history and its resistance to control, this chapter sets the basis for the Taliban insurgency to be understood.

Positioned at the crossroads of Central, West and South Asia, a 'geographical map, more than a political one, best explains Afghanistan's importance over the centuries.'⁷⁹⁹ Its geopolitical importance has hindered its internal stability and made it a target of sustained use of force by external actors.⁸⁰⁰ Around 250,000 square miles of British imagination, the modern state of Afghanistan was drawn only in the last 150 years. Located on the eastern side of the Iranian Plateau, it linked the Great empires of Central Asia, the Middle East and the Indian subcontinent.⁸⁰¹ Regional geopolitical manoeuvrings shaped the formation of the modern state out of 'shards of rival tribal fiefdoms, ethnic loyalties, and shifting alliances and allegiances.'⁸⁰² The terrain is unrelentingly harsh, so while easily invaded, it has proved impossible to hold in the long term.

⁷⁹⁷ Barnett Rubin March 26 1992 response to Letter from Nejat Khalili Feb 12 1992 in Ahmed Rashid, *Taliban, Oil and the New Great Game in Central Asia* (IB Tauris 2000) 108.

⁷⁹⁸ While the term 'Afghan' in the third century was interpreted as 'noisy', 'unruly' or 'less than sedate', the country's violent history has undoubtedly intensified the nature and reputation of its people in the contemporary state. Stephen Tanner, *Afghanistan: A Military History From Alexander the Great to the Fall of the Taliban* (OUP 2002) 5

⁷⁹⁹ Tanner (n798) 2

⁸⁰⁰ John Bew, Ryan Evans, Martyn Frampton, Peter Neumann, Marisa Porges, 'Talking to the Taliban: Hope over History?' New America Foundation, 2013. http://icsr.info/wp-content/uploads/2013/06/ICSR-TT-Report_For-online-use-only.pdf

⁸⁰¹ Graham Chapman, *The Geopolitics of South Asia: From Early Empires To The Nuclear Age* (Routledge 2009) 89; Tanner (n798) 2

⁸⁰² See Karl Ernest Meyer & Shareen Blair Brysac, *Tournament Of Shadows: The Great Game And The Race For Empire In Central Asia* (Basic Books 1999) 65.

The country is demarcated by four strategically crucial and ethnically varied cities around the Hindu-Kush: Kandahar, Herat, Mazar-i Sharif and Kabul (*Map 1*).⁸⁰³ Its country's capital sits in its own strategic sphere of influence, with Bamiyan to the west, Bagram to the north; Ghazni to the south and Jalalabad, the 'head of the Khyber Pass', to the east. While '[p]ossession of Kabul does not translate into control of the entire country... no one can hope to rule Afghanistan without holding Kabul.'⁸⁰⁴

Map 1: Afghanistan



Credit: University of Texas Libraries

6.1 Afghan Resistance to Domination

Welcoming waves of migration, the country is described as a 'roundabout of the ancient world.'⁸⁰⁵ Stretching back to Antiquity, Afghanistan fell victim to a string of conquerors and was subsumed in larger empires.⁸⁰⁶

A feature of the various conflicts over the last two centuries is the involvement of external military forces and organizations, a feature amplified in the recent decades-long history of

⁸⁰³ Hiran Abtahi, 'From the Destruction of the Twin Buddhas to the Destruction of the Twin Towers: Crimes Against Civilisation Under the ICC Statute' (2004) 4 *Int'l Cr L Rev* 3, 4.

⁸⁰⁴ Tanner (n798) 4.

⁸⁰⁵ Arnold Toynbee cited in Tanner (n798) 1.

⁸⁰⁶ While each ethnic group can claim some period of history, none can make an absolute indigenous claim to the region. Thomas Barfield, 'Problems in Establishing Legitimacy in Afghanistan' (2004) 37(2) *Iranian Studies* 263

warlordism and the direct military involvement of three of the United Nations Security Council's five permanent members.⁸⁰⁷ Its strategic location made the state a *Game* changer. Hinging on imperial ambitions, it acted as a buffer between the Russian and the British Empires during the nineteenth century and served as an ideological swing-vote between the Soviets and the US in the twentieth century. '[T]he fate of Afghanistan is decided not by Afghans but by foreigners [to its] north, south, east and west...'⁸⁰⁸ The increasing use of sea and air-power however has made 'Afghanistan.. less [geo-strategically] important to a round world than it was to a flat one,'⁸⁰⁹ leading to its current designation as 'a mere hideout... offering refuge to international terrorists.' Yet the Afghan terrain and the people 'present the same problem to foreign antagonists today as they did 2,500 years ago,'⁸¹⁰ 'with love [Afghans] will accompany you to hell but with force not even to the heaven.'⁸¹¹

The state of Afghanistan emerged in 1747 as the Mughal and Persian empires were imploding.⁸¹² When the Pashtun prince and military commander Ahmad Shah Durrani united fragmented tribes and provinces into one nation he created an Afghan tribal confederacy.⁸¹³ Dominated by ethnic Pashtuns, this distinct political entity was midwife to what would become Afghanistan.⁸¹⁴ While forging a state, this expansion and consolidation of his dominion came at the expense of causing deep division among the ethnic and religious groups, in particular among the Pashtuns *vis a vis* the Tajiks, Hazaras, Uzbeks and Turks.⁸¹⁵ All Afghan rulers up

⁸⁰⁷ Afghan Wars: The First Anglo-Afghan War (1839-1842), Second Anglo-Afghan War (1878-1881), Third Anglo-Afghan War (1919), Soviet War in Afghanistan (1979 – 1989), Soviet Involvement, Afghan Civil War (1989-1992), Najibullah's Regime Collapse, Afghan Civil War between Mujahadeen (1992-1996), Afghan Conflict (1996-2001), Taliban Regime. Talatbek Masadykov, Antonio Giustozzi, James Page, Working Paper No 66 'Negotiating With the Taliban: Toward a Solution for the Afghan Conflict' (2010) Crisis States Working Paper Series No 2 LSE Development Studies Institute 1. See 'Afghanistan Profile' BBC News (London, 31 Mar 2013) <<http://www.bbc.co.uk/news/world-south-asia-12024253>> accessed 29/05/13

⁸⁰⁸ K Yousafzai, Afghan Pashtun politician based in Kandahar. Ali Chishti 'Do the Taliban represent Pashtuns?' *The Friday Times* (Pakistan, 03 February 2012)

Niaz Shah 'The Islamic Emirate of Afghanistan' (n72) 456

⁸⁰⁹ Rhea Stewart, *Fire in Afghanistan 1914-1929: The First Opening to the West Undone by Tribal Ferocity Years Before the Taliban*. (Orig. 1973.) iUniverse.com 2000

⁸¹⁰ Tanner (n798) 1

⁸¹¹ Quote from revered Bacha Khan (6 February 1890 – 20 January 1988), a Pashtun independence activist against the rule of the British Raj. In Quotes about Pashtuns, Pakistan Defence <https://defence.pk/pdf/threads/quotes-about-pashtuns.248868/>

⁸¹² Anthony Hyman, 'Nationalism in Afghanistan' (2002) 34(2) *International Journal of Middle Eastern Studies* 299-301

⁸¹³ 'Pashtun or Pathan a corruption of the native 'Pakhtun' used in the subcontinent, identified the Pashtuns in British colonial ethnography...' Avihail & Brin, *Lost Tribes from Assyria*, Trans. S. Matlofsky (Amishav, 1978).

⁸¹⁴ The Durrani dynasty came to an end only in 1974, when Afghanistan became a republic. Chapman, (n801) 90-91. Derek Gregory, *Colonial Present* (Blackwell Publishing 2004) 31. Karen Spriggs, *The Legal System of Afghanistan*, 9 *Mod. Legal Sys. Cyclopaedia* 5

⁸¹⁵ The majority Pashtuns straddle the now Pakistan border, the Tajiks (roughly 25 % of the population) are found in the northeast, the Hazaras (13 %) reside in the central mountains, the Uzbeks and Turks (<10%) inhabit the

until the 1978 Marxist coup have been branches of the Durrani tribe,⁸¹⁶ leading the Pashtuns to identify initially as King-Makers, and subsequently government makers.⁸¹⁷ The Pashtun domination in governing the land led to Afghanistan and Pashtunistan being used synonymously (*See Annex 3 for list of Pashtun tribes*).

Both the Mughals and the Durrani Afghan kings encouraged Pashtuns to respond ‘tribally’, that is to maintain family-based networks instead of other forms of organization.⁸¹⁸ The British continued this tradition, making great efforts to engage Pashtuns along tribal lines to the exclusion of other methods. Pashtuns were entitled to subsidies, to a rank in the Indian army, and a direct relationship with the Crown. ‘Schooling internalized the racial taxonomy, supplanting allegiances to village, family, clan while linking Pashtun identity with modernization.’⁸¹⁹ Cultivating a Pashtun identity as a unitary ‘pure’ race in contrast to the ‘mixed’ Tajiks, Baluchis, Hazaras and others with whom they mingled, colonial officials invented the reputation of the Pashtuns as a warrior caste. They were ‘our chaps’, natural rulers, the equals of the British.’⁸²⁰ Attempting to increase tribal solidarity, they ‘introduced special tribal laws and developed competing theories about how tribes worked and should be handled.’⁸²¹ The British believed that regulating customary law institutions would help them better control the Pashtun populations of the ‘tribal areas.’ That approach was unsuccessful.

Ethnic divisions are a major source of identity in Afghan societies with Pashtuns historically occupying the dominant ethnic group based on percentage of the total population. However, with over twenty different ethnic groups speaking more than forty languages Pashtun

north centre. While accurate census data is lacking, it can be estimated that at least forty million....Pashtuns live in Afghanistan and Pakistan. The Afghan figures are based on Afghanistan *Statistical Yearbook* 2009-2010, <http://cso.gov.af/yearbook.zip>. These figures are contentious with census data never collected. Larry Goodson, ‘Afghanistan’s Long Road to Reconstruction.’ (2003)14(1) *Journal of Democracy* 82

Leon Hadar, ‘What Green Peril?’ (1992) 72(2) *Foreign Affairs* 84

⁸¹⁶ Since 1818 not only from the Durrani tribe but also from the Mohammadzai class. Abubakar Siddique, *The Pashtun Question: The Unresolved Key to the Future of Pakistan and Afghanistan* (Hurst & Co Publishers 2014) 11 – 12; Rasul Rais, *Recovering the Frontier State: War, Ethnicity, and the State in Afghanistan* (Lexington Books 2008) 29, 44-47; Aisha Ahmad & Roger Boase, *Pashtun Tales From the Pakistan- Afghan Frontier* (Saqi 2008) 13; Anwar-ul-Haq Ahady, ‘The Decline of the Pashtuns in Afghanistan.’ (1995) 35(7) *Asian Survey* 7.

⁸¹⁷ Caroe (n80); Barnett Rubin, *The Fragmentation of Afghanistan: State Formation and Collapse in the International System*, Second Edition (Yale University Press 2002) xxi

⁸¹⁸ Hugh Beattie *Imperial Frontier: Tribe and State in Waziristan* (Curzon 2002) 199.

⁸¹⁹ Post-colonial Afghan Governments have also found that ethnic division of Pashtun and non-Pashtun politically expedient, in turn fuelling ethnic polarization and the militarization of politics. Nick Cullather ‘Damming Afghanistan: Modernization in a Buffer State’ (2002) *The Journal of American History* 515-517.

⁸²⁰ Contrast with the colonial practice of the Belgians and their treatment of the Huts and the Tutsi’s in Rwanda. ‘Damming Afghanistan: Modernization in a Buffer State’ the *Journal of American History* September 2002, 517.

⁸²¹ Beattie (n818) 199.

domination was not welcomed.⁸²² Indeed each of these ethnic groups have either autonomously or through strategic alignments resisted rule by the other, attempts to dominate met with bloodshed. Recent history evidenced the extent to which the Uzbeks and Tajiks would align to resist a Pashtun-based government.⁸²³ The relevance of ethnic friction and historical unrest is directly related to the most egregious human rights violations and violations of IHL over the last 40 years.

In terms of population, after Pashtuns, Tajiks account for approximately a quarter of Afghans with Uzbeks, Hazaras, Aimaq, Nuristani, Kirghiz and other minorities comprising the remainder. With the increased visibility of the Pashtuns since the Taliban emerged, the large percentage of Afghans that are not tribal has been overshadowed. These non-tribal groups live mostly in the central, western, and northern areas of Afghanistan and include Tajiks, Uzbeks, Hazaras, and many city-dwellers.⁸²⁴ Northern Afghanistan, in contrast to the largely Pashtun south, is a complex ethnic mosaic.⁸²⁵

Unlike the Tajiks, where geographical location encourages loyalty, the Pashtuns have a web of tribal divisions and hierarchy. Two large and historically hostile categories that have carved out pockets of Afghanistan: the Durrani and Ghilzai Pashtuns.⁸²⁶ The Durrani's occupy south-western Afghanistan and the Ghilzai are based mainly in the mountainous region in eastern Afghanistan along the border of Pakistan. These divisions splinter into smaller tribes, sub-tribes and families. The dynamics of social organization which stems from the different tribe's agrarian economics has led to the Ghilzai's thriving politically in time of war and anarchy,

⁸²² Besides constituting the country's lingua franca, Persian is one of its two official languages, together with Pashtu, an Eastern Iranian language spoken by Pashtuns (40%). Abtahi, (n803), 4. A. Rashid, Taliban, 2; Tanner (n798) 6. This complex linguistic and religious composition of Afghanistan impacted on internal tensions. Ahady (n816); Amin Saikal & William Maley, *Regime Change in Afghanistan: Foreign Intervention and the Politics of Legitimacy* (Westview Press 1989) 13

⁸²³ This alliance would be known as the 'Northern Alliance' and the Pashtun Government, the Taliban. Tanner (n798) 6

⁸²⁴ RB Ferguson & Neil Whitehead 'The Violent Edge of Empire' in *War in the Tribal Zone: Expanding States and Indigenous Warfare*, eds. RB Ferguson & Neil Whitehead (School of American Research Press 1992) 12-14.

⁸²⁵ The Pashtun presence in the north dates to the 1880s and early 1890s, when Amir Abdur Rahman Khan, the Durrani Pashtun ruler in Kabul, forcibly relocated thousands of Ghilzai Pashtuns and members of other rival tribes from southern Afghanistan to the north. Later settlers, such as the Shinwari Pashtuns who began moving to Kunduz from eastern Afghanistan in the late 1940s, came voluntarily. Both the forced and voluntary migrants were allocated land by the central government, a development that fostered tensions with communities that consequently lost access to farmland and pastures. Louis Dupree, *Afghanistan* (Princeton University Press 1980) 188, 419; Asger Christensen, 'Afghanistan: Can the Fragments be Put Together Again?,' (2001) 4 *Nordic Newsletter of Asian Studies, Nordic Institute of Asian Studies*

⁸²⁶ Previously known as Abdali's, Ahmad Shāh Durrānī was also known as Ahmad Khān Abdālī

while the Durrani's have emerged as victors during times of peace.⁸²⁷ While the Ghilzai are larger in number, the Durrani have generally been more politically dominant, occupying important representative offices as well as higher levels of the armed forces.⁸²⁸

6.2 Anglo Afghan Wars

The first Anglo Afghan War (1839-1842) also known as 'Auckland's Folly' was the first major conflict in the Great Game era.⁸²⁹ More aptly characterized as a patriotic over religious war, there were elements of *jihad bi'l sayf*, especially from the Ghilzai.⁸³⁰

The Russian expansionist agenda through Asia in the first half of the nineteenth century required the quiescence of geo-strategic Afghanistan. Providing support to Russia was not repugnant to Dost Muhammad, the Durrani King at the time. However, he had his own agenda, to secure Peshawar which had been previously taken by the Sikhs. Dost was in negotiations with both the Russians and the British for an undertaking to satisfy this agenda, his loyalty given to whichever country provided support first. The British saw Dost's negotiations as duplicitous and subsequently labelled him a Russian conspirator and enemy of the British Empire. Consequently, the British invaded Afghanistan in 1838 to overthrow the King and impose a British styled government which would halt Russian expansion.

The creation of an 'artificial state outside its natural element, albeit with best intentions, the devil's choice soon became whether to support it in perpetuity or to abandon it with more dire consequences than would have come before.'⁸³¹ William Macnaghten, designated as Envoy to the new government, argued that continued support of Afghanistan was in the best interest of the British Empire. This support Macnaghten conditioned on austerity measures including the counterintuitive reduction of British military personnel with simultaneous reduction in the subsidies paid to the Afghan tribes for their quiescence. Calling on the Ghilzai chiefs, Macnaghten informed them that their 'stipend would cut in half.' While appearing amenable

⁸²⁷ Thomas Barfield, *Weapons of the Not So Weak in Afghanistan: Pashtun Agrarian Structure and Tribal Organization for Times of War & Peace* (Agrarian Studies Colloquium Series 2007) 15

⁸²⁸ Thomas Barfield, 'Afghan Customary Law and Its Relationship to Formal Judicial Institutions' (USIP, Washington 2003) 4; Saikal & Maley (n822) 15

⁸²⁹ The term 'Great Game' was coined by Lieutenant Arthur Connolly of the 6th Bengal Native Light Cavalry. the British agent sent to reconnoitre the region between colonial India and the Caucasus in 1829. Peter Hopkirk, *The Great Game: The Struggle For Empire In Central Asia* (Kodansha 1992)123-124.

⁸³⁰ Lord Auckland was the Governor General of India. Tanner (n798) 172.

⁸³¹ Such transposition of imperial governance would suffer the same defects America would endure in Vietnam in the twentieth century. Tanner (n798) 156.

to the new terms, the Ghilzai retreated to the hills. Within forty-eight hours, the Ghilzai attacked a caravan coming from India to Afghanistan terminating the ‘British lifeline to India...’⁸³² Macnaghten drastically underestimated the Ghilzai, an error that would prove fatal over the coming years.

The tribes had a two-fold agenda: remove the foreigners from Afghanistan while taking as much booty as they could. Although there are recorded instances of Afghan mercy attested to by British officers,⁸³³ there are many examples of the tribes not simply killing the British, but ‘cut[ting] them to pieces with knives’; they would not just target the soldiers, their wives and children were also ‘hacked to death.’⁸³⁴ Congruent with the *Badr* narrative (Ch. 5.2), the subsequent years saw a ‘catalogue of errors, disasters, and difficulties, which following close upon each other, disgusted [the British] officers, disheartened [its] soldiers, and finally sunk [them] all into irretrievable ruin, as though Heaven itself, by a combination of evil circumstances for its own inscrutable purposes, had planned [their] downfall.’ In 1842 when the British impenetrable forts were flattened by an earthquake in eastern Afghanistan. Akbar Khan, the son of Dost, considered this the ‘intervention of Allah.’⁸³⁵

The complicated Afghan power politics was not an intuitive construct for the British to understand. The King could be unilaterally declared and would be legitimated if and when support was gleaned. Akbar Khan, led negotiations with the British however as a Durrani prince, he laid no claim to Ghilzai loyalty.⁸³⁶ While many of the tribes united under a patriotic defensive war, none of the chiefs could exercise control over Ghazi Mohammad Jan Khan Wardak, and his force of 10,000 Afghans whose fervour was dedicated to destroying the British.⁸³⁷

Akbar would eventually kill Macnaghten and mutilate his body, the ‘trunk of his body turned up in the Kabul bazaar. His head and limbs had meanwhile been paraded around the city.’ The

⁸³² Bernd Horn & Emily Spencer, *No Easy Task: Fighting in Afghanistan* (Dundurn 2012) 45; Tanner (n798) 157.

⁸³³ Captain Trevor said that on several occasions Afghan fighters let him go rather than kill him. Tanner (n798) 171, 175.

⁸³⁴ Among the last words of a British Colonel Mackrell was ‘This is not battle, this is murder.’ Cited in Tanner (n798) 161 -162, 166-167.

⁸³⁵ Tanner (n798) 167, 191

⁸³⁶ This is in line with the Islamic notion of ‘right authority’ in 4.2.1.

⁸³⁷ Ghazi is a title given to Muslim warriors. The Wardak are from the Karlani subgroup of the Pashtuns in central and Eastern Afghanistan. Historically, the Wardak are known for their opposition to the British during the Anglo-Afghan wars. Tanner (n798) 172

British retreat saw massive civilian losses at the hands of the Ghilzai. In the Khord-Kabul Pass over 3000 bodies were left behind, ‘500 soldiers and 2500 civilians.’⁸³⁸ These civilians were either directly targeted or victims of indiscriminate attacks both a violation of the laws and customs of war in at least a CIHL sense if not *jus cogens*. There is no record of the attack being based on status as *apostates*.

Since 1849, and for nearly one hundred years, the British Empire attempted to control the Pashtun tribes of the North-Western Frontier of India in a continuous series of campaigns aimed at subduing the tribes.⁸³⁹ To ward off Russian expansion, the British would not concede their interest in securing the northern border through a physical presence. This presence was hostile to Pashtun libertarianism. Concepts of freedom in these remote areas were not derived from liberty enunciated in a Bill of Rights, rather it was the ancient derivation, being ‘unbothered by government at all.’⁸⁴⁰ A stale mate ensued until the late nineteenth century.⁸⁴¹

6.3 Abdur Rahman and the Durand Line Agreement 1893

Abdur Rahman, the grandson of Dost and nephew of Akbar Khan was Amir of Afghanistan from 1880 until 1901. He is credited somewhat paradoxically as both undermining the Pashtuns through a literal division of their homelands in the Durand Line Agreement, while at the same time reinforcing Pashtun dominance. Initially, Abdur Rahman directed his campaigns to reduce power on three fronts: of the anti-British Pashtun tribes; of his rival cousins who ruled Turkistan; and the non-Sunni ethnic groups in remote Afghanistan that had escaped control of an executive body. This ‘internal imperialism’ was designed to reconstruct Afghanistan so there were no more autonomous regions and the Amir could rule autocratically.⁸⁴² The simultaneous imposition of direct control and taxes vexed a population that did not invite nor consent to either. The more than forty uprisings against his regime over the course of his rule is testament to this opposition, however lack of coordination in the insurgencies meant the Amir’s regime was never overthrown.⁸⁴³

⁸³⁸Of the 17,000 garrison that had retreated Kabul in 1842, only one man, Dr Brydon had reached sanctuary. Tanner (n798) 181-182, 187.

⁸³⁹ Simner (n82) 9

⁸⁴⁰ Tanner (n798) 4.

⁸⁴¹ Simner (n82) 9.

⁸⁴² Dupree *Afghanistan* (n825), xix

⁸⁴³ ‘The level of violence it took to bring Afghanistan [to a police state, where even subversive talk would end in detention or worse] has been frequently overlooked by historians and later political leaders, who instead lauded the Amir’s ability to bring order to such a fractured land. Thomas Barfield, *Afghanistan: A Cultural and Political History*, (Princeton University Press 2010) 147.

Amir Rahman internalized ethnic divisions using force and manipulation to centralize the modern state. While directing the majority of his early campaigns against the Pashtuns, particularly Ghilzais', the Amir then became instrumental in their subsequent domination and privilege in Afghanistan's power politics. Next the Amir made *jihad* in defence of Islam part of Afghan national identity. It was in the Amir's interest to forcefully impose his xenophobic views as any talk of reconciliation and brotherhood could undermine the spirit of *jihad*.⁸⁴⁴ Directing *jihad* outward united the people internally. Some claim Afghans are only capable of unity when they are responding to a foreign threat.⁸⁴⁵ The Amir 'linked elements of Islamic belief with Afghan tribal customs in ways that convinced his largely illiterate population that the two were identical. The tautology was that since all true Afghans were devout Muslims then all their customs must be Islamic as well, otherwise they could not be good Muslims. Anyone proposing to change tradition could therefore be accused of attacking Islam itself.'⁸⁴⁶ The Amir's 'retrograde view of Islam combined with his policy of xenophobic isolation' preserved the territorial integrity of Afghanistan and closed the state to any external innovation, even from the Muslim world. While promoting on the one hand the wholly Islamic character of the Afghan state, he simultaneously created a fundamentally secular government that dominated the religious establishment.⁸⁴⁷

Although there are some examples prior to the Anglo-Afghan Wars where fighting *fi sabil Allah* was used to motivate insurgencies, Abdur Rahman sowed the seeds for the stylized Afghan *jihad* that can be seen in modern conflicts. Distinguished from eighteenth century Afghan *jihad*, where the struggle was offensive and directed against Hindu India, Abdur Rahman, referring to the 'God-granted State of Afghanistan' encouraged *jihad* to defend the land against attacks from the infidels to the north and south of the country.⁸⁴⁸

By 1896 the Afghan Government was viewed as a Pashtun Government rather than a Durrani dynasty, creating an ethnic hierarchy that would typify Afghan society for the next century, transforming the relative egalitarian Pashtuns into elitist aristocrats.⁸⁴⁹ This hierarchy crudely

⁸⁴⁴ A cleric who preached a softer line, calling for Afghans to view Christians as brothers was put to death at the impetus of Abdur Rahman. Hasan Kakar, *Government and Society in Afghanistan* (University of Texas Press 1979) 178-179; Olseen (n34) 74.

⁸⁴⁵ Tanner (n798) 4; Department of the United States Army (n35) 5.

⁸⁴⁶ Barfield, *Afghanistan*, (n843) 159.

⁸⁴⁷ Barfield, *Afghanistan*, (n843) 155.

⁸⁴⁸ Oleson (n34) 89-93

⁸⁴⁹ Kakar (n844) 228

positioned Pashtuns at the apex followed by Persian speaking Tajiks who played a significant role in the administration of government and then the Turks who were voiceless in areas of governance. The Hazara's sat outside the hierarchy and were actively discriminated against.⁸⁵⁰

Abdur Rahman was the nationalist who declared the necessity of defending Afghanistan's borders to the death, never ceding Afghan land. In reality he made calculated concessions which lost land.

6.4 Durand Line

To prevent tribal feuds from inviting Russian influence colonial officials devised a strategy to bring the Pashtun belt under British control, a literal divide and conquer strategy. They split it in half by surveying the Durand line, a 1200 mile boundary that continues to demarcate Afghanistan and Pakistan.⁸⁵¹ (*Map 2*) Drawn in 1893, the 'scientific frontier' followed a topographic ridgeline that could create a 'terrain advantage for the British defenders of the Raj.'⁸⁵² Slicing through tribes, villages, and clans, it 'cut the [Pashtun] people in two.'⁸⁵³ It separated the Pashtun tribes on both sides of the line into 26 agencies, each with its own laws and tribal councils.⁸⁵⁴ While some inaccessible sections remained unmarked, the line created a strategic frontier that 'did not correspond to any ethnic or historical boundary.'⁸⁵⁵

This 'confusing, artificial and unnecessary border' compounded the already unappreciated foreign intervention and united the largest tribal grouping straddling either side of the Line. The Pashtun tribes resisted the division. The British responded by stationing permanent garrisons. The Pashtuns remained restive, with religious leaders often playing leading roles in the unrest.⁸⁵⁶

⁸⁵⁰ Abdur Rahman quashed a Hazara revolt in the late 1880's. He then began a campaign of ethnically cleansing forcing Hazara girls into marriage and slavery. He sent Sunni clerics to Hazarajat, forced Hazara to attend the mosque and abandon Shi'ism. He imposed punitive taxes on the group and they remained *de facto* slaves until 1919 when King Amanullah declared independence. Barfield 'Customary' (n828) 155.

⁸⁵¹ A British commission led by Sir Mortimer Durand was tasked with creating a border.

⁸⁵² George McMunn, *Afghanistan from Darius to Amanullah* (Sang-e-Meel Publications 2002) 225-8; Tanner (n798) 5

⁸⁵³ Owen Bennett Jones, *Pakistan: Eye Of The Storm* (Yale University Press 2009)

⁸⁵⁴ Milt Bearden, 'The Pashtuns of Afghanistan: Alexander the Great Also Got in Trouble Here' New York Times (New York, 31 March 2004)

⁸⁵⁵ Olivier Roy, *Islam and Resistance in Afghanistan* (Cambridge University Press 1990) 17. The Durand Line has been characterized 'illogical from the point of view of ethnography, of strategy and of geography.' William Frasertytler, *Afghanistan: A Study Of Political Developments In Central And Southern Asia* (OUP 1953) 188.

⁸⁵⁶ Abdulkarim Khan, 'The Pashtun Man' in Adam Jones *Men of the Global South: A Reader* (Zed Books 2006) 368; Simner, (n82) 10; Bijan Omrani, *The Durand Line: History and Problems of the Afghan-Pakistan Border*

The Durand demarcation, although contentiously official, did not divide the Pashtuns of Afghanistan and Pakistan.⁸⁵⁷ '[T]he Pashtun themselves have never paid the boundary much regard since it was drawn.... They don't recognize the border. They never have. They never will.'⁸⁵⁸ Through bisecting tribal homelands of three million pastoralists..., the Durand Line restricted Pashtun autonomy and facilitated new forms of indirect influence over peoples on both sides of it.⁸⁵⁹ This remnant of nineteenth century predatory colonialism has left a porous Afghanistan-Pakistan frontier which has sustained insurgencies.⁸⁶⁰ It 'raises questions about the relationship between contested borders, nation-building, failed states, cultural differences and foreign interventions.'⁸⁶¹ Conflicting values within an artificially-created state are at the root of Afghanistan's current instability.⁸⁶²

(2009) 40 Asian Aff 187. See also David Edwards, *Heroes of the Age Moral Fault Lines on the Afghan Frontier* (University of California Press 1996) 143-44, 169-71.

⁸⁵⁷ There are 13 million Pashtuns living in Afghanistan, across the Durand line there are a further 30 million. Figures based on CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>

⁸⁵⁸ Scott Shane, *The War in Pashtunistan*, NY Times (NY, 6 Dec 2009)

⁸⁵⁹ Colin Davies, *Problem of the North West Frontier* (Curzon Press 1975) 162-3; C. Sulzberger, 'Nomads Swarming over Khyber Pass' *New York Times*, April 24 1950, 6 cited in Cullather, (n819), 516; J Elliott *The Frontier 1839 – 1947* (London, 1968), 53

⁸⁶⁰ These tribal areas have rejected advances from contemporary society and lack an adequate legal infrastructure to support a sustainable rule of law. Rather, its antiquated legal system provides optimum conditions for nurturing and harbouring ANSGs and fuelling conflict. Frasertyler (n855) 332; Cullather (n819) 517. During the 1979-84 Afghan 'jihad,' The border agencies served as a 'launching pad for the *mujahidin*.' Sayed Hussain, *Frontline Pakistan* (IB Tauris 2008) 43; Thomas Johnson & Chris Mason, 'No Sign until the Burst of Fire: Understanding the Pakistan-Afghanistan Frontier,' (2008) 32(4) *International Security* 41, 69; Jeremy Crampton & John Krygier, *An Introduction to Critical Geography*, (2006) 4 *Acme: An Int'l E-Journal For Critical Geographies* 11, 15

⁸⁶¹ Tayyab Mahmud, 'Colonial Cartographies, Postcolonial Borders, and Enduring Failures of International Law: The Unending Wars Along the Afghanistan-Pakistan Frontier', (2011) 36(1) *Brook J Int'l L* 1, 3

⁸⁶² Edwards *Heroes* (n856); Johnson & Mason, *No Sign* (n860) 69; Crampton & Krygier (n860) 11, 15

Map 2: Durand Line, 1893

Afghanistan-Pakistan Border



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Credit: University of Texas Libraries

6.5 Resistance to Centralization: The Urban Rural Divide

*'We are content with discord...; we are content with blood; but we never will be content with a master.'*⁸⁶³

Identities in Afghanistan are shaped by more than ethnicity, with religious divisions and urban-rural tensions also impacting the stability of the State.⁸⁶⁴ 'A bridge between the Persian and Indian worlds transmitting elements of each to the other,' Afghanistan was the conduit for Buddhism to reach China and Japan.⁸⁶⁵ During the 7th century, Arab armies invaded Afghanistan and Islam became the predominant cultural influence by the mid 800's.⁸⁶⁶ Islam became the *lingua franca* between the various tribes and ethnicities of Afghanistan, the 'central nerve for Afghan culture, complementing and extending existing structures as well as creating a monopoly on education and learning in the region, a legacy that has continued into the twenty first century.'⁸⁶⁷ In the nineteenth century amid imperialist agendas, Islam emerged as the dominant legitimating discourse in Afghanistan.

From 1818 a series of opposition movements emphasized Islam as their dominant symbol.⁸⁶⁸ A power struggle between the urban and rural, the state and tribal structure pushed the reformist King Amanullah from power in 1929 under the slogan 'Islam is in danger'.⁸⁶⁹ Propaganda successfully depicted his modernists policies as attacks on Islam; 'religion became a focal point

⁸⁶³ A Pakhtun leader once told Elphinstone in William Hough, *A Narrative of the March and Operations of the Army of the Indus* (BiblioLife 2015) 141

⁸⁶⁴ Hyman (n812) 299-315.

⁸⁶⁵ Louis Dupree, 'A Suggested Pakistan-Afghanistan-Iran Federation' (1963) 17(4) *Middle East Journal* 386

⁸⁶⁶ The earliest historical record of Islamic conversion among the Afghans was that of the King of Kabul in the reign of al-Ma'mun. Subsequent rulers relapsed to Buddhism until conquests in the Saffarid dynasty extended as far as Kabul and Islam became established in most areas of Afghanistan. There were parts of Afghanistan resistant to a seamless transposition of Islam, in these areas Islam blended with local shamanistic rituals overlaid with folklore. Abu Ja'far Abdullah al-Ma'mun ibn Harun al-Rashid was the seventh Abbasid caliph reigning from 813 until his death in 833. Thomas W Arnold, *The Preaching of Islam: A History of the Propagation of the Muslim Faith* (Aryan Books International 1998) 217; Dupree, *Afghanistan* (n825) 104-107. Spriggs, (n822).

⁸⁶⁷ Afghanistan is today a majority Muslim state with 99.7 % Muslim. (84.7- 89.7% Sunnis and 10-15% Shi'as; the latter being mainly the Hazaras). This is a 2009 estimate. CIA Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>. Nagamine (n71) 11.

⁸⁶⁸ Ashraf Ghani, 'Afghanistan: Islam and Counterrevolutionary Movements', in John Esposito (ed) *Islam in Asia: Religion, Politics and Society* (Oxford University Press 1987) 85

⁸⁶⁹ 'Throughout the country the advantages of anarchy seem to have been better appreciated than its drawbacks, and the tribes were asking themselves why they should resign the freedom which they had enjoyed for the past year, and submit again to a central authority which would inevitably demand payment of land revenue, customs duties and bribes for its officials, and possibly the restoration of the arms looted from the government posts and arsenals.' Richard Maconachie, British Minister in Kabul, writing in 1931, quoted in Martin Ewans, *Afghanistan A New History* (Curzon 2001) 101.

for opposition that was essentially political'.⁸⁷⁰ Indeed, Governments perceived as un-Islamic continue to have little chance of long term survival in Afghanistan.⁸⁷¹

The urban-rural divide is an important characteristic of Afghan society. Where Afghan cities have engaged and absorbed science and development, rural areas have remained mostly 'decoupled from the development of cities.'⁸⁷² There is a 'mutual contempt' entrenched on either side, urban population seeing their rural counterparts as 'barbarian', while these 'barbarians' see city dwellers as political elitists removed from traditional Afghan culture.⁸⁷³

Successive Afghan governments have sought to impose centralized code based judicial institutions upon local communities that have historically had their own informal institutions for conduct regulation and dispute resolution.⁸⁷⁴ However its reach has rarely penetrated the rural and peripheral areas of the country, providing little to and asking little of the population.⁸⁷⁵ 'While the content of these state-supported codes has varied in ideology, opposition to them has not,' and depending on whether the community perceived a foreign flavour to the code that potentially compromised Afghan tradition it could result in rebellion and overthrow of the regime that imposed them.⁸⁷⁶ This foreign flavour need not be external to Afghanistan, rather, it is any state imposed system that is foreign to the customary law and practice of traditional Afghan society. During the 20th century modernists and Islamists battled over the Afghan legal

⁸⁷⁰ Eden Naby, 'The Changing Role of Islam as a Unifying Force in Afghanistan' in Banuazizi and Weiner (eds), *The State, Religion and Ethnic Politics* (Syracuse University Press 1986) 128

⁸⁷¹ Lau "Islamic Law" (n78) 2. In 1970, there was huge public outcry when a Marxist journal published a poem which used words reserved for the Prophet. For the first time, the clergy and the militant Islamists worked together but their demonstrations were violently repressed. Roy *Islam and Resistance* (n855) 47. As the parliament failed to act, the government itself was attacked for not following the tenets of Islam and the opposition's demands became diversified to include banning alcohol, reintroducing the veil and the abolition of secular education and legislation. Oleson (n34) 215.

⁸⁷² Nagamine (n71) 12.

⁸⁷³ Tribal peoples who move to the cities tend to lose their kinship links and identify by locality over the course of a few generations. Shahm Mahmood Miakhel, 'Understanding Afghanistan: The Importance of Tribal Culture and Structure in Security and Governance' (United States Institute of Peace, November 2009) 2. Barfield *Afghanistan* (n843) 64, 168.

⁸⁷⁴ Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary* (Brill 1985) 4

⁸⁷⁵ This is especially true for war functions, where the state requires manpower and support from its population and must be willing to grant people rights and protections as incentives for support. Charles Tilly, *Coercion, Capital and European States* (Basil Blackwell 1990); Barfield 'Customary' (n828) 1.

⁸⁷⁶ Thomas Barfield, 'Culture and Custom in Nation-Building: Law in Afghanistan' [2008] 60(2) *Maine Law Review* 347, 349.

system, the former advocating replacing exclusive dependence on *Shari'a* with statutory law. Such attempts were met with fierce resistance.⁸⁷⁷

Shari'a developed procedures for evaluating evidence, deciding cases in a consistent manner, and justifying decisions by reference to Hanafi *fiqh*. Yet the translation of judgments was often a poor fit between its procedures and the needs of illiterate rural Afghans. Customary law was part of an oral tradition in which any competent adult could participate; state law courts demanded written documents and citation of specific laws to bring a case. The use of *Shari'a* by state courts often ran contrary to rural traditions, particularly the right to blood revenge, payment of bride price, denying property inheritance to women, and punishment of crimes like adultery. Rural Afghans often ignored the gap between *Shari'a* law and local custom because they often assumed that there was none inferring compatibility on the same logic used by Abdur Rahman, that they themselves were good Muslims therefore it must be compatible. The high level of illiteracy in Afghanistan and weak training in Arabic even among educated clerics meant too few of them actually knew just what *Shari'a* actually required.⁸⁷⁸

Proposed and actual legislation was used as a vehicle by conservative *mullah's* to mobilize opposition to the government in Kabul which was seen as legislating against the will of rural Afghanistan. The most widely cited example was the opposition to King Amanullah's reforms in the 1920s that resulted in rural revolts that eventually toppled his regime. What rural Afghans tended to resist, and what Muslim clerical opponents could effectively play upon, was the imposition of direct control by the Kabul government (ignoring the fact that *Shari'a* was an alternative type of direct state control).⁸⁷⁹ Although to outsiders the alliance of rural communities and Islamists clerics seemed natural, it was not. Islamist clerics opposed customary law institutions as blood feud, marriage payments, and exclusion of women from inheritance rights as much or more than the Kabul government did, and they had more influence to change them at the local level.

⁸⁷⁷ Afghanistan's first written constitution in 1923 *Shari'a* was given a supplementary and subordinate role to other laws, with the exception of the personal and family law domains. Ask 'Legal Pluralism' (n34) 347, 351

⁸⁷⁸ Barfield 'Customary' (n828) 28.

⁸⁷⁹ The Hanafi school was written into the 1964 Constitution as the official doctrine for judicial and legislative purposes. This school permits a considerable amount of personal opinion of the *Qadi* to enter into the deduction of this spirit and hence in administering justice. Spriggs, (n822), 11. Barfield 'Customary' (n828) 26. Even if *Shari'a* as a divinely revealed law cannot in principle be changed by human intervention, there is ample historical evidence which show that all Muslim nations have codified religious law as part of their nation building project. Ask, 'Legal Pluralism' (n34) 355.

Renewing a top-down process of centralization contested community autonomy. Challenging the formal legal system was a feasible option because the alternatives to it were well developed traditions with deep roots, both tribal and religious.⁸⁸⁰ These alternative systems better reflected local values and traditions than did the formal system, which was often attacked in the past as a vehicle for introducing alien ideologies into the country.⁸⁸¹ The very notion of state-imposed codes is inimical to traditional Afghan political and governance dynamics. This has proved true for both liberal and conservative changes.⁸⁸²

Afghanistan was never held under the sway of a strong central government.⁸⁸³ From Europe's first encounters with Afghan tribes and states, these Muslim men of the mountains have represented to the West the firmest resistance to its power and domination.⁸⁸⁴ A product of the rapid turnover of ruling parties, central government is a temporary condition in Afghanistan, '...many areas... operate without (or outside of) formal government institutions...; not just because of war, but because that is the way things have always been.' While Afghan governments formally reject claims of personal justice, they have never been able to extend the formal justice system to rural Afghanistan; the people there never relied on state institutions and often took offense when the state interfered in what they viewed to be personal matters.⁸⁸⁵ Whether a result of occupation or civil war, the absence of a functional government over a thirty year period led the people of Afghanistan to rule themselves on the basis of these traditional codes through local assemblies, *jirgas* or *shuras*.⁸⁸⁶

The preservation of order and the ability to resolve disputes in the absence of government is only a problem when the society depends on the state and its formal institutions to define law

⁸⁸⁰ Barfield 'Culture' (n876) 350.

⁸⁸¹ Kathleen Reedy 'Customary Law and Its Challenges to Afghan Statehood' (2012) *Military Review* 27, 28

⁸⁸² In the 1920's, King Amanullah's attempt to modernize the Afghan legal system by improving women's rights was met with resistance that aided the toppling of his regime in 1929, forcing Amanullah into exile. Fifty years later when a socialist party took power in a coup, it was women's rights that provoked a new conflict. Leon Poullada, *Reform and Rebellion in Afghanistan 1919-1929* (Cornell University Press 1973) 99-103 in Barfield 'Culture' (n876), 349; Lau 'Islamic Law' (n78) 4; Ask, 'Legal Pluralism' (n34) 351.

⁸⁸³ Failure contextualizing tribal governance in rural *vis a vis* urban Afghanistan has proved problematic. These distinctions became amplified over the succeeding years. (n881), 1. Alex Strick Van Linschoten & Felix Kuehn, 'Kandahar: Portrait of a City' (Hurst 2012); Abdul Salam Zaeef *My Life with the Taliban* (Columbia University Press 2011) xv; Tanner, (n798) 3

⁸⁸⁴ Rubin *Fragmentation* (n817) 3

⁸⁸⁵ Barfield 'Problems in Establishing Legitimacy' (n806) 263-264; Barfield 'Culture' (n876) 348.

⁸⁸⁶ In rural Afghanistan, most people solve their disputes and problems through local dispute resolution mechanisms (*jirga* or *shura*) because the formal judicial system is weak, inaccessible, and ineffective and corrupt. Formal rulings are generally considered invalid and cannot prevent the possibility of future revenge. Most people opt for the informal system. USIP Briefing paper December 2006, Kabul, Afghanistan. Barfield 'Culture' (n876) 348; Reedy 'Customary' (n881), 28; Hashmi *Law in Afghanistan* (n874) 227

and ensure its enforcement. Hobbes believed that the absence of government or its collapse led to anarchy and a breakdown of social order to produce a ‘war of each against all.’ He posited the maintenance of social order legitimized the government and took precedence over tyranny, failure to preserve social order inviting replacement.⁸⁸⁷ This Hobbesian bargain has been invoked by Afghan governments to justify oppressive behaviour.

The benefits of the many failed attempts at centralization meant a diminished role and reliance on formal government. As the tribes have been left mostly to themselves, the tribal system is consistent in providing resilience and stability in tumultuous times.⁸⁸⁸ Anarchy has not been as prevalent at local level even when government institutions proved incapable of maintaining order, the local population mobilizing their immediate relatives and larger kinship groups to get justice. The use of customary law sustained rejection of the Hobbesian bargain.

The reconstruction of the post-colonial world asserted ‘all nations followed a common historical path and that those in the lead had a moral duty to those who followed.’ This problematic assumption firstly failed to factor that ‘...the hands of the clock of history are set at different hours in different parts of the world [,]’ and that different parts of the world may not only use alternate clocks, but they may have different conceptions of time. When referring to Afghanistan as a nation-state the term does not presuppose that it fully or even partially shares the characteristics of a Weberian ideal state, Kabul does not even claim to enjoy a monopoly on the use of force.⁸⁸⁹

⁸⁸⁷ Hobbes (n601)

⁸⁸⁸ Bearden (n854)

⁸⁸⁹ The ‘use of force is regarded as legitimate only so far as it is either permitted by the state or prescribed by it...The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization.’ Max Weber, *Theory of Social and Economic Organization* (Simon and Schuster 2009) 56. For analysis and critique, see Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China* (Cambridge University Press 1979); Reedy ‘Customary Law’ (n881) 28. Tilly distinguishes coercion-wielding organizations from households and kinship groups which exercise clear priority in some respects over all other organizations within substantial territories. This definition includes what Giddens calls the *traditional state* and what other refer to as *empires*, as well as city-states and federations of towns. Rarely did such empires directly administer areas outside of cities and towns. They dealt with most of the rural or nomadic population as corporate groups. Anthony Giddens, *Nation-State and Violence* (Wiley 2013); Shmuel Eisenstadt, *The Political Systems of Empires* (Free Press of Gelncoe 1963) cited in Rubin *Fragmentation* (n817) 5-6; Tilly (n875), 1. Martin Lau, Afghanistan’s Legal System and its Compatibility with International Human Rights Standards (Int’l Csn Jurists Final Report) 4 <http://www.refworld.org/pdfid/48a3f02c0.pdf> accessed Jan 16 2016.

Nation building in Afghanistan did not fail for want of money or time. While modernization in post-colonial creed manifested in a ‘projection of [imperialist] identity,’⁸⁹⁰ best efforts in history has shown Afghanistan by and large ‘ungovernable’ by Western methods.’⁸⁹¹ Ordinary Afghans may not see the expansion of the formal legal system as a step forward in establishing the rule of law, as historically they had no role in creating the national law codes they were asked to accept a system they had only known as a corruption of due process. ‘The values that the Afghan state has pledged itself to uphold internationally are largely unknown and unenforceable domestically.’⁸⁹²

6.6 The *Mujahidin*, Saur Revolution and Soviet Invasion

Afghanistan has been described as a ‘bottomless pit’, the more money and manpower third states pour into the country the harder it is to extricate, a reality recently felt by the Americans, learned by the Russians in the 1980s, and by the British a century earlier.⁸⁹³

The history of modern armed conflict in Afghanistan began in April 1978, when Soviet backed Afghan communists took control of the government in a coup, overthrowing the self-proclaimed president of Afghanistan, Daoud Khan, the cousin of Afghanistan’s former King Zahir Shah, who was earlier overthrown in a bloodless coup by Daoud in 1973.⁸⁹⁴ This coup known as the *Saur* Revolution was led by the People's Democratic Party of Afghanistan (PDPA) in April 1978.⁸⁹⁵ The revolutionaries who seized power in Kabul consisted of two opposed political parties: *Khalq* and *Parcham*.⁸⁹⁶ The revolution was far from popular, each had minimal support, and many segments of the country’s army and police opposed the coup. The new government, the Democratic Republic of Afghanistan (DRA) was dominated by a ruthless *Khalq* leader, Hafizullah Amin, who sought to terrorize Afghanistan

⁸⁹⁰ Cullather (n819) 513, 515

⁸⁹¹ The outside world desperate to see Afghanistan in a western construct comprising the ‘gentle oasis’ of Kandahar, Kabul, the ‘Paris of the East’, and Lashkar Gah, the New York of Afghanistan. Jere Van Dyk, *Inside Afghanistan* (Author’s Choice Press 1983); Cullather (n819) 1.

⁸⁹² Barfield ‘Culture’ (n876) 350.

⁸⁹³ Isaac Kfir, ‘The Role of the Pashtuns in Understanding the Afghan Crisis’ (2009) 3(4) *Perspectives on Terrorism* 37

⁸⁹⁴ 27 April 1978 Coup against Daoud’s regime, President Daoud and about 30 men, women and children of his family are killed as well as about 1,000 soldiers and civilians. Louis Dupree, ‘Red Flag over the Hindu Kush: Part II’, American Universities Field Staff Reports, LD-3- 1979, 8; Lau Afghanistan’s Legal System’ (n889). See Rubin *Fragmentation* (n817) and Barnett Rubin, *The Search for Peace in Afghanistan: From Buffer State to Failed State* (Yale University Press 1995)

⁸⁹⁵ *Saur* is the Dari name of the second month of the Persian calendar, the month in which the uprising took place.

⁸⁹⁶ The names of the two parties derived from their respective newspapers, *Khalq* (the masses) and *Parcham* (the flag). At the time of the 1978 coup, Khalq and Parcham were ostensibly united within the PDPA.

into submission through Stalin-styled purges and arrests. The autumn of 1979 saw largely uncoordinated revolts explode through Afghanistan with about ten separate rebel groups ranging from the secular left to the monarchical right identified in the insurgency.⁸⁹⁷ The insurgencies led to a first wave of Afghan refugees and by mid-August 1979 about 150,000 Afghans have fled to Pakistan and about 30,000 to Iran.

Up to 10,000 ‘dissidents’ were executed by DRA as ‘enemies of the revolution’. Such measures fuelled the insurgency. By the summer of 1979 the *mujahidin*, a collective of Islamic ANSGs, controlled most of Afghanistan’s countryside. Sensing the increasing hostility towards the communist government, the Soviet Union invaded Afghanistan to support the failing revolution and government and installed a new leader from the *Parcham* party, Babrak Karmal.⁸⁹⁸ A Soviet–Afghan War ensued against the *Mujahidin*.⁸⁹⁹ This Soviet adventure in Afghanistan took a decade to cycle through, ending in exactly the same fashion as all the other foreign enterprises in that land, with failure. The Soviets could not establish their authority.⁹⁰⁰

When the *Saur* revolution occurred, Afghanistan was not particularly militarized. The *mujahidin* were severely under-equipped to fight a standing Soviet army, and the communist Afghan government was severely disorganized and poorly outfitted. The Soviet invasion filled Afghanistan with weapons. During the 1980’s, Afghanistan likely received more light weapons than any other country in the world, and by 1992 it was estimated that there were more light weapons in Afghanistan than in India and Pakistan combined.⁹⁰¹ Once armed, the insurgency and the government needed to be financed. Pakistan used the Afghan *Jihad* to enhance its ties with Saudi Arabia and the United States, who provided money for *jihad*.⁹⁰² In the 1980’s, the

⁸⁹⁷ Before the Soviet invasion, US President Jimmy Carter authorized the CIA to assist *mujahidin* with money and non-military supplies through Pakistan. Saudi Arabia also had an interest in maintaining a Sunni footprint in Afghanistan. Pakistan deemed seven groups warranted the bulk of the aid. These included: Buhruddin Rabbani, Afghanistan National Liberation Front; Hekmatyar Hizb-I Islami; Abdul Rasul Sayyaf the Islamic Union for the Liberation of Afghanistan (also known as Ittehad), Yunis Khalis Hizb-I Islami; Sibghatullah Mojaddedi National Islamic Front of Afghanistan; Sayyid Ahmad Gailani, Revolutionary Islamic Movement and Mohammad Nabi Mohammadi Afghanistan National Liberation Front. These groups would go to Peshawar for money, arms and personnel, hence the namesake Peshawar Seven.

⁸⁹⁸ 27 Dec. 1979 Amin is overthrown and Babrak Kamal, who returned with Russian troops to Kabul, is installed as the new President. 1980 Babrak Kamal promulgates The Interim Constitution of Afghanistan [‘The Fundamental Principles of the Democratic Republic of Afghanistan’]. Lau ‘Afghanistan’s Legal System’ (n889)

⁸⁹⁹ Within a week about 50,000 Soviet troops enter the country. *ibid* (n889)

⁹⁰⁰ Bearden (n854)

⁹⁰¹ Rubin *Fragmentation* (n817) 196.

⁹⁰² Ahmed Rashid. *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (Yale University Press 2000); Olivier Roy, ‘Rivalries and Power Plays in Afghanistan: The Taliban, the *Shari’a* and the Pipeline’ (1996) 202 *Middle East Report* 37, 38-39.

United States, Saudi Arabia, and to a lesser extent Iran and China, allocated an estimated \$6 to \$12 billion dollars (U.S.) in military aid to *mujahidin* groups, while the Soviet Union sent approximately \$36 to \$48 billion of military aid into the country to support the government.⁹⁰³ This covert aid was channelled through Pakistan's Inter Services Intelligence Directorate (ISI), and given primarily to the most radical religious groupings, thus bypassing the moderate Afghan nationalists.⁹⁰⁴ Pakistan, where some of the *mujahidin* parties set up exile headquarters, arranged large military training programs for the *mujahidin* and controlled the delivery of Saudi and U.S. Pakistan, the US and Saudi cloaked their activities behind intermediaries in what amounted to nothing less than a sub-contracting and privatization of the *jihad*.⁹⁰⁵

The war had terrible effects on civilian life in Afghanistan. It is estimated that well over one million people were killed during the Soviet occupation however they did it in such a 'boring, mechanical, impersonal way as to deflect sustained attention'.⁹⁰⁶ In the end what 'worked' in Afghanistan was not reason or negotiation or the advent of *perestroika* but the Afghans' willingness to die.⁹⁰⁷ A country inhabited by a people willing to endure a decade of brutal bombing, scorch-earth campaign and see a million dead and another third of its population subsisting in make-shift refugee camps, is a country that 'one should think twice before taking head on'.⁹⁰⁸ It was not the military prowess that defeated the Soviets, rather it was the *mujahid* commitment to defend their land against evil.⁹⁰⁹ Accounts of good triumphing over evil fed into many accounts within the Afghan *jihad* that align with the *Badr* narrative.

'A large battalion came from Russia; consisting of seventy tanks and some regiments, covered by twelve planes. The *mujahidin* were only one hundred and fifteen in number.

⁹⁰³ Larry Goodson, *Afghanistan's Endless War: State Failure, Regional Politics, and the Rise of the Taliban* (University of Washington Press 2001) 63, 99; Coll (n798) 65-66, 151, 190, 239. See also generally, George Crile, *Charlie Wilson's War: The Extraordinary Story of the Largest Covert Operation in History* (Atlantic Monthly Press 2003); HRW, *Crisis of Impunity: The Role of Pakistan, Russia, and Iran in Fuelling the Civil War*, A HRW Short Report, July 2001, vol. 13, no. 3 (C)

⁹⁰⁴ Thomas Johnson & Chris Mason, 'Understanding the Taliban and Insurgency in Afghanistan' (2007) 51(1) *A Journal of World Affairs*, 71; Coll (n903) 59, 161-67; Thomas Johnson, 'Financing Afghan Terrorism: Thugs, Drugs, and Creative Movements of Money, in Harold Trinkunas and Jeanne Giraldo (eds.) *Terrorism Financing and State Responses: A Comparative Perspective* (Stanford University Press, 2007) 93-114. See Hamid Khan, *Constitutional And Political History Of Pakistan* (OUP, 2005), 647-67; Rashida Patel, *Islamisation Of Laws in Pakistan* (Faiza Press 1986)

⁹⁰⁵ Abou-Zahab & Roy (n418) 53-54.

⁹⁰⁶ Rubin *Fragmentation* (n817) 1.

⁹⁰⁷ Robert Kaplan, 'Afghanistan Post Mortem' (1989) *Atlantic Monthly* 24; Tanner (n798) 169.

⁹⁰⁸ Kfir, (n893) 50; Abou-Zahab & Roy (n418) 37-38.

⁹⁰⁹ HRW *Blood Stained* (n760), 2.

A fierce battle ensued. Eventually the enemy was defeated. We had destroyed thirteen tanks. From amongst us only four were blessed with martyrdom.’⁹¹⁰

‘When the communists entered a town with their tanks, they enquired where the ‘stables for the horses of the Muslim brothers’ were. The people were surprised since they did not ride horses. Then they realized that these were the horses of angels.’⁹¹¹

The Pakistani government, through the army and its ISI, used the opportunity of the Soviet invasion to nurture and radicalize resistance groups. Islamabad hoped to undermine the Soviet-backed pro-communist regime, its very existence offending a conservative Muslim like Zia-ul-Haq.⁹¹² He used the ISI to support, train, and prop up the Islamic resistance movements by involving Pakistan-based Islamic movements (mainly Jama’at-i-Islami) to instil greater commitment amongst the refugees, while also ameliorating tribal divides in favour of the concept of an *umma*.⁹¹³

‘The presence on Pakistan’s soil of large numbers of refugees, most of them cut off from their traditional leadership, economically dependent, and united in belief of the righteousness of their resistance cause, benefited most from the highly conservative domestic religious parties... it was Pakistan's Jama’at-i-Islami that took the lead in assisting the displaced Afghans and promoting their cause...’.⁹¹⁴

Afghan refugees enrolled in Pakistani *madrassas*. Meanwhile the curriculum of instruction was ‘wahhabized’ under the influence of Saudi benefactors. *Madrassas* become militarized and politicized during the Soviet invasion; indeed, Islam became increasingly radicalized as a result of the 1980’s.⁹¹⁵ Thousands of ‘Gucci *jihadis*’ who flooded into Afghanistan in order to fulfil their Islamic duty of defending the *umma*, left behind them a religious and cultural legacy. They imported into the region a more puritanical strain of Islam which included anti-Shi’ism,

⁹¹⁰ Abdul Azzam, Signs of Ar-Rahman from the *Jihad* in Afghanistan, ed. A.B al-Mehri (Birmingham, n.d), 33 in Halverson (n260) 54.

⁹¹¹ Ibid, 55.

⁹¹² See Amin Saikal, *Islam and the West: Conflict or Cooperation* (Palgrave Macmillan 2003) 104-06; Abou-Zahab & Roy (n418); 26; Kfir, (n893) 41.

⁹¹³ Rashid Taliban: *Militant Islam* (n902) 38-39.

⁹¹⁴ Marvin Weinbaum. *Pakistan and Afghanistan: Resistance and Reconstruction* (Westview Press 1994) 86.

⁹¹⁵ Abou-Zahab & Roy (n418) 13.

opposition to Sufi customs and the broadening of the battle against the invader from military defence to cultural defence against a *kafir* onslaught.⁹¹⁶

At the end of the conflict, Pakistan had to find something to do with the religiously instructed and motivated youth. The issue, however was that the *mujahidin* were increasingly uncontrollable and hostile, as they fought over the spoils of Afghanistan.⁹¹⁷ The disunity among the *mujahidin* was aggravated throughout this period by the continuing policy of the United States, Pakistan, and Saudi to give a disproportionate amount of military assistance to one particular *mujahidin* party: Hizb-i Islami of Gulbuddin Hekmatyar.⁹¹⁸ There was never any real unity between the *mujahidin* parties: some were openly hostile and occasionally fought battles with each other. For most of the 1980s, the *mujahidin* groups, supported by the United States, the United Kingdom, Saudi Arabia, China, Iran, and Pakistan, fought a brutal guerrilla war against Soviet and Afghan national forces, attacking convoys, patrols, arms depots, government offices, airfields, and even civilian areas. Much of the countryside became a battle zone in the 1980s.⁹¹⁹ Through the 1980's, Hekmatyar received the majority of assistance from these countries, and in 1991, the CIA (with Pakistani support) was still channelling most U.S. assistance through Hekmatyar—including large shipments of Soviet weapons and tanks the United States captured in Iraq during the first Gulf War.⁹²⁰

6.7 The Geneva Accords 1988 and the Soviet Withdrawal

The Geneva Accords, a series of bilateral agreements negotiated at the end of the conflict between the US, Soviet Union, Pakistan and the pro-Soviet Afghan government did not include the *mujahidin*.⁹²¹ Having lost their common enemy and having not been included in the negotiations, the *mujahidin* split into factions and fought each other for the control of the country, resulting in years of civil war.

⁹¹⁶ Olivier Roy, 'Has Islamism a Future in Afghanistan?' in Maley *Fundamentalism*,(n55) 202.

⁹¹⁷ Kfir (n893) 43.

⁹¹⁸ HRW, Blood Stained (n760) 14.

⁹¹⁹ *ibid* 11.

⁹²⁰ These weapons were later used by Hekmatyar to attack Kabul in 1992-1996. Coll (n903) 226; and Steve Coll, 'Afghan Rebels Said to Use Iraqi Tanks' The Washington Post (Washington, October 1, 1991) accessed 23 October 2015; Rubin *Fragmentation* (n817) 196-201; Saikal, 'The Rabbani Government, 1992- 1996' in Maley *Fundamentalism*,(n55) 30-31.

⁹²¹ The Accords, signed 14 April 1988, consisted of several instruments which are collectively known as the Geneva accords. They have been hailed as the key to Soviet withdrawal from Afghanistan and a settlement of the conflict. They have also been condemned by critics as a betrayal of the Afghan people and their ten-year struggle against communist domination. Rosanne Klass, 'Afghanistan: The Accords' (1988) *Foreign Affairs* 1 <https://www.foreignaffairs.com/articles/asia/1988-06-01/afghanistan-accords> accessed Jan 12 2016; Agha Shahi, Geneva Accords (1988) 41(3) *Pakistan Horizon* 23.

Facing an increase of *mujahidin* attacks against the government, the Soviet Union completed its withdrawal from Afghanistan, pursuant to the Geneva Accords on February 15, 1989. Najibullah, the Soviet backed president, remained in power and in control of the country until 1992, although his followers were now a minority in the legislature. It was only through the continued Soviet support that Najibullah maintained a tenuous grip of the Government Post-Soviet withdrawal. After the Soviet Union collapsed, bringing an end to the flow of money, food and weapons that sustained Najibullah's regime, Kabul fell to the *mujahidin*.⁹²² A collective of *mujahid* reflecting every major ethnicity in Afghanistan took control in 1992. This was formalized in a power sharing agreement, the Peshawar Accords with the idea of a rotating presidency. When Burhanuddin Rabbani became President in 1992 the framework was undermined. A power struggle ensued between the *mujahidin* leaders that were meant to be supporting the presidency.⁹²³ These groups exploited local factional conflicts that had expanded from family rivalries to recruit fighters.⁹²⁴ Afghanistan once again plunged into a civil war, as Pakistan and other regional powers supported different factions.⁹²⁵

The period from 1992 – 1994 was marked with broken peace agreements, switching alliances, violence and anarchy.⁹²⁶ One of Afghanistan's darkest eras Kabul was the scene of almost constant armed conflict among hostile Afghan military factions, rival *mujahidin* and defecting army forces who swept into the city after the Soviet backed government collapsed. In 1994 after several secret alliances and negotiations in the shadows between various factions, the Uzbek General Dostum struck an alliance of convenience with Hekmatyar's *Hizb-i* to take on the Tajik Massoud. Intense fighting between the factions overwhelmed Kabul with an estimated 25,000 people killed over six months. These included targeted attacks on civilian

⁹²² Barfield 'Customary' (n828) 33.

⁹²³ The 24th April 1992 saw seven parties agree the establishment of an interim government of fifty-one members under the leadership of Mujaddidi for two months then Rabbani for four months. Hizb-I-Islami, (Hekmatyar) was Prime Minister designate, the Defence portfolio was assigned to Massoud (Jamiat-i-Islami), Foreign Affairs to Gaylani (Mahaz); Justice to Mhd Navi (Harakat I Enqelab); Education to Hizb-i- Islami (Khalis), and Ministry of Interior to Sayyaf (Ittihad). Hizb-i Wahdat was excluded from the early stages of negotiations for formation of the *mujahidin* administration in 1992. It was brought in at a later stage and nominated cabinet ministers to Burhanuddin Rabbani's government in 1993 (including Karim Khalili as minister of finance). Pakistan recognized the new regime on the day it was transferred from the former government to the interim council (28 April). The EEC and the UN recognized it the following day. HRW, Blood Stained (n760) 60. Roy 'Has Islamism a Future in Afghanistan?' (n913) 207.

⁹²⁴ Department of the United States Army (n35) 13.

⁹²⁵ For details of the Geneva Accord, see William Maley, *The Afghanistan Wars* (Palgrave Macmillan 2002) 134-42.

⁹²⁶ Abou-Zahab & Roy (n418) 48.

areas.⁹²⁷ Eventually, this fighting reached the threshold of a NIAC, with the means and methods of combat destroying the capital and surrounding areas.⁹²⁸ Gradually the carnage in Kabul was mirrored throughout the entire country, fragmenting Afghanistan into ‘fiefdoms of *mujahidin* who fought in an array of alliances, betrayals and bloodshed.’⁹²⁹ Kabul and the northeast of Afghanistan became controlled by Tajik government of Rabbani; the Uzbek Dostum occupied the north, the Hazara’s controlled central Afghanistan, Jami’at’s Ismael Khan took the Western areas and forces loyal to Hekmatyar occupied some areas in the East.⁹³⁰

During this period, various factions battled over Kabul and committed countless atrocities against the Afghan civilian population. Most of these civilian casualties were the result of direct or indiscriminate attacks on the civilian population and other serious violations of IHL. Disappearances were commonplace as was looting and wanton destruction.⁹³¹ A failing centralized government and continued fragmentation of the state provided ripe conditions for the proliferation of ANSGs.

These movements were not centrally coordinated. Personal rivalries and ethnic divisions compounded by strategic differences frustrated any chance of genuine unity between them. Networks of personal relationships played a substantial role, especially among former *mujahid* who fought in Afghanistan, and *madrassa* alumni which were all based on ethnic connections.⁹³² As fighting militias representing specific localities, each *mujahidin* group had its own unique combination of ethnic and tribal support, and there were rivalry and violent clashes even between the Pashtun groups.⁹³³ Some fought on the side of Hekmatyar against Massoud, but the majority were attached to local commanders, who were nearly all Pashtuns.⁹³⁴ Where there was no clear *mujahid* responsible, power vacuums created an environment of

⁹²⁷ ‘Scores Killed as Factional Battles Devastate Afghanistan’s Capital’ New York Times (New York, June 3 1994) <http://www.nytimes.com/1994/01/03/world/scores-killed-as-factional-battles-devastate-afghanistan-s-capital.html> accessed 12 March 2016; ‘Afghan Army Ousts Foes From Capital’ The New York Times (NY, 27 June, 1994); Roy, ‘Rivalries and Power Plays in Afghanistan’ (n902), 38; Kfir (n893) 42.

⁹²⁸ For example Hekmatyar’s indiscriminate shelling in his attempt to occupy Kabul. Ahmed Rashid, *The Power of Militant Islam and Beyond* (IB Tauris 2000)

⁹²⁹ Rashid *The Power of Militant Islam* (n928)

⁹³⁰ Michael Griffin, *Reaping the Whirlwind: the Taliban Movement in Afghanistan* (Pluto Press 2001) 35; Nagamine (n71) 13.

⁹³¹ HRW Blood Stained (n760) 1-2.

⁹³² Abou-Zahab & Roy (n418) 47.

⁹³³ Saikal, *Modern Afghanistan*, 210.

⁹³⁴ Abou-Zahab & Roy (n418) 48.

violence and suffering where warlords ravaged the civilian population, taking children into sexual slavery; brutalizing food supplies to the extent of famine; imposing arbitrary taxation.⁹³⁵

6.8 An Afghan Solution

*'If you do not like the image in the mirror, do not break the mirror, break your face.'*⁹³⁶

Since the establishment of modern Afghanistan in 1747, tribes have played an important role in installing and in deposing their rulers. The tribes have also played an equally important role in establishing order in the country, especially in areas where the reach of central government was non-existent.⁹³⁷ 'Afghanistan is a vague backdrop in a long running international drama,'⁹³⁸ conflicts reappear as 'iterations of the binary divides between civilized versus uncivilized, reason versus faith, and modernity versus fundamentalism.'⁹³⁹

Afghanistan confronted modernity through its forced integration into the Eurocentric state system as a buffer between the Russian and British empires. The formation and transformation of that state system as well as the reformulation of tribal and ethnic loyalties as national identity, created discord, violence and decay, a reflection of Afghan that society.⁹⁴⁰ Some say that these conflicts were 'not about Afghanistan, [rather it was] about [the] people straddling a border.'⁹⁴¹ After the Soviet invasion, communities that were reshaped by the process of detribalization found new ways to organize themselves.⁹⁴² Between 1992-1994, an 'iconic post-Cold War scene unfolded on the streets of Kabul, with ethnic and factional battles killing thousands, questioning not only the composition of the government but the nature and existence of the state.'⁹⁴³

⁹³⁵ 'Afghan Army Ousts Foes From Capital' (n972); AJP, 'Casting Shadows' (n81) 63.

⁹³⁶ Old Persian proverb cited in Rashid 'Taliban, Oil and the New Great Game' (n797) 108.

⁹³⁷ Miakhel (n873) 2.

⁹³⁸ Barfield 'Customary' (n828) 1.

⁹³⁹ Etienne Balibar, 'Racism and Nationalism' in *Race, Nation, Class: Ambiguous Identities* (Verso 1991) 38 cited in Mahmud, (n861) 5

⁹⁴⁰ Rubin *Fragmentation* (n817) 5; Cullather, (n819) 515.

⁹⁴¹ Shane, *The War in Pashtunistan*, (n858); William Dalrymple, *The Ghosts of Gandamak*, NY Times (NY, 9 May 2010)

⁹⁴² Barfield 'Customary' (n828) 2-3.

⁹⁴³ Rubin *Fragmentation* (n817) 1.

Although Afghanistan is often cited as a ‘failed’ State, a term which has lost favour,⁹⁴⁴ whether it was the imperialist interventions of the British including Durand’s arbitrary line, or the Russian ideological expansionist agenda triggering an opportunistic American restaging of Vietnam, it was a state that and remained fragile by the design of a paranoid Pakistan.⁹⁴⁵ A predictable seven-stage repetitive cycle has emerged since the State’s inception, a cycle of ‘order, counter-order, disorder’,⁹⁴⁶ consisting of invasion by a foreign power or ideology; destruction of existing social fibre within Afghanistan in the name of progressive reform; reconstruction attempts mirroring that of the invading State; resistance by large pockets of Afghan society; breakdown of social control and social power internecine fighting; anarchy.⁹⁴⁷

Afghanistan was not hugely unstable, fractured, or militarized in 1978, when the Soviet Union orchestrated the communist coup in Kabul. But the Soviet invasion coupled with decisions by the United States, United Kingdom, Saudi Arabia, China, Iran, and Pakistan to support the *mujahidin*, ultimately made Afghanistan one of the most unstable, fractured, and militarized places in the world. Afghanistan is yet to see a peaceful transfer of power. Compounding an already volatile atmosphere are external forces which have repeatedly transformed the state into a Pashtun-sponsored coliseum where global powers would, using both regular and private armies, use this arena to advance their imperial agenda. Though ideological divisions have undoubtedly played a role in ongoing conflict, Afghanistan's troubles derive less from foreign forces and the ideological divisions between groups than they do from the moral incoherence of Afghanistan itself.

Irrespective of contentions around whether the Taliban was a Pashtun Movement. It was a movement comprising Pashtuns. The following chapter considers the impact Pashtun

⁹⁴⁴ ‘Quasi-states’, ‘weak states,’ ‘failed states,’ ‘fragile state’ and ‘rogue states’ — what such labels have in common, is that they are all portrayals of post-colonial states. Suchitra Vijayan ‘The Fallacy of Failed States’ Huff Post Blog (NY, 30 June 2014)

⁹⁴⁵ ‘The convergence of Pakistan’s regional foreign policy goals through *jihad* with the western goal of defeating its Cold War rival (the USSR) in Afghanistan through Islamic *jihadist* means led to the establishment of an extensive infrastructure involving the educational and military training of today’s Islamic guerrillas. Taj (n31) 62.

⁹⁴⁶ A military proverb suggesting consistency across various instruments preconditions the effective shaping and enforcement of standards of behaviour. Olivier Bangerter ‘Internal Control: Codes of Conduct Within Insurgent Armed groups’ An Occasional Paper of the Small Arms Survey (Small Arms Survey, Switzerland 2012), 10.

⁹⁴⁷ President Karzi in a 2010 speech on a state-run Radio Television Afghanistan 28 September 2010. First, the Soviets came [in the 1980’s], claiming they would turn us into communists. They failed and destroyed us in the process. Then our neighbours came, [Pakistan and Iran in the 1990s] and said, ‘We are going to administer you.’ That effort also did not succeed. Now, NATO has come here in the name of fighting the war against terrorism. But this war has been going on for ten years and we still don’t know its result.’ Siddique (n816) 9.

customary law has had as a regulatory mechanism in shaping relationships between Pashtuns, as well as between Pashtuns and non-Pashtuns.

Chapter 7 The Pashtuns: Customary Law and Conflict Conduct

*'Every man is a warrior, a politician and a theologian. Every large house is a real feudal fortress...Every family cultivates its vendetta; every clan, its feud...Nothing is ever forgotten and very few debts are left unpaid.'*⁹⁴⁸

Understanding the culture of the Pashtun tribes in Afghanistan and Pakistan has been a challenge for all who interact with them, and particularly for outsiders who have attempted to occupy their territories.⁹⁴⁹ The inability to understand the 'labyrinthine tribal machinations' of the Pashtuns in Afghan Politics has hindered progression towards peace.⁹⁵⁰ Interest in this ethnic group arose not just through their dominance of Afghan politics but also the role they played in the *mujahid*-cum Taliban.⁹⁵¹ In contemporary Afghanistan, this ethnic group are often viewed through the prism of the idiosyncratic interpretation of Islam presented by the Taliban.⁹⁵² This perspective skews the recognition of certain cultural values and rules of behaviour, which had been determining the way of life of many Pashtuns since *jahiliyya*, and which remain of influence today.⁹⁵³ The chapter will present an overview of the local law that was operational through the Taliban's evolution and applicable to its Pashtun members individually.

The origin of the Pashtuns is not clear.⁹⁵⁴ Historical documentation refers to ancient people called *Pakthas* between the first and second millennia living in the region between the Hindu Kush and Indus River, an area the Pashtuns continue to occupy.⁹⁵⁵ Tribally organized, the Pashtuns claim patrilineal descent from a common ancestor known as Qais bin Rashid of Gor, a tribal chieftain of the seventh century.⁹⁵⁶ While originally egalitarian, history has

⁹⁴⁸ Winston Churchill *My Early Life* (Scribner, 1996) 134.

⁹⁴⁹ JL Schubert, T Moore, P Finley, R Hammer, RJ Glass 'Modelling Tribal Leadership Dynamics: An Opinion: Dynamics Model Of Pashtun Leadership Selection', Sandia National Laboratories. http://www.sandia.gov/CasosEngineering/docs/CSSS_Schubert_Tribal_Dynamics.pdf

⁹⁵⁰ Tanner (n798) 189.

⁹⁵¹ Olivier Roy, 'Afghanistan, Back to Tribalism or on to Lebanon?' (1989) 11(4) *Third World Quarterly* 71-72.

⁹⁵² The majority of Pashtuns are Sunni Muslim.

⁹⁵³ In the Pashto language, these values and rules of behaviour are often summarised under the word *Pashtunwali*, which can be translated as 'Pashtunness'. Thomas Ruttig, 'How Tribal Are the Taliban? Afghanistan's Largest Insurgent Movement between Tribal Roots and Islamist Ideology,' (2010) Afghanistan Analysts Network.

⁹⁵⁴ They are believed to have evolved from ancient people known as the Scythians 900-200 BC. Tanner (n798) 7.

⁹⁵⁵ 'These are the strict, fierce and warlike tribes of Paktia' Herodotus 464 BC. Barfield *Afghanistan* (n843) 90; Caroe (n80)

⁹⁵⁶ Ahmad & Boase (n816) 13.

incrementally stratified the Pashtun system dividing into a large number of separate clans and lineages.⁹⁵⁷

Mapping tribal, and clan identities and boundaries only tells a small and potentially misleading part of the story. Local knowledge adds critical context.⁹⁵⁸ Despite ‘tribe’ providing a convenient narrative for understanding pockets of Eastern Afghanistan, scholars who have performed research in Afghanistan are unanimous in the view that Pashtun ‘tribes’ are not political units that act collectively.

‘...[A]mong academic anthropologists and historians, there is a unanimous consensus on the subject of tribes in Afghanistan... The classic definitions of Middle Eastern tribes are hard to find in Afghanistan. In fact many scholars are reluctant to use the word tribe at all for describing groups in Afghanistan.’⁹⁵⁹

Rather, as an analytical unit, preference is given to the word *qawm* loosely transcribed as a ‘solidarity group’, a group of people that acts as a single unit and is organized on the basis of some shared identity.⁹⁶⁰ *Qawm*, is a flexible term that indicates ‘us’ as opposed to ‘them’⁹⁶¹ Fellow *qawmi* at its broadest can include all members of a large tribal or ethnic group or as few people as members of the same village or lineage. ‘...[Q]awm and ethnic affiliations are...a dynamic process and not a static taxonomia.’⁹⁶²

While Pashtuns often answer with their tribal identity that doesn’t mean they will act on it. ‘No clear evidence exists of tribes actually coalescing into large-scale corporate bodies for joint action even defensively, even for defence of territory.’⁹⁶³ *Qawms* change. They can cut across family relationships.⁹⁶⁴ Conditions and context dictate Pashtun alliances.

⁹⁵⁷ Qais Abdur Rashīd or Qays ‘Abd ar-Rashīd is said to be the seventh century CE legendary founding father of the Pashtun nation. Qais is said to have travelled to Mecca and Medina in Arabia during the early days of Islam. While Afghans share more than one ethnic ancestry or are intermarried, still, most Afghans identify themselves as belonging to a single particular ethnic group, usually their fathers’. HRW, Blood Stained (n760) 9.

⁹⁵⁸ Department of the United States Army (n35) 24.

⁹⁵⁹ *ibid* 3.

⁹⁶⁰ *ibid* 4, 8.

⁹⁶¹ Barfield ‘Customary’ (n828) 2-3.

⁹⁶² Olivier Roy *Islam and Resistance in Afghanistan* (Cambridge University Press 1986) 216-217.

⁹⁶³ Jon Anderson ‘*Khan and Khel: Dialectics of Pakhtun Tribalism*’ *The Conflict of Tribe and State in Iran and Afghanistan* (St Martin’s Press 1983) 132.

⁹⁶⁴ *Qawm* can mean any group of people that has something in common and acts as a single group. Iterations include a family group; geographical location; group of people with the same profession; and it can also mean a group of people united by common political goals under a leader. Department of the United States Army (n35) 8.

The Pashtun ethnic group exists in a confederation and provides the umbrella framework for the tribal connections. This filters to the *qawm* or tribe which occupies a specific territory with its own interpretation of law, practice and politics. The *qawm* is then divided into large lineages or clans known as the *khel*. Finally, the *khel* comprises the *khol*, smaller lineages or family groups. The head of each *khol* is referred to as *malik* (**Fig 1**). This system creates a hierarchy of allegiance, with loyalties first to the family, then the clan, the tribe and finally the confederation.⁹⁶⁵

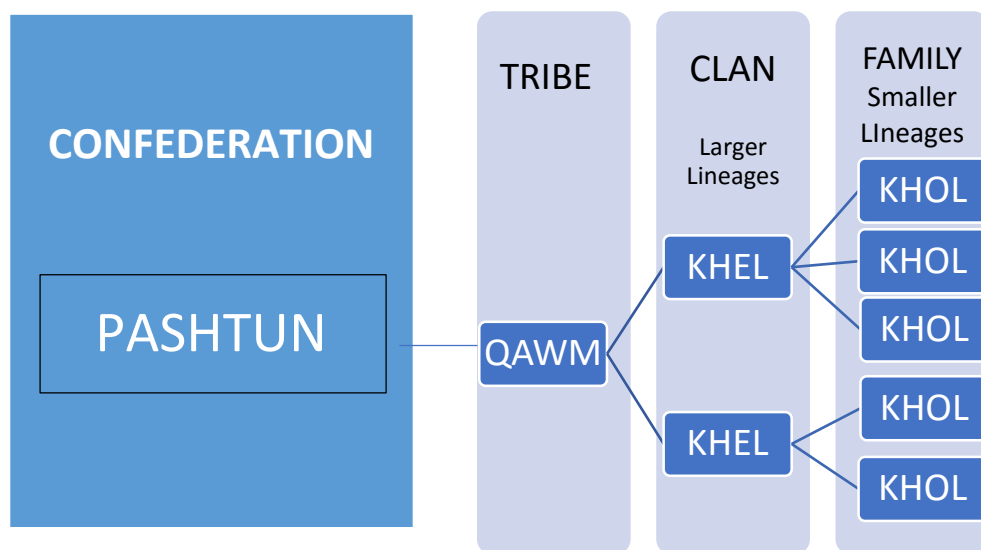


Figure 1: Pashtun Tribal Structure

Adapted from Kfir (n893)

In Afghanistan ‘...the family still takes precedence, reserving the right to take revenge or demand compensation when one of its members has suffered an injury.’⁹⁶⁶ Almost every aspect of Afghan society is related to the structure and function of the family system. The country’s harsh terrain isolates communities making it necessary for loyalties to focus on family first, then on the tribal group and lastly on the nation.⁹⁶⁷

⁹⁶⁵ Roy uses the example of Ismat Muslim, an important tribal leader who joined Barak Karmal’s government. Ismat began by looking out for his extended family followed by his clan (Kakozai), his tribe (Atshekzai) and then his confederation (Durrani) followed by his ethnic identity (Pashtun). Roy ‘Afghanistan, Back to Tribalism or on to Lebanon?’ (n951) 71-73; Maley *Fundamentalism*, (n55) 167-181.

⁹⁶⁶ Monstuart Elphinstone, *The Kingdom of Caubul* 339-40 (1815) cited in Barfield ‘Culture’ (n876) 348.

⁹⁶⁷ Spriggs (n822) 8.

However, there are alternate ways Pashtuns might organize themselves in addition to family relationships.⁹⁶⁸ While some countries structure their tribal system like trees, in Afghanistan ‘tribes’ are like jellyfish, with a notoriety for changing their form of social organization when pressured by internal dissension or external forces.⁹⁶⁹ The tendency for rural Pashtuns to form groups that aren’t based on family relationships has been a way for Pashtuns to stymie attempts by central governments to establish control over them while simultaneously providing ‘social capital’ for the resilience of the Afghan society to external shocks, such as war and failed governance.⁹⁷⁰ For Pashtuns, the phrase ‘blood is thicker than water’ is not an accurate depiction. Pashtuns are just as likely to choose a way of organizing that has nothing to do with the closeness of family relationships. This made it difficult to externally predict how the group would coalesce and dissolve.⁹⁷¹ So while tribe is a factor in Pashtun society, it is neither the only source of Pashtun identity, nor the foundation of Pashtun social organization.⁹⁷²

A more traditional form of social organization in Afghanistan is patronage networks which depend on the ability of the patron, or khan, to distribute resources to make a convincing case for his leadership. Local khans are not elected, and people decide whether to support or reject them.⁹⁷³ Rivalry between close male relatives, the formation of factions within kin groups, and the dynamics of patronage make Pashtun social structures complex.⁹⁷⁴

Absent a functioning government since 1978, the majority of Pashtuns used the tribal and district structures. The *qawn*, has played a strong role in keeping security and ensuring governance. It is among people of the same *qawm* that customary law has its strongest force.⁹⁷⁵

⁹⁶⁸ ‘We should not think of the native model... as a rigid structural model, joined to a reality which itself also changes little. The framework itself is changeable, and capable of accommodating both the static functioning of social forms and its transformations.’ Anatoly Khazanov, *Nomads and the Outside World*, trans. Julia Crookenden (University of Wisconsin Press, 1994)119.

⁹⁶⁹ Malcom Yapp *Tribes and States in Khyber, 1838 – 42: The Conflict of Tribe and State in Iran and Afghanistan* (St Martin’s Press 1983) 186; Department of the United States Army (n35) 2.

⁹⁷⁰ Raphy Favre, ‘Interface Between State and Society in Afghanistan, a Discussion on Key Social Features Affecting Governance, Reconciliation and Reconstruction’ (Aizon Publications 2005)

⁹⁷¹ Beattie (n818) 197.

⁹⁷² Department of the United States Army (n35)14.

⁹⁷³ C.f Akbar Khan and unilateral declaration of King in chapter 6. Jose Oberson, *Khans and Warlords: Political Alignment, Leadership and the State in Pashtun Society. Anthropological Aspects and the Warlordism* (Institute for Ethnology 2002); G Whitney Azoy, *Buzkashi: Game and Power in Afghanistan* (University of Pennsylvania Press 1982) 32.

⁹⁷⁴ Department of the United States Army (n35) 14.

⁹⁷⁵ While technically ‘tribe’ may not be the most appropriate anthropological term for Pashtuns, this research is the combination of many disciplines as such the term tribe and *qawm* will be used interchangeably.

7.1 Pashtunwali

‘Obedience to a law which we prescribe ourselves is liberty’⁹⁷⁶

The Pashtuns distinguish themselves through their tribal code of *Pashtunwali* which guides acceptable behaviour within the community and governs the individual and inter-tribal relationships.⁹⁷⁷ Of the pluralistic mechanisms regulating conduct through Afghanistan and the Pashtun tribal belt including Khyber Pakhtunkhwa (KPK) and the Federally Administered Tribal Area (FATA), *Pashtunwali* remains the least known outside South Asia. Fragmented and arguably orientalist, the literature is however unified in asserting the importance of this tribal code as a pervasive feature of social organization in Pashto speaking areas.⁹⁷⁸ *Pashtunwali* defines the Pashtun as a ‘man of honour’, honour being the backbone of the code. It is an ethnic self-portrait of the Pashtuns, including all traditions by which the Pashtuns, according to their understanding, distinguish themselves from other ethnic groups.

Like many other concepts which are aimed at shaping ethnic identity, *Pashtunwali* describes an ideal. Among the Pashtun tribes, these general principles and practices (*tsali*) have been transmitted orally for centuries, an inherited way of life, especially for Pashtuns in rural areas on both sides of the Durand Line.⁹⁷⁹ The nuanced rules within the *Pashtunwali* matrix, the strict adherence the code demands, and the severity of punishments it gives the authority to summarily execute, makes it difficult to imagine a situation where the code could be subordinated to another regulatory mechanism.

However, forty years of conflict has seen the ideals of *Pashtunwali* compete with other value systems which gained influence during that time. The transformation of its institutional aspects is more obvious than changes within the system of values. There is no doubt that ideals of *Pashtunwali* still continue to present an attractive and sometimes binding option for contemporary Pashtuns.⁹⁸⁰

⁹⁷⁶ Jean-Jacques Rousseau *The Social Contract and Discourses* 178 (G.D.H Cole trans., J.M Dent & Sons Ltd. 1973) cited in Ochoa (n119) 121.

⁹⁷⁷ The *Pashtunwali* concepts are subject to dialectical variation in pronunciation. Akbar Ahmed, *Pukhtun Economy and Society: Traditional Structure and Economic Development in a Tribal Society* (Routledge and Kegan Paul 1980).

⁹⁷⁸ Ahady (n816) 7; Ahmad & Boase (n816) 13.

⁹⁷⁹ Miakhel (n873) 2.

⁹⁸⁰ Ruttig ‘Tribal’ (n953).

Just as Islam claims, *Pashtunwali* is also more than a system of customary laws. It is a way of life.⁹⁸¹ As an egalitarian model, each member had equal power. This meant any violations would trigger *lex talionis*.

‘*Pashtunwali* requires that every insult be revenged and, conversely, every guest protected. To safeguard his honour, or the honour of his family or clan, a Pashtun will sacrifice everything, including his money and his life. He will return even the slightest insult with interest.’⁹⁸²

The Code stresses personal autonomy and equality of political rights in a world of equals. Mobilization of consensus is at the heart of leadership with acceptance of any authority needing to be voluntary and not coerced by force as evidenced in the Anglo Afghan Wars. As such it is a code that is practically impossible to fulfil in a class-structured society or where blood feuds are prohibited. It is the Pashtuns living beyond the reach of state government, where state or proto state power legitimacy is contested, that see themselves as true Pashtuns because only they can maintain the strict standards of autonomy demanded by the Code.

Pashtuns who moved to large cities were farther removed from the values of the *Pashtunwali* because there they were enmeshed in state systems of government that restricted autonomy, and cash economies that valued money more than honour. It is for this reason that examples of customary law as a living tradition are found mainly in the marginal areas of rural Afghanistan even though the ethos of the *Pashtunwali* is common to all rural Pashtuns. Thus, the Pashtun tribes that have remained in the hills and deserts continue draw a sharp distinction between themselves and their tax-free way, blood feuding, way of life (*nang*) and those Pashtuns who live under state control (*qalang*). The hill tribes assert that they are the proper Pashtuns because their cousins on the plains and in the cities have been stripped of any true autonomy and are forced to obey state regulations.⁹⁸³ This divide is the source of the Pashtun proverb that ‘honour ate up the mountains, and taxes ate up the plains.’⁹⁸⁴

⁹⁸¹ This way of life resonates with Islam which claims the same, albeit with an emphasis on God above all else.

⁹⁸² Quotes About Pashtuns, Blog, <https://defence.pk/pdf/threads/quotes-about-pashtuns.248868/>

⁹⁸³ Ahmed, *Pukhtun Economy* (n977).

⁹⁸⁴ Rubin *Fragmentation* (n817) 28.

Premised on punitive deterrent mechanisms, Pashtunwali's paternalistic chauvinistic tribal code is sensitive to diverging from valued tribal norms, and suspicious of those who neither understand nor subscribe to these norms. Prioritizing collective interest over the individuals is evidenced in the mechanisms of social exclusion, exile, and revenge which can extend to the individual's entire family and over generations. A social death, not a physical one was the worst possible punishment that could be inflicted on a member of the community.⁹⁸⁵ The application of these rules is called *narkh* (informal or traditional law), the implementation of which is being the responsibility of a *jirga* and *shura*.⁹⁸⁶ It is not a single set of rules that can be collected and codified for simple application. Rather it encompasses sets of principles and rules that are tailored to specific contexts that are used to seek reconciliation rather than adjudication. It is this sensitivity to local social relations that make it so effective. It has a number of specific institutions, the most important of these are *badal* (revenge), *melmastia* (hospitality), and *nanawati* (sanctuary). In addition, it valorizes the accumulation of *ghayrat* (personal honour) and defense against insults by outsiders to the honour of the group or its women (*namus*).^{987 988}

These central tenets of *Pashtunwali* are used in a string like manner, each concept is interconnected. As a regulatory framework it is subject to cultural variations and nuances. While attempting to avoid uncritically drawing upon colonial literature which 'has strengthened the colonial stereotypes about the Pashtun', as well as reducing *Pashtunwali* to the sum of its constituent parts, it is these parts that provide the skeleton of the customary law framework as well as foundation for comparison with other operational law through the Pashtun Belt.⁹⁸⁹

7.2 Melmastia

Without jurisdictional boundary, the Pashtun must obey the first law of *Pashtunwali*, *melmastia* or hospitality, which must be extended to all without discrimination. While showing the generosity of the Pashtun, *melmastia* also imposes expectations on the beneficiary of the hospitality who must not test the limits of the hospitality by engaging in shameful acts.⁹⁹⁰ It demands that guests be welcomed without question. In addition to shelter and food, the Code

⁹⁸⁵ Barfield 'Customary' (n828) 4.

⁹⁸⁶ Miakhel (n873) 2.

⁹⁸⁷ Ahmad & Boase (n816) 13.

⁹⁸⁸ Ahmad & Boase (n816) 13; Willi Steul, *Paschtunwali: ein Ehrenkodex und seine rechtliche Relevanz* (Franz Steiner Verlag 1981)

⁹⁸⁹ Taj (n31) 1, 27.

⁹⁹⁰ Barfield 'Customary' (n828) 7.

demands that guests receive absolute protection. This obligation applies to all irrespective of wealth and supersedes even the requirements of revenge. This means that even if a host discovers that his guest is an enemy which under other circumstances he would, under the Code, be within his rights to kill, he must not harm him. Failure to treat a guest properly results in an offence to one's honour.⁹⁹¹

The obligation has a defensive element also. If enemies are pursuing the guest, the host is required to take up arms to defend him from them. If another person is planning to carry out a revenge attack, he will ordinarily wait until his victim has left the host's property so as not to provoke a blood feud with the host. *Melmastia* replaces the protection of kin with the protection of the host. The host is personally liable for the security of his guest and seeing that no harm comes to him is his primary obligation. The exception to this rule is where the person seeking protection has committed an act that would bring shame, for example the rape of a woman. In this instance there is no claim to *melmastia*.⁹⁹²

The guest must not deliberately burden his host: his stay must be limited, and he must accept the host's authority. As *melmastia* is temporary, and the roles can be reversed at different times, and seeking the protection of a host is not seen as an infringement of a man's autonomy.⁹⁹³ *Melmastia* is practical in that it allows for travel in rural regions outside the cash economy where one cannot buy food or rent a room while ensuring personal security in a country with no overarching legal authority that preserves the peace. Adherence to *melmastia* brings honour to the host. Breaching the code brings tremendous dishonour. Pashtun narratives revel in stories that reveal the extent to which a man is torn between his desire for revenge and the need to fulfil his role as host. There are also cases where enemies are murdered after being invited to a feast. While such killings may bring power, they have no honour. An old Baluch folktale illustrates the point, telling of an old Khan who killed his own son who had brought dishonour on his clan by murdering their guest in order to avenge his brother's death.⁹⁹⁴

So powerful is this tenet, its application arguably played a pivotal role in the US invasion of Afghanistan in 2001. This will be discussed in the following chapter on the Taliban.

⁹⁹¹ Syed Quddus, *The Pathans* (Ferozsons Ltd, 1987) 69-70.

⁹⁹² Khan *The Pashtun Man* (n856) 368.

⁹⁹³ Barfield 'Customary' (n828) 7.

⁹⁹⁴ Dupree, *Afghanistan* (n825) 127-128.

7.3 Badal

Badal is the right and expectation of retaliation that lies at the heart of the *Pashtunwali* as a non-state legal system, *lex talionis* in operation. While the community may recognize that acts such as theft, homicide or rape are wrong, it does not take collective responsibility for judging or punishing people who commit such acts.⁹⁹⁵ This is a right reserved to the victims. Pashtuns are notorious for family feuds, it is proper under the code for a son to be killed for a father's crime extending the temporal scope of the conflict for generations. As such these are private wars, the right of every free man to seek his own justice by attacking whosoever wrought him ill and by bringing his entire family into the quarrel.⁹⁹⁶ One scholar recounts the story of a man he interviewed 'who proudly declared that he had killed seven male members of [another Pashtun] family for having insulted his wife, and so far only his brother had been killed in the revenge.'⁹⁹⁷ As Lord Auckland discovered, a Pashtun's loyalty to his social superior depends on how he is treated, the slightest disrespect can transform him into a killer. What the British called treachery, the Pashtun called vengeance. It is the duty of a Pashtun to avenge the murder of his family. Until this vengeance is fulfilled his honour will remain in question. When revenge is complete a psychological need for justice is satisfied. 'The whole village knows what was done, and to whom; the whole village takes pleasure in an act of revenge successfully performed.'⁹⁹⁸

Revenge need not be hasty but it must be effective. One example talks of a village elder who scolded a Pashtun for his haste in avenging his father's killer after fifty years.⁹⁹⁹ There are no temporal limits for exacting revenge. Unresolved cases hang over the communities like uncollected debts. The most classic of these cases involves the responsibility of revenge falling on young boys whose fathers were killed and remain unrevenged. Upon reaching adulthood many years later they return to kill their enemies. Given that each revenge killing demands a response by the new victim's family, blood feuds between hostile kin groups can last for generations and involve many deaths if left unresolved.

⁹⁹⁵ Barfield 'Customary' (n828) 5.

⁹⁹⁶ Scott (n228)

⁹⁹⁷ Andre Singer, *Lords of Khyber* (Faber and Faber 1984)

⁹⁹⁸ Khan *The Pashtun Man* (n856) 369.

⁹⁹⁹ Dupree *Afghanistan* (n825) 127-128.

However, this need for effectiveness does not mean a Pashtun should miss an opportunity for revenge. In *Pashtunwali tsali* the murder of an innocent man put a target on the killer's agnatic relatives. Killing any of them was considered a legitimate form of retaliation. Over the course of the 20th century the custom was modified to make only the murderer himself the legitimate target of revenge attacks unless he had fled the area and could not be found. Under these conditions the murderer's adult sons or brothers were considered acceptable substitutes.

7.3.1 Pashtun Compensation

Because revenge is an individual right there is the option to bring the cycle of retaliation killings to an end. Where Islam says 'haram', *Pashtunwali* says 'pay'.¹⁰⁰⁰ By far the most complex rules for compensation are applied to personal injury. Pashtun *tsali* divides the human body into four parts: eyes, feet, hands and the rest of the body. The middle of the twentieth century saw the value of a human Afghan life set at 60,000 Afghanis (*Afs*) (\$1200 USD) and so the each of the four parts was deemed worth 15,000 *Afs* (\$300 USD) (**Table 3 and 4**).¹⁰⁰¹ In addition to actual wounds threatening a person with a knife or rifle carried a 1,000 *Afs* compensation penalty.¹⁰⁰²

Money is paid to the victim's family by the murderer's family along with two sheep as a shame payment and an apology. In addition, the victim's family receives an unmarried girl in marriage. Giving a girl in marriage serves two purposes: it provides a replacement for the life lost and binds the two families with a marital alliance that should act as a barrier to further hostilities. In fact, the judges may encourage an even larger exchange of women in which each side accepts in marriage the sisters or daughters of the other. This is sometimes easier to arrange because the exchange is a mutual one and thus does not call into question a family's honour.¹⁰⁰³

Pashtunwali protects the 'three Z's': *Zan* (woman), *Zar* (gold) and *Zamin* (land). These are Pashtuns inviolable assets. Disputes among Pashtuns are traditionally said to arise from violating one of the three Z's which is tantamount to a crime that can only be redressed through revenge.¹⁰⁰⁴ These are the most difficult cases as they provoke blood feuds. Settlements are

¹⁰⁰⁰ Alef-Shah Zadran, *Socioeconomic and Legal-political Processes in a Pashtun Village, South-eastern Afghanistan* (UMI Dissertation Services 1977) 274.

¹⁰⁰¹ Zadran *Socioeconomic and Legal-political Processes* (n1000) 264.

¹⁰⁰² Barfield 'Customary' (n828) 22; Zadran *Socioeconomic and Legal-political Processes* (n1000) 257-264.

¹⁰⁰³ Zadran *Socioeconomic and Legal-political Processes* (n1000) 274.

¹⁰⁰⁴ Khan *The Pashtun Man* (n856) 368; Boase (n816) 13.

difficult to arrange because they involve questions of honour and giving up the right of retaliation. Unlike state law which may imprison for a crime, Pashtuns seek compensation and social reconciliation,¹⁰⁰⁵ bearing in mind ‘he is not a Pashtun who does not give a blow for a pinch.’¹⁰⁰⁶

The tables below are used to illustrate the pragmatic approach to injury and compensation similar to that used in common law tort. Sometimes compensation discharges the need for revenge, other times it is awarded concurrent to revenge.

Table 3 Bodily Injury Compensation Schedule (\$1 USD = 50 Afs)

Body Part Injured	Level of Compensation
Eye (right)/ Eye (left)	7,500 afs/ 7,500 afs
Ear (right)/ Ear (left)	5,000 afs/5,000 afs
Incisor (middle)/Incisor (side)/ Canine	5,000 afs/5,000 afs/2,500 afs
Premolar/ Molar	2,000 afs/1,000 afs
Hands (right)/ (left)	10,000 afs/ 5,000
Thumb/indexfinger/middle finger/ring/pinky	3750 afs/2,500 afs/2000 afs/1,500 afs/1,000 afs
Feet (right)/ (left)	7,500 afs/7500 afs
Amputation of Foot	30,000 afs
Fingernail/toenail (visible)	150 afs
Fingernail/toenail (not visible)	100 afs

¹⁰⁰⁵ Barfield ‘Customary’ (n828) 14.

¹⁰⁰⁶ AG Liwa, ‘Areas between Afghanistan and Pakistan and the Present Turmoil’ Eurasia Border Review Part II 75 http://src-h.slav.hokudai.ac.jp/publictn/eurasia_border_review/no1/07_Liwal.pdf accessed 02/08/2017.

Table 4 Environmental Compensation Schedule¹⁰⁰⁷

Type of Tree	Compensation	Type of Animal	Compensation
Apple	1,000-2,000 afs	Camel	10,000-20,000 afs
Apricot	500- 1,000 afs	Ox	3,000- 7,000 afs
Pomegranate	100-300 afs	Cow	2,000 – 5,000 afs
Walnut	1,500 – 2,000 afs	Donkey	1,000 – 2,000 afs
Mulberry	1,000- 1,200 afs	Sheep	1,000 – 3,000 afs
Willow	500 – 1,300 afs	Goat	600 – 1,000 afs

7.3.2 Blood Revenge

There is the obvious desire to punish the person who committed the act by the victim's family, but it also involves questions of honour and personal responsibility. Not seeking blood retaliation personally is deemed a sign of moral weakness, even cowardice, not just of the individual who was wronged, but his whole kin group. Payment of compensation agreed to by both parties can also bring an end to the dispute without violence but settling too quickly may also impugn the honour of the victim's kin group. This task cannot be outsourced to the state and using state law will not necessarily negate a customary law response. Reporting a murder to get action from government officials is considered a sign of weakness, that the kin group is too weak to take revenge honourably themselves. As with the Australian indigenous concept of 'pay-back', punishment by a government court does not erase the obligation to take revenge: a victim's family is expected to kill the murderer once he is released from prison unless there is a settlement to end the feud before that time.¹⁰⁰⁸ This works both ways. Local communities also reject the legitimacy of state actions to punish men who have taken their revenge legitimately or to take action against a killer who has arranged a settlement with his victim's kinsmen. Similarly, if the death fails to meet the standards set for blood feud, people also believe that the government has no right to interfere because no crime was committed.¹⁰⁰⁹

¹⁰⁰⁷ The compensation tables are adapted from Zadran *Socioeconomic and Legal-political Processes* (n1000) 268.

¹⁰⁰⁸ Chris Graham, 'Different World: Understanding Indigenous Justice' ABC News (Sydney, 25 July 2012)

¹⁰⁰⁹ Zadran *Socioeconomic and Legal-political Processes* (n1000) 312-13.

Blood revenge is preconditioned on certain rules. Partial defences include if the death is the result of an accident or an involuntary act, the victim's family may be entitled to compensation but not revenge. Blood revenge may also be prohibited if the victim was engaged in a dishonourable act, such as a thief killed in the night or a man caught engaging in adultery. Within *badal* there are elements of distinction. Since blood revenge is the obligation of a kin group, a man who kills his brother is not subject to revenge (since the murderer would have to take revenge on himself) but he would have to flee the community. Women and children are excluded as targets of revenge in all cases. In relation to how revenge killings are achieved there is little prescription. Pashtuns have had however, a reputation for mutilation.¹⁰¹⁰

‘When you're wounded and left on Afghanistan's plains
An' the women come out to cut up what remains,
Jest roll to your right an' blow our your brains
An' go to your Gawd like a solider.’¹⁰¹¹

The rules of blood revenge change in a conflict context. Personal blood revenge cannot be taken in time of peace for a man killed in battle because the fight was group against group, although if hostilities are renewed then each side tries to even the score.¹⁰¹² There are also guidelines around who is allowed to take blood revenge. Death must be of equal value/loss.¹⁰¹³ The person taking the revenge should be a close relative of the victim, although in some Pashtun traditions it was legitimate to hire a substitute to take revenge in the name of the victim. The most honourable revenge attacks take place face to face but killing in ambush is also acceptable as long as those taking revenge take public credit for their deed.

There are further rules around distinguishing civilian and religious property, booty and mortal remains. Revenge attacks cannot be carried out in a mosque or against a guest. The goods and weapons of a man killed in a revenge attack cannot be robbed and, as in Islam, relatives should be given quick notice of the death so that they can recover his corpse for burial.¹⁰¹⁴ If revenge cannot be carried out the victim's family will often leave the village to avoid the public shame of having to live in proximity to the killers.

¹⁰¹⁰ Barfield ‘Customary’ (n828) 6.

¹⁰¹¹ Rudyard Kipling, *Barrack-room Ballads*, 1892 <https://www.crossroad.to/Quotes/Islam/Pashtun.html>

¹⁰¹² Barfield ‘Customary’ (n828) 6.

¹⁰¹³ Zadran, *Socioeconomic and Legal-political Processes* (n1000) 119-120, 124.

¹⁰¹⁴ Barfield ‘Customary’ (n828) 6-7.

7.4 Nanawatay

Badal is counterbalanced by *nanawatay* or sanctuary.¹⁰¹⁵ In common parlance it is taken to mean submission or forgiveness. It is a remedy of feuds. When an enemy enters a Pashtun neighbourhood and, begging forgiveness, places his life in the hands of that Pashtun, there is a heavy obligation on that Pashtun to grant it. The begging can take collective form, begging the village *jirga* to intervene on his behalf. While ultimately up to the Pashtun whether forgiveness is granted, if the *jirga*'s request is received positively, his enemy will enter the *hujra*, the men's assembly place, and slaughter a sheep or goat which denotes his contrition.¹⁰¹⁶ The formal request to grant pardon puts the offended party into the role of the more powerful party even if this is not in reality the case.

There is a duty to grant asylum to any who request. In its best-known form someone leaves his own community looking for permanent protection, for example someone fleeing a blood revenge which is due him.¹⁰¹⁷ The institution of sanctuary recognizes an exception to Pashtun egalitarianism. Because the supplicant must declare his lack of autonomy, the request for *nanawati* occurs only in extreme cases.

7.5 Gundi & Tarburwali

In Pashtun, *gundi* means factional, tribal or personal rivalry.¹⁰¹⁸ *Gundi* can start from internecine rivalry between brothers or cousins, within a clan or tribe. *Gundi* within the family or among cousins is also called *tarburwali*. In *gundi*, each side tries to develop relationships with other *gundi* in other villages or sub-tribes, which may lead to larger rivalries between two influential families or major tribes.¹⁰¹⁹

These informal relationships are strong and when an event occurs that requires the support from others, help comes from the connections and relationships of *gundi*.¹⁰²⁰ In order to strengthen your *gundi*, you and your family should have a reputation for supporting others in times of need. If a member of the *gundi* is killed in enmity, he or she will be counted in the last

¹⁰¹⁵ The word literally means 'going in'.

¹⁰¹⁶ Jones (n856) 369.

¹⁰¹⁷ Barfield 'Customary' (n828) 7.

¹⁰¹⁸ *Gund* means party, faction or a bloc of people.

¹⁰¹⁹ Miakhel (n873) 4.

¹⁰²⁰ *Gundimar* is also used to describe people who pursue rivalry, never forgetting personal enmity, always seeking revenge.

of final peace agreement by *jirga*. So when both sides finally agree to have long term peace, the *jirga* will count all of the people who have been killed or wounded in the duration, as well as all damages inflicted upon each side during the duration of the conflict. As hostility is carried from one generation to the next if the conflict has lasted several generations, they count all the people who were killed in each generation.¹⁰²¹

One reason the ‘family tree’ model of tribes doesn’t apply to Pashtuns is this relationship between patrilineal first cousins. It is unique to Pashtuns in Afghanistan and Pakistan and is said to be a defining feature of the Pashtun ethnicity.¹⁰²² *Tarburwali* refers to the enmity of the brother’s son (cousin) rivalry.¹⁰²³ This enmity is traced to competition over the inheritance of land from common ancestors. The *daftar* (tribal land) and *daftari* (individual share in tribal land) are central to understanding *tarburwali*. *Daftari* means only those that own land can have a say in the running of the village. A person without land becomes a person without a voice, a *faqir*.¹⁰²⁴ Being a *faqir* is sub-optimal, thus land disputes are often at the core of blood-feuds. Farming land is scarce, as a result the individual men of each succeeding generation inherit smaller and smaller parcels. Compounding the situation is the fact that the family members in competition are also neighbours, sharing borders, which, in the absence of a system of conveyance, are the cause of many violent negotiations.¹⁰²⁵ Feuds between first cousins and their respective factions can last decades and there are no shortages of examples of protracted first cousin feuds.¹⁰²⁶

While land and money are central to cousin conflicts, *ezzaf* (reputation or good name) can also serve as a trigger. The behaviour of cousins reflects directly on a man’s reputation.

‘A vital dynamic of tribal society – arguably the fuel that keeps honour alive as a moral code- is the understanding that a man will not willingly allow his paternal cousins and other peers to outdo him in any competitive endeavour, particularly combat. One gains renown

¹⁰²¹ Miakhel (n873) 4; Lutz Rzehak, ‘Doing Pashto’ (2011) Afghan Analysts Network

¹⁰²² Ahmed *Pukhtun Economy* (n977) 199. The word in Pashto for paternal first cousin is *tarbur*, which is, at the same time, also one way of saying “enemy” in Pashto. Tarbur concept became synonymous with enemy and has contributed in making the Pashtun conflict oriented. The anthropological literature on Pashtun first-cousin hostility is deep and unanimous.

¹⁰²³ Beattie (n818) 11.

¹⁰²⁴ Kfir (n982) 38.

¹⁰²⁵ Fredrik Barth, ‘Segmentary Opposition and the Theory of Games,’ *Features of Person and Society in Swat* (Routledge and Kegan Paul 1981) 66.

¹⁰²⁶ Ahmed *Pukhtun Economy* (n977) 185-196; Lindholm (n629) 74; Rzehak (n1021)

by being the first into the fray, the most daring in the pursuit of glory, and the most successful in battle.¹⁰²⁷

If a cousin makes himself seem braver, better, or more successful, then a man will feel compelled to match the cousin.

‘[A feud began with a] boy’s refusal to let his second cousin play soccer with him. This trivial insult led to a fight which spread to include the boys’ fathers. [In the end] three men were dead and the fields of both families had either been sold for weapons or else left fallow as the remaining men sought to eliminate their rivals.’¹⁰²⁸

7.6 Namus

Honour is not just an ideal in Pashtun society, it is viewed by many Pashtuns as the very mechanism that preserves Pashtun society as something separate from the wider world. Men seek to preserve and enlarge their reputation at all costs. Positive acts as physical courage, generosity, outstanding public speaking, success in building political alliances, or winning disputes add to *ezzāt*.¹⁰²⁹

In order to live in a Pashtun family, village or society, you should be able to protect your *namus* and you should have *ezzāt*. Land property and female members of the family are *namus*. Homeland is also *namus*. Protection of homeland is the same as protecting your family. If someone cannot protect his *namus*, he loses *ezzāt* in his society. That person will not have a place in the family, village or in the larger Pashtun society and will have to migrate to another location to live as *hamsaya* (to take protection and live outside one’s tribe – essentially an asylum seeker.) As *hamsaya*, a person doesn’t have the same status and privileges as the other inhabitants who live in the village. *Hamsaya* live under the protection of the family whom they dwell.¹⁰³⁰

¹⁰²⁷David Edwards, *Before Taliban: Genealogies of the Afghan Jihad*. (University of California Press, 2002) 151; Whitney (n973) 32.

¹⁰²⁸Lindholm (n629) 74.

¹⁰²⁹Bernt Glatzer, ‘Is Afghanistan on the Brink of Ethnic and Tribal Disintegration’ in *Maley Fundamentalism*,(n55) 167-182; Barfield ‘Customary’ (n828) 8.

¹⁰³⁰Miakhel (n873) 4.

7.6.1 Women

Matters of honour can be to some rural Pashtuns as real as infringements against a land border, if only because they are 'representative' of some possible future event in which actual resources are involved.¹⁰³¹ The role of personal honour (*ghayrat*) in the *Pashtunwali* is the driving force behind these institutions. Nowhere is fear of shaming the group stronger than in the requirement to defend the honour of women.

Namus demands the maintenance of sexual propriety. Complete chastity among female relatives is of the essence. Only with the purity and good repute of his mother, daughters, sisters, and wife (or wives) does a man ensure his honour. Women are restricted to private, family compounds in much of the Pashtun Belt, secluded from contact with strangers and have no public face in disputes. While they cannot accumulate honour in their own right, they can lose it through misbehaviour or attacks on them. Any attack on a woman, physical or verbal, is seen as an attack on a man's honour, and must be avenged.¹⁰³² Similarly any sexual improprieties by women themselves are deemed such serious violations of the honour code that they can and should be killed by their male relatives.

The Pashtun attitudes towards women are Manichean archetypes, either considered fickle or virtuous. There are recurrent themes in Pashtun folktales of the adulterous wife whose 'bad' action can only be atoned by death or exile. However, while there are many misogynistic stories there are some that elevate the status of women, at least the virtuous woman who knows how to preserve her honour, is seen as more wise and courageous than a man.¹⁰³³ Women's passive role in the honour system is well known, but they also play a large role in assessing men's honour. It is women's opinion that is often decisive in raising and lowering a man's position. Their praise or malicious gossip can have a powerful impact in how a man or group is judged.¹⁰³⁴

7.6.2 Illicit Sex, Gender Crimes and Abduction

Sexual misbehaviour is subject to rigorous consequences similar to those that legitimize revenge killings because it is deemed an offense against family honour. Pashtun tradition takes

¹⁰³¹ 'Violence in the community is really over scarcity of resources, but it is represented' through oppositions concerning honour.' Lindholm (n629) 78.

¹⁰³² Barfield 'Customary' (n828) 8.

¹⁰³³ Ahmad & Boase (n816) 16.

¹⁰³⁴ Benedicte Grima, *The Performance of Pashtun Women* (University of Texas Press 1992).

such violations so seriously that while revenge for murder is one for one, a victim's family is seen as having the right to kill seven members of the offender's family in revenge for adultery, abduction or rape. Adultery is punished by killing both individuals if they are caught in bed together. If only one of the two is slain, the killing is viewed as illegitimate because it throws suspicion on the killer's motives. In the case of rape or if a woman reports that she has been sexually harassed, only the man is liable to be killed. Even making lewd innuendos or, in the case of women, having one's reputation maligned may mean death. Such honour killings may also occur in cases of abduction when a man takes an unmarried woman or girl without her family's permission. Because her father and brothers are then expected to kill them, the man often flees with the woman or girl and seeks *nanawati* elsewhere. In cases of abduction of a married woman, the woman and her abductor are similarly liable to be killed if caught by either the husband's family or the women's family since both have had their honour offended. Should the man be killed in revenge the woman is expected to marry her lover's brother, but this now marks him as a target for revenge as well. *Badal* is closely related to the notion of honour.¹⁰³⁵

7.7 Narkh

In areas where government is weak, Pashtuns solve their disputes through local councils. The rules of dispute resolution are called *narkh*. *Narkh* are unwritten rules based on precedent. Literally it means 'price' because each decision involves certain costs.¹⁰³⁶ Different contexts produce different *narkh*. Where these interpretations would cause a conflict of norms in an inter-tribal dispute, a decision would be made in advance whose *narkh* would be used (akin to Private International law rules on selecting a forum).

The authority of local law is upheld by tribal or *Shari'a* councils, *jirgas* or *shuras*.

'A *jirga* in its simplest form is merely an assembly, a local/tribal institution of decision-making and dispute settlement. It is an informal institution which utilises local customary law to arrive at collective decision about the resolution of a dispute is binding on the parties involved.'¹⁰³⁷

¹⁰³⁵ Miakhel 'Understanding Afghanistan' (n873) 6.

¹⁰³⁶ *ibid* (n873) 5.

¹⁰³⁷ The informal justice system has a very long history in Afghanistan. Different names are given to this system throughout the country such as *Jirga*, *Shuras Mark* or *Maraka*. The term *Jirga* is commonly used in the Pashtun populated areas and terms *Shura* and *Marka* are common among Tajiks, Hazaras and Uzbeks. Abdul. Khwa 'The

Shuras are local councils, either religious or secular, that are typically convened on an as-needed basis to resolve disputes or decide issues of community governance or resource management. *Jirgas* and *shuras* are similar however *jirgas* are more prevalent among Pashtuns. These informal institutions do not enforce the state laws of Afghanistan, but rather Islamic *Shari'a* law, customary tribal law, or the collective wisdom of elders (**Fig.2**). In a typical *jirga*, for example, decisions are made in accordance with well-developed understandings of morality and justice

Figure 2 ¹⁰³⁸

	Tribal	Islam
	<i>Jirga/Shura</i>	<i>Shari'a</i>
What is the madnate?	To make decisions according to particular tribal values (<i>Pashtunwali</i>)	Interpretation/decisions made according to universal rules (<i>Fiqh</i>)
Who Makes the Decisions?	Well regarded members of the community	Judge who is an externally appointed expert
What is the Format?	Context sensitive resolutions	Rule specific judgments

Where the *jirga* is the wellspring of Pashtun identity and provides a key socialization tool for younger Pashtuns, the village mosque is the ‘locus of religious belief.’ The role that religious families played in these tribal consultative bodies was traditionally small; the mullah would recite a few *Qur'anic* verses at the start and would have minimal input throughout the discussion. If a *mullah* had greater involvement it was likely linked to his holding a tribal standing. ¹⁰³⁹

Current Informal Justice System in Afghanistan’ USIP, GWU & WORLD BANK CONFERENCE AGENDA Conference on Customary Law Washington, DC November 17-18, 2009

¹⁰³⁸ Adapted from Kristian Harpviken & Karin Ask, *Afghanistan and Civil Society*, (Oslo: Norwegian Ministry of Foreign Affairs, 2002), 6.

¹⁰³⁹ Salam-Zaeef (n882) xiv.

The main contrasts between the local councils and a court of *Shari'a* may be summarised as the difference between negotiations to restore equilibrium between two contestants and adjudication to restore justice.¹⁰⁴⁰ In a *jirga* the mediator is a well-regarded member of the community whose identity is agreed upon by the disputant. This is often a person who is reputed to have a lineage with an accepted claim to descent from the Prophet.¹⁰⁴¹ He is expected to utilise both his religious and his personal influence and knowledge about the conflict to settle disputes, while in a *Shari'a* court the judge (*Qadi*) is a religious expert who passes judgements on the basis of interpretations of general rules.

Afghanistan has a multitude of justice providers.¹⁰⁴² From the courts and prosecutors, the police, the district governors, the *mullahs*, to the elders, there is a continuum of justice options. Universal law codes do not work in Afghanistan.¹⁰⁴³ Afghans are famous for forum shopping. If they do not like the decision one source makes, they will readily turn to another for an alternative.¹⁰⁴⁴ Since the 1940s a pluralist political choice has always existed in Pashtun society.¹⁰⁴⁵ For Afghans, customary forms of justice are prevalent, and they 'use the government as an alternative for justice.'¹⁰⁴⁶

7.8 Pashtunwali Resilience to Instability and Resistance to Completing Legal Orders

In the absence of any higher or even hierarchical authority, people's first source for practical governance is the local village leaders. The government is not the only source or the most effective and pervasive rule of law in rural Afghanistan. *Pashtunwali* and *Shari'a* produce legalistic effects and as such essentially do governance without a government.¹⁰⁴⁷

The existence of plural legal orders makes plain that state law is not the only relevant and effective legal order in people's lives. Pluralism will vary in jurisdiction, procedures, structure

¹⁰⁴⁰ Khwa, (n1083).

¹⁰⁴¹ Ask 'Legal Pluralism' (n34) 347, 356.

¹⁰⁴² Kate Fearon, 'Grappling with Legal Pluralism in Afghanistan' Session II USIP, GWU & WORLD BANK CONFERENCE AGENDA Conference on Customary Law Washington, DC November 17-18, 2009.

¹⁰⁴³ Johnson & Mason, No Sign (n860) 27-28.

¹⁰⁴⁴ For an overview of this theory, see David Kilcullen, *The Accidental Guerrilla*, (OUP 2009) 77-82

¹⁰⁴⁵ Ruttig 'Tribal' (n953).

¹⁰⁴⁶ Reedy 'Customary Law' (n881) 27.

¹⁰⁴⁷ *ibid* (n881) 29-30.

and degree of autonomy.¹⁰⁴⁸ Numerous interrelated factors influence the evolution of legal pluralism including ‘colonialism; the state’s need for legitimacy; the quality, reach and relevance of official legal systems; as well as other social, political and economic factors.’

Afghanistan has a rich history of legal pluralism where informal systems existed before the formal state institutions. These informal institutions are based upon local custom, tradition, and religious practices and have existed in Afghanistan for centuries.¹⁰⁴⁹ In most parts of Afghanistan, tribal structure or locally established *shuras* and *jirgas* have been the only source of social justice in times of conflict and to some extent prior to that.¹⁰⁵⁰ Power struggles and vacuums through the Pashtun belt over at least six centuries continue to manifest in 21st century Pashtun Politics and legal structures. War, invasion and internal struggles seem to bolster Pashtuns resilience, while the Pashtuns have never being fully integrated into a ‘single empire, state or political system, they have formed empires of their own.’¹⁰⁵¹

Pre-Soviet invasion, Afghanistan was a Pashtun dominated state. ‘Ironically the historic pattern of political instability and outside interference in the region has helped to reinforce the tribal nature of Pashtun society, particularly in the countryside, where most Pashtuns live.’¹⁰⁵² Traditional Pashtun life was disrupted by the social consequences of the Soviet invasion, both through the actual conflict as well as through the loss of people forced to seek refuge as well. Over 80 % of the 6.2 million Afghan refugees who sought refuge in Pakistan were Pashtun.¹⁰⁵³ Even when foreign fighters came to Afghanistan to support the *mujahidin* altering the tribal dynamic temporarily, the elasticity of the Pashtuns showed their ability to accommodate external forces until they have the opportunity to regroup and readjust to a power position. When there is no wider conflict outside of the local conflict, factional disputes may remain limited to the local community. When a national conflict overlays the local situation, the local conflict can transfer itself into the different sides of the larger conflict.

¹⁰⁴⁸ Vijay Nagaraj ‘Human Rights, Legal Pluralism and Conflict: Challenges and Possibilities—Some Reflections’ USIP, GWU & WORLD BANK CONFERENCE AGENDA (Conference on Customary Law Washington, DC November 17-18, 2009)

¹⁰⁴⁹ For an overview of this theory, see Kilcullen *The Accidental Guerrilla*, (n1044) 77-82

¹⁰⁵⁰ Miakhel ‘Understanding Afghanistan’ (n873) 2

¹⁰⁵¹ Siddique (n816)12, 34

¹⁰⁵² *ibid* (n816) 12-13

¹⁰⁵³ Ahmad & Boase (n816) 13

Understanding local conflict dynamics is a critical first step in understanding its actors.¹⁰⁵⁴ The commonality of Afghanistan-Pakistan Islamic movements include that ‘all [claim to] give the Muslim *umma* priority over ethnic or national identities or interests.’¹⁰⁵⁵ However, these networks operate with two sets of criteria in view, the local and the global. While there are similarities in language, with their appeal to the *jihad* and the *umma*, this can hide the essentially ethnic motivations that arise within the local context.¹⁰⁵⁶

Though convenient, the tribal narrative can oversimplify local conflicts and distract observers from key issues in these disputes. Pashtuns’ motivations for choosing how to identify and organize politically are flexible and pragmatic. ‘Tribe’ or *qawm* is only one potential choice of identity among many, and not necessarily the one that guides people’s decision making.’¹⁰⁵⁷ While a way of life, *Pashtunwali* is not as prescriptive in its conflict conduct as is *siyar* or IHL. Rather permissible conflict conduct is derived from Pashtun norms. Where tribal narratives may be inappropriate in understanding local conflicts, it remains appropriate in examining the way the tribal code influences conflict conduct whether in wars of nationalism or ideology.

¹⁰⁵⁴ Department of the United States Army (n35) 12, 16

¹⁰⁵⁵ Abou-Zahab & Roy (n418) 2

¹⁰⁵⁶ *ibid* 69

¹⁰⁵⁷ Department of the United States Army (n35) 2, 17

Chapter 8 The Afghan Taliban, 1994-2001

*'We have never called ourselves Taliban...If you want, it is a Taliban movement, a movement of religious scholars rather than an organization.'*¹⁰⁵⁸

It is difficult to isolate the Taliban's actual constitution.¹⁰⁵⁹ It has been cited as an umbrella organization for a loose network of dispersed constituent groups varying in size and levels of coordination.¹⁰⁶⁰ Some claim these groups have achieved 'significant unity of purpose and even some unity of effort';¹⁰⁶¹ some cite these groups as alliances only, a franchise;¹⁰⁶² while others contend the Taliban are mere puppets manipulated by external actors.¹⁰⁶³ There are arguments that the label 'Taliban' was lazily imposed on any person who offered armed opposition to the Afghan Government,¹⁰⁶⁴ the Movement compared to a 'caravan to which different people attached themselves for various reasons.'¹⁰⁶⁵ Scholars and commentators disagree over whether the Taliban be treated as a primarily political movement with political aims, and not as a tribal one,¹⁰⁶⁶ or if it was more a military organization than a political one.¹⁰⁶⁷

While there are many incarnations of the Afghan Taliban, there are two distinct and organic parts to the Taliban insurgency: the formative years of the Movement led by *mujahidin* and *madrassa* students up until late 2001 and everything after. The 'old' Taliban, a quasi-national liberation movement with tribal undertones needs to be distinguished from the 'new' Taliban,

¹⁰⁵⁸ Taliban Governor of Kandahar telling Japanese diplomat in 1996 in Nagamine (n71) 14

¹⁰⁵⁹ Taliban means student, the word derives from the Arabic verb *talaba* (to seek) of which the Persian plural is Taliban. The figure of the *Talib* is a familiar one in the North-West Frontier as long ago as 1898 Winston Churchill penned some cutting remarks about 'a host of wandering *Talib-ul-ilms*, who correspond with the theological students in Turkey [and] live free at the expense of the people.' W. Churchill, *The Story of Malakand Field Force* (NY, WW Norton & Co., 1990) 7

¹⁰⁶⁰ This network includes the vicious Haqqani Network; the Quetta *Shura* Taliban; Hizb-i Islami (Hekmatyar); Lashkar-i Taiba; and al-Qaeda. Vanda Flebab-Brown 'Blood and Faith in Afghanistan: A 2016 Update' (May 2016) Brookings Center on 21st Century Security and Intelligence 1, 2

¹⁰⁶¹ Theo Farrell & Antonio Giustozzi, 'The Taliban at War: Inside the Helmand Insurgency 2004-2012' (2013) *International Affairs* 9

¹⁰⁶² Emile Simpson, 'War from the Ground Up: Twenty First Century Combat as Politics' (Hurst 2012) 76-77

¹⁰⁶³ Taj (n31) 14. Zabiullah Mujahid, a spokesman for Mullah Omar, denied that the Taliban were under al-Qaeda's sway, '[W]e are from the country [Afghanistan], we are the boss. We [do] not have any link with [al-Qaeda], they [do] not have any link with us'. Nigel Robertson, 'Afghan Taliban Spokesman: We Will Win the War', CNN, 5 May 2009

¹⁰⁶⁴ Simpson 'War from the Ground Up' (n1062) 76-77

¹⁰⁶⁵ Irrespective of the current classification difficulties these recognized ANSGs operating through the Pashtun belt, with the exception of *al Qaeda*, were founded in the Tribal areas by Pashtuns, all have tribal associations, all navigated unhindered through the frontier with impunity. Bernt Glatzer, 'War and Boundaries in Afghanistan: Significance and Relativity of Local and Social Boundaries,' (2001) 41(3) *Die Welt des Islams* 379; Ruttig 'Tribal' (n953) 16

¹⁰⁶⁶ *ibid* (n953)

¹⁰⁶⁷ See Davies *Problem of the North West Frontier* (n859)

part of a transnational 'citizens of *jihad*' with religious overtones possessing distinct ideologies and susceptible to different influences.¹⁰⁶⁸ For the purposes of this research, only the formative years are examined with a focus on the Taliban's conception around the principle of distinction through a selection of the groups campaigns. Having considered the various non-state laws that were operational through the Taliban insurgency (1994-2001), the purpose of this chapter is to examine the application of these laws in certain of their conflict conduct.

The Taliban movement is understood by contextualizing its evolution. The early 1990's woke to an anarchic Afghanistan. 'Soviet withdrawal meant that the Afghan-Pakistan border was left with...highly motivated, deeply religious men looking for a new cause.'¹⁰⁶⁹ Heavily armed, with no employment opportunities, disaffected Afghan war veterans became the kernel for militant Islamic networks. The situation in Kandahar was particularly bad because the roads had been taken over by unemployed fighters who now specialized in robbery, rape and extortion. There was widespread corruption and theft, and roadblocks everywhere.¹⁰⁷⁰ The post-Soviet power vacuum caused the once unified *mujahidin* to descend into an era of warlordism. These ingredients added to what would become a brutal civil war. 'Anything that looked like a human being would be targeted. They shot everything: rockets, shells, bullets...'¹⁰⁷¹

There is no consensus about the birth of the Taliban or the hands that crafted it. While the majority see it as an organic response, others see it as a design from the ISI. Regardless, it seemed the only effective remedy to warlordism and tribal disputes was religious zeal.¹⁰⁷² There are 'an entire factory' of myths and stories to explain the Taliban's rise to prominence in Kandahar,¹⁰⁷³ with some describing their rise to government as amateur if not accidental.¹⁰⁷⁴ There is however a consistent theme that enjoins its emergence as a moral project, marrying

¹⁰⁶⁸ Maley *Fundamentalism*, (n55) 15. Even within the pre-2001 Taliban, there is no organized or recognizable moderate faction in the Taliban to counterbalance religious hardliners. It is more useful to differentiate between the different currents: pragmatic, politically thinking pro-talk Talibs who want a political solution but who are still conservative Islamists compared with those who are in favour of a purely military approach often combined with a hypertrophic recourse to terrorist means. The first-generation Taliban are now talking while the second generation (neo-Taliban) are fighting. Ruttig (n953)

¹⁰⁶⁹ Kfir (n893) 42

¹⁰⁷⁰ Peter Marsden, *The Taliban: War and Religion in Afghanistan* (OUP 2002) 61

¹⁰⁷¹ HRW interview with S.K., Afghan medical worker in Karte Seh (West Kabul) during early 1990's, Kabul, July 9, 2003 cited in HRW Blood Stained (n760) 34

¹⁰⁷² Mujib Mashal, 'The Myth of Mullah Omar' Al Jazeera (Doha, 06 June 2012)

¹⁰⁷³ See Rashid 'Taliban, Oil and the New Great Game' (n797) 25

¹⁰⁷⁴ Marsden (n1070), 70; Robert Crews, *The Taliban and the Crisis of Afghanistan*, (Harvard University Press 2008); Nagamine (n71) 15

extreme piety with a humanitarian impulse to answer the desperate pleas of their countryman.¹⁰⁷⁵ This narrative of the pious, courageous and disciplined Taliban aligned with the populations need for salvation.¹⁰⁷⁶

‘On 20 September 1994, a Herati family, while on its way to Kandahar from Herat, was stopped at a check point ninety kilometres short of Kandahar by local *mujahidin* bandits. The men and women were separated. The boys were taken away and molested. The girls were repeatedly raped until they became unconscious. Later all of them were killed and their bodies partially burnt. It was Mullah Omar (sometimes referred to as Mullah Mujahid) who was the first to arrive on the scene. He is reported to have gathered some *talibs* who helped him in collecting the bodies. These were washed and given a decent burial. He then gathered the [religious] students and pledged to start a campaign to get rid of such criminals... The Taliban movement had begun.¹⁰⁷⁷

A variation of this account sees Mullah Omar, enlisting 30 *talibs* with only sixteen rifles between them, mounting the rescue of two teenage girls who had been abducted and repeatedly raped at a military base in his hometown of Sangesar. On freeing the girl, the Talib’s hung the responsible commander from the barrel of a tank. The Mullah and his *talib*’s claimed to restore peace, enforce *Shari’a* and defend Islam as sanctioned through the primary sources.¹⁰⁷⁸ ‘Asking for no reward save help in establishing an Islamic system, Mullah Omar’s prestige grew rapidly.’¹⁰⁷⁹ The restoration of law in this mythical story is dominated by an Islamic narrative with a flavour of *Badr*, however it also aligns with *Pashtunwali*, using the traditional rules of *badal* to restore *namus*.

It was in the context of a disparate state with a dispirited population that the legend of the Taliban emerged. The group and its agenda were localized from inception and attracted little comment from the international community.¹⁰⁸⁰ They were a purely Afghan movement with

¹⁰⁷⁵ Alia Brahimi, ‘The Taliban’s Evolving Ideology’ LSE Global Governance (2010) WP 02/2010 3; Marsden (n1070) 61

¹⁰⁷⁶ Salam-Zaeef (n883) 67

¹⁰⁷⁷ Kamal Matinuddin, *The Taliban Phenomenon: Afghanistan 1994-1997* (OUP 1999) 25-6

¹⁰⁷⁸ Griffin (n930) 43; Ask, ‘Legal Pluralism’

¹⁰⁷⁹ Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia* (IB Tauris 2008) 25

¹⁰⁸⁰ Salam-Zaeef (n883) 65. Initially, the Taliban were not all anti-Western. Under Bin-Laden’s influence, the Taliban movement are said to have undergone a ‘neo-fundamentalist radicalisation’ including the strict application of *Shari’a*. Abou-Zahab & Roy (n418) 13

‘no foreign policy’.¹⁰⁸¹ The idea of an ordered Afghanistan was appealing to large pockets of the Afghan communities attracting new recruits from like-minded people.¹⁰⁸² Within a year, the Taliban grew to 10,000 members, capturing Kandahar with minimal losses.¹⁰⁸³ Within three years their control extended to over 90 % of the country.¹⁰⁸⁴

The Afghan *jihad* against the Soviets demonstrated the unifying power of channelling nationalist sentiments within an Islamic framework. Indeed, Islamic and nationalist values were twinned by the Taliban, who spoke of their ‘lofty Islamic and nationalist aims’,¹⁰⁸⁵ in turn, mobilising a distinctly rural constituency, a feat that was not accomplished by an array of regimes prior.¹⁰⁸⁶ Yet, the Taliban did not have a sophisticated view of what a genuinely Islamic system would look like. Further, speaking in the name of Islam neither brought unity of ranks nor unconditional popular support’.¹⁰⁸⁷

The Taliban made clear from the start it would be uncompromising. One of their first public moves was pulling president Najibullah from the UN Compound he was residing under house arrest. They tortured him and mutilated his body in the streets of Kabul.¹⁰⁸⁸ After the capture of the capital, the Taliban issued no manifesto. There was no administration, no public services and no economic plan. Once in the capital, ‘the Taliban did not so much take control of Afghan institutions as completely eviscerate them, erecting in their stead only three functions: morality, commerce and war.’¹⁰⁸⁹ However the Taliban did leave the structure of the old government court system intact, creating a parallel court system to run out of Kandahar. They enumerated no new government codes, believing the *Shari’a* offered answers to all questions. Taliban courts were particularly keen on reinvigorating *hudud* punishments, such as stoning adulterers and amputating the hands of thieves that had largely disappeared from Afghanistan generations earlier. Yet in spite of their clerical garb and professed interest in imposing a pure form of Islamic law, Taliban leaders were not so much *ulama* scholars as they were rural ‘tribal

¹⁰⁸¹ Albeit instrumentalised by Pakistan as discussed below. Roy, ‘Has Islamism a Future?’(n913) 210

¹⁰⁸² Salam-Zaeef (n883) 67; Abou-Zahab & Roy (n418)14

¹⁰⁸³ Rashid *The Power of Militant Islam* (n928) 29

¹⁰⁸⁴ John Burns, ‘Taliban Opponent Reported to Have Died’ NY Times (NY, 15 Sept 2001)

¹⁰⁸⁵ ‘Remarks of Esteemed Mullah Brader Akhund Made to Media about Obama’s New Strategy’, 30 October 2009 in ‘Taliban leader rejects U.S. attempts to lure away fighters with money’ <http://www.uruknet.info/?new=59561>

¹⁰⁸⁶ Roy ‘Has Islamism a Future?’ (n913) 205

¹⁰⁸⁷ Ghani (n868) 94

¹⁰⁸⁸ BBC, ‘Flashback: When the Taliban Took Kabul,’ World: South Asia (Oct 15, 2001)

¹⁰⁸⁹ Kepel *Jihad* (n486) 229

puritans,' men who focused more easily on what they wished to destroy than what they wished to build.¹⁰⁹⁰

Within months, Mullah Omar's *talibs* controlled most of the country. The Taliban's immediate goals were to disarm all rival militia, fight against those who refused to disarm, enforce Islamic law and retain all areas captured by the Taliban.¹⁰⁹¹ A series of events aligned in the early 1990's which thrust the Taliban as a legitimate contender for power. The group profited from a turf war which occurred within Benazir Bhutto's government in Pakistan. The ISI, which had been supporting Hekmatyar in his quest to capture Kabul, was undermined by Naseerullah Baber's Ministry of the Interior.¹⁰⁹² When the Taliban rescued a Pakistani truck convoy, Baber took Mullah Omar under his wing. The Bhutto government dropped Hekmatyar, who was increasingly viewed as a losing horse, and put all of its money on the Taliban.¹⁰⁹³ Bhutto aimed at strategic depth in the region as well as stability to facilitate trade and the transport of oil and gas from the Central Asian Republics.¹⁰⁹⁴ With the aid of Pakistan, the Taliban displaced Hekmatyar's Hizb-i-Islami as the leading Pashtun faction in 1995 and their power spread quickly through other Pashtun regions.¹⁰⁹⁵ Despite a number of setbacks, they succeeded in occupying Kabul in 1996 and then extended their control to all of Afghanistan except the northeast by 1998.¹⁰⁹⁶

The Taliban took the momentum from their early territorial gain in the capital to expand its control. The expansion was quashed in the Uzbek controlled, Hazara populated Mazar-i-Sharif. General Dostum's second in charge had made a secret pact with the Taliban allowing them easy access into the area. Whether through arrogance or naivety, the Taliban failed to factor

¹⁰⁹⁰ Rashid *The Power of Militant Islam* (n928) 102

¹⁰⁹¹ Matinuddin, (n1077) 26

¹⁰⁹² JN Dixit, 'Soldiers of Islam: Origins, Ideology and Strategy of the Taliban', (1997) 20(5) *Strategic Analysis* 665-73

¹⁰⁹³ Rashid discusses the complexities of Pakistan's relationship with the Taliban outlining the nature and character of their links with Pakistani groups: the ISI, Jamiat e Uema-I Islam, the transport mafia and the Bhutto government exploring the exploitation of these links by the Taliban. See Rashid 'Taliban, Oil and the New Great Game' (n797).

¹⁰⁹⁴ The support the Taliban received from Pakistan is dwarfed by the support the United States gave Hekmatyar's *Hizb-i-Islami* when fighting the Russians. See Gregory Copley, 'Pakistan Under Musharraf,' (2000) *Defense and Foreign Affairs Strategic Policy*.

¹⁰⁹⁵ The Taliban movement draws on the financial and human resources of Pakistan and Saudi Arabia which have transformed it from a disorganized collection of fronts with local agendas into an organized political force with countrywide objectives. It is this external factor that distinguishes the Taliban from earlier Pashtun Movements. Only after their initial moves were the Taliban 'adopted', supported and instrumentalized by the Pakistani military establishment. Maley *Fundamentalism*, (n55) 16, 45-46. Amin Saikal, *Modern Afghanistan: A History of Struggle and Survival* (IB Tauris 2006) 221.

¹⁰⁹⁶ Barfield 'Customary' (n828) 34.

the possibility that there could be a revolt by the population it was taking by force. A massacre ensued with the slaughter of 600 Taliban and the capture of 1000 under the watch of General Dostum.¹⁰⁹⁷ This revolt, while temporarily damaging the Taliban offensive was permanently etched in the groups collective memory.¹⁰⁹⁸

The Taliban were able to seize power in Afghanistan by exploiting a series of divisions among the *mujahidin*. '[M]ujahidin internal conflicts, which inflicted heavy damages and huge suffering on Afghanistan, provided the Taliban with a golden chance to verify their claim over the corruption and hypocrisy of their opponents.'¹⁰⁹⁹ However, they themselves were not unified. After all, the Taliban was a Pashtun-dominated movement embodying the 'ethnic polarisation of a rural and segmented society under the banner of Islam.'¹¹⁰⁰

8.1 'Every Pashtun is not a Talib but every Talib may be Pashtun.'¹¹⁰¹

The Taliban were primarily a Pashtun phenomenon rooted in tribal society, motivated by 'family, clan, tribal and economic interests.'¹¹⁰² The Movements' rise to power represented a consolidation of Pashtun power.¹¹⁰³ It was a Movement sustained by Pashtun nationalism which sought to re-establish the Afghan state, the traditional fief of the Pashtuns.¹¹⁰⁴

A puritan religious movement with no political narrative beyond 'the *Shari'a*, the whole *Shari'a* and nothing but the *Shari'a*'. Taliban Islam in this sense displayed a Saudi character and did not relate to an anti-imperialist revolutionary project such as had previously existed in

¹⁰⁹⁷ David Rohde, Executions of POWs Casts Doubts on Alliance, NY Times (NY, 13 Nov 2001); Alessio Vinci, 'Hundreds Killed After Mazar-e Sharif Takeover' CNN News (NY, 13 Nov 2001); Rashid *The Power of Militant Islam* (n928) 55-66.

¹⁰⁹⁸ United Nations, UN Mapping Report Afghanistan,' Unpublished, 2005, 248 in Nagamine (n71) 14.

¹⁰⁹⁹ MJ Gohari, *The Taliban Ascent to Power* (OUP 2000) 26

¹¹⁰⁰ Roy 'Has Islamism a Future?' (n913) 211

¹¹⁰¹ Hassan Abbas, *The Taliban Revival: Violence and Extremism on the Pakistan-Afghanistan Frontier* (Yale University Press 2014) 10

¹¹⁰² Shehzad Qazi, 'Rebels of the Frontiers: Origins, Organization & Recruitment of the Pakistani Taliban' (2011) 22(4) *Small Wars and Insurgencies* 564, 582; Some of the worst affected areas by the civil war had been around Kandahar, the heartland of the Pashtuns, where *mujahidin* commanders were engaged in drug trafficking, extortion and rape. As a result, 'most Pashtun commanders, whatever their ideological affiliation joined or approved of the Taliban... By the same token, no well-known non-Pashtun figures joined the Taliban'. Roy, 'Has Islamism a Future in Afghanistan?'(n913), 208. Dalrymple 'This is No NATO Game' (n941)

¹¹⁰³ Rashid, Taliban, (n1082), 2; Qazi 'Rebels' (n1102) 587.

¹¹⁰⁴ Abou-Zahab & Roy (n418) 14.

Iran.¹¹⁰⁵ Dominated by Pashtun clerics from southern Afghanistan,¹¹⁰⁶ the Taliban's leadership was almost exclusively clerical, however most had neither distinguished religious lineages nor been educated at particularly prestigious *madrassas*. The Pashtun dominance in leadership meant the movement was less well received in other parts of the country. However, the stronger emphasis on the Taliban's supra-tribal ideology of Islamism broadened membership for non-Pashtun elements allowing the systematic expansion into non-Pashtun areas of the North and West.¹¹⁰⁷ Yet, the overtly unified ideological dimension blurs the underlying fragmented nature which draws its strength from local grievances.¹¹⁰⁸

The Taliban identified in its rhetoric as a religious movement purifying society of evils. It sought to impose a strict *salafist* interpretation of Islamic law after seizing power. This 'provoked antagonism by championing a set of values that were as far from the Afghan mainstream as those of [King] Amanullah and the socialists had been, albeit in opposite directions.'¹¹⁰⁹ The Taliban were seen as using state power to impose a rigid legal system with foreign roots that ignored the country's traditions and values.¹¹¹⁰ The Taliban's theocracy was a particularly unusual and largely unrepresentative form of Islam. 'Notwithstanding the *sui generis* nature of the Taliban's edicts and the reality that they mostly emerged from a culture of war, the fact remains that they also drew from Islam.'¹¹¹¹

8.2 'Every Afghan is a Deobandi'¹¹¹²

The principle formative influence of Taliban radicalism has been the Deobandi School, named after Deoband, where a religious academy was founded near Delhi in 1867. It comprises religious figures of a traditional and conservative inclination, 'whose manifestation in the sphere of politics is the *Jamiat-i-Ulama-i-Islam*, the largest Deobandi-based party, established

¹¹⁰⁵ Abou-Zahab & Roy (n418) 13-14.

¹¹⁰⁶ Its senior leaders such as Mohammad Omar, Rabbani, Ghaus, Abbas, Hassan and Wakil Ahmad all claimed titles like *Mullah* or *Mawlawi* signifying they have moved beyond the status of talib. *Maley Fundamentalism*,(n55) 15.

¹¹⁰⁷ Some say this broadening was in relation to front line militants only, and that the Taliban resisted incorporating other ethnic groups in their political base which proved a failing as they moved into non-Pashtun areas. Barfield 'Customary' (n828) 35.

¹¹⁰⁸ Taj (n31) 93.

¹¹⁰⁹ Barfield 'Culture' (n876) 349; Nagamine (n71) 15.

¹¹¹⁰ Lau 'Afghanistan's Legal System' (n889)

¹¹¹¹ JG Elliott, *The Frontier 1839-1947: The Story Of The North-West Frontier Of India* (Cassell 1968) 396

¹¹¹² Hashimi, Taliban Ambassador, 2001 in Alex Strick Van Linschoten & Felix Kuehn, *An Enemy We Created: The Myth of the Taliban-Al Qaeda Merger in Afghanistan, 1970-2010* (C Hurst & Co., 2012) 11.

in 1945.¹¹¹³ The thrust of the Movement was to resist British imperialism by training cadres of conservative clerics who would adhere to what they viewed as puritanical Islam.

The Taliban recruited mainly among Deobandi *madrassas*, some local, others through the Durand Line.¹¹¹⁴ These *madrassas* were run by *Jamiat-i-Ulama-i-Islam*, headed by Maulana Fazlur Rahman. Its students were particularly poor and generally war orphans. The Deoband School preached a form of Sunni conservative orthodoxy, and *madrassas* under its influence provided the bulk of the Afghan *ulama*.¹¹¹⁵ While *mujahidin* professed to be followers of the Hanafi school of Islam, almost all declared allegiance to the teachings of Deobandi Islam.¹¹¹⁶

In the tradition of reformist Sunni movements in the region, the Taliban sought to purify society from non-Islamic influences. It appealed inconsistently to the authority of Ibn Taymiyya, and Muhammad ibn Abd al-Wahhab. It looked to the practice of Syed Ahmed Bareilvi (Ahmed Shaheed) and Ismail Shaheed, the leaders of the so-called 'Wahhabi' movement,¹¹¹⁷ 'a rigid puritanical version of Islam [that] views the outside world and modernity with hostility.'¹¹¹⁸ The majority of attacks by armed non-State groups against the West have been from Islamic groups espousing Wahhabism.¹¹¹⁹ Wahhabism met the tacit approval of many Western and Muslim governments because it obstructed both communism and the ideological expansion of the Islamic Republic of Iran. This view aligned with the Taliban who were particularly contrary to the Shi'a.¹¹²⁰

The Movement are viewed through a lens of militarization and Islamization of Pashtuns during the Afghan *jihad*. The Islamization process saw Pakistani-based Islamic groups promote a Deobandi interpretation of Islam, in which believers were more than members of a tribe or

¹¹¹³ Abou-Zahab & Roy (n418) 20.

¹¹¹⁴ *ibid* 13.

¹¹¹⁵ The radicalization of the Deobandi movements can be traced to the policy of conservative re-Islamization instituted by General Zia-ul-Haq after his seizure of power in Pakistan in 1977. Abou-Zahab & Roy (n418) 13, 22. Caution must be exercised when talking about individual talibs as opposed to the Taliban Movement which became more than the total of the *madrassa* students. Maley *Fundamentalism*,(n55) 14. For a detailed discussion on Deoband tradition see Barbara Metcalf, *Islamic Revival in British India: Deoband, 1860 -1900* (Princeton University Press 1982)

¹¹¹⁶ Siddique (n816) 47.

¹¹¹⁷ Ahmed Shaheed is an authority turned to by most *jihadi* movements. Abou-Zahab & Roy (n418) 33.

¹¹¹⁸ Fared Zakaria, 'The Allies Who Made Our Foes' *Newsweek* (NY, 1 Oct 2001) 34.

¹¹¹⁹ Esther Peskes, 'Wahhabiyya: the 18th and 19th Centuries', *the Encyclopaedia of Islam*, Vol. 11 (E.J. Brill 1993) 42-43. Among the measures taken by the Wahhabis are the 1802 sacking of the Shi'a holy city Karbala and the damaging of Shi'a shrines; the 1803 turning back from Mecca of the Muslim northern pilgrims to avoid their *kufri* practices and the destruction of the 12th century statues of Dhu Khasala in 1820. Zakaria (n1118) 34.

¹¹²⁰ Abtahi, (n803) 7.

clan, they were part of the *Caliphate*. Ideologically, most Islamic movements operating through the Durand Line share two characteristics: they are ‘*jihadist*’ and ‘*salafist*’. *Jihadist* in that they seek to recover ‘occupied’ Muslim lands, or usurp Muslim regimes regarded as traitorous, and *salafist* pertaining to the demand to return to a strict Islam, untainted by local customs and culture. If the Taliban are ‘*salafi jihadist*’, there can be no place for *Pashtunwali*.¹¹²¹

8.3 Department for the Promotion of Virtue and the Elimination of Vice

The Taliban emphasised the individual dimension of faith as the basis for rebuilding the *umma*, the view that Muslims must first return to the true faith before it becomes possible to issue any call to *jihad*.¹¹²² For its realization, the Taliban established an Islamic state with rule by edict based on a *salafi* interpretation of *Shari’a*. These edicts controlled most aspects of life, from the clothes that a woman was to wear; to the length of a man’s beard, to appropriate family activities. The religious edicts were enforced by the Saudi inspired ‘Department for the Promotion of Virtue and the Elimination of Vice’ (*Amr el-Maruf wa el-Munkar*), the *raison d’etre* of the Taliban.¹¹²³ It was the most cohesive organization in the Taliban’s otherwise inchoate structure, institutionalising the operation of *Shari’a*.

A cross between the church and the army, the Taliban recognized no private sphere beyond the purview of its authority.¹¹²⁴ Over 30,000 Taliban were tasked with enforcing the observance of religious service, dress codes, and enforcing bans on all forms of entertainment. Indeed, the long beards and turbans which became the Taliban hallmark had long been a part of Kandahari culture. The Taliban thus sought to universalise a specifically Pashtun custom and enforce its adoption across Afghanistan, a visible expression of piety but also as a symbol of the Taliban’s political monopoly.¹¹²⁵

Men with beards shorter than the ‘Islamic’ standard were whipped, drinkers were flagellated with rubber hoses, the limbs of thieves amputated and murderers executed, all of which were deemed the only legitimate forms of public spectacle as thousands of people were crowded into

¹¹²¹ Abou-Zahab & Roy (n418) 1- 2.

¹¹²² Ibid 3-4.

¹¹²³ The religious legitimacy for this special ministry is based on the Islamic legal doctrine of *Hisbah*, which aims to guard public order through social vigilance. Similar police exist in Saudi Arabia. The expression is derived from the *Qur’an*, 3:3, *Amr bil Maroof wa Nahi ‘anil Munkar* is an important aspect of Islam.

¹¹²⁴ Isaiah Berlin is reported to have described the Communist Party the same way. Maley *Fundamentalism*, (n55) 21.

¹¹²⁵ Matinuddin (n1077) 37.

stadiums to watch.¹¹²⁶ Public punishment was a cornerstone of the administration of draconian justice through *Shari'a* courts.¹¹²⁷ In terms of punishment, the Taliban's approach conflicts with the restorative approach used by the Pashtun tribal Elders who aimed to restore community harmony where social bonds had been ruptured by the actions of one or both parties. The Taliban focused on the enforcement of modes of behaviour which externally seemed to run parallel to solving Afghanistan's problems.

Although restricting civil liberties, the Afghan population wanted security and the Movements policy of moral purity resonated with the values of those under Taliban control. For the affected population, the Taliban represented discipline and order which they juxtaposed with the *mujahidin* lawlessness and brutality. This initial support turned into a benign tolerance as the regime progressed, the diminished public services became outweighed by enhanced security, or 'peace in the graveyard.'¹¹²⁸

8.4 Mullah Omar

Mullah Omar was an obscure character on the Kandahar political map. Like many *mujahidin*-cum Taliban, he wore the physical effects of the Soviet resistance.¹¹²⁹ The son of a village *mullah* and a *mullah* himself, the Taliban's leader was renowned for doing much of his strategic thinking on his prayer mat.¹¹³⁰

Sharing hallmarks of fundamentalist leaders like Amir Abdur Rahman Khan a century earlier, Omar also had his call to action through a visionary dream in which the Prophet visited him and told him to lead the country.¹¹³¹ This mystical dimension distinguished the Mullah from other politicians and served as a charismatic basis for personal authority.¹¹³² In order to authenticate his role as a ruler ordained by God to lead the Afghan people, Omar drew upon both Islamic and Pashtun motifs. In 1996, he visited the shrine of the Cloak of the Prophet

¹¹²⁶ Antonio Giustozzi, *Koran, Kalashnikov and Laptop: The Neo-Taliban Insurgency in Afghanistan* (Columbia University Press, 2008) 72.

¹¹²⁷ Henry Bill, 'Country Without a State- Does it Really Make a Difference for the Women?' *Afghanistan, A country without a State* (Vanguard 2002) 107.

¹¹²⁸ Bernard Lewis, *The Revolt of Islam: When Did the Conflict With the West Begin, and How Could it End?* *The New Yorker* (NY 19 Nov 2001); Nagamine (n71) 16.

¹¹²⁹ Myth tells of the Mullah continuing to fight after shrapnel struck his right eye leaving him blind. Mashal, (n1072).

¹¹³⁰ Rashid *Taliban* (n1082) 82.

¹¹³¹ In a dream the Prophet visited him and told him to lead the country.

¹¹³² Maley *Fundamentalism*, (n55) 18.

(*Khirqā-e Mubarak*), which is situated next to the tomb of Ahmad Shah Durrani, the founder of the Pashtun dynasty. Standing in Kandahar's central bazaar, Mullah Omar removed the cloak and wore it in front of a large crowd of followers, a symbolic legitimation for his authority. He was then named *Amir al-Mo'mineen* (Commander of the Faithful),¹¹³³ which bestowed on him supreme executive power.

In donning the cloak, the Taliban's leader sought to adopt the Prophet's mantle, as he did when he stood up to the oppressive warlords and initiated the Taliban's crusade against ordinary people's suffering. But this powerful symbolism did not long insulate the Taliban from a crisis of authority.¹¹³⁴ In his rhetoric Omar often harked back to the days of early Islam for the model of society he wished to see installed in Afghanistan. His stock answer to every legal question was that the issue was adequately addressed by the *Shari'a*, without ever referencing the many issues that were still subject to long debate within the different legal schools of Islam. This insistence on imposing *Shari'a* without being clear on its details or sources was a hallmark of Taliban *fiqh*.¹¹³⁵

The Taliban arrived in a perfect storm, appealing to the rural population as a beacon of security and stability; appealing to the war orphans who evolved in the politicized *madrassas* in Pakistan and needed to focus on a localized saviour against the savage, good over evil; appealing to Pakistan as a better positioned (than Hekmatyar) group to defend their national interests triggering a change in alliance; and appealing to the transport mafia which funded the Taliban with a monthly retainer in the expectation that the Taliban would reopen the border route.¹¹³⁶ The Taliban stepped into the power vacuum and culture of war. '[Its] grip on power in Afghanistan was derived from a society with a starkly negative view of the outside world, due to the cycle of intervention and abandonment by the Soviets, the United States and other foreign interests.'¹¹³⁷

¹¹³³ Rashid, *Taliban*, (n1082), 20.

¹¹³⁴ Declan Walsh, 'Taliban's leadership council runs Afghan war from Pakistan' *The Guardian* (London, 29 Jan 2010)

¹¹³⁵ Tim McGirk & Rahimullah Yusufzai, 'Mullah with a Mission', *Time* (NY, 31 March 1997) The title *Amir al-Mu'minin* had been used by Amir Dost Mohammad Khan in the 19th century. It was also used by followers of Sayyid Ahmad Barelvi to describe their leader. Barbara Metcalf, 'Sayyid Ahmad Barelvi' in J. Esposito (ed) *The Oxford Encyclopaedia of the Modern Islamic World*, vol I (OUP 1995) 86-87, 200.

¹¹³⁶ Conrad Schetter, *The 'Bazaar Economy' of Afghanistan: A Comprehensive Approach*, (Sudasiens-Informationsnetz 2004) 122; Ahmed Rashid, 'Pakistan and the Taliban,' *The Nation* (Lasgos, 11 April 1998); Amalendu Misra 'The Taliban, Radical Islam and Afghanistan,' (2002) 23(3) *Third World Quarterly* 577, 582.

¹¹³⁷ Ali Ahmad, Editorial, *From Kyoto to Jalozai*, *News* (Pakistan, 2 April 2001) 7.

8.5 The Taliban Insurgency 1994-2001

“[W]e are ruled by men who offer us nothing but the [Qur’an], even though many of them cannot read... we are in despair’.¹¹³⁸

The period from 1978-2001 has been stained by the most heinous abuses of human rights and violations of IHL as well as *siyar*. Massacres, uprisings, rapes, arbitrary arrests, detention, torture, indiscriminate bombardments and reprisals have been perpetrated by the government and ANSGs.¹¹³⁹

While Afghanistan was once described as a graveyard of empires, the entire country became a mass graveyard.¹¹⁴⁰ The period leading up to the Islamic Emirate of Afghanistan was marked by daily and arbitrary abuse.¹¹⁴¹ Some of this abuse shows a clear reversion to both *lex talionis* in *jahiliyya* and *badal*. Indeed, it has been proffered that many Pashtuns joined the Taliban as a ‘revenge of the Pashtuns,’ after their slaughter in Mazar.¹¹⁴²

The Taliban militancy is ‘one of the most complex [least understood] conflicts.’¹¹⁴³ Originally, a manifestation of widely held grievances and issues within a broader population, the Taliban combined successive or simultaneous use of violence against civilians to build control over a population.¹¹⁴⁴ Despite a long history of engagement with IHL, they continued to execute attacks while hiding among civilian populations, the number of attacks against protected

¹¹³⁸ A quote from an elderly Islamic scholar in Herat to New York Times correspondent John Burns, quoted in Matinuddin, (n1077) 38.

¹¹³⁹ From the PDPA period, April 1978 to Dec 1979: Kerala massacre 1979; the Herat Uprising March 1979; From the PDPA period and Soviet Occupation 1980-88: Arrests, detention and torture; indiscriminate bombardments and reprisals against civilians in the country side; From the Najibullah government after the Soviet withdrawal, and the resistance: Continuing bombardments; abuses by government-backed militias; attacks on Afghans in Pakistan; torture in *mujahidin* prisons. From the civil war 1992-96 and United Front period 1996-98: the bombardment and rocketing of Kabul 1992-95; the Afshar massacre and mass rape in Kabul 1993; torture; From the Taliban era: the massacre in Mazar-i-Sharif 1998; massacres in Sar-i-Pul 1999-2000; the massacre in Rabatak 2000; the massacre in Yakaolang in 2001; Burnings and deliberate destructions: the Shamali campaign 1999-2000; Yakaolang and Bamiyan 2001.

¹¹⁴⁰ Afghanistan is now a place where mass graves at Pul-i-Charkhi prison hold the bodies of thousands of political activists and *mujahidin* who lost their lives as a result of summary execution by the Soviet-backed regime from 1978 to 1992. This country became the scene of the mass killing of civilians. Afghanistan Independent Human Rights Commission (AIHRC), *A Call for Justice - A National Consultation on past Human Rights Violations in Afghanistan*, (25 January 2005), <http://www.refworld.org/docid/47fdad50.html> [accessed 15 Oct. 2017], 4.

¹¹⁴¹ In Oct. 1997, the Taliban re-name the country to the ‘Islamic Emirate of Afghanistan’.

¹¹⁴² Roy, ‘Has Islamism a Future in Afghanistan?’ (n913) 208.

¹¹⁴³ Qazi ‘Rebels’ (n1102) 574.

¹¹⁴⁴ Vincent Bernard ‘Editorial: Engaging Armed Groups’ (2011) 93(883) *IRRC* 581, 585.

property increased and distinctive emblems protected under the Geneva Conventions were deliberately targeted by Taliban fighters.¹¹⁴⁵ In the mid to late 1990s, the Taliban committed numerous war crimes during military operations, and as a governing power operated almost entirely outside of established human rights standards.¹¹⁴⁶ A sample of instances concerning ‘distinction’ will be measured against *Pashtunwali*, *salafi* Islam and IHL using material documented by international agencies.

8.6 IHL Distinction in the Afghan Conflict 1994-2001

The IHL principle of distinction is described both as a cardinal customary IHL rule and the cornerstone of IHL.¹¹⁴⁷ A fundamental rule of humanitarian law is that civilians enjoy general protection against danger arising from military operations. The rule of ‘civilian immunity’ has been codified in numerous treaties,¹¹⁴⁸ and is binding on all parties to a conflict regardless of conflict typology.¹¹⁴⁹ Civilians are protected at all times from attack unless they take a direct part in the hostilities (DPH).¹¹⁵⁰ Under certain interpretations of Islam there appears a broad notion of what constitutes DPH, the distinction less clear between the ‘common people’ not engaged in government related activities and everybody else subject to penalty. There are no discrete protections within the common people head. Rather than invoke *darura* to make lawful the targeting of civilians, radical interpretations of Islam changes the status of civilians like drivers and contractors to be subsumed under what they consider a legitimate target.¹¹⁵¹

Under IHL, civilian objects, such as residences, schools and mosques, are protected from attack, except for such time that they are military objectives. A civilian object becomes a military target during the period it is used for military purposes.¹¹⁵² In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall

¹¹⁴⁵ Dieter Fleck ‘Reflections on 9/11 and IHL’ (Dec, 2011) 14 *IHL* 277, 349.

¹¹⁴⁶ HRW Blood Stained (n760), 2.

¹¹⁴⁷ Nuclear Weapons Case, para 78. Yoram Dinstein, *The Conduct of Hostilities Under the Law of Armed Conflict* (Cambridge University Press 2008) 115.

¹¹⁴⁸ One of the clearest expressions of the principle is set out in article 51(2) of AP I to the Geneva Conventions, which states civilians shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited. Similar language is found in Article 13(2) AP II.

¹¹⁴⁹ See ICRC, Customary IHL, rules 1-8. Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict* (OUP 1995) 120.

¹¹⁵⁰ A. 51(3) API, A.13(3) APII. DPH lacks a precise definition under IHL, but it has generally come to mean acts that are intended to cause actual harm to the enemy, such as using or loading weapons. Providing food or other assistance to armed groups does not deprive civilians of their civilian immunity under IHL. See R.6 ICRC, CIHL.

¹¹⁵¹ Nagamine (n71) 64.

¹¹⁵² See A.52(1) AP I which reflects customary law for international armed conflicts. See R. 9-10 ICRC, Customary IHL.

at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives, and accordingly shall direct their operations only against military objectives.¹¹⁵³

As discussed in chapter 5 there is also a strong principle of distinction running through Islamic Law with prohibitions on targeting civilians. However differing interpretations of ‘civilians’ and constructions on how they can lose their protected status means that claiming to comply with rules of IHL or using IHL terminology does not *prima facie* make such prohibitions IHL compliant.¹¹⁵⁴

8.6.1 Taliban Distinction: People

Apostasy

In Taliban orthodoxy, evil and apostasy were defined in terms of ‘action wrapped in a web of symbolism’.¹¹⁵⁵ During the formative years of the Taliban insurgency, through their puritanical Sunni narrative, the Taliban pursued a virulent anti-Shia agenda under the head of apostasy, directing attacks against mainly Shi’as and Hazaras civilians and their cultural heritage.¹¹⁵⁶

‘Hazaras are not Muslim, they are Shia. They are [*kufir*]... wherever you go we will catch you. If you go up, we will pull you down by your feet; if you hide below, we will pull you up by your hair’.¹¹⁵⁷

In August, 1998 Mazar i-Sharif became the scene of ‘one of the single worst examples of killings of civilians’ in the Afghan wars.¹¹⁵⁸ Within hours after the capture of Mazar-i Sharif (Mazar), the Taliban killed civilians in indiscriminate attacks, regardless of age and gender, all over the city; in some cases, firing uninterruptedly from machine guns mounted on jeeps.¹¹⁵⁹ The Taliban hunted Hazara men, shooting them in the head, chest or testicles, suffocating them

¹¹⁵³ A. 48 API. ‘Military objectives’ are defined as ‘those objects, which by their nature, location, purpose or use make an effective contribution to military action.’ A. 52(2) API.

¹¹⁵⁴ Sandesh Sivakumaran, ‘Lessons for the Law of Armed Conflict from Commitments of Armed Groups: Identification of Legitimate Targets and Prisoners of War.’ (2011) 93 *IRRC* 463.

¹¹⁵⁵ David Kertzer, *Ritual, Politics and Power* (Yale Press 1988) 9.

¹¹⁵⁶ Muhammad Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton University Press, 2002) 139; HRW, The Massacre in Mazar-i-Sharif, Nov 1998, Vol 10, No. 7(c), 2 <http://www.hrw.org/reports98/afghan/>; BBC World: South Asia, ‘All We Want Now is Peace’ http://news.bbc.co.uk/1/hi/world/south_asia/234352.stm

¹¹⁵⁷ Proclamation from the Taliban Governor of Mazar i-Sharif (n1156)

¹¹⁵⁸ *ibid*

¹¹⁵⁹ *ibid* 3-7

in shipping containers or slitting their throats ‘the Halal way’. Up to 8000 were killed, with thousands more maimed or raped.¹¹⁶⁰ The Shia were targeted in other parts of Afghanistan, too. At one point, a Taliban commander announced in a mosque that it was the Taliban policy was to ‘exterminate’ Hazaras.¹¹⁶¹

‘One witness recounted that a Taliban member, who had personally shot people in 28 houses, realised that on two separate occasions he had unintentionally killed Pashtuns instead of Hazara’s. He was ‘very worried he might be excluded from heaven. [. . .] That he had killed people in 28 Hazara households seemed not to cause him any concern at all.’¹¹⁶²

As a result of the massacres, the holes dug along the roads, from which soil was excavated to build houses, were filled with bodies, elsewhere, they were left in the streets, their burial being prevented by the Taliban ‘until the dogs ate them.’¹¹⁶³ Non-Pashtun males were detained in Mazar’s prison, which soon became overcrowded. In case of doubt as to their religious identity, detainees would be asked to recite Sunni prayers. Thousands of detainees were transported into the desert and packed in closed metal container trucks resulting in death by asphyxiation of many. While it is not clear whether these deaths were intentional, container killing had precedent in Afghan wars.¹¹⁶⁴

Civilians displaced from Mazar headed toward the central Afghanistan’s highlands. The road was “black’ with a column of people, led by about 700 Hazara combatants.’¹¹⁶⁵ The column was fired at indiscriminately, from the air, but also from the land by imprecise weapons such as rocket launchers.¹¹⁶⁶

¹¹⁶⁰ Michael Sheridan, ‘How the Taliban Slaughtered Thousands of People’, The Sunday Times (NY, 1 November 1998) The Taliban claimed to be avenging the killing of Taliban prisoners by Hazaras the previous year. Nine Iranian diplomats were also slaughtered at Mazar i-Sharif, taking Afghanistan to the brink of war with Iran. In a Taliban religious inquiry (istifta), one cleric maintained that the Iranians’ Shia beliefs were “wicked and corrupt” and “a direct criticism of Islam itself”. A’Ula Deobandi in Gohari (n1099) 126.

¹¹⁶¹ Sheridan (n1160)

¹¹⁶² *ibid*

¹¹⁶³ HRW, Massacre (n1156) 9.

¹¹⁶⁴ *ibid* 2.

¹¹⁶⁵ *ibid* 13.

¹¹⁶⁶ *ibid* 13-14.

Within months, Taliban forces bombed the town of Dara-i Suf, a predominantly Hazara enclave. Ground forces burned down the entire central market and destroyed wells and homes.¹¹⁶⁷ If a Hazara became a prisoner of the regime, Taliban forces would *summarily* execute them.¹¹⁶⁸ There were also reports that the Taliban used detainees for mine clearance.¹¹⁶⁹ While *prima facie* this appears an ethnic cleansing under IHL, through an Islamic and tribal narrative it would be better seen as a reprisal. Neither Islam nor *Pashtunwali* can rationalize this conduct. However a hybrid of the two frameworks of law, a pick and mix approach to the law could see *hudud* punishments for *apostasy* or arguments stemming from ‘*isma*’ matched with *badal* and blood revenge circumventing prohibitions on killing.¹¹⁷⁰

While freedom of religion stems from the Charter of Medina, in Afghanistan religious persecution has been part of its cultural history. For example, Amir Abdur Rahman vilified the Hazara Shia’s and solicited fatwas condoning attacks on them. Under the relatively moderate reign of Amanullah in the 1920s, the Constitution provided that the followers of certain unacceptable sects were ‘to be killed’.¹¹⁷¹ Harsh attitudes towards the Shia specifically persisted well into the twentieth century.¹¹⁷² After the defeat of the Soviet Union in 1988 and despite the fighting prowess shown by minority groups during the resistance, minority rights were not dealt with. When the *mujahidin*’s Charters declared the supremacy of Hanafi jurisprudence, the Shias were largely left out of the process of political reconstruction.¹¹⁷³ The religious persecution is arguably an example of a cultural rather than religious norm, however it could be argued that in the Prophet’s experience there was no other religion claiming to represent true Islam.

¹¹⁶⁷ HRW interview and e-mail communications with a witness in Islamabad who investigated the incident, November 2000-May 2001.

¹¹⁶⁸ For example, at least thirty-one Ismaili Hazara civilians near the Robatak pass, northwest of the town of Pul-i Khumri. These were men taken during sweep operations throughout Samangan and neighbouring provinces in late 1999 and early 2000. HRW, *Massacres of Hazaras in Afghanistan*’ 8-10

¹¹⁶⁹ Human Rights Watch interview with a human rights investigator, Islamabad, May 2001 in HRW ‘Killing You Is A Very Easy Thing For Us To Do’ (May 2001). A. 51 & 52 GC III.

¹¹⁷⁰ In classical Islamic law, the killing of a person is permissible if he lacks legal protection (‘*isma*’). The categories of persons that lack ‘*isma*’ in classical Islamic doctrine include: apostates (*murtadd*); and those *kafir* that live in the *dar al-harb*. Peters *Jihad* (n359) 38.

¹¹⁷¹ Naby (n870) 132.

¹¹⁷² The Shi’ite minority has always been far removed from the centres of power; they have been looked down upon and, until 1963, were practically outside the law. Roy *Islam and Resistance* (n855) 51.

¹¹⁷³ Roy *Islam and Politics* 291; Oleson (n34) 56; Neamat Nojumi, *The Rise of the Taliban in Afghanistan: Mass Mobilisation, Civil War, and the Future of the Region* (Palgrave 2002) 216.

A series of Taliban offensives was marked by the abduction of women, forced labour of detainees, the burning of homes, and the destruction of agricultural assets, including fruit trees.¹¹⁷⁴ In one village, 3,000 houses were systematically destroyed.¹¹⁷⁵ The affected populations were mainly Uzbek and Tajik who were Sunni Muslims. The Taliban never contended that the Uzbeks or Tajiks were *kufir*, as such no crime of apostasy making the targeting ethnically based and prohibited in both *Siyar* and IHL.

Women

The Afghan Taliban have been a subject of journalistic and academic outpourings reiterating misogynistic aspects of their ideology attached to their *salafi*, Wahhabi or Deobandi postulations, depending on who was writing. This narrative has dominated the West since 9/11 however existed long before.¹¹⁷⁶

Women in urban parts of Afghanistan would feel the full extent of the Taliban's proscriptions. Overnight they were deprived liberties such as education. Failure to adhere to these new edicts would attract public punishment.¹¹⁷⁷ The *Mahram* decree issued by the Taliban authority in July 1997 was the first among a series of decrees that restricted Afghan women's legal rights. *Shari'a* classifies cross-sex relationships within two categories, lawful, (*mahram*) and unlawful, (*na-mahram*). In customary law the norms for how men and women of these two categories associate in everyday life are related to institutionalised gender segregation between men and women.¹¹⁷⁸

The Taliban's repressive gender policy has been credited, or at very least find roots in *Pashtunwali*. The group's severe attitudes toward the seclusion of women seemed closer

¹¹⁷⁴ U.N. Special Rapporteur of the Commission of Human Rights, 'Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World: Report on the situation of human rights in Afghanistan submitted by Mr. Kamal Hossain, Special Rapporteur, in accordance with Commission resolution 1999/9,' E/CN.4/2000/33, January 10, 2000, 12-13.

¹¹⁷⁵ Human Rights Watch interview with a human rights investigator HRW 'Killing You Is A Very Easy Thing For Us To Do' Islamabad, May 2001

¹¹⁷⁶ Malik, *Pashtun Identity* (n434), 53.

¹¹⁷⁷ Department of State, 'International Religious Freedom Report – Afghanistan,' Washington, DC, 2000; Rashid *The Power of Militant Islam* (n928) 225; John Burns, 'A Year of Harsh Islamic Rule Weighs Heavily for Afghans,' New York Times (NY, 24 Sept 1997); United Nations, 'Report of the Secretary- General on the Situation of Women and Girls in Afghanistan, Submitted in Accordance with the Sub-Commission Resolution 1998/17,' ed. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, July 15, 1999, paras 9-11.

¹¹⁷⁸ For a discussion of the shifting priorities given to human rights programming during the Taliban regime see Arne Strand, 'Bombs and Butter: Compensation Issues in Protracted Conflicts and the Case of Afghanistan' in George Ulrich and Louise Krabbe (eds.) *Human Rights in Development Yearbook 2001* (Kluwer Law 2001) 124-128; Ask, 'Legal Pluralism', 353.

aligned to rural Pashtun life than interpretations of religious law.¹¹⁷⁹ Under the Taliban, the rights of women in the national law codes were abolished in the name of bringing state law in conformity with their interpretation of *Shari'a*. Although the Taliban asserted that its draconian policies that removed women from the workplace and required them to be veiled were simple applications of religious law, *Shari'a* legal experts in other Islamic disagreed. However, in the Afghan countryside the emphasis on enforcing *Shari'a* often increased women's rights to inheritance and control over marriage that were denied to them under customary practices. Social restrictions that were so widely resented in the cities provoked little opposition in the countryside because they reflected commonly accepted rural values and lifestyles.¹¹⁸⁰

While their repression of women symbolizes the vulnerability of women it also shows the impotence of their male relatives. Dupree argues the situation is more complex. The dependence of the Taliban movement on young, *madrassa* educated combatants made the leaders concerned about how these young men may act in a cosmopolitan city and decided that rather than educate the men on how to behave it was easier to exclude women from spheres of education and employment and imprison them behind the *burqa* and cast them to exist in the shadows of society.¹¹⁸¹

8.6.2 Taliban Distinction: Property

After its initial conquest of the central Hazarajat region in September 1998 the Taliban withdrew most non-local forces from several districts and left them under the nominal control of Hazara commanders who had changed their allegiances.¹¹⁸² After retaking Bamiyan districts, Taliban forces under the command of Mullah Dadullah burned about 4,500 houses, 500 shops, and public buildings. As they retreated east, they continued to burn villages and to detain and kill Shi'a Hazara civilians in villages in Bamiyan district. The Taliban 'planted bombs in schools and occasionally burned its opponents alive'¹¹⁸³ Burning was permissible in *Pashtunwali* but prohibited in Islam.

¹¹⁷⁹ Henry Bill, 'Country Without a State- Does it Really Make a Difference for the Women?' *Afghanistan, A country without a State*, Noelle-Karim (Vanguard 2002), 107; Jane Perlez, 'Anger at US Said to Be at New High' NY Times (NY 11 Sept 2002); Barfield 'Customary' (n828) 35.

¹¹⁸⁰ Barfield 'Customary' (n828) 44.

¹¹⁸¹ Anand Gopal, No Good Men Among the Living: America, the Taliban and the War Through Afghan Eyes' (Henry Holt & Co 2014); Maley *Fundamentalism*, (n55) 26.

¹¹⁸² Human Rights Watch e-mail communication with a former humanitarian worker in northern Afghanistan, January 23, 2002.

¹¹⁸³ Issam Ahmed, 'New Taliban Code: Don't Kill Civilians, Don't Take Ransom', CS Monitor, <<http://www.csmonitor.com/World/Asia-South-Central/2009/0731/p06s19-wosc.html>> accessed 09/09/13.

Several refugees described witnessing the subsequent movement of ethnic Pashtun pastoralists into the valleys, and the grazing of large herds of sheep on their farmlands.¹¹⁸⁴ As discussed in chapter 7, farming land was a rare and valuable commodity. Conflict over fertile land was common. By stealing the Hazara's property, the Pashtuns found a solution to the intractable problem of *daftari*.

The Buddhas of Bamiyan

Due to its location in Afghanistan's central highlands, the Bamiyan province constitutes a strategic area. It was the site of sustained pattern of Taliban abuse from September 1998 to January 2001.¹¹⁸⁵ Four hundred years before the rise of Islam on the eastern flank of Iran, the Bamiyan Valley, then full of monasteries, witnessed the birth of the Irano-Buddhic art, characterised by the Bamiyan Buddhas.¹¹⁸⁶ Seven meters taller than the Statue of Liberty, the largest of the Buddhas (53 and 38 meters respectively) were built around the 3rd century and constituted the world's tallest standing Buddha.¹¹⁸⁷

In 1997, a Taliban commander declared that if the valley were captured, he would destroy the Buddhas.¹¹⁸⁸ Two days after the capture of Bamiyan in September 1998, two non-Afghan groups of Taliban members shelled the lower parts of the smaller Buddha and blew its face off, creating some cracks in its body. The following year, the burning of tires blackened the face of the bigger Buddha.¹¹⁸⁹ Mullah Omar originally responded to the hostility against Afghanistan's cultural objects with a decree in 1999 declaring that 'all historical cultural heritage is regarded as an integral part of the heritage of Afghanistan'.¹¹⁹⁰ Within two years, the Amir did a *volte face* holding that Afghanistan's Islamic clerics had decided that the Buddhas should be destroyed, in order to save Afghans from idolatry. Mullah Omar rationalized the decision that 'because God is one God and these statues are there to be worshipped, and that is wrong, they

¹¹⁸⁴ HRW, Massacre (n1156) 3; Griffin (n930) 177.

HRW, 'Afghanistan: Ethnically-Motivated Abuses Against Civilians,' A Human Rights Watch Backgrounder (October 2001)

¹¹⁸⁵ Human Rights Watch, The Massacre of Hazaras in Afghanistan, February 2001, Vol. 13, No 1(c), 6-7, 8-10, 14-15, <http://www.hrw.org/reports/2001/afghanistan/>

¹¹⁸⁶ M Rouche, *Les Empires Universels*, Paris, 1968, 449 cited in Abtahi, (n803) 10.

¹¹⁸⁷ Souren Melikian, 'Taliban's Act Flies in Face of Islam's Tenets', International Herald Tribune (NY, 7 March 2001)

¹¹⁸⁸ Han Van Krieken, 'The Buddhas of Bamiyan, Challenged Witnesses of Afghanistan's Forgotten Past', *International Institute for Asian Studies* (University of Leiden 2000)

¹¹⁸⁹ Llewelyn Morgan, *The Buddhas of Bamiyan*, (Harvard University Press 2012) 8.

¹¹⁹⁰ Rory McCarthy, 'Taliban Order all Statues Destroyed', The Guardian (London, 27 February 2001)

should be destroyed so that they are not worshipped now or in the future.’¹¹⁹¹ This argument was made in relation to a region where the Buddhist faith had disappeared for a millennium. To counter arguments appealing to historical tradition, Omar explained that ‘if people say these are not our beliefs but only part of the history of Afghanistan, then all we are breaking are stones.’¹¹⁹² According to the Taliban ambassador in Pakistan, *Shari’a* necessitated the destruction of sites decorated with pictures, since it ‘orders the destruction of statues and considers the drawing of portraits a mockery to the servants of Allah’, adding that the fact that these Buddhas were not destroyed in the past did not constitute ‘a valid precedent.’¹¹⁹³

After the intent to destroy the Buddhas was known, but before it was completed, high-ranking Egyptian clerics personally visited Omar in Kandahar and attempted to convince him that *Shari’a* did not require their destruction. After his refusal to heed their advice they were scathing in their opinion of Taliban legal reasoning.¹¹⁹⁴

‘[Because of the Taliban’s] incomplete knowledge of jurisprudence they were not able to formulate rulings backed by theological evidence. The issue is a cultural issue. We detected that their knowledge of religion and jurisprudence is lacking because they have no knowledge of the Arabic language, linguistics, and literature and hence they did not learn the true Islam.’¹¹⁹⁵

Omar responded to criticism for his destruction of the Buddhas by ordering the sacrifice of 100 cattle and giving the meat to the poor to express his regret for not having destroyed the monuments sooner. ‘[L]ike a banner, the mullah show[ed] his beauty in a headwind.’¹¹⁹⁶ In March 2001, having survived over a millennia of Arab and Turco–Mongol invasions, ‘the most

¹¹⁹¹ *ibid* (n1190)

¹¹⁹² ‘All we are breaking are stones’, AFP, Kabul, 27 February 2001.

¹¹⁹³ John Redden, ‘Taliban Vow to Smash Afghanistan’s Statues’ Reuters (Islamabad 27 February 2001)

¹¹⁹⁴ Congruent with the justification for baghy in chapter 4 and 5, any ‘denouncement of the Taliban’s misinterpretation of Islam is based on an implied claim that other, more correct and appropriate interpretations of Islam, and in turn, of Islamic law, will be implemented by the current government,’ which is how the Taliban came to power in the first place, it had decided it was competent to decide the right authority. Lau ‘Islamic Law’ (n78) 1.

¹¹⁹⁵ Egypt’s Mufti Wasil Interviewed in Afghanistan, BBC SUMMARY WORLD BROADCASTS, Mar. 23, 2001 (citing the text of an undated interview with Dr. Nasr Farid Wasil by Muhammad Khali in Cairo that appeared in *Al-Sharq Al-Awsat*, a London-based Arabic journal, on March 20, 2001).

¹¹⁹⁶ Oleson (n34) 15.

important twin representations of Buddha anywhere' were destroyed not by Afghan Taliban, who refused to carry out the destruction, but by non-Afghan members.¹¹⁹⁷

The Taliban sought to bring the 'Islamic Emirate of Afghanistan' to their perceived idyllic era of the dawn of Islam. To do so, they imposed a harsh moral regime on Afghans and sought to destroy everything that, during the fourteen centuries following the life of the Prophet, had 'polluted' Islam, namely culture.¹¹⁹⁸ The destruction of the Buddhas of Bamiyan, while outraging the international community, reportedly increased the Arab support for the Taliban tenfold.¹¹⁹⁹

8.7 Osama Bin Laden

A compelling example of the hybrid legal regulation that the Taliban used in practice is that of Mullah Omar's protection to Osama bin Laden after the attacks in America on September 11, 2001. The *Pashtunwali* obligation to provide asylum and hospitality, *nanawatay* and *melmastia*, tested the limits of the Pashtun Taliban. The Taliban initially relied on parts of *Pashtunwali* that involve treatment of foreign guests as a basis to resist bin Laden's ejection from the country. *Pashtunwali* dictates that he must be protected because he is *hamsaya*.¹²⁰⁰

Mullah Omar, affording Bin Laden Islamic hospitality, owed him three days, which could arguably be extended to such a time when the Mullah had nothing left to offer. By not handing bin Laden to the American authorities, he allowed his guest to become sinful.¹²⁰¹ However if Omar was adhering to the tenets of *Pashtunwali*, there was no such temporal or substantive limitation, *melmastia* extended for as long as the guest required it.

¹¹⁹⁷ Melikianm (n1187); Barry Flood, 'Between Cult and Culture: Bamiyan, Islamic Iconoclasm, and the Museum.' 84(4) *The Art Bulletin* 641, 658.

¹¹⁹⁸ Griffin (n930) 38.

¹¹⁹⁹ Wahid Muzhda, *Afghanistan wa panj sal sulta-ye Taleban* (Nashr-e ney, 1382 [2003]) 46-48 in Nagamine (n71) 17.

¹²⁰⁰ Miakhel (n873) 4.

¹²⁰¹ While some scholars decided the enmeshed symbiotic relationship between the Taliban and al-Qaeda as self-evident, that they were partners in governance, others who have worked closely with the Taliban prior to 2001 would see the relationship as far from self-evident. See for example, John Burns, 'Taliban Say They Hold Bin Laden For His Safety, But Who Knows Where?' *NY Times* (NY, 1 Oct 2001) (quoting Mullah Abdul Salam-Zaeef who claimed bin Laden was under Taliban control days after the September 11 attacks directly contradicting reports that had been made by other Taliban claiming that they did not know bin Laden's location.) John Stackhouse, 'One Million Afghans at Risk as Humanitarian Crisis Looms' *Globe & Mail* (Toronto, 28 Sept 2001) (reporting from a Taliban source that bin Laden had been invited by the Afghan government to leave Afghanistan.)

After September 11th, 2001, when the U.S threatened them with destruction if bin Laden and al Qaeda were not expelled, Omar called for a *jirga* to meet and affirm his claim that because Osama was a guest of the country he could not be given up. With a nuanced approach the assembled clerics told Omar that he must protect his guest, but that because a guest should not cause his host problems bin Laden should be asked to leave Afghanistan voluntarily as soon as possible. It is notable that the question Omar tabled was not one of *Shari'a* jurisprudence, but rather an issue of *Pashtunwali*. Afghanistan issued bin Laden with a *fatwa* requesting he voluntarily leave the country but did not follow up on this edict. The Islamic Emirate then decided to compromise and suggest that bin Laden stand trial under Islamic law.¹²⁰² Mufti Nizamuddin Shamzai, the spiritual adviser of Mullah Omar was a member of the delegation who went to Kandahar to officially persuade Omar to abandon bin Laden. In reality, he encouraged the Mullah not to succumb to international pressure.¹²⁰³ He issued a *fatwa* in September 2001 calling on Muslims to wage *Jihad* against the US if they attacked Afghanistan. The *fatwa* also stated that according to *Shari'a*, citizens of Muslim countries which supported the U.S or any other infidel force were no longer obliged to obey their governments.¹²⁰⁴ Such a position is consistent with challenging authority under Islamic law.¹²⁰⁵

While the Taliban could not have anticipated the potential difficulties that might arise by giving sanctuary to bin Laden, it must be stressed that the last major policy decision of the Taliban before they were attacked by America was based on good customary law standards in which religious law provided only the 'window dressing'.¹²⁰⁶ Mullah Omar sacrificed his regime to protect Bin Laden.¹²⁰⁷ However by refusing hand him over to the Americans it solidified their status in a David/Goliath narrative, or more aptly the Pharaoh narrative. The response from the Arab communities was tangible with funds and personnel advanced in support of the Taliban.¹²⁰⁸

¹²⁰²The Taliban had previously requested that bin Laden would be turned over to a third country court if that court comprised at least one Muslim judge. John Burns, 'Taliban Refuse Quiet Decision Over bin Laden.' NY Times (NY, 18 Sept 2001); US Rejects Taliban Offer to Try bin Laden,' CNN News, (Oct. 7, 2001).

¹²⁰³ Geoffrey York, 'Taliban Rebuffs Bid for Guest' Globe & Mail (Toronto 18 Sept 2001)

¹²⁰⁴ Abou-Zahab & Roy (n418) 60.

¹²⁰⁵ Hallaq *Shari'a* (n524) 327; A.Y. Ali, *The Meaning of the Noble Quran* (1989) 390; Ali & Stuart (n363) 12.

¹²⁰⁶ However, the role of *aman* (see 4.1) should not be wholly discounted. Barfield 'Customary' (n828) 36.

¹²⁰⁷ Abou-Zahab & Roy (n418) 2.

¹²⁰⁸ Nagamine (n71) 17.

8.8 Violations of International Humanitarian Law

It is not contentious, at least regarding traditional international law, that the requirements for the initial Taliban insurgency qualified as a NIAC, and the Taliban qualified as a party to the conflict under the threshold requirements in both APII and CA3.¹²⁰⁹ CA3 which applies to NIAC requires ‘as a minimum’ that persons taking no active part in hostilities be ‘treated humanely’. These minimum safeguards are meant to protect human life and dignity and bind both the government and rebel forces.¹²¹⁰ APII developed the CA3 safeguards by prohibiting violence to life, health and physical and mental wellbeing of persons, including torture; collective punishment; hostage taking; acts of terrorism; outrages upon personal dignity.¹²¹¹ It also protects children, civilians, treatment of prisoners and detainees and the wounded and sick.¹²¹²

Afghanistan only ratified API and AP II in 2009. As such, they were not directly applicable over the 1994-2001 period. Regardless of the direct inapplicability of APII, there is a wealth of alternate humanitarian, human rights, criminal and customary law that have sought to bind ANSGs during the Islamic Emirate of Afghanistan. In addition to the protections found in CA3, customary international humanitarian law provides civilians and captured combatants a number of fundamental guarantees. Those particularly relevant to the situation in Afghanistan in 1994-2001 include prohibitions against enforced disappearance, sexual violence, arbitrary deprivation of liberty, and forced labour.¹²¹³ In addition, certain provisions of AP I applicable to IAC, including many of those concerned with protection of civilian populations, are also reflective of customary international law applicable to NIACs.¹²¹⁴

¹²⁰⁹ Afghanistan ratified the Geneva Conventions in 1956.

¹²¹⁰ The ICJ in the *Nicaragua* case, ICJ Reports, 1986, 14, 114 stated that the rules contained in common article 3 reflected ‘elementary considerations of humanity.’

¹²¹¹ Article 4, AP II. Green, *The Contemporary Law of Armed Conflict* (n152)

¹²¹² Article 15 and 17; Article 56; Article 10 AP II respectively.

¹²¹³ See generally ICRC, CIHL, chapter 32. Enforced disappearance, though not defined under IHL, encompasses the prohibitions against arbitrary detention, inhumane treatment, and murder. See R. 98 ICRC, CIHL, also Declaration on the Protection of All Persons from Enforced Disappearances, G.A. res. 47/133, 47 U.N. GAOR Supp. (No. 49) 207, U.N. Doc. A/47/49 (1992).

¹²¹⁴ A.20 International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind (1996), article 20. See also, Fleck *Handbook* (n149) 120. For an authoritative analysis of customary IHL, based on an extensive study coordinated by the International Committee of the Red Cross, see Henckaerts and Doswald-Beck (n750).

However evidence of increasing violations and casualties indicates a disconnect between the binding nature of these obligations, enforcement and compliance.¹²¹⁵ With the exception of the Disability and Refugee Conventions, Afghanistan had ratified all the major international humanitarian conventions, human rights conventions and covenants, international criminal conventions and statutes, anti-terrorism conventions and weapons conventions.¹²¹⁶ International human rights standards, which do not cease in times of armed conflict, were also violated, in particular the International Covenant on Civil and Political Rights¹²¹⁷ and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,¹²¹⁸ both of which had been ratified by Afghanistan. Applying the complex body of international laws relevant to the NIAC occurring in Afghanistan has not increased compliance with these norms.¹²¹⁹

In a NIAC, IHL is legally binding on both government forces and armed opposition groups or between such groups. Over the period of 1994-2001, violations of IHL amounting to war crimes, crimes against humanity and other serious violations of the laws and customs applicable in NIAC were perpetrated by the Taliban.¹²²⁰ These include intentionally directing attacks against civilians and destroying or seizing the private property of civilians where there was no military necessity for doing so.¹²²¹

¹²¹⁵ Update 97/03 on ICRC Activities in Afghanistan

<<http://www.icrc.org/eng/resources/documents/misc/57jnw2.htm>> accessed 28/05/13; UNAMA 'Afghanistan: Protection of Civilians in Armed Conflict', Annual Report 2011 (2012)

<unama.unmissions.org/.../UNAMA%20POC%202011%20Report_Final_> accessed 24/05/13

¹²¹⁶ Afghanistan has ratified the four 1949 GCs (in 1956); the two 1977 APs in 2009. In relation to International Criminal Law: the Slavery Convention 1926 in 1935; the Genocide Convention 1948 in 1956; the Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968 in 1983; ICC Rome Statute 1998 in 2003

¹²¹⁷ International Covenant on Civil and Political Rights (ICCPR), opened for signature December 16, 1966, 999 U.N.T.S. 171

¹²¹⁸ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, annex, 39, U.N.Doc.A/39/51 (entered into force June 26, 1987; ratified by Afghanistan on April 1, 1987).

¹²¹⁹ Joaquin Lacavo 'International humanitarian law and irregular warfare' (2000) 82 *IRRC* 941.

¹²²⁰ Crimes against humanity were first codified in the charter of the Nuremberg Tribunal of 1945. Since then, the concept has been incorporated into a number of international treaties, including the Rome Statute. For more on legal definitions of crimes against humanity, see Cherif Bassiouni, *Crimes Against Humanity in International Humanitarian Law* (Kluwer Law International 1999). See also, 'Article 18: Crimes against Humanity' in chapter II, 'Draft Code of Crimes Against the Peace and Security of Mankind' in the International Law Commission Report, 1996, www.un.org/law/ilc/reports/1996/chap02.htm#doc3 (accessed July 2017). ICC Statute, article 8(2)(e).

¹²²¹ Pillage, the forcible taking or destruction of property for private purposes, is strictly forbidden. Looting can be defined as the taking of property without the direct use of force. Both pillage and looting violate the general prohibition against theft. See generally, ICRC, Customary IHL, chapter 16; Theodor Meron, 'Human Rights and Humanitarian Norms As Customary Law' (1989) 46-47.

There are several examples that evidence violations of the laws and customs of war committed by the Taliban. There are reports on lootings and executions as they advanced on Kabul, of massacres, ethnic cleansing, rape and indiscriminate attacks.¹²²² Throughout their battle chronology, the Taliban once known for the virtuous behaviour resorted to scorched earth tactics of burning down homes, businesses and entire villages.¹²²³ The Taliban exacted ruthless reprisals against minority communities that were perceived to have supported its rivals. In several cases, its forces carried out large-scale summary executions of Hazara, Uzbek, and Tajik civilians or systematically destroyed homes and means of livelihood, effectively preventing the return of displaced populations.¹²²⁴

‘Hazaras abducted Pashtuns and Pashtuns abducted Hazaras wherever they saw each other. They pulled out the fingernails of prisoners, cut off hands, cut off legs, even hammered nails into prisoners’ skulls. Humans were kept in [shipping] containers and containers were set on fire...Cruelty, injustice, and inhumanity began, and became a chronic disease; humanity and honour were crucified.’¹²²⁵

All sides committed acts tantamount to war crimes, crimes against humanity and violations of the laws and customs of war. Launching indiscriminate attacks that may be expected to cause loss of civilian life, the Taliban treated entire cities as a single military objective.¹²²⁶ Feasible precautions to protect civilians against the effects of attacks were not taken, rather these civilians were caught in a prolonged and indiscriminate shelling and artillery attacks.

The Taliban blossomed in a civil war followed by factional fighting. It was an era in Afghanistan when there was flagrant disregard for IHL.¹²²⁷ Examining the conduct of the actors including the Taliban evidences inconsistent use of IHL, in particular *ad hoc* compliance with the principle of distinction as framed in IHL. It shows that sometimes the group used distinction

¹²²² Rohde (n1097); Vinci (n1097)

¹²²³ UN Mapping Report Afghanistan, Unpublished, 2005, 248, in Nagamine (n71) 14.

¹²²⁴ Human Rights Watch e-mail communication with a former humanitarian worker in northern Afghanistan, January 23, 2002; confidential field report by an international NGO, November 15-17, 2000, on file at Human Rights Watch.

¹²²⁵ Mohammed Nabi Azimi, *Ordu va Siyasat*, 609 [translation by Human Rights Watch] Cited in HRW *Blood Stained* (n760) 39.

¹²²⁶ Article 51(5) API GC which is considered generally to amount to customary international law for IAC or NIACs, prohibit indiscriminate attacks ‘by bombardment’ which treat ‘as a single military objective a number of clearly separated and distinct military objectives located in a city. . .’

¹²²⁷ AJP ‘Casting Shadows’ (n81) 61.

in the IHL sense, other times distinction was used to distinguish between Muslims and apostates, sometimes targetability was based on reprisal consistent with *Pashtunwali*. There are instances where the Taliban's practice cannot be aligned to any of these laws. Inchoate compliance with rules on IHL distinction could indicate an understanding of IHL rules and an active choice to displace with another norm. During the Taliban era, it is difficult to see any instrument effectively tempering the harshness and cruelty of combat.¹²²⁸

International law is 'riddled with the baggage of two centuries of ill thought and ill-explained assumptions and beliefs.'¹²²⁹ This law of nations remains the law *for* nations. Over the last 60 years, there have been several attempts by international human rights and humanitarian institutions, security agencies, foreign policy makers and academics to manipulate the existing arsenal of international law to pierce the state's sovereign veil and effectively regulate ANSGs.¹²³⁰ Despite innovative legal gymnastics, the reality remains that international law, both positive and other, suffers in its application. It has not and arguably cannot bind, in any meaningful way, ANSGs without undermining existing international law and the international system.

Irrespective of the context through which the international legal framework governing ANSG in NIAC is experienced, its position is at best convoluted. Criminalized by the State, contentiously legitimized by the international community, the status of these groups exists in a figurative vise. ANSGs ability to wage war and mimic state functions threatens core Westphalian principles of sovereignty and territorial supremacy. State preservation dictates insurgents be regulated under the vertical domain of domestic law. Paradoxically, it is ANSGs very ability to undermine the state that elicits international intervention. Added to which, traditional Westphalian approaches to enforcement mechanisms largely ignores ANSGs.¹²³¹

Dominating contemporary conflicts yet unyielding to international legal influence, ANSGs ability to impact the international landscape, to truncate the process of peace and state-building, necessitates an alternate engagement and regulation strategy. IHL, IHRL and international

¹²²⁸ Michael Reisman & William Lietzau, 'Moving International Law From Theory to Practice: The Role of Military Manuals in Effectuating the Law of Armed Conflict' (1991) 64 *International Law Studies* 12.

¹²²⁹ ME Turpel & Phillippe Sands, 'The Reconstruction of Jus Cogens Alone Is Not Enough' (1987-1988) 3 *Conn J Int'l L* 371.

¹²³⁰ Sassoli 'Seriously' (n42)

¹²³¹ *ibid* 51.

criminal law (ICL) are attempting to work in tandem to address the legally created intractable problem of the international framework governing, or not governing ANSGs. Traditional international law should not be diluted or interpreted *ad absurdum* to account for ANSGs in NIAC.¹²³² Developed in response to IAC, this cross referential framework sought to regulate state conduct. Attempts to transpose the rights and obligations from States and their actors to non-state actors; from international armed conflict to NIAC has revealed the existing international infrastructure ill-equipped in both substance and mandate.

Of these international legal pillars, IHL stands alone in its express ability to engage and regulate ANSGs. IHL grants rebel groups belligerent status in certain circumstances, but this recognition is legally and politically problematic. The equality of belligerents (EB) principle, a central tenet of IHL, strikes at a central tenet of the state, that is, its authority over its constituents.¹²³³ Fundamental to ANSGs effective regulation and engagement is an appropriate diagnosis and treatment of the underlying problem with an overarching rule of law focus. Systemic and consistent engagement need not equate to a ‘direct’ approach. Indirect regulation, engaging with the environment in which the armed group operates, would free the international community from its self-imposed political and legal restraints.

8.9 Creating Unstable Rights Through Legal Pluralism

Factoring norms from *Pashtunwali* and *Shari’a* to complement IHL in NIAC must be fully thought through. Recognition of cultural differences in the form of plural legal orders must assess ‘actual human rights impacts on inter- and intra-group equality; the proportionality of any restriction on rights caused by such recognition; and whether the cumulative effect of the proposed measure would be to create a qualitatively new level of discrimination.’ There is evidence that plural legal orders are structurally likely to precipitate certain negative outcomes. The ‘subordination of rights to a regime based on (religious or other) identity can cause discrimination and inequality before the law... Those who are poor or otherwise marginalised can be seriously disadvantaged.’ Recognition of customary law does not translate to ‘backward’, rather it may legitimate present and future political claims. Yet the ‘demand to

¹²³² Dunlap (n106) 432.

¹²³³ There is debate on whether the equality of belligerents is still necessary. For articulation of the arguments see Marco Sassoli & Yuval Shany, ‘Should The Obligations Of States And Armed Groups Under International Humanitarian Law Really Be Equal?’ (2011) 93(882) *IRRC* 347; Somer ‘Jungle Justice’ (n100) 656.

recognise the culturally specific is often invoked in the name of universal equality which by definition, implies giving status to something that is not universally shared.¹²³⁴

The Taliban's idea of peace was staged in a medieval theatre.¹²³⁵ If *Pashtunwali* influenced the Taliban's interpretation of Islam, it was equally shaped by a desire to reject the customary laws they believed contravened their interpretation of *Shari'a*.¹²³⁶ At governance level, the Taliban sought a return to 'authentic Islam', however such authentic Islam could not escape, paradoxically being shaped by local customs.¹²³⁷ All the policies were justified as the proper enforcement of *Shari'a*. The way that the Taliban interpreted *Shari'a* as well as its violent enforcement, betrayed a concern with Pashtun conceptions of honour and control. The use of Islamic discourse to legitimize protection of honour through control asserted the unity of the values often cited by Pashtuns as motivation for participating in *jihad*.¹²³⁸ Such sentiment in line with a Pashtun call to action: *Da Islam Da Para, Da Watan Da Para, Da Namus Da Para*, 'For Islam, for homeland and for honour'.¹²³⁹

The Taliban rhetoric was that they were a *Salafist* movement, opposed to the tribal system as well as tribal law. Islam provided a platform to create cohesion in a growing ethnic and politically heterogeneous movement. Combining the religious and tribal provided the Taliban organizational elasticity in its tribal dimension allowing discussion and even dissent. It appealed to Pashtun individualisms permitting quasi-autonomy of local commanders, a sense of freedom. However, as most of the leadership was trained in rural Pakistan madrasas that could not provide advanced religious training in Arabic, there was a conflation of *Pashtunwali* with *Shari'a*. The laws the Taliban promulgated during their years in power were idiosyncratic arrangements of local law and *Shari'a*.¹²⁴⁰ Mullah Omar's social edicts were frequently met with serious resistance prompting Omar to issue an order allowing Taliban field commanders discretion on the implementation of his social edicts in the areas under their control.¹²⁴¹

¹²³⁴ Nagaraj (n1048).

¹²³⁵ Tanner (n798) 277.

¹²³⁶ This is evidenced in relation to tribal dealing of women. See chapter 7.6. Doronsorro (2005) 300.

¹²³⁷ Durrani (n15) 412.

¹²³⁸ Rubin *Fragmentation* (n817) xvii.

¹²³⁹ Hakim Taniwal, 'The Impact of *Pashtunwali* on Afghan Jihad' (1987) 2 *Quarterly Journal of Writers Union of Free Afghanistan* 1 - 24

¹²⁴⁰ For example, executions of murderers could only be authorized by a *Shari'a* court, but at the public execution itself the victim's family was given the opportunity to shoot the prisoner personally, an anastomosis of Islamic punishment and blood feud revenge. Barfield 'Customary' (n828) 35.

¹²⁴¹ Ruttig (n953)

The twentieth century phenomenon of violent Islamic ANSGs draws a link between ‘populist theological and doctrinal teachings to ideologically motivated violence.’¹²⁴² Whether through a misguided or inchoate knowledge of Islam, there is an increasing deficit in certain societies’ understanding of the religion. The subsequent teaching of this knowledge by unqualified *mullahs*, *imams* or other self-proclaimed religious leaders, has not passed through a ‘corrective filter’ from better informed religious scholars.¹²⁴³ The Taliban did not possess the tertiary learning of many Islamists like Khomeini, Fadlallah and Qaradawi. Their ‘*madrassa* education is best captured in their own self designation as ‘students’¹²⁴⁴ When a former official of the Taliban Ministry of Foreign Affairs was asked what he thought was the relationship between Mullah Omar and Azzam, the ideological defender of offensive global *jihad* and inspiration for al-Qaeda, the official posited that Mullah Omar was not interested in Azzam’s writing and was ignorant about the state of global *jihad*.¹²⁴⁵

While the Taliban have been labelled fundamentalist, extremist, radical, puritanical and totalitarian, it is the label of ‘traditionalist’ which provides an accurate description of the group.¹²⁴⁶ The Taliban as a ‘traditionalist’ Movement has received scant attention. A minority opinion, scholars argue that the Taliban, through reinvigorating established modes of behaviour, are implicitly characterized as traditionalist. They argue that the Taliban represented the ‘arrival of ‘village’ values and attitudes in the cities.’¹²⁴⁷ While the majority dismiss the idea that the Taliban are traditionalist, and relegate the Taliban as representing a radical departure from established patterns of social authority in Afghan society, it is an important dissenting voice that weighs rural tradition in shaping and underpinning the Taliban movement. The ‘tradition’ may not represent the values of the village *de facto*, but rather is warped to represent the ‘values of the village as interpreted by refugee camp dwellers or *madrassa* students most of whom have never known ordinary village life that the Taliban [sought] to impose...’¹²⁴⁸ This warped tradition made permissible that which would have attracted penalty in the typical Afghan village.¹²⁴⁹

¹²⁴² Cherif-Bassiouni ‘Evolving’ (n716) 120.

¹²⁴³ Cherif-Bassiouni ‘Misunderstanding’ (n21) 650.

¹²⁴⁴ Durrani (n15) 414.

¹²⁴⁵ Nagamine (n71) 17; Kepel *Jihad* (n486) 147; Abou-Zahab & Roy (n418) 68.

¹²⁴⁶ Roy in Maley *Fundamentalism*, (n55) 26-27; Eickelman & Piscatori (n50)

¹²⁴⁷ *The Future of Afghanistan: The Taliban, Regional Security and US Foreign Policy* (Washington DC: USIP, March 1997)

¹²⁴⁸ Maley *Fundamentalism*, (n55) 20.

¹²⁴⁹ For example, the beating of a woman from a stranger’s family. Ibid, 20.

The many labels attached to the Taliban reflect the different language they have used to legitimize themselves in the eyes of their different stakeholders: religious, nationalist, tribal or iterations of all three. A former official of the Taliban Ministry of Foreign Affairs claimed ‘the Taliban feared the ire of the populace more than anything. They were fully aware that people would avenge all the torture and hardship they had suffered at their hands at the first opportunity.’ This is a destiny common to all tyrannical regimes upon defeat’ and a cornerstone of *Pashtunwali*.¹²⁵⁰ *Pashtunwali* and Islam both contend to govern all aspects of life.¹²⁵¹ In the rural areas there is much more blending of tribal and Islamic law, and the ‘two are often viewed as inseparable and mutually supportive.’¹²⁵²

Individually, the Taliban are deeply rooted in their tribal societies. But in their self-identification the balance between being Pashtun and being Muslim has, as is the case with many Afghans, changed. In the thirty years of conflict and gradual state collapse, Pashtun tribal society has undergone drastic changes. The authority of traditional *Malik's* and *Khans* have been targeted by the communists, warlords and *mujahidin*, undermining the centrality of tribe as a source of identity.¹²⁵³ During the last quarter of the 20th century the changing Afghan regimes have *de facto* operated on the principles of the ‘rule of the gun’ trumping any semblance of the ‘rule of [any] law’.¹²⁵⁴

‘Observers considered the [original] Taliban a Sunni movement against the Shia in a wider confrontation of geostrategic interests between Pakistan and Saudi Arabia, on the one side, and Iran, on the other side.’¹²⁵⁵ There are competing layers which complicated the overarching interest for the Taliban to exist: tribally it was a victory for the Pashtuns attempting to restore the glory of the past and a way for the Ghilzai to reassert supremacy against the Durrani. Locally, it provided a platform for the rural movement to judge and condemn the elitist bourgeoisie of the urban population.¹²⁵⁶ The Taliban were born into two worlds at the same time without truly belonging to either. Their narrative indicated they were a puritanical Islamic movement however there was not an absolute fidelity to prescriptions of *salafi* dicta. Their

¹²⁵⁰ Muzdah *Afghanistan* (n1199) 92 in Nagamine (n71) 17.

¹²⁵¹ Siddique (n816) 25. Lau ‘Islamic Law’ (n78) 1

¹²⁵² Matinuddin (n1077) 34; Rashid *Taliban* (n1082) 89-90; Barfield ‘Customary’ (n828) 4.

¹²⁵³ Dorronsoro *The Taliban's Winning Strategy* (n36) 21-26; Ruttig, Tribal’ (n953)

¹²⁵⁴ Ask ‘Legal Pluralism’ 353.

¹²⁵⁵ Saikal *Modern Afghanistan* (n1095); Rashid *The Power of Militant Islam* (n928) 196-206.

¹²⁵⁶ Nagamine (n71) 15.

rhetoric rejected all notions of tribal law however their actions betrayed compliance with certain tribal norms.¹²⁵⁷

¹²⁵⁷ John Esposito & John Voll, *Makers of Contemporary Islam* (OUP 2001) 61.

Chapter 9 In the End.

This thesis opened with the following hypothesis:

‘The Afghan Taliban (1994-2001) operated through various legal systems: state based legal codes, IHL, Islamic law and local customary law. The conflict conduct of Pashtun Taliban could be regulated through any or all of these legal systems. While the Taliban as a Movement adjusted justification for conflict conduct to fit in an Islamic legal framework, in practice conduct was regulated through a hybrid tribal-religious law. IHL compliance was incidental, dependent on whether the tribal (local) or religious norm is compatible with IHL norms. Where there exists a conflict of norms regarding behaviour in war, Islam takes precedence in the narrative irrespective of what ‘law’ was used in practice. The system of reference individual Taliban or their leaders allude to: tribal, international or Islamist, depends on the circumstances under which a particular decision is taken and on the particular tactical or strategic aim at stake.’

Contrary to accepted wisdom, this thesis has found that the Afghan Taliban (1994-2001) in its conflict practice displayed incidental, *ad hoc* adherence to all the non-state laws examined in this research. In relation to a hierarchy of norms regulating the groups conflict conduct, IHL was the least compelling legal framework. There could be no conflict of norms between Pashtunwali and Shar’ia as the Taliban’s rural Pashtun members historically conflated the customary and religious laws, subsuming the principles of the tribal law under their unique interpretation of the Shari’a.

It is clear that the Movement in its collective narrative wanted to be seen as a fundamentalist Islamic ANSG. It is clear that both Pashtunwali and Shari’a had authority in regulating Taliban conflict behaviour. Less clear is the authority of international law to regulate Taliban use of force.

Conventional *ius ad bellum*, *ius in bello* and weapons law, while evolving separately, all evolved regulating a type of force that is not reflected in contemporary conflicts. Since the creation of the UN Charter, these legal regimes have become surrounded by contestation around their interpretation and application according to what is seen as the best interest of the state

making a particular claim. Multiple claims of legality by states around the military operations they have entered have reduced the certainty and predictability of international law. These legal regimes also uphold imperialist views of international law, claims made by northern powers gain more attention than those from the south. The legality of military intervention in International law is assessed accordingly.

In IHL the engagement of different legal regimes such as international criminal law and IHRL has led to inconsistent legalism from tribunals, domestic and international courts, for example what constitutes a legitimate target and can norms of IHRL be the *lex specialis* in conflict contexts.

Several similarities can be drawn between the way the Taliban Movement manipulated different legal frameworks and the way states use international law in justifications around use of force. Interpretation by states about what constitutes force and self-defence attempts to make legal that which is otherwise illegal. The notion of self-defence has been reduced to nothing or everything depending on the interpretation. Suffering the same criticism as international law, the Taliban (1994-2001) focused on legitimacy at the expense of legality.

Part I outlined the difficulties international law faces in regulating ANSG. It then looked at Shari'a as an alternate form of ANSG regulation. Chapters 3-5 considered the application of Islamic law and legal theory through a *salafi* lens, looking at points that distinguish between violent and non-violent puritans. It concluded that there are no fixed or universal keys for reading the intellectual map of political Islam. Traversing the vast terrain of this phenomenon it is clear there is no 'one fundamentalism fits all formula for generalising about a complex current that is multi-vocal, and whose discourses speak to multiple 'islams' in the name of a single and universal Islam. Irrespective of proclaimed authority of radical or moderate declarations of what is prohibited in Islam, these are not characterized by absolute definitiveness. At most they are 'approximations or understandings of God's law rather than definitive statements of it.'¹²⁵⁸ As a result, no jurist can claim greater authority in the *Shari'a* than another which makes Islamic law vulnerable to universal and equal application even among Islamic groups.

¹²⁵⁸ Reza (n 25) 26

Part II considered the extent to which local law regulated the conflict conduct of the Taliban, whether conflict conduct of contemporary *mujahidin* flows from fidelity to foundations of faith or whether other sources of law impact conflict behaviour. It revealed a historical pattern. As with Amir Abdur Rahman, Mullah Omar and his *talibs* ‘linked elements of Islamic belief with Afghan tribal customs in ways that convinced his largely illiterate population that the two were identical. The tautology was that since all true Afghans were devout Muslims then all their customs must be Islamic as well, otherwise they could not be good Muslims. Anyone proposing to change tradition could therefore be accused of attacking Islam itself.’¹²⁵⁹

Laws are important because they shape relations with others, because they become either a source of peaceful coexistence, setting the rules for just and equitable relations, or one of demonization of others which may lead to the use of violence. The globalization of western norms through the ‘software of international law’ reveals the need for a greater legitimization of public international law within the Muslim world.¹²⁶⁰ The imposition of western legal norms creates dissonance among certain *ulama*.¹²⁶¹ Radicalization cannot be separated from ‘a deep-rooted sense of Islamic exclusion from geopolitical institutions’.¹²⁶² Where international law has dictated, as opposed to mediated, processes, it has resulted in criticism that the international justice system is imperial. Local culturally-contoured justice mechanisms may be more effective in changing behaviour. ‘Universal rights must be subject to local implementation.’¹²⁶³ Every person must have an existential sense of such rights rather than a sense of them having been imposed.

Without deep knowledge of local norms and practices, it is difficult for outsiders to understand such a system. Of greater difficulty is how to deal with cases in which the norms and expectations of the local community violate internationally accepted standards embodied in an ever-wider series of conventions designed to protect human and civil rights that are presumed to be universal.¹²⁶⁴ Normally in a country with a sovereign and functioning government, potential contradictions between the two are mediated by the state. But where state institutions are weak or non-existent, contradictions leave it to the individual or community leader to

¹²⁵⁹ Barfield *Afghaistan* (n843) 159.

¹²⁶⁰ Michael Ignatieff, ‘The Attack on Human Rights’ (2002) *Foreign Aff.* 102-103.

¹²⁶¹ An-Na’im, ‘Human Rights’ (n5) 725-726

¹²⁶² Drumbl (n99) 92.

¹²⁶³ Rosen (n13) 215.

¹²⁶⁴ Certain ways of maintaining order like blood feuds or particular hudud punishments cannot be accepted as they constitute human rights violations.

regulate. They cite an equally praised principle that customary systems deserve protection and respect because they embody unique local cultural values.¹²⁶⁵

Pashtunwali needs to be understood as an idealised concept. As with the Pashtuns' genealogical chart, it can change in time and space.¹²⁶⁶ As opposed to the highly localized systems of *Pashtunwali*, *Shari'a* is universally applicable to all times and places, despite the *Shari'a* being increasingly supplemented by non-Muslim influences.¹²⁶⁷ However, '[i]t can be argued that Islam provides the sole coherent, non-liberal world view of any political significance, and consequently the only vital external perspective on the liberal project of public international law.'¹²⁶⁸

There is an urgency to improve compliance with IHL by ANSGs and state forces. Its observance is dictated mainly by non-legal factors, such as public opinion, ethics, religion and reciprocity, just as violation in the law or its mechanisms of implementation.¹²⁶⁹ However, culturally specific norms should not be elevated in the name of universal equality.¹²⁷⁰

'Modern law's insistent claims of its universality notwithstanding lines of demarcation that separate legality from illegality often create zones where bodies and spaces are placed on the other side of universality, a moral and legal *no man's land*, where universality finds its *spatial limit*.'¹²⁷¹

The Afghan Taliban operating from 1994-2001 do not fit into any insurgency template. Fashioned from blended *Pashtunwali*/Islamic material, the Taliban were crafted by the UK, the Soviet Union, the USA, Iran, Saudi Arabia and Pakistan. So unique is the Afghan experience, the original Taliban has no Islamic ANSG comparator. Indeed, there is not one type of Islamic ANSG. Lacking a centralized authority, there is not one Islam. However, there can only be one international humanitarian law, which is the IHL codified in the Geneva Conventions and customary IHL.¹²⁷² While it can be enriched through other

¹²⁶⁵ Barfield 'Customary' n828) 43-44.

¹²⁶⁶ Ruttig 'Tribal' (n953)

¹²⁶⁷ Harvey Smith, *Area Handbook for Afghanistan*, 4th ed (Government Printing Office 1973)

¹²⁶⁸ Westbrook (n26) 820-821.

¹²⁶⁹ Sassoli 'Seriously' (n42) 6.

¹²⁷⁰ Nagaraj (n1048).

¹²⁷¹ Mahmud (n861) 6.

¹²⁷² Abdullahi An Na'im cited in Matthew Evangelista and Nina Tannenwaldm, *Do the Geneva Conventions Matter?* (OUP 2017)

versions of humanitarian law, there should be no cultural variation or regionalization of this law. That said, it should reflect the different legal traditions not just a Euro-ethnic approach.¹²⁷³

In this growing body of literature focusing on post-conflict bottom-up justice initiatives, the relative absence of pre-conflict or conflict grass-roots initiatives to obviate the need for transitional justice mechanisms conflict conduct is a gap that is ready to be filled. This research has been contextualized geographically and temporally. There is an opportunity for it to serve as a possible template. The hypothesis can be transposed to similar pluralistic contexts, potentially testing tested against the Houthis in Yemen, al-Jughaya in Iraq, or the Shilluk in South Sudan, considering the narrative of these groups' conflict conduct regulation *vis a vis* its practice.

¹²⁷³ An Na'im (n29) 229-242

Annexes

Annex 1 Common Article 3 of the Geneva Convention

‘In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.’

Annex 2 The Charter of Medina

‘To the Jew who follows us belong help and equality. He shall not be wronged nor shall his enemies be aided...the Jews shall contribute to the cost of war so long as they are fighting alongside the believers. The Jews of the Bani ‘Awf are one community with the believers (the Jews have their religion and the Muslims have theirs), their freedom and their persons except those who behave unjustly and sinfully, for they hurt but themselves and their families. The same applies to the Jews of the [other tribes]...Loyalty is a protection against treachery...None of them shall go out to war save the permission of Muhammad, but he shall not be prevented from taking revenge for a wound...The Jews must bear their expenses and the Muslims their expenses. Each must help the other against anyone who attacks the people of this document. They must seek mutual advice and consultation, and loyalty is a protection against treachery...Yathrib [i.e Medina] shall be a sanctuary for the people of this document...the contracting parties are bound to help one another against any attack on Yathrib.’¹²⁷⁴

¹²⁷⁴ Guillaume (n553) 231-233.

Annex 3 Pashtun Tribes

Achakzai Pashtun tribe situated in SW Afghanistan and SW Pakistan. Part of the Durrani confederacy.

Afridi Pashtun tribe that inhabits regions around the Khyber Pass.

Alizai A Durrani Pashtun tribe in SW Afghanistan.

Alokozai A Durrani Pashtun tribe in SW Afghanistan

Barakzai Durrani Pashtun tribe in SW Afghanistan

Bhittani One of the four main Pashtun tribal groupings. Also the name of a smaller tribe living in Waziristan and the neighbouring Tank district of Khyber Pakhtunkhwa (KPK) province.

Durrani Pashtun tribal confederation in southern and SE Afghanistan. The majority of modern Afghan rulers have been Durrani.

Ghilzai Pashtun tribal confederation in southern and SE Afghanistan.

Ghurghust One of the four main Pashtun tribal groupings.

Hotak Pashtun tribe of the Ghilzai confederation.

Ishaqzai Pashtun tribe of southern Afghanistan. Part of the Durrani confederation.

Kakar Pashtun tribe in southern Afghanistan and neighbouring south western Baluchistan province.

Karlani One of the four main Pashtun tribal groupings.

Khattak A large Pashtun tribe in KPK. Some Khattak communities also live in the eastern Punjab Province.

Khugiani A Pashtun tribe mainly concentrated in the eastern Afghan province of Nangahar.

Lashkar Armed groups organized by tribes to defend territory

Mehsud (Maseed) A tribe of Waziristan

Mohmand Pashtun tribe situated in eastern Afghanistan and Pakistan's tribal areas.

Noorzai Pashtun tribe of south-western Afghanistan. Part of the Durrani confederation.

Panjpri A village in the Swabi district of Pakistan's KPK known for its madrasa which propagates a puritanical strand of Sunni Islam close to Salafism.

Panjpiris Followers of the Panjpri, a distinct sect in the Pashtun regions.

Popalzai Pashtun tribe of southern and western Afghanistan. Part of the Durrani confederation. Former President Hamid Karzai's tribe.

Safi Pashtun tribe in eastern Afghanistan which extends into Pakistan's Tribal areas.

Sarbani One of the four main Pashtun tribal groupings.

Taraki Pashtun tribe in eastern and southern Afghanistan. Member of the Ghilzai confederation.

Wazir A Pashtun tribe predominately based in Waziristan and south-eastern Afghanistan.

Yousafzai Large Pashtun tribe in Pakistan's KPK

Zadran Pashtun tribe in south eastern Afghanistan

Glossary

Islamic/Arabic Terms

'adil Just man

'adl Justice

'aql Reason

'illa (ratio legis) cause, occasional factor; the attribute or set of attributes common between two cases and which justify the transference, through inference, of a norm from one case (that has the norm) to another (that does not have it). See also *qiyas*.

'ilm (pl. 'ulum) Religious knowledge, Those possessing 'ilm are known as *ulama*. Also known as science.

'ilmāni scientific

Abu Bakr al Siddiq The first caliph of Islam after Muhammad's death, 632-634 CE.

Ahl al-Kitab Peoples of the Book

Akham, plural *hukm* Rulings

al-Adilla' or al-Ada' The Guides; Scouts, who studied approaches to the terrain and the battlefield. **'Ahd** A truce.

Amal ahl al Madina Practice of the people of Medina. For the Maliki Madhhab, the practice of the people of Medina post the Prophet (*Salla allahu 'alayhi Wa Salam*) death was a storehouse of the *Sunna*.

Aman A safe-passage agreement issued to a person from non-Muslim territory.

Ameer/Amir Leader/Commander

Anno Hegirae In the year of the Hijra. Islamic or Hijri calendar. It consists of 12 months and 354 days. It is used concurrently with the Gregorian calendar. The first year was the Islamic year beginning in AD 622 during which the emigration of the Prophet (*Salla allahu 'alayhi Wa Salam*) from Mecca to Medina, known as the *Hirja*, occurred.

Apostasy One of the most serious crimes in Islamic law. Denying one's faith in Islam, or conversion to another religious creed.

Aqidah Creed, clearly derived from *Qur'an* or Hadith.

Ard Land

Asir Prisoner of War

Baghi Dissenter/Rebel. The *hadd* crime of engaging in armed rebellion against a legitimate ruler.

Banu Nadir One of three Jewish tribes living in Medina.

Banu Qaynuqah One of three Jewish tribes living in Medina.

Banu Qurayza One of three Jewish tribes living in Medina.

Barelvis: Adherents of a traditionalist movement which appeared in the 1880's under the leadership of Ahmed Riza Khan in reaction to the Deobandi movement. In the majority in the rural areas, the Barelvis are characterized by the importance they ascribe to the veneration of saints and their especial devotion to the Prophet Muhammad.

Bashar A human being. Al Bashar refers to humankind.

Bid'a(h) Literally means innovation (in religious practice and beliefs). In Islamic law it means carrying out actions which displease Allah *ta'ala* and his messenger. The word heresy has no equivalent in Islam, but *bid'a* come close.

Caliph (Khalifah) A political office used to govern urban areas of pre-Islamic Arabia and chosen by the consensus of tribal elders. The term predates Islam and simply means "successor." The four Caliphs to succeed Muhammad from 570-632 A.D were, in order, Abu Bakr, 'Umar, 'Uthman, and 'Ali.

Caliphate: The spiritual and political headship of the Sunni Muslim community; an expansionist state where *Shari'a* functions as state law

Da'eef Weak

Da'wa(h) Invitation, preaching, proselytism. Literally the call to faith, to accept Islam.

Dalil indicator. It is the piece of evidence (like a verse from the *Qur'an*, or a Prophetic tradition) that points to or indicates a particular *hukm* or ruling regarding an act, for example, whether a particular act is obligated, permitted, prohibited, disliked, preferred, etc.

Dar al-harb Literally the abode or house of war. Territory that is not controlled by Muslims.

Dar al-Islam Literally the abode or house of Islam. The territory controlled by Muslims where Islamic law is observed.

Dar House

Darar Harm/Injury

Darura Necessity. In legal terminology, a state of necessity on account of which one may omit doing something required by law or may do something illegal. The conditions allowing this license and the extent of the license are stipulated variously by different legal scholars. Most legal theorists agree that murder or other gross physical harm is never legitimate. Judicial norms can be set aside in cases of extreme necessity.

Deobandis: The adherents of the reformist movement based on the Deobandi madrasa founded in 1867 in Uttar Pradesh in Northern India, which expounds the fundamentalist inheritance of Shah Waliullah. Islamic revivalist movement based on strict adherence to Hanafi Sunni Islam as defined by its founders Maulana Mohammad Qasim Nanautavi and Maulana Rasheed Ahmed Gangohi.

Dhimmi A person living in a region overrun by Muslim conquest who was accorded a protected status and allowed to retain his or her original faith. non-Muslim subjects who become subjects after a war. If there is no war and there is a negotiated settlement, then they are called mua'ahids. People of the book

Din Religion, faith.

Diwana Mad

Diya Blood Money

Durand Line Border between Afghanistan and Pakistan drawn in 1893.

Faqih (pl. Fuqaha) Jurist/Scholar of *Shari'a*; *Fiqh* expert

Fard (also Farida) Duty/Obligation

Fath Al-Dhari'a Opening of the door to something usually *haram* but if you say it *haram* you close the door to a greater benefit.

Fatwa (pl. Fatawa) Ruling/verdict given by the scholar. Answer to a question. An opinion given by a jurist (Mufti), usually on a point of law which is not obligatory to follow.

Fida Ransom

Fidayin: the plural of 'fida'i', a person who martyrs himself

Fiqh From the Arabic word *al-fahm al-daqiq* means a deep understanding. Islamic jurisprudence. *Fiqh* is divided into two branches: *fiqh ibadah* and *fiqh mu'amalat*. *Fiqh ibadah* is the Islamic laws that regulated the worship and rituals between individuals and their God, for example prayer, pilgrimage, fasting. *Fiqh Mu'amalat* is the Islamic laws that regulate relations between how the individual conducts himself, as well as how he conducts himself in relation to others. The scope of *fiqh mu'amalat* is broad and includes laws related to crimes; to Non-Muslim peoples who reside in a Muslim country; to the Government system and human rights.

Fi sabil Allah In the path of God (a phrase often associated with *jihad*)

Fitna Literally means temptation, test or trial, but has come to refer to discord and civil strife among Muslims; a *fattan* is a tempter or subversive. It is a common way of referencing the first civil war in Islamic history (656-61), which is generally considered the point of origin of the division between Sunni and Shi'a. Applying these terms to our enemies and their works condemns their current activities as divisive and harmful. The term "*Fitna*" refers us to

misconduct on the part of a man who establishes his own norms and expects obedience from others, thereby usurping God's authority—who alone is sovereign. The term has many meanings, including sedition, schism, insurrection, to mislead, and to guide in error.

Gharb The West

Ghazi Warrior

Ghawza Originally meant a raid but has evolved into the term for battle. When one sees this term in the context of a sentence, it may also denote battles that the Prophet Muhammad participated in directly.

Hadd (pl. Hudud) Penalties prescribed in *Qur'an*

Hadith(pl. ahadith) A narration that carries the *Sunna*. Tradition of the Prophet. Hadith are the report of the words and deeds of the Prophet Muhammad, and there are seven collections of compiled hadith that are considered to be “sound,” or reliable by the majority of Muslims: al-Bukhari, Al-Tirmidhi, Muslim, Abu Dawud, al-Nisa'i, al-Nawawi, and Ibn Majah. These are the recorded sayings of Muhammad or his Companions, in both the Shiite and Sunni versions of Islam. **Harb** War, the general term for warfare not specifically designated as *jihad*. Hashir: (Stuffer): Specialists who brought up the rear of an army.

Halal That which Allah and the Prophet (*Salla allahu 'alayhi Wa Salam*) have allowed to be done in a lawful manner.

Haram That which Allah and the Prophet have completely and specifically forbidden. Engaging in an act that is Haram (i.e. eating food like pork, drinking alcohol, having sex outside of marriage) would lead to punishment in the Next Life, and maybe even in this Life.

Harbi Enemy Person

Haqq (pl. huquq) Right; truth

Hasan Good

Hasana(h) If a new thing opposes the *Qur'an* and *Sunnah* then it is *Say'iah*, but if it is not against the *Shari'ah* then it is *Hasana(h)*

Hakimiyya/Hekimiyyah Sovereignty. In the Islamic context it is used to assert God's sovereignty.

Hijra(h) Refers to the migration of Muslims from Mecca to Medina and Prophet Muhammad escaping the genocide of Muslims in Mecca around 622 A.D.

Hiraba(h) derived from the Arabic root which refers to war or combat, means sinful warfare, warfare contrary to Islamic law.

Hudud Severe penalties for the capital crimes in Islamic law which include apostasy, sedition, adultery, and fornication. At the court's discretion, the penalties may be death by the sword, lapidation (stoning, usually to death), or lashing; rarely applied in pre-modern Islam due to strict requirements of procedural law.

'ibadat (singular ibada) Matters of worship/ ritual practice.

Ibn Taymiyya A 13th century Islamic jurist who redefined *jihad* and apostasy to address the Crusades and the Mongols who had invaded the region and influenced local rulers in his day. He is considered a spiritual source for Islamic militants and al-Qaeda.

Ijma Consensus/agreement. There is disagreement as to how this consensus is found: scholarly /*ummah*/silent

Ijtihād (Legal) Juristic reasoning, to endeavour, self-execution. Systematic reflection of the foundational sources of the law to arrive at a new legal ruling. Independent intellectual reasoning by learned scholar where either the *Qur'an* or *Sunna* is unclear or silent on a topic. It is a methodology of producing a fatwa.

Ikhtilaf Legitimate disagreement

Imam: An imam is, in one meaning of the word, merely a prayer-leader. For the Shi'a Muslims, the Imam is appointed by God to lead the Muslims. The Ja'fari Shi'a sect are called the Twelvers because of their belief in a line of twelve Imams who were the rightful authorities,

the last of which is in occultation (absent, not dead or alive) and will return one day to humanity. In the Muslim rulings on war, the term imam stands for the legitimate ruler, who was then called the caliph. For that reason, radical leaders have sometimes used the title of Imam.

Iman Belief/ Faith

Intifada ‘Shaking off’; mass uprising

Iqra Read/recite

Islah reform

Istihsan: juristic preference/ consideration of *maqasib*: the mufti based on *maslaha* would choose an opinion because he feels that it benefits his society more. It is a form of *Ijtihād*. An objective won’t be achieved through *qiyas ijma* etc so for this specific situation, based on *maslaha*, a decision is reached.

Istishab: presumption of continuity or the status quo. If something is OK, it remains OK. Innocent until proven guilty.

Istislah literally, to find something good or serving a certain lawful interest. ‘To seek the best public interest’.

Jahada Struggle

Jahili From the pre-Islamic period, or “time of ignorance.” Islamists often brand the West, or their own governments, as *jahili* or being in a state of Jahiliyya, just like the pre-Islamic world.

Jahilyya Age of Ignorance/pre-Islamic culture and philosophy

Jihad Struggle or offensive war. Frequently defined in English as “holy war,” Muslims distinguish between the greater *jihad*, the daily struggle to fulfil the requirements and ideals of Islam, and the lesser *jihad*, fighting for the faith. After the Battle of badr (22 AH/624 CE) between Muslim forces in Medina and Meccan forces, where Medinan forces were victorious, Muhammad referred to this battle as the smaller *jihad*.

Jizya(h) A tax levied on the Jews and Christians, who are not subject, as are Muslims, to payment of zakat. The jizyah was similar to the Roman poll tax. Land taxes were also charged.

Al-khilafa al-rashida ‘The rightly guided caliphate’ the common designation in Sunni Islam for the first four Caliphs (Abu Bakr; ‘Umar ibn al-Khattab; ‘Uthman ibn ‘Affan and ‘Ali ibn Ali Talib) to rule the community between the death of the Prophet Muhammad in 632 CE and the death of ‘Ali in 661 CE.

Kaffir a polytheist. Khaybar: The Jewish section of Medina when Prophet Muhammad governed the city.

Kafir Infidel

Kufr Unbelief; Ingratitude.

Lashkar People gathered to defend against common enemy

Layeha Rule/Program

Madhhab: Schools of scholars who have accepted a methodology of *fiqh*/jurisprudence

Madrasa: A religious school, offering theological and juridical instruction

Mafsada Injury. Opposite of *maslaha*

Makrouh Something that is not liked. Also defined as offensive.

Makrouh Tahrimi This is a category of *Makruh*, and is defined as offensive in the extreme, and close to the Haram.

Makrouh Tanzihi Another category of *Makruh*. It is defined as less offensive, but still extremely distasteful.

Mashbooh Questionable or doubtful.

Mushtabhat This is described as the “grey area” that is found between Halal and Haram. It has also been defined as questionable. It is based on the Hadith: What is Halal is clear and what is Haram is clear. Midway between them are things which people do not know whether they are Halal or Haram. He who keeps away from them will protect his religion and will be

saved. He who approaches them is very near to Haram, like a shepherd wandering his flock near Him (protected grazing land), who could soon enter the forbidden area, and Allah's protected area is what He has declared forbidden.”

Harb War

Malik ibn Anas An early Islamic scholar who founded the Maliki school, or madhhab of Islamic law. **Niya(h)** Intention, specifically the pure intention to commit an act. For instance, scholars argue that the intent for prayer is more important than the physical completion of that act.

Maqasid goal/purpose/objective

Maqasid of Usul-al-fiqh: to allow the scholar with a greater certainty of representing the Prophet (*Salla allahu 'alayhi Wa Salam*) in his absence when it comes to answering community questions.

Maslaha Public Interest.

Mawdoo' Fabricated

Mu'amalat Those aspects of Islamic law that relate to the relations of human beings with one another, as distinguished from the relationship of the human being with God.

Mufasar: person qualified to do *Tafsir*

Mufti Person who gives a *fatwa*. Juris-consult.

Mullah/Mawlavi/ Maulvi/Maulana Islamic cleric who is usually a prayer leader in a mosque.

Muhaddith Scholar of Hadith

Muhajirun Literally a refugee. Denotes Muslims who leave their homeland because of oppression or a calamity.

Mujahidin: Plural of 'mujahid', warriors in the holy war.

Mujtahid: Scholar who exercises *Ijtihad*. Not anyone can represent the Prophet (*Salla allahu 'alayhi Wa Salam*) in his absence. Scholar qualified in representing the Prophet (*Salla allahu 'alayhi Wa Salam*)

Murtad Apostate

Naskh: The abrogation of one verse with another

Qaulu Sahaba Opinion of the Sahaba

Qawa'id Ground Rules

Qazi Islamic judge

Qital Fighting or killing, a term for military activity used in the Quran.

Qiyas reasoning by analogy (alcohol/cocaine example) which expands Islamic law

Qubh Evil

Quran Islamic book of divine revelation. The Quran is divided into 114 Suras, or chapters, with 6,219 Ayahs or verses.

Sadd Al-Dhari'a: Blocking of the ways to haram/Where a thing is halal but could lead to haram you close the door.

Sahaba Companions of the Prophet (*Salla allahu 'alayhi Wa Salam*)

Sahih Authentic beyond question

Sahifat Page. Sahifat traditional meaning is a 'declaration' and its contemporary counterpart is a constitution.

Salaf Pious ancestors. The first three generations of Muslims.

Salafiyya A neo-orthodox brand of Islamic reformism originating in the late 19th century and centred in Egypt. Its aim was to regenerate Islam by returning to the tradition represented by the 'pious forefathers' – *al-salaf al-salih*.

Shafi'i One of the four traditional *madhahib*. Al-Shafi developed a cohesive procedure for legal derivation of verdicts. Where Hanafite methodology accounted for the sayings and rulings of the companions and successors, Shafi' held only those practices directly passed

from the Prophet (*Salla allahu 'alayhi Wa Salam*) were valid. Shafi'i seminal work, *Risala* reflects logic and order being injected into Islamic jurisprudence. The term '*usul*' however is not found within the text of this work. The *jus ad bellum* for *Jihad* in the Shafi madhhab is *kufir* not injustice as it is with the other schools.

Shahada Testimony; Bearing Witness

Shahid One who is martyred for the cause of Islam.

Shari'a: The corpus of models and obligation contained in the Quran and the Sunna, which make up Muslim law. The road to the watering place¹²⁷⁵

Shaykh also known as *Sayyid* or tribal leader

Shura Council/Consultancy. The process of consensus.

Siyar Conduct of state (in international affairs). (Pl) *Sirah*

Sunna Ahaad is broken down into *Gharib* (single chain hadith); *Azeez* (double chain hadith); *Mashur* (three chain hadith)

Sunna Mutawatir Multi chain Hadith (greater to or equal to a 10 chain hadith)

Sunna: Custom, rule based on Prophet precedent; The corpus of deeds, acts, words and opinions of the Prophet Muhammad. The exemplary bibliography of the Prophet; the normative precedent, conduct, and cumulative tradition, typically based on Muhammad's example.

Tafsir: Translation or commentary on the meaning of the *Qur'an*.

Tajdid renewal

Talfiq mixing madhahib/cross pollination of madhahib for greater benefit

Takfir The act of passing verdict or declaring *kuffar* (deviation from fundamental Islamic beliefs) on an individual or community whose acts or words openly manifest deviations or opposition to fundamental Islamic beliefs.

Talib Student (sing) *Taliban* (pl)

Taqlid Imitation. The opposite of *Ijtihad*

Tauhid/ Tawhid From the root-words w-h-d and a-h-d. Divine unity. Acceptance or recognition of the singularity and centrality of God. It refers to the one-ness of the creator, the controller of the whole universe and all its contents. One-ness of the creator also implies one-ness of the systems, functions, destiny, and objectives of the universe. *Tauhid* nullifies the concepts of atheism and polytheism. Belief in a creator nullifies atheism. Belief in only one God nullifies polytheism.

Ulama/ Ulema (sing. Alim) Scholar. Plural of Maulanas or mullahs

Umma(h) nation/community (of believers). Used to denote Muslim nation/community/transnational Muslim community.

Urf: custom (cultural practice)

Usul source or origin

Usul al-fiqh source or philosophy of law; the knowledge of the evidences; what can be used as evidence in *Shari'a*; how to use those evidences and who qualifies to use those evidences. It is a science where the scholars came back to the scriptural sources to try to define a methodology of extraction, how to extract from the sources. When you get this methodology, as *fiqh* is the practical implementation, *usul al fiqh* is philosophy of law, a better understanding of the scriptural sources. This provides the methodology which help you extract the rules from the text, and a list of conditions and principles that have to be referred to in order to understand how to deal with the scriptural sources.

Usuli, Usuliyyun (pl.) Literally 'fundamentalists'. Those who follow a fundamentalist approach as defined in *usuliyya*.

¹²⁷⁵ Rom Landau, *Islam and the Arabs* (George Allen and Unwin Ltd 1958) 141

Usuliyya Literally ‘fundamentalism’. A movement by conservative theologians who rejected reason as a basis for interpretation and called for a return to the early practices of Islam as a way of preserving the purity and unity of Islam.

Wahhabis: The followers of a religious reformist movement founded in the eighteenth century in the Arabian peninsula by Muhammad Abdul Wahhab. The Wahhabi doctrine, strongly opposed to Shi-ism and Sufism, places its emphasis on the reaffirmation of ‘*tawhid*’, or divine unity.

Wahy Inspiration

Wasat(i)/Wasat Harmonizing middle ground; the golden mean

Zakat ‘purification.’ This is not an act of charity but of religious devotion. The tax legally obligatory on all Muslims under the *Shari’a*, which represents 2.5 % of profits realized during the year

Pashtunwali/ Afghan Terms

Adera Cemetery. Unlike the burial norms in Islam, *Pashtunwali* places importance for the Pashtun to be buried in his ancestral graveyard.

Amanat To ensure the safety of anything kept in the custody. A Pashtun must ensure the safety of anything in their custody, including prisoners.

Arbab village representative; may be appointed by the community, who liaises in a quasi-official capacity between community or government; may also fulfil an executive role (see malik, qaryadar)

Arbaki tribally mobilised community police force in southeastern Afghanistan. **Arbakai** is a tribal based community policing system grounded in volunteer grassroots initiatives. The Arbakai are volunteers and carry responsibilities which are approved and recognized as the common or public good. Lashkar and Arbakai have different functions and roles in Pashtun tribes. The Arbakai institution plays the role of the police in tribe, sub-tribe or community areas.

Badal Literally means ‘exchange’. For example a wedding in which two families exchange brides is a badal wedding; however it also means exchange in the sense of ‘payback’. Pashtun concept of reciprocity. Revenge or retaliation to protect, defend or restore honour. It is mandatory for a person who has had his honour offended to take revenge in order to restore the compromised honour to its initial standing. The obligation to take revenge is considered essential to maintaining the respect of honour which underlies the Pashtun value system.

Badruga Escort/Convoy This element of *Pashtunwali* states that any tribe that grants permission to someone outside the tribe to travel in a particular tribal area, that tribe is bound to protect the visitors safety and security until their departure.

Bundez Stay order. If a Pashtun community determines a particular area is off limits, this injunction must be respected by Pashtuns.

Chagha War Cry/ Siren. Within a Pashtun community, if a Pashtun becomes aware of an incident that warrants alarm, like a fire or a robbery, they are bound to assist. This call for help or chagha can be transmitted by loudspeaker, radio or mobile phone.

Da Khazo Dranaway Women, respect and rights. The protection of women during warfare is linked to honour. If a Pashtun kills a woman in this context they could expect to be taunted and stripped of their Pashtun identity for 100 years.

Da Masher Manena Recognizing the elder's wisdom. The principle points to the pre-eminence of elders as the chief custodians of *Pashtunwali* and its cultural history. Age grants credibility to the tribal institution.

Da tharrey thug Women follow men and young follows old (when walking). This is about protection of what Pashtuns consider vulnerable groups.

Da zina saza Death sentence. This particular death sentence is implemented for adultery. Where Islam requires three witnesses, in *Pashtunwali* the articulated imaginings of infidelity can be enough to invoke the death sentence.

Dah'uz Man of no honour.

Dala Tapala Political lobbying or coalition building. The element of *Pashtunwali* emphasises collective organization. Pashtuns are bound to organize themselves in networks, by joining an existing coalition or developing their own. Such networks frequently have political connections.

Darra Guerrilla War. This is the *Pashtunwali* concept describing guerrilla warfare wherein a Pashtun tries to create the impression that his force is stronger against a more powerful enemy.

Ghleh (pl) People who steal.

Gila Complaint. If a man in a village has done something non-violent which is at odds with community values, the offended party may approach the man's kin with *gila*, a complaint about his behaviour. The man's kin will then approach him about his behaviour to extract an apology.

Gwand Political party or faction.

Haqqani An honourific title for the alumni of Darul Uloom Haqqania Akora Khattak in the Nowshera district of KPK province in Pakistan which is considered a major seat of Deobandi learning.

Hujra: is traditionally a male club and social centre which exists in every village of the tribal as well as settled areas. They have lost much of their functional importance.

Jirga Decision process. Assembly/Council. A *Jirga* is a process which is convened to resolve an important question. It is often thought of as a meeting of elders, but it is properly understood as a process, not a singular event. The meeting of elders itself is part of a decision making process which may take a period of weeks or months. It is a meeting of elders with an external party. It is considered to have substantial authority because it frequently includes the participation of a political agent. A *loya Jirga* or grand *Jirga* is held between all tribes to resolve a shared dispute.

Khan A clan leader or notable land owner in some Pashtun communities.

Khoon-Kaaraan (pl) People who cause the spilling of blood

Khum Baha Bloodshed. Lex talionis. If a Pashtun kills a person then the victim's family or community must kill either the person or a person from the offending family.

Lashkar army is formed for the implementation of the decision taken by the *jirga*. The word is originally from the Persian *lashkar*, 'an army,' 'a camp.'

Lass neva To raise hands for condolence. If a member of the Pashtun community dies from unnatural causes, the Pashtun is bound to attend the funeral for two reasons: to show solidarity and sympathy; and to dispel suspicion of involvement in their untimely demise.

Lauz (waada) Promise or word. A Pashtun should suffer extreme hardship rather than sacrifice his word. Failing to honour a promise is tantamount to losing credibility and even honour.

Layeha Pashto for 'Book of rules'.

Loy Kandahar Pashto for 'Greater Kandahar' denotes the Pashtun regions of southern and south western Afghanistan.

Loy Nangahar (Mashriqi) Pashto for 'Greater Nangahar'. An unofficial term for the Pashtun regions of eastern Afghanistan.

Loya Jirga Pashto for 'Grand Council or Assembly'.

Loya Paktia Pashto for 'Greater Paktia' denotes the Pashtun regions of south-eastern Afghanistan.

Malik village representative; may be appointed by the community, who liaises in a quasi-official capacity between community or government; may also fulfil an executive role (see *arbab*, *qaryadar*)

Markara/Maraka is the primary forum for dialogue between communities and tribes at a local level.

Melmastia Hospitality. One of the primary obligations of a Pashtun. He is required by his honour to offer rank-appropriate hospitality to all. This often takes the form of offering tea to visitors.

Nagha Penalty on disobeying norms, rules and regulations. The *Jirga* is empowered to impose fines (money or chattel) upon any member of the community who violates *Pashtunwali* or Pashtun norms. This norm can be triggered if someone does not attend a funeral or does not give requisite regard to a guest.

Nanawatey Literally means 'going in', when a weaker man surrenders to a more powerful man in exchange for mercy. It is the ultimate dishonour, but it is mandatory under the code to give it when asked, even to an enemy. Reconciliation / repentance/ peace delegation. Involves making a gesture to relieve enmity or discordant relations. Nanawatey is not prescriptive and can take various forms: a written apology; gift of livestock or other property.

Nang Honour. Primacy status within the code. Manichean in construction. The highest personal value of a Pashtun. Temporary loss of honour triggers an automatic requirement for revenge.

Nang o Ghairat Protection of self-respect and honour

Narkh Pashtun customary laws based on the principle of *Pashtunwali*.

Nikat Good standing. Nikat comes from the same root word as grandfather. It assesses social ranking or standing within a community based on individual genealogy and descent from the original clan ancestor.

Paighor Taunt. Paighor is a mild humorous taunt directed at a person's behaviour to remind them that they are close to the edge of acceptable community behaviour.

Panah Asylum. *Panah* is the asylum or refuge offered to a man in need, which will include food, water, shelter and protection. **Panah** is to take someone in personal protection. Even if a notorious criminal or an outlaw asked for panah he will definitely be granted asylum and duly protected. It has happened many a times that a murderer after committing murder asked for panah from the family of the victim and they have him panah. During panah he enjoys equal rights and status but when he leaves their house, he can be killed in revenge and his family cannot claim for any penalty of reward under the custom of badal. Seeking refuge or shelter; sanctuary or protection. A Pashtun is obliged to provide shelter to anyone seeking refuge. There are numerous accounts of this practice in peculiar circumstances including providing shelter to one's enemy.

Pashto First language of most Pashtuns.

Pashtunwali Fundamental Pashtun values codified as customary laws among most Pashtun tribes.

Peghore Taunting. There is an obligation on the Pashtun to taunt an individual and their family members over generations for any act which is considered against *Pashtunwali*. Taunting can occur at any opportunity but is generally undertaken at special events. This norm is pivotal in the *Pashtunwali* deterrence regime, perpetually reminding Pashtuns of the consequence and shame that must be imposed for acting outside *Pashtunwali*.

Qaryadar village representative; may be appointed by the community, who liaises in a quasi-official capacity between community or government; may also fulfil an executive role (see arbab, malik)

Quetta Shura Exiled Taliban Leadership council in Quetta, Pakistan

Rish-e-safed male elder; "whitebeard"

Rogha Jorra Non-war time intervention from the *Jirga*. Similar to **Tega**, this is the process for settling disputes which have not yet reached the threshold to qualify as warfare. This dispute resolution mechanism seeks to prevent hostilities.

Sakhawat To be generous to others to the extent it may cause the benefactor to suffer. Examples of this can be seen when communities adjacent to an area where the civilian population has been displaced accommodate families to the detriment of their own.

Salah Mashuwarah Consultation; emphasis on an inclusive approach to dispute resolution if it impacts the community.

Saugand To swear an oath; similar to covenant/ deposition testimony or *qasam* in Islamic law. The practice of Saugand often manifests by swearing on the *Qur'an*. Used to emphasize the importance or truthfulness of the idea which follows it in the sentence; to swear that a version of events is true or make an unbreakable commitment.

Seyali Competition, *Seyal* means equal. These terms are intricately intertwined to create balance and justice.

Shah-rel Ostracism. Shah-rel encompasses a spectrum of remedies from the mild (*gila*) to the extreme (killing) to keep social behaviours within the acceptable norms of the village.

Sharm o Haya Modesty. The obligation to avoid disgracing oneself and others. This concept is also linked to the protection of dignity and honour. Contravening *Pashtunwali* in front of Pashtun, especially an elder can be to disgrace him.

Sharrontya Exile. Social boycott. This punishment exists on a continuum ranging from participatory restrictions in community events or exiled from the community completely. In the case of exile, tribes from neighbouring communities may accept the person and reform them depending on the severity of the crime. Reintegration into their community is possible post reform.

Shura community council

Siyali Competition among relatives or cousins.

Spin geree male elder; “whitebeard” (Pashto)

Swara Transfer of an unmarried girl as compensation for a violent crime. Such compensation is intended to resolve any outstanding conflict. A swara marriage is generally considered dishonourable and the girl is stigmatized. Other general features of a swara marriage are a large mismatch in the age of the bride and bridegroom as well as the forced bride being subject to ongoing punishments.

Tarburwali Agnatic rivalry, common among male cousins. A common pattern of animosity and competition in Pashtun society.

Tarun A declaration issued by tribal *jirga*

Teega A binding or collective decision by a tribal *Jirga*, particularly in Waziristan. A Truce declared by *Jirga* to avoid bloodshed among two or more tribal factions. 'Teega' literally means a stone which is fixed at a certain place across which both the combating parties make pledges to have no concern with life or property of the opposite party until the time a permanent settlement is carved out. Teega, in other words, is a temporary truce in a feud arranged by a

tribal *jirga* or the *jirga* arranged by the government which is symbolized by the setting out of a Teega.

Tega War time intervention through *Jirga*. The process for initiating ceasefire during conflict.

Wajhoonkee (pl) Killers

Yerghama Transfer of men between two opponents or rivals for confidence building. This concept governs the process of negotiations particularly when there is significant conflict. Men from each tribe or group are transferred between the two groups to act as a surety of good faith in negotiations. If something should go wrong during negotiations the transferred men would probably become hostages. If negotiations are settled amicably the men return to their respective tribes.

Zaalem qaatelaan (pl) Cruel Killers

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