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Asmi J Wood

7 April 2011
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ABSTRACT

This thesis is a comparative legal examination, of the use of force by non-State actors under both international law and the shari'ā. It aims to identify measures for regulating the use of force and thus to promote harm minimisation. The narrower, more specific topic examined here is to determine the legality, or otherwise, of the contemporary use, or threatened use of force, by non-State Islamist groups. Such Islamist groups often work together formally or informally, sometimes to achieve purportedly strategic ends, for reasons variously termed ‘fighting for Islam’ or being engaged in *djihad/jihad* or ‘holy war’ (one of *djihad’s* less accurate contemporary definitions).

Consequently, how a legal methodology can be used to regulate this behaviour is examined by a comparative analysis of (a) lawful pre-conditions for the use of force and (b) the legitimate means that may be employed during armed conflict. Under international humanitarian law (IHL), ‘the means of inflicting harm upon the enemy are not unlimited’¹ and similarly the *shari’ā* prohibits certain means of fighting and targeting.² As with IHL these *shari’ā* limits, can form the basis for creating *shari’ā* crimes, and for criminalising such acts when perpetrated during armed conflict.

*Shari’ā* legal principles and methodologies applicable to humanitarian and criminal law are identified. There are differences between IHL and *shari’ā* laws of war which are also examined. Islamic law however goes further than harm minimisation during conflict, emphasises that a state of justice is mandated and calls for the elimination of all injustice as a positive obligation,³ through the use of force if necessary and

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³ Qur’an 4:135.
is achieved through *djihad*, a strictly defined and circumscribed concept.\(^4\) Herein however, can lie the root of the problem of the gratuitous use of force, particularly when *djihad* is instrumentally employed absent its regulatory framework.

*Shari'a* views on fighting, justice, life and the reason for human existence, among other issues are also in many ways fundamentally different from the moral yardsticks underlying the current secular international legal regime, signalling potentially significant differences with respect to the regulation of the legitimate use of armed force. However, while the differences between the Western and Islamic legal traditions may at first appear substantial, *the laws* that result are not significantly different, arguably because what is considered 'criminal' in both legal traditions is deeply rooted in the Mosaic Law.\(^5\) It is shown therefore, that most differences are not irreconcilable.

The *shari'a* is a system of law and should be treated on its merits rather than dismissed out of hand merely because of an emotive link with 'terrorism' or with radical Islam. On the other hand, critique of the *shari'a* (as with any system of law) is clearly legitimate and necessary, but for a useful outcome, such criticisms should be fair and objective both options examined in some detail in this thesis. This thesis concludes that the most egregious international crimes can be criminalised under the *shari'a* and examines practical means for doing this.

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\(^4\) Qur'an 2:190.

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CHAPTER 1

IS ISLAMIST VIOLENCE PERMISSIBLE UNDER THE SHARI'A?

"Freedom's just another word for nothing left to lose"¹

There are times when even stones cry — Bosnian Proverb²

INTRODUCTION

This thesis explores the idea of whether it is feasible, peacefully if possible, to reduce the present wanton use of force. The UN framework already satisfactorily regulates the use of force by States, including Muslim States.³

The regulation of activities by so-called non-State actors,⁴ however, is more patchy in law, particularly with respect to the use of force. This class of international actor forms the starting point for the issues examined in this thesis. The subjects of this thesis are a sub-set of the class of non-State actors and for convenience will be referred to as Islamists, clearly a contested term, but one that will be clarified in the body of this work. This thesis is current to about December 2010.⁵

The analysis will show that improving the regulation of non-State Islamists is a desirable practical outcome. The proposed solutions revolve around the central thesis that if the justification or pretext for the recourse

¹ Kris Kristofferson "Me and Bobby McGee"
² Tanja Mikulic (a former refugee from Bosnia and Herzegovina) 'Women and Girls in War: The Case of Bosnia and Herzegovina' (Speech delivered at the Australian Red Cross Forum on Women and War, Canberra, 22 November 2007.
³ Disputes between States are largely regulated by international law, broadly speaking, governed the Charter of the United Nations (UN), and the organs of the UN, areas that are covered as comprehensively as practically possible under the current international regime.
⁴ The use of the term 'non-State actors' in international law is arguably broad and far reaching. In theory it can encompass the activities of entities that are not States and include multi national corporations, terrorist groups, international non governmental organisations among others. In the context of the use of force however, the use of the terminology 'non-State actors', as opposed to liberation fighters or guerrillas etc, in the 'terrorism context', to describe groups such as al-Qa'eda has been approved by leading publicists and is adopted as a convenient shorthand in this thesis: See for example Cherif Bassiouni (ed) International Terrorism: Multilateral Conventions (1937 -2001). International and Comparative Criminal Law Series (2001), xxvii.
⁵ The monumental changes occurring in the Middle East early 2011, in the so called 'jasmine revolution' in Tunisia, Egypt and in other places is noted but is not considered in any detail.
to the use of force is the underlying injustice faced by a people, then, and subject to the availability of a suitable judicial forum and a recognised law, law could reasonably be used either to address the injustice in a non-coercive manner or else expose those who would use or exploit the misfortune of others to drive their own violent agendas. On the other hand this thesis contests the validity of the notion of a ‘single’ law for all and notes the jealous, pragmatic guarding of jurisdiction even by ‘activist’ justices such as Sir Anthony Mason, former chief justice of Australia. It is also submitted that plurality in a civilised world must encompass not only the laws of ‘the strong’, but also the laws of the numerically, economically or otherwise considered weak, subject only that such law is just, good, fair and equitable, a concept further explored in chapter 7.

This analysis takes it as axiomatic that the concept of the rule of law, or at least the desire by people for a rule of law regime, is universal, and largely is independent of how this regime is constructed as a polity. While on the one hand this assertion might prima facie appear unsupportable given some Islamists’ preference for violence, armed activity by Islamists appear to be aiming in cases to establish, the shari’a which from their perspective is a complete system of law. The subjects of this thesis, Islamist non-State actors, are those inter alia who purport or aspire to ‘live by Islam’ and under ‘the laws of Islam’. The shari’a is arguably the law of the people,

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8 Jennifer A Widner, Building the Rule of Law: Francis Nygadi and the road to judicial independence in Africa (2001), 9. examines the centrality of establishing a rule of law regime in the African context, and can with appropriate adjustments also generally be analogously applied to non-African Muslim States. According to Joseph Raz, The Authority of Law: Essays on Law and Morality (2nd ed, 2009), 212:

[...] in political and legal [the theory rule] has come to be read in a narrower sense, that the government should be ruled by the law and subject to it. The ideal of the rule of law in this sense is often expressed by the phrase ‘government by law and not by men’.

It is conceded that the notion of the rule of law is not universally accepted as an unmitigated ‘good’. The Nazi’s oppressed people with positive law. It is acknowledged that the notion of the rule of law is complex and can have contrasting meanings: Lord Thomas Bingham, ‘The Rule of Law’ (2007) 66 Cambridge Law Journal 67, 67. There are also others with much stronger views on the issue: John Hasnas, ‘The Myth of the Rule of Law’ (1995) Wisconsin Law Review 199. Stephen Bottomley and Simon Bronitt, Law in Context (3 ed, 2006), 59 78. also discuss the issue in some depth.
viewed by some as a birthright of a Muslim and is analogous to the notion of the common law as the birthright of an Englishman.⁹

As a general proposition, law is likely to have the greatest impact and give the best results for both negotiation and prosecution when that law is significant to the parties. This system for Muslims is broadly known as the *shari’a* even though it is not always clear exactly what different people mean by the term and, which therefore needs clarification.¹⁰ A crucial proviso however, is that for outcomes under this law to be accepted as valid and fair by the international community, both the law and its application must meet objective minimum standards that are acceptable to a significant segment of the international community, and which must include a reasonable number of people within the UN or international legal community.

The ‘serious crimes’ examined in this thesis with a view to prosecution are those broadly falling within the meaning of the Rome Statute of the International Criminal Court (‘ICC’, hereinafter referred to as the ‘Rome Statute’).¹¹ All defendants generally have a substantive right under international law to ‘a fair and public hearing by a competent, independent and impartial tribunal’.¹² This thesis posits that even Islamists, charged with a serious crime, are entitled to be subjected to the due process benefits of these binding international norms and humanity is best served in not diminishing their rights, however despised those people may be as ‘the universal enemy’.¹³ A countervailing consideration strongly advocated in this thesis is that the specific expressions of a ‘right to be heard,’ and that

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¹⁰ The terms Islamic law, *shari’a* and *shari’a* law, which are substantially equivalent for the purposes of this thesis, will be used interchangeably. The meaning and scope of the *shari’a* are explored more fully in Appendix 1. In brief, in its traditional and historical form the *shari’a* is derived from the Qur’an and the *sunna*, and therefore, is significant to observant Muslims.

¹¹ Art. 6, Art. 7 and Art. 8 *Rome Statute of the International Criminal Court*, Came into force on 1 July 2002 (with the ratification of 60 States), U.N. Doc. A/CONF.183/9, (as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999), 2187 UNTS 3. U.N. Doc. A/CONF.183/9, as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999. (hereinafter the Rome Statute). This thesis will not examine all three crimes in detail but will concentrate on genocide in some detail (see Appendix 3) and war crimes in less detail.


of a fair trial under international law, are predicated on the premise that for a meaningful expression of these rights, one must be subject to a system that is of significance to the person asserting the right, which in the case of Islamists is the shari’a.

To engage the accused in the trial process, both genuinely and actively, (as suggested and explained in the body of the thesis), will prima facie provide both the defendant and victims substantive justice and not merely procedural justice, mere revenge or a Pyrrhic victory. Further, as a shari’a option, the victim may (or may not) seek to exercise personal discretion, within the limits of the law, to assist a tribunal in formulating a penalty for the guilty. Such engagement by both defendant and victim may help to modify behaviour and thus reduce the further desire or ‘need’ to resort to violence to settle legitimate and sometimes even existential concerns. Equally importantly, a fair trial will also help to distinguish the criminal who masquerades as a martyr.

In the past, those who have committed such serious crimes have been dealt with in different ways. Various jurisdictions have opted for a range of remedies, from Truth and Reconciliation Commissions, to prosecution and of course tragically in other instances even mob rule, gratuitous violence and crude revenge. For example, in the aftermath of the violence in Rwanda and the former Yugoslavia, the Security Council provided for specific tribunals. Further, the Rome Statute also now provides for the prosecution of individuals both within domestic courts and on the international plane.

In considering the prosecution in domestic jurisdictions of Muslim-majority States (hereinafter referred to simply as Muslim States) which are largely secular, one must take cognisance of some discrepancies and gaps which can cause substantial problems between the concept and execution or ‘delivery’ of justice. This is especially important with respect to the

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14 Article 11(1) of the Universal Declaration of Human Rights 'states (emphasis added): Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence [sic].

15 Article 1 of the Rome Statute.
Muslim State or States with which an Islamist, has a nexus. The term ‘Islamist’ is used in its general contemporary context.\textsuperscript{17} However, even in a legal system which has normative significance to the accused, failure to provide an accused person the right to a fair trial brings with it the danger of injustice. The absence of a legal or practical recourse to justice for the defendant and access to fair redress or available remedies for the victims in the view of this thesis, is also unjust.\textsuperscript{18} While the opinions such as those of Meron open up the discussion on law, they nonetheless represent a largely Western view, and to some degree includes an international view. Still it is argued here, even publicists such as Meron do not quite encompass the Muslim, Hindu, Confucian or other great civilisations in a comprehensive sort of way. This thesis posits that a recognition by a defendant of the legal tradition under which one is being tried must be considered one of the guarantees necessary for one to be able to effectively and best defend oneself.

It is a truism that the trend in the 21\textsuperscript{st} Century is towards ‘democratisation’.\textsuperscript{19} A crucial question with respect to Muslims and Islamists here is: what is the legal system of normative significance? The wish of the Muslim majority, as expressed where available in relatively free and fair elections, for the shari’a has arguably been demonstrated in States such as Algeria, Iraq, Turkey, Jordan, Indonesia, Pakistan, Bangladesh, Mauritania, Malaysia, the Occupied Palestinian Territories to mention a few. Some Muslim countries either do not allow ‘Islamist’ parties to take part in their electoral process or do not conduct periodic elections of any form. However, notwithstanding the woeful state of legal and political development in some of these jurisdictions, this is the legal system that would most likely apply, in preference to the status quo (generally the legal system of the once ruling Colonial power), if effect was given to the majority’s views. This in no way minimises the attendant problems with


\textsuperscript{17} While the terms Islamist, \textit{djihadist} and Muslim are often used interchangeably; this practice is not strictly speaking sufficiently precise when speaking of legal obligation.

\textsuperscript{18} Theodor Meron, \textit{War Crimes Law Comes of Age} (1998).
the substantive content and perception of the *shari’a* which are both addressed in context.

In addressing this issue, President Khatami of Iran noted the ‘backwardness’ in Muslim States, including their ‘legal backwardness’.\(^\text{20}\) For example a child (including a Muslim child,) who has acquired a substantive right to be heard in judicial proceedings\(^\text{21}\) can lose this and perhaps even other substantive rights simply as a result of the crude application of the *shari’a* in some Muslim States.\(^\text{22}\) Such an untenable situation demonstrates the problem of prosecution of serious international crimes in domestic jurisdictions, particularly because many of these States appear to lack adherence to even the minimum international standards that the prosecution of such serious crimes would warrant. While Khatami confined his statement to the standards of justice in Muslim States, similar concerns also apply to other less-developed countries (LDCs), and in some cases even developed countries. For example, John Taylor of Liberia (an LDC) and Slobodan Milosevic of Serbia (not an LDC) were arguably not tried in their own domestic jurisdictions because their domestic legal systems were somehow seen as unsuitable or deficient.

Therefore, fairness and justice require that notwithstanding the ‘complementarity’ provisions of the Rome Statute,\(^\text{23}\) and for reasons alluded to above, trials for the most serious breaches of international criminal law (ICL) by Islamists should take place on the international plane, in free, fair and transparent trials and under a legal system recognised and accepted as binding by Muslims.

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21 Article 12(2) *Convention on the Rights of the Child*, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, (hereinafter CROC). If this is not a ‘right’ *erga omnes*, then it is at least a right for nationals of States party.

22 Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (2008), 88. points out some absurdities that can result from *shari’a* based reservations where girls acquire rights under CROC which they lose when they become adults.

23 Article 1 of the Rome Statute.
The Central Question
This thesis limits its scope to the examination of the use of force, under a particular interpretation of the *shari'a*, by non-State actors, as an area that needs addressing. The narrower, more specific question examined is the *shari'a*’s suitability for dealing with legality, of the contemporary use, or threatened use, of force by non-State Islamist groups. Such groups often work together formally or informally, sometimes to achieve strategic ends, for reasons variously termed ‘fighting for Islam’ or being engaged in *djihad* or ‘holy war’ (one of *djihad*’s less accurate contemporary definitions).

Consequently, how the *shari'a* can be used to regulate this behaviour, particularly with respect to minimising recourse to the use of force, is examined by (1) identifying the lawful pre-conditions for the use of such force and (2) identifying the legitimate means that may be employed during armed conflict.

An underlying subtext is the perception that Islam and its legal and theological traditions somehow predispose Muslims to wanton violence, and that introducing the *shari'a* into the equation cannot ipso facto be helpful. This perception is examined in some detail in Appendix 1, and concludes that this perception cannot reasonably be founded either in law or fact. The general purposes and content of the Appendices is more fully explained below.

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24 Michael Wood, 'Nécessité et Légitime Défense dans la lutte contre le terrorisme: Quelle est la Pertinence de l’Affaire de la Caroline Aujourd’hui? N’a pas de loi?' (Paper presented at the Colloque en Grenoble: la nécessité en droit international, Grenoble 2007) 286, observes rightly that ‘proof of the threatened use of force is difficult to obtain’.


This list confirms that all ‘Muslim’ organisations listed are generally associated with *Sunni* majority societies. For example while Saudi Arabia and other Persian Gulf Arab States have significant *Shi’i* minorities, these societies would still generally class themselves as *Sunni*.


27 While generally, it would appear unnecessary to answer this and similar questions, some commentators consider Islam an abomination, and therefore for safety the relevant questions are examined, in a substantial manner in the Appendices. The body of the thesis is the main treats the *shari'a* as a system of law which falls within the meaning of Article 38(1) of the Statute of the International Court of Justice (1945) (ICJ).

28 Please see Thesis Structure and Layout, 34.
On the other hand, Muslim history shows that its civilisation has not backed away from the use of force. In practice though, except in its very early period when Muslim leaders were strongly guided by the shari'a, Muslim attitudes do not appear to be significantly different from those of other civilisations in their use of force to achieve their strategic and material ends. However, Islam is also constrained by its own laws, mores and moral standards. This thesis posits that these qualities can, potentially act as a significant restraint to Islamist violence. The intent is not completely to de-legitimise the use of force to effect necessary change – as the concept of a 'legitimate struggle' is known in international law — but instead to circumscribe the legal means by which this use of force can be regulated and thus minimised. This could be achieved by engaging and activating the peaceful means of dispute resolution under the shari'a, an area that is greatly neglected. That is, to identify the steps that a Muslim must exhaust before resorting to the use of force and then identify legal norms with respect to the use of force, the breach of which can be prosecuted under the shari'a.

Al-Qa'eda
Further, this thesis will concentrate on the operations of al-Qa'eda, the 'Islamist group' recognised by the USA, but is not meant to be a prescriptive definition as it's membership can in cases be difficult to ascertain for it’s necessarily secretive and nebulous nature, (and it’s associated groups when necessary) as a case study. Al-Qa'eda is an

31 The word al-Qa'eda (اَلْقَاعدة) means 'the base' and in the early days was a term rarely used by Osama bin Laden (although he later used the term for impact): Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 108. The term was apparently first used in English by the CIA in 1996: Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 108 n 3. Al-Qa'eda as used in this thesis refers to the use of the label in several forms, for example al-Qa'eda in the Arab Peninsular, al-Qa'eda in the land of the two rivers (Iraq), Al-Qa'eda in Darfur, in Somalia or in Russia (Chechnya, Dagestan and Ingushetia). The term is used broadly to encapsulate self identification with al-Qa'eda or to include those who subscribe to its ideology and methodology and is not meant to be a comprehensive definition. Al-Qa'eda is also recognised as a non-state entity by the US: Sec 2(1)(i) George W. Bush, Military Order of November 13, 2001 (Military Order No. 1): "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism". (2001).
32 According to P J van Krieken (ed) Terrorism and the International Legal Order (2002), 14, there is not a single fixed definition of terrorism that is broadly agreed upon. On the
appropriate subject as it is well known and also because it has an effect on the debate that is hugely disproportionate to its constituency, arguably because it is allowed to inspire great fear even among powerful States. Al-Qa’eda’s own intransigence can be matched equally with the ‘liberal’ or neo-conservative extremes in the West. However characterised, each extreme views the other’s position as being incompatible either with ‘humanity’ or ‘God’s law’. Both extremes portray the world as irreconcilably polarised, yet when juxtaposed, aid in locating a more reasonable ‘middle ground’.

Al-Qa’eda inter alia is committed to establishing and upholding, through force if necessary, the *shari’a* – the scope of which in theory it defines from a particular Sunni perspective. It is on this *shari’a* basis that al-Qa’eda et al seek to regulate at least their own particular Muslim societies, if not the entire Muslim community (or *umma*). Equally therefore, the *shari’a* can be considered binding on al-Qa’eda, making it the natural choice of law to regulate al-Qa’eda’s actions, including with respect to their use of force. It is conceded that the ‘facts’ surrounding al-Qa’eda, including that the identity of its key players are sometimes ‘muddled’, confused, unknown or unsettled and that specific conclusions that have been drawn with respect to their activities may consequently be contested. The global issues of principle and the broader conclusions drawn from this analysis, however, are very unlikely to be greatly affected by these uncertainties. Al-Qa’eda’s past and possibly future actions also embody the kind of legal issue that confront jurists.

**Humanitarian Law**

In Islam, as in international humanitarian law (IHL), ‘the means of inflicting harm upon the enemy are not unlimited’ and the *shari’a*

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33 Article 22 *International Convention with respect to the Laws and Customs of War on Land [Hague II]*, The Hague, 29 July 1899,
prohibits certain means of fighting. These limits, can form the basis for creating shari’a crimes, and for criminalising such behaviour during armed conflict. There are differences between IHL and the shari’a laws of war or shari’a humanitarian law (SHL) as referred to in this thesis. SHL is not a recognised term, is nascent concept in contemporary law and was coined for this thesis as a form of shorthand. For example, while the concept of ‘the liberation movement’ or struggle is known and reluctantly tolerated in contemporary international law, it will be shown that Islamic law emphasises that a state of justice is mandated not only for Muslims and calls for the elimination of all injustice as a positive obligation through the use of force if necessary. Further, shari’a views on fighting, justice, life and the reason for human existence, among other issues (peripheral to the main issues examined in this thesis and consequently as discussed in Appendix 1), are also in many ways fundamentally different from the moral yardsticks underlying the current secular international legal regime, signalling potentially significant differences with respect to the regulation of the legitimate use of armed force. It is shown that these differences however, are not irreconcilable and some ‘middle ground’ is identified.

In general, under the current international regime, States have a monopoly on the use of force. The ‘cross-border’ use of force affecting most non-P5 countries is strictly governed by the UN Charter, customary law and treaty obligations. States’ use of force within their own borders and particularly against non-State entities appears to be a less restrained. On the other hand the shari’a permits the use of force only under strict


36 Qur’an 4:135. Qur’anic verse numbers are indicative only. The actual verses, and particularly the verses with legal content, in most cases are long and address several issues and subjects, i.e. subjects broader than the area indicated to in the footnote. Unless stated otherwise all references to the Qur’an are to, Abdullah Yusuf Ali, The Holy Qur’an: Translation and Commentary (1980). Verse numbers sometimes vary in other translations, for reasons which are not examined here. Yusuf Ali is arguably the most popular contemporary English rendition. It is conceded that every translation is an interpretation and can have an impact on the ‘true’ meaning and thus affect the interpretation as used in this thesis.

37 Qur’an 2:190.

38 The term P5 is used as an abbreviation for the five permanent members of the UN Security Council.
circumstances irrespective of who is using such force. Although the use of force by the Muslim sovereign (leader, caliph or king, and read here as ‘State’) is permitted under the shari’a, the same strict rules that govern the individual, prima facie appear to apply to the behaviour of ‘States’ as well. That is responsibility for collective acts, under the shari’a must still be sheeted back home to an individual.

Further, the differences between international law and Islamic law on the use of force are much more nuanced and complex than some contemporary analysis would suggest. Without overstating the point, this mismatch causes some dissonance within Muslim societies who are in the main, it appears, forced to submit to secular legal traditions even within Muslim-majority States.

Establishing a Baseline: Who is the Gatekeeper?

While there is some reasonable opposition to the use of the shari’a by both non-Muslims and Muslims who prescribe secularism, it is equally reasonable for others to want such law, and/or even to oppose the use of non-shari’a-based judicial institutions for Muslims. That is, practising Muslims may, in good faith and conscience, refuse to recognise the jurisdiction and validity of extra-shari’a secular laws including ICL and IHL. It appears arrogant and ‘mean spirited’ for the world community to refuse them the right to be tried by their own ‘civilised law’, particularly

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39 While not directly to point, the common law and the shari’a have co-existed in may jurisdictions within the British Commonwealth of nations and have arguably managed to co-exist, adapting in offer to do this. Procedurally, some shari’a requirements, particularly in the civil jurisdiction, can be satisfied within the common law framework. For example, succession under the shari’a can be very easily be given effect under the common law notion of freedom of testation. While this level of formal law can easily be accommodated, the reasons for shari’a division of an estate is under laid by a complex process and understandings of kinship and is affected by the Islamic characterisation of the nature of ‘property’ its uses and ‘ownership’ which in cases can be completely different to the common law understandings of these otherwise superficially very similar concepts. In the area of criminal law, the matter can become even more complex.

40 These particular words, used in Article 31(2)(d) of the Statute of The International Court of justice, are words from a different era and arguably, do not hold much significance in the laws of the 21st Century. Note that the rest of the article provides the legal basis for the sources of international law. While the authors describe Islamic civilisation as ‘intransigent’, they nonetheless do not deny it the character of civilisation: Patricia Crone and Michael Cook, Hagarism: The Making of the Islamic World (1977), 107. On the other hand, it would be disingenuous to imply that the framers of the Statute of the ICJ seriously contemplated considering Islamic law as a source of international law. However, this aspect is not fatal if one gave less weight to the ‘framers’ original intention’ view of the Statute and took a broader view that the Statute must be construed in a contemporary light. Lombardi makes the point that the case ‘for’ Islamic law made by judges of the Court is not strong because of their limited
as discussed in Appendix 1, given the centrality of law to the Islamic faith. As a matter of Islamic law, a believing Muslim must not judge (and thus arguably and consequently a fortiori must not agree to be judged) other than under the shari'a. At any rate, as a matter of principle, a desire to be tried under one's own law is not and should not be viewed as an unreasonable request. When there is an option to do so, many secular States and leaders may rightly refuse to subject their citizens to laws including secular laws other than 'their own'. Such sensibilities however, must be respected universally and not applied arbitrarily to suit the powerful.

There is also a broader reason for advocating the use of the shari'a. It is argued that a shari'a perspective can provide some answers which at present appear to elude the international community. This perspective has at times manifested this dissonance through violence, sometimes at great human and material cost. Thus a practical Islamic legal perspective on the use of force would help to 'fill-in' some of the gaps created by an analysis based solely on a secular model. However, while the differences between the Western and Islamic legal traditions may at first glance appear substantial, the laws that result are not significantly different, arguably engagement with Islamic law: Clark B. Lombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis' (2007) 8 Chicago Journal of International Law 85, 99. See also generally Ford who questions the assertion that the Statute provides a legal basis for the inclusion of Islamic law in International law: Christopher A Ford, 'Siyar-ization and its Discontents: International Law and Islam's Constitutional Crisis' (1995) 30 Texas International Law Journal 499. Finally and in a pragmatic sense, William McCants, Jarret Brachman and Joseph Felter, Militant Ideology Atlas: Executive Report, (2006) 5. The US Government recognises that change must occur from within Muslim communities, that external influence is limited and that:

It is their own thinkers [that] are best positioned to influence their base [...]  

41 Norman Anderson, Law Reform in the Muslim World (1976), 1.  
42 Qur’an 5:47.  
44 For example the USA, China and Russia have all yet to ratify the Rome Statute.  
45 The West has for most part tried to stop Islamist violence through the use of force, particularly after 11 September 2001. The levels of violence however, in the theatres of operation, seemed to have increased. In contrast the methods used by the Indonesian authorities to limit violence in Indonesia, through a combination of understanding of the phenomenon and punishments have helped to reduce the levels of violence in that community: Di Martin, 'Tackling Indonesian terror' in Background Briefing ABC, 23 September 2007. The Indonesian approach, broadly speaking, is examined in some detail in this thesis.
because what is considered ‘criminal’ in both legal traditions is rooted in the Mosaic Law.46

Further, this work is concerned with both legality and legitimacy.47 It is, however, not a critical examination of the shari‘a but rather accepts the shari‘a as a normative system of law adaptable and adapting to contemporary exigencies. However, the shari‘a criminal law ‘as is’, requires some development for use in contemporary legal processes, the scope of which is examined. An important aspect of this examination is to ensure that this development will not create injustice for others and that such possibilities, if present, are highlighted. For the purposes of this thesis inter alia this means ensuring that the laws and processes so derived, while independent, are, to use one yardstick, not inconsistent with the principles and practices of general international (criminal and humanitarian) law.48

An important shari‘a consideration is that God forgives transgressions against ‘God’s rights’ but generally does not forgive wrongs done by one person to another, only the victim or his/her agent being legally competent to forgive that wrong.49 A temporal mechanism for providing justice between individuals is therefore of utmost importance in Islam.

To this end this thesis recommends and attempts thereby to encourage the international community to institutionalise core (and, it is argued in most cases, universal) shari‘a values as augmenting the present international order. Augmentation however, can sometimes, unfortunately and simplistically, be viewed by some Muslims as an imposition of ‘Western’ values. Note however, that as an Abrahamic faith Islam does indeed subscribe to many of these same values. Further, Muslim States unilaterally have subscribed to certain minimum customary standards,


47 According to Deina Abdelkader, Social justice in Islam (2000), xi. ‘ justice has become the first and most fundamental objective of the Islamic awakening’.

48 Harmonising the shari‘a with international law can be viewed as intra vires because Muslim nations are bound by the UN Charter and also to general international law under shari‘a treaty law as discussed below.
through the UN framework, that must apply to the administration of justice. That is, these norms and customs must apply *erga omnes* including to Muslims because, as is discussed, these instruments are binding under *shari’a* treaty law.

Some Western scholars appear to point to an incompatibility between Islamic law and a Western notion of international law. Although this is clearly a legitimate perspective, it is not a relevant consideration, as an aim of this exercise is to broaden the scope of the representative nature of international law, not to make all laws subordinate to a notion of what is politically desirable. It is noted however, that commentators such as Abuza make the misleading and unsubstantiated link between a desire for *shari’a* law over secular law, and a lack of tolerance, moderation and pluralism, which in turn, in his view, leads to terrorism. It is true that some Islamist groups engaged in ‘terrorism’ — such as al-Qa’eda — call for the application of the *shari’a*. This link alone is inconclusive as other ‘terrorist’ groups such as the African National Congress, the Tamil Tigers or secular Muslim liberation groups call for secular laws, while no equivalent general link is made between ‘terrorism’ and secular legal

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51 This desire appears to reflect a general aspiration as reflected by non-Muslim delegates to the UNGA: For example, 18 U.N GAOR C.6 (805th meeting) para. 16, U.N. Doc. A/C.6/805 (1963) (Delegate for Ceylon); 1 Y.B International Law Commission 65 (1963) (Indian View).

52 According to Zachary Abuza, *Militant Islam in Southeast Asia: Crucible of Terror* (2003), 1:

> Islam in Southeast Asia has always been defined by tolerance, moderation, and pluralism. Most of the inhabitants of Southeast Asia support the secular state and eschew the violence and literal interpretations of Islam that have plagued their South Asian and Middle Eastern co-religionists. Only a small minority advocates the establishment of Islamic regimes governed by *sharia*, law based on the Quran.

Certainly Islam is not the only faith tradition or ideology beset by problems of a minority. The tiniest number of paedophile priests has effected the Catholic Church significantly. The atrocious behaviour of some settlers in the Palestinian Occupied Territories has tarnished the many Israeli Jews and a numerically insignificant minority of rogue US soldiers abusing detainees at Abu Ghrabi or Guantánamo have sullied US military and the nation.

53 For example, the Palestinian Liberation Organisation / Palestinian Authority and the PKK (*Partiya Karkerên Kurdistan* or Kurdish Workers Party).
traditions on the grounds of their terrorist actions alone. The shari'a is a system of law and should be treated on its merits rather than dismissed out of hand merely because of an emotive link with 'terrorism' or with radical Islam. On the other hand, critique of the shari'a (as with any system of law) is clearly legitimate and necessary, but for a useful outcome, such criticisms should be fair and objective.

Further this work aims to propose means of adapting shari'a criminal law with reference to its own norms, in an internally consistent manner, and with minimal reference to 'external paradigms'. It also seeks to avoid reference to some 'perfect' external, and for the purposes of this thesis, Western, legal standard. Adherence to 'minimum' international standards is advocated not because these are Western values, or because they are 'ideal', but because Muslim States have acceded to these obligations via treaty or customary law and therefore provide an objective baseline.

A question for this thesis therefore becomes: how can serious breaches of international norms by Islamists be prosecuted in a fair and transparent manner, under the shari'a, which results in judicial decisions that are perceived as 'fair' by Muslims generally, the international community and the defendants themselves, and operate within international standards of fairness and justice? To this end, chapters 6 and 7 outline a four-step process leading to two recommended and thus proposed solutions; one for the medium term and the other, long term.

To be liable for prosecution, fighting has to prima facie be unlawful. In order to get to this point, a subsidiary aim of this thesis is to demonstrate that there is a sufficient body of shari'a law and jurisprudence or alternately, that legal methodologies exist that will enable the development of such contemporary law within a reasonable timeframe. Universally recognised Islamic legal sources are identified and examined in Appendix 2 and the sources most likely to assist in the process of creating new laws within this legal framework are highlighted. While this information is important generally, it is placed in the appendices. This is because the sources, their object and purpose and their broader aims with respect to the
human soul, while important, are in a practical sense peripheral to this particular exercise, which in the main focuses on the application of aspects of this law.

Armed conflict under the shari'a is discussed in chapters 2 through 5. These chapters examine the key differences between the shari’a and current international custom. Chapter 6 examines how these differences may be identified and addressed in a systematic, on going and principled manner, ensuring that they are not be overstated, understated or pragmatically swept aside, as has sometimes been the case in the recent past.

The UN General Assembly’s (UNGA) desire to harmonise international laws and the concern it expressed on the fragmentation brought about by the diversification and expansion of international law is noted. It is proposed however, that the harmonisation of laws must be considered a subsidiary issue when compared with the UN’s broader policy of representing the laws of different civilisations within the general rubric of international law.

The caveat in this thesis is the criterion of a fair trial must be applied equally for the trials of all defendants considered. It is further recognised inter alia (due to radicalisation in Muslim States, coupled with a significant ignorance of the shari’a), all citizens but particularly non-Muslim minorities (in Muslim States) reasonably may fear the application of the shari’a per se, and ergo must be assured, for example by adopting appropriately strong legal and procedural protections, that the shari’a humanitarian and criminal laws as discussed in this thesis is binding on Muslims only. This particular issue is much more nuanced and complex than is indicated here and beyond the scope of this thesis.

**Methodology and Structure**
The general methodology employed in this thesis is that of comparative legal analysis (and when greater specificity becomes necessary, informed

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by events, developments and matters touching upon Australia\textsuperscript{55}), principally covering international law, the common law, and the \textit{shari'a}, starting from a ‘positivist’ base of examining sources.\textsuperscript{56} While the examination of a religious law could be expected to follow a natural law methodology, these terms are avoided because an impartial observer would arguably categorise the \textit{shari'a} methodology as positivist.

On the other hand, this work also attempts to go beyond the narrower ‘black-letter’ approach to highlight the aims and spirit of the \textit{shari'a} by examining relevant legal provisions from a broader legal and policy context. The broader context is often neglected in studies of contemporary legal literature, resulting in representation of Islamic law as harsh, inflexible and punitive.\textsuperscript{57} In this context Appendix 1 attempts to highlight the ‘spirit of the \textit{shari'a}’ by examining its raison d’être. It is not a missionary approach i.e. it does not attempt to ‘convert’ the \textit{shari'a} lawyer into a common lawyer (or vice versa). This analysis attempts to view the \textit{shari'a} as it was experienced by its proponents but also tries to avoid an instrumental or selective approach.\textsuperscript{58} Unfortunately there is not a shared understanding between the two legal traditions, or a common understanding of many legal terms, and one thus has to be careful when drawing conclusions based on translated terminologies and concepts. This work also introduces terms such as the \textit{shari'a} humanitarian law (SHL), a concept that is known in the \textit{shari'a} but a term, as mentioned, specifically coined for this comparative analysis with IHL. Also a work of this nature, will necessarily touch upon a broad range of disciplines, terminologies and

\textsuperscript{55} This choice of Australia it is conceded appears parochial. In defence it is submitted that most other comparable Western jurisdiction \textit{mutatis mutandis} would equally be illustrative and therefore, arguably apt.

\textsuperscript{56} The shortcomings of a positivist approach can be seen with respect to systems of law such as the Nazi legal system and are acknowledged: Ronald Dworkin, \textit{Laws Empire} (1986), 104. However, as a universally recognised legal tradition that has stood the test of centuries, this critique arguably cannot reasonably be brought to bear on the \textit{shari'a}, although no doubt there is a tiny minority who would undoubtedly hold this view, perhaps a view it is posited held on emotion rather than one based on objective fact.

\textsuperscript{57} It is not suggested that this is a non-Muslim view. Jurists employed legal devices (\textit{hiyal shari'a}) by which an act may seemingly be lawful (or in accordance with the literal reading of a provision) but attempts to defeat the spirit or the general purposes of the law: Majid Khadduri, \textit{The Islamic Conception of Justice} (1984), 151; N J Coulson, \textit{A History of Islamic Law} (1964), 140.

\textsuperscript{58} For a brief description of this phenomenon in the contemporary context see for example Ebrahim Moosa’s foreword to Wali Allah Shan, \textit{Shan Wali Allah’s Treatises on Islamic Law} (2010), viii.
methodologies but unless directly relevant will avoid their controversies, nuances and subtleties, principally for space but also to avoid distraction from examination of the key issues of importance to this thesis.

There are possibly as many solutions to the problems of the 'unlawful' use of force by Islamists as there are people who would care to think up solutions. This thesis is one among the many such perspectives. The need for this study is that contemporary solutions do not appear to have a significant impact on the problem and therefore it is time for others to examine alternative means of addressing the issue. The central question examined in this thesis can alternately be stated as a methodology, and the perspective taken here is straightforward: let us examine the possibility of using law, and in this case Islamic law, which is significant to Islamists, to try to regulate their use of force and to distinguish and identify use of force that is clearly legitimate, thereby providing a universally understood and Islamically acceptable basis for comparison.

As mentioned earlier, the contemporary political trend is towards 'democratisation' in all States including Muslim States. On the other hand the use of force has also been successful in changing governments including ending occupation and colonialism. More recently, the West used force to replace governments in Iraq and Afghanistan. The free and fair elections that followed say in, Iraq, Afghanistan and the Palestinian Entities, have arguably shown a desire by a majority of the voting population for Islamic institutions, governance and ethos, albeit expressed uniquely and differently as a combination of Islam and democratic institutions. According to Ku and Jacobson, democratisation has two elements, (1) the rule of law regime and (2) majority rule. The perspective taken in this thesis accords with the notion that ideally, freedom and human expression best flourish when the principle of the rule of law finds full effect. The examination of the political issue of majority rule however,

60 Ibid 6.
61 Ibid 8.
is beyond the scope of this thesis although the shari'a legal notion of 'Muslim consensus' (as it relates to law) is examined in some detail.

Islamic law spans a period of approximately 1,400 years and it is therefore necessary to identify the significant periods of shari'a legal development. This work concentrates on the early period with respect to sources because of its proximity to the revelation of the Qur'an and establishment of the sunna of the Prophet. This period is widely considered the most authentic period.

With respect to the subsequent processes of the development of law after the passing of the Prophet, the period of the orthodox caliphs is included, though their widely accepted place in generating precedent is discussed in Appendix 2. Further, the works of the eponyms of the surviving legal Schools and some of their better-known followers through time, and whose works survive, are also examined. In addition to these significant periods, the works of contemporary scholars, although patchy in their scope, are nonetheless in some cases, highly persuasive vis-à-vis the shari'a's 'adaptation' to operate in the contemporary context.

However, the criminal and public law (siyar) aspects of the shari'a of interest here, have remained fairly stagnant for the last five hundred years or so and there appears little opposition to this view. The practical use of the shari'a thus inter alia requires reversing this stagnation, a process that has begun in some national jurisdictions and in the works of contemporary scholars, but for the legal backwardness of Muslim States, would be better served by development on the international plane.

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62 For a very brief examination of the related notion of leadership under the shari'a see chapter 2, 31, 40.

63 The author explicitly concedes that there is much material that has not been researched, and therefore not all of the available legal material has been referred, primarily because, in addition to the time-span issue alluded, much of this material is available only in Turkish, Malay, Persian or in other languages and have not been translated into English or are not easily available in Australia via inter library loan from overseas. This lack of access is likely to be viewed as a significant shortcoming of this work. It is asserted that the material referred to has been used as correctly and as closely as possible to be within the spirit of the intent of the original authors.


This thesis inter alia seeks to survey the material described above to demonstrate the existence of an Islamic jurisprudence, legal theory and methodology capable of re-interpreting the primary provisions of independent shari'a sources by examining Islamic law in its relevant contemporary contexts. The specific examination of the crime of genocide, comprehensively in Appendix 3 (for space) and, more briefly in chapter 3, war crimes, arguably illustrates the adaptability of shari'a principles for contemporary use.

The Qur'an asserts its eternal validity and must, for internal consistency therefore, be capable of constant renewal. This development is possible principally because even though some basic principles of the shari'a remain unchanged and unalterable, much more of the shari'a is adaptable to contemporary needs. Scholars of the past, and present, have in many cases demonstrated this phenomenon.

A crucial shari'a requirement is that legitimate development of the shari'a must fall within the scope or 'aims' of the shari'a; referred to as the maqasid al-shari'a (or the object and purpose of the law), the theory and underlying principles of which are discussed in Appendix 1 and Appendix 2, and applied to the case of armed djihad and other manifestations of the use of force in chapters 2 to 5. It is demonstrated that giving due consideration to the 'spirit' of the shari'a is not an insurmountable or even a practically substantial adverse issue with respect to prosecuting serious crimes against the person.

nature of the shari'a as a jurist's law is relevant to this statement and is discussed in the body of the thesis.

66 See text accompanying n 20, 6.
67 See Appendix 2.
68 See Appendix 3.
69 Article 57 Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977. The term 'grave breach' of the Geneva Conventions has been replaced in this context by 'war crimes' since API was adopted. See Article 85 API, and particularly Article 85(5). This diesis uses the terms interchangeably as appropriate.
70 Qur'an 15:9.
71 See generally: Ahmad al-Raysuni, Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law (2005); Wan Azhar Wan Ahmad, Public Interests (Al-Masalih Al-Mursalah) In Islamic jurisprudence: An Analysis of the Concept in the Shafi’i School (2003), 9. The concept of 'maqasid al-shari'a' now appears accepted and settled. It is noted however, that the concept itself evolved and its development occurred [in both Shi'i and Sunni schools] about 300 years after the death of the Prophet: Jasser Auda, Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach (2008), 16.
That is, the *shari'a* is capable of generating current law that is true to the sources both in intent and in form, and legitimate in terms of classical, generally accepted *shari'a* methodology and legal theory.\(^{72}\) It is thus likely to be recognised as valid law by Muslim consensus. Scholars such as Hallaq,\(^{73}\) Hosen\(^{74}\) and others have ably examined the issue of Islamic legal theory in a contemporary context and other scholars such as Bassiouni,\(^{75}\) Malekian,\(^{76}\) El-Fadl,\(^{77}\) Nyazee,\(^{78}\) and Peters,\(^{79}\) among others,\(^{80}\) have persuasively identified both a general compatibility with ICL or have constructed 'equivalent' crimes under the *shari'a*, discussed in subsequent chapters and for convenience, collectively referred in this thesis to as *shari'a* crimes and defined below.

A broad-based and transparent effort by independent scholars and institutions will permit the further principled development of the *shari'a* for practical use and for prosecution in a contemporary ICL context. It will take both a concerted political and legal effort, but one which will allow codification to be accomplished with integrity in a relatively short time.

The *shari'a* comprises both criminal and civil jurisdictions.\(^{81}\) This thesis concentrates principally although not exclusively on the criminal jurisdiction.\(^{82}\) A practical qualification is that a *shari'a* crime for which an action is brought must also be one that draws temporal penal sanction.

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\(^{72}\) See generally in this regard, the several works of Professor Hallaq variously referred to within this thesis.


\(^{74}\) Nadirsyah Hosen, *Shari'a & Constitutional Reform in Indonesia* (2007).


\(^{80}\) There are several great contemporary scholars who write in many modern languages including English, French, Arabic, Turkish, Persian, Malay/Indonesian etc and who will be able positively to contribute to this development, a process that is ongoing even if not recognised as such.

because the shari’a arguably reserves judgment and punishment for some serious ‘crimes’ (e.g. for example hypocrisy and apostasy)\textsuperscript{83} to the hereafter and does not countenance temporal sanctions for these crimes alone.

Creating a workable body of contemporary SHL necessarily includes identifying a ‘base’ body of law, evidence and rules broadly equivalent to and related to IHL for the contemporary situation and the serious international crimes in the meaning of the Rome Statute.\textsuperscript{84} The list of shari’a crimes examined is not exhaustive but will be limited to the serious Rome Statute crimes.\textsuperscript{85}

**Shari’a Crime Defined**

A shari’a crime is defined here as a crime that can be rooted in the sources of Islamic law and whose elements and content are derived using shari’a-compliant legal theory, rules and evidential procedures. The purpose here is not so much to be comprehensive in the scope of coverage of the shari’a criminal law but to draw out the principles, process and policy objectives associated with the prosecution of these crimes. Defining a shari’a crime is also an important precursor to examining the legitimacy of Muslims’ claims of characterising their armed struggles as a *djihad* because if armed struggle can legitimately be characterised as *djihad* then ipso facto, it cannot simultaneously be characterised as a crime under the shari’a (and vice versa).

A key test for the integrity and coherence of the methodology surrounding the creation of a body of law and procedure (and indeed as is discussed in chapter 6 in the development of a Weapons Charter or a shari’a tribunal in chapter 7) is general acceptance of these initiatives (through consensus/\textit{idjma}\textsuperscript{86}) by a great majority of Muslim peoples and jurists.

\textsuperscript{82} Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), at 33. Professor Peters cites the use of Abu Yusuf’s minority position as a basis for the formulation of a general law.

\textsuperscript{83} These shari’a crimes also fail the double criminality test alluded to below. Where the shari’a does not clearly provide for temporal jurisdiction, then such crimes must be left out for safety.

\textsuperscript{84} Art. 6, Art. 7 and Art. 8 of the Rome Statute.

\textsuperscript{85} Art. 6, Art. 7 and Art. 8 of the Rome Statute.

\textsuperscript{86} See Appendix 2 for a discussion of \textit{idjma} or consensus as a source of Islamic law.
General and broad acceptance of legal instruments and institutions is more likely to be engendered if there is a belief that the outcomes or the ‘fruit’ of these instruments or institutions generally are fair and equitable. It is argued that such acceptance is likely to lead to a greater confidence in international law and the rule of law so that deference to the law would result in the avoidance of violence as a means of seeking redress for perceived wrongs.

Who Interprets the Shari'a?
The shari'a is a jurists law. An ‘accurate’ identification of an interpretative community would facilitate the process of validation of law through consensus, a key process discussed in Appendix 2. It is this Muslim consensus that gives law its force. Since in reality the Muslim umma cannot be and is no more homogeneous than are ‘Western society’ or ‘Chinese society’, it is arguably important to identify this ‘interpretative community’ with care. While not being prescriptive about this, an interpretative community for shari'a development, validation and exposition must at least include a community of jurists reflecting the various surviving Schools and legal traditions and perhaps more pragmatically, living in countries with both academic freedom and

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87 That is, a tribunal, its body of law and the judicial decisions, together with its law development and law reform processes.

88 There is an implicit assumption that the rule of law is a desirable outcome and that a commitment to the rule of law is universal at least among the peoples of the world if not their leaders. The notion that the rule of law is an unmitigated good is not uncontested: see n 8, 2. According to Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009). Even Hizbollah (an organisation classified as a terrorist organisation by the USA and some other States) accepted a rule of law regime, dropped terrorism and opted for a ‘classical military struggle’. Some, but not all Marxists, accept the universality of the rule of law: Daniel H Cole, "An Unqualified Human Good": E.P. Thompson and the Rule of Law (2001) 28 Journal of Law and Society.


90 See Appendix 2 for a discussion of idjma' or consensus as a source of Islamic law.

91 However, for the final acceptance of these opinions as law (as it will be shown) the final consensus of its validity will be in the acceptance of the ‘ordinary Muslim' and
freedom of expression so that their work can be reasonably considered as their own un-coerced, independent views on the relevant issues. Development of the law would go towards the declaration of the existence or production of a contemporary body of \textit{shari'a} criminal law that would form part of ‘(the) unified and modern system of Islamic law’ as described by Mohamed Abduh (1849 –1905) the then Mufti of Egypt. 

In formulating the causes of action, the model described by Professor Nyazee is very useful. Broadly speaking, the model consists of an inner core of sources and jurisprudence developed by past jurists on which an outer accretion develops and upon which contemporary lawmakers can draw, to create a new and a further expanding body of law, and bears a strong similarity to the common law. While development in the past has been carried out sometimes in the spirit of the \textit{shari'a} and sometimes expediently, this body of law still has the advantage of being informed by centuries of jurisprudence. Much, but not all, of this accreted jurisprudence is likely to be ‘time specific’ and must be reviewed for relevance and applicability in contemporary society. An examination and establishment of an exhaustive list of actionable contemporary crimes under the \textit{shari'a} and ICL/ IHL is a next step in this process and a mechanism to do this is examined in chapter 6.

Crimes committed during armed conflict may, potentially, simultaneously constitute offences under international criminal law as well as crimes under domestic criminal law, including domestic \textit{shari'a} laws, and this thesis relies on this probability as a starting point. That is, in

\begin{itemize}
  \item[93] Imran Ahsan Khan Nyazee, \textit{The Methodology of \textit{ijtihad}} (2002), 16.
  \item[94] Ibid.
  \item[96] John Duncan Martin Derrett, \textit{An Introduction to Legal Systems} (1968), 54.
\end{itemize}
principle there is bound to be some equivalence under the shari‘a and under contemporary international law of the definition and elements of a ‘criminal act’, a view confirmed by scholars such as Anwarullah. This commonality provides a useful starting point for comparing specific, legally relevant issues under both Islamic law and contemporary international criminal and humanitarian law. The recognition of an act as ‘criminal’ under the two systems is vital, as the question with respect to prosecution then principally becomes one of jurisdiction and procedure. A caveat however: in the prosecution of crimes on the international plane, the culpability of the worst criminals is so clear and uncontested that the finer distinctions made in the domestic criminal jurisdictions are often not necessary. Thus distinguishing between general intent and specific intent with respect to the mental state of a perpetrator or sometimes even whether she or he acted negligently, recklessly or with reckless indifference is often not an issue. However, domestic law versions of the shari‘a will clearly have to contend with these degrees of granularity.

Malekian, who has published on both shari‘a law and ICL, sums up the definition of ICL from various sources as:

[that] part of international law which applies to serious violations of international law leading to international crimes [... However, most jurists] consider the [international] system an integral part of domestic criminal law and therefore, do not give certain necessary independent characterisation to the [international] system.

He further quotes Bassiouni, a renowned contemporary scholar who has also widely published in both subject areas who noted:

‘a reticence in 1999] on the part of the international community to creating a Criminal Court and to give ‘independent

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97 While some legal opinions adopted in this thesis are minority positions there is precedent in the use of minority legal opinions in formulating law and this will be identified as applicable including in chapter 6.
100 It is noted that as a dualist system the common law (as is the shari‘a) does not generally consider international obligations as self-effecting and that treaty and other international obligations do not have full legal effect unless explicitly incorporated into domestic law.
characterisation to the system of ICL [because] domestic criminal
laws co-operate with ICL in the prosecution and punishment of the
perpetrators of international crimes'.

(Noting here his crucial involvement in the creation of the
International Criminal Court (ICC)), Bassiouni stated that 'a criminal court
is essential for the independent characterisation of the system'.103 Even
though this statement was made in the context of the ICC, for similar
reasons it is clearly a general statement of principle, equally applicable to
prosecution under the shari'a.

Shari'a constraints in this context of practical application will be
described and analysed in the subsequent chapters. Nonetheless, only self-
identifying Muslims should face shari'a criminal charges. The scope of these
crimes must be constructed carefully and diligently by law makers, and, for
best acceptance by the international community, continue to evolve in
concert with the jurisprudence of the ICC.104 While nothing in this thesis
turns on this point, serious shari'a crimes so constructed must become self-
effecting in States that recognise 'the shari'a' and therefore, such
international formulations of crimes will have some domestic impact in
such States, a matter outside the scope of this thesis. Note also that Islamic
capital punishments (which are largely deontological and not utilitarian)
will generally not directly be considered within the scope of this thesis.105

102 A reticence, that has gradually been overcome. The ICC website states "As of 17
October 2007, 105 countries are States Parties to the Rome Statute of the International
Criminal Court."


Darryl Robinson, 'Defining 'Crimes Against Humanity' at the Rome Conference' in O

103 Cherif Bassiouni, 'The Time Has Come for An International Criminal Court' (1991) 1
Indiana International and Comparative Law Review 1, 43.

104 See text accompanying n 46,13.

105 There are some key issues such as the use of the death penalty under the shari'a.
Under international law there is a fairly uniform, although not unanimous, view
against the death penalty which is at odds with the use of the death penalty in some
domestic jurisdictions of States. These differences while serious do not preclude the
development of the general law and should not prove to be an impediment to the
development of the shari'a. For a general brief description of Islamic criminal
punishments see Rudolph Peters, Crime and Punishment in Islamic Law: Theory and
Practice from the Sixteenth to the Twenty-first Century (2005), 30.

On the other hand some Islamic punishments, if carried out, are clearly at odds with
human rights norms: Edna Boyle-Lewicki, 'Need World's Collide: The Hudad Crimes
of Islamic Law and International Human Rights' (2000) 13 New York International Law
Review 43, 71. On the conflict between the shari'a and human rights norms see also,
Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the
Sixteenth to the Twenty-first Century (2005), 190.
Chaper 1 — 27

It is noted in passing and for completeness that the intent of the work undertaken in this thesis is neither to apportion 'blame' to Islamists nor to exonerate 'Western' leaders or vice versa. There is a reasonable and supportable view that there is sufficient evidence to bring prima facie war crimes charges against some Western leaders including former President George Bush, former Prime Minister Tony Blair\(^{106}\) and others associated with the Coalition of the Willing. Broadly speaking these crimes include recklessly causing hundreds of thousands of civilian 'collateral' deaths,\(^{107}\) the use of torture,\(^{108}\) humiliation and stress techniques against prisoners/detainees\(^{109}\) aimed at 'removing their culture, their religion\(^{110}\) and their identity',\(^{111}\) unlawful 'rendition' to third countries,\(^{112}\) and the novel exploitation of 'medical' weaknesses such as the continuous use of


The USA is party to the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, entered into force June 26, 1987, but is not party [See: <http://www.apt.ch/content/view/40/82/lang,en/>] as at 10 September 2007 to OPCAT, its Optional Protocol (The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), entered / in force since 22 June 2006, ); Article 7(f) *Rome Statute of the International Criminal Court*, Came into force on 1 July 2002 (with the ratification of 60 States), U.N. Doc. A/CONF.183/9, (as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999), 2187 UNTS 3.

\(^{109}\) The US Department of Defence insisted that foreign prisoners were referred to only as ‘detainees’: Clive Stafford Smith, *Bad Men: Guantánamo Bay and the Secret Prisons* (2007), 130.

\(^{110}\) While the purpose of and import of religion is deep, crucial and central to the shari’a, the broad understanding of what constitutes a religion broadly speaking is arguably very similar to the ordinary meaning of the term as used in international law.

\(^{111}\) Michael Ratner, Ellen Ray and Stephen Kenny, *Guantánamo: What the World Should Know* (2004), 40. Although nothing in the thesis turns on this point, it is noted that the authors’ form of words come close to describing genocide.

foods to which a detainee is allergic,\textsuperscript{113} to extract evidence and confessions.\textsuperscript{114}

Both sides of the 'war'\textsuperscript{115} use the rhetoric of law and morality as a justification for their individual positions and actions but generally, evidence of exemplary behaviour on both sides appears to be wanting.\textsuperscript{116}

The point is made here in order specifically to exclude this task of examining the conduct of Western leaders, troops and institutions from the scope of this work without appearing to exonerate or justify their own sometimes inhumane and arguably sometimes even illegal actions. That is, the examination of alleged Coalition crimes is outside the scope of this work.

**Terminology and Language Issues**

The use of many technical Arabic terms is unavoidable and a glossary\textsuperscript{117} is attached for convenience. There is also often inconsistency in transliteration in the literature.\textsuperscript{118} This thesis employs transliteration as used by the Encyclopaedia of Islam (El), except for the 'k,' where this thesis uses the now more standard 'q' (ie Qur'an instead of Koran. However, the use of the 'j' instead of 'dj', (ie, Jakarta instead of Djakarta) is not adopted here because, even though old fashioned and cumbersome, is still widely (albeit


\textsuperscript{114} For example: the case of Mr Maher Arar Syrian born Canadian national who was tortured in Syria after being sent there by US Authorities: 'Arar launches lawsuit against U.S. government' Canadian Broadcasting Corporation 22 January 2004 <http://www.notinournam.net/detentions/arar-22jan04.htm> [Accessed January 2007]. Refer also generally: Arar Commission Report <http://www.ararcommission.ca/eng/AR_English.pdf> [Accessed January 2007]. Mr Arar was 'sent' to Syria, although Syria is part of the US Administration's Axis-of-Evil and is a place where the US claims (and knew) that he would be tortured: James Risen, *State of War: The Secret History of the CIA and the Bush Administration* (2006), 34. While the Coalition has declared a 'War' on terror the term armed conflict is a more useful description in characterising the conflict between al-Qa'eda and its affiliates and the Coalition and its allies. The issue of statehood however is important in-as-much it clearly allows the identification of the non-state actors party to the conflict.


\textsuperscript{116} The Glossary is in both in the Arabic and Latin scripts. Please see page 741.

\textsuperscript{117} For example, some authors transliterate the Arabic word \textsuperscript{118} as \textsuperscript{119} while others use \textsuperscript{11E} and yet others as \textsuperscript{11I} etc.
Chaper 1 — 29

decreasingly) used in the literature. However, original spellings and transliterations, including transliterated names, are retained creating some inconsistency. For general references to the Qur'an in the Arabic, any standard Arabic version should suffice. Abdullah Yusuf Ali’s English translation is used generally although there appear to be slight variations in the different editions. For convenience, either or both hijri dates (AH) and Christian/ Common Era (AD) dates will be used to denote appropriate historical events.

On the general issue of referencing, please note that the primary shari’a sources are in Arabic and are supported by a huge accretion of commentary over the centuries, also largely in Arabic. A reliance on what appears to be English translations of primary sources is unfortunately unavoidable and is a drawback but perhaps not as debilitating as might first appear. Many of the translations are easily verifiable and there is a large body of scholarship available in English and French. This said, it is conceded that it is easier to verify the translation of ‘text’ but that it is much more difficult to translate the ‘spirit’ which generally is more nuanced and complex. The analysis in Appendices 1 & 2 attempt to convey a view of this ‘spirit of Islam’ and the reading of which is strongly recommended in this context even for those who are very familiar with the terminology, sources and concepts of Islamic law. Further, reference to what sometimes appears to be secondary sources is in reality reference to translations of primary sources.

Commonly-used expressions or clichés are avoided when possible. For example, the terms ‘suicide bombing’ or ‘martyrdom

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119 It is conceded that the choice of the Encyclopaedia of Islam as the standard for transliteration could reasonably be criticised.

120 Abdullah Yusuf Ali, The Holy Qur’an: Translation and Commentary (1934). There are some versions of Yusuf Ali (but not all and probably only a small percentage of the huge number) published and printed in Saudi Arabia, which sometimes acknowledge the translator (and sometimes do not), and in which there appear to be some not insignificant changes from the original translation. This translation is used throughout this thesis as it is the most cited English translation. There are more faithful translations such as those by Maulana Muhammad Ali, The Holy Qur’an: Arabic Text English Translation and Commentary (1917), and Muhammad Asad, The Message of the Qur’an: Translated and Explained (1984).

121 The hijra calendar (the years being denoted with an ‘AH’) commences with the Prophet’s migration (hijri) from Mecca to Medina in 1 AH and corresponds to 622 AD.

122 Smith describes how a word (zalata) meaning ‘salad’ in one Arabic dialect while referring to ‘money’ in another, got a 14 year old locked up in Guantanamo for several
Chapter 1 — 30

operations', are avoided because both expressions which are intrinsically value-laden, also carry some legal implications under the *shari'a*. For example, suicide (*intihaar* or *qatl nafs*) is prohibited under Islamic law, in both peacetime and in war, ipso facto creating a prohibition on 'suicide operations'. On the other hand martyrdom is encouraged and lauded by the Qur'an (as it is in other faiths) thus ipso facto lending its imprimatur to 'martyrdom operations' as among the better human deeds. Further, years: Clive Stafford Smith, *Bad Men: Guantánamo Bay and the Secret Prisons* (2007), 149. An example of more sinister use of language to disguise what was taking place is the use for example of the term 'dehousing' to describe the British bombing of German civilian workers' homes in Cologne and Dresden: BBC, *Sir Arthur 'Bomber' Harris* (189-1984) (2008) <http://www.bbc.co.uk/history/historic_figures/harris_sir_arthur_bomber.shtml> at 12 March 2008.

123 Declaring someone a martyr is disliked or prohibited in the traditions of the Prophet: Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 4 (1976), 95. The custom of declaring martyrs is however deeply entrenched in contemporary Muslim society, a fact that is acknowledged.

124 Qur'an 2:195. Izzeddin Ibrahim and Denys Johnson-Davies, *Forty Hadith Qudsi* (1991), 112. Suicide refers to taking one's own life as opposed to being killed in a war (in which one participates, cognisant of a higher risk of death) and is a distinction that is also recognised in other legal systems. The *hadith* provides an endless punishment for those who commit suicide: Bernard K Freamon, 'Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History' (2003) 27 *Fordham International Law Journal* 299, 324.


126 Qur'an 22:58-59 (the Qur'an lauding martyrdom). See also Qur'an 3:140, Qur'an 4:95; Qur'an 9:111. While not explicitly discussed in this thesis, martyrdom in Islam is not confined to 'battlefield martyrs'. Muslims who are killed by inundation (eg in a tsunami), in an earthquake or killed on a journey of service to God are also considered martyrs in Islam: Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 6 (1976). Professor Freamon uses the term 'lesser martyrs' and discusses other categories of persons encompassed by this term: Bernard K Freamon, 'Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History' (2003) 27 *Fordham International Law Journal* 299, 320. For example, the Prophet said 'the ink of the scholar is holier than the blood of the martyr' and as such becoming a scholar is a better station in God's eyes and thus must be a better (albeit, perhaps not the easier) way to paradise. See also Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 4 (1976), 61. While the word martyr is sometimes not invoked by secular leaders, the concept of martyrdom is alluded to, particularly with reference to killing and being killed in (offensive and defensive) warfare. For example in Tony Eastley, 'New Australian War Memorial Wings Opened by PM' in AM Programme ABC Radio National, Wednesday, 27 February , 2008 08:00:00 2008., the then Australian Prime Minister (and without citing authority for this proposition) said of Australian soldiers killed in wars (for Britain and Australia) that:

There is no higher calling in our nation's life than to serve the nation in uniform.
the use of acronyms such as S.I.B\textsuperscript{127} to disguise suicide or homicide in custody\textsuperscript{128} or ‘redefining’ common words, such as ‘voluntary’\textsuperscript{129} and ‘juvenile’, instrumentally to convey very specific technical meanings or perhaps even to deceive,\textsuperscript{130} is noted.

While particular phrases have clearly been coined to create a bias among their respective constituencies, such terms are not helpful when attempting to analyse the legality of such actions and are thus best avoided where possible. As a matter of law however, these rhetorical labels or adjectives must mean little to a properly constituted court, which must adjudicate on the alleged crimes based on the facts at hand and according to the law. Such judicial consideration will in time result in clearer definitions of important terms of art.

For the many Muslims struggling against poverty, helplessness, hopelessness and oppression, martyrdom and its lavish, strife-free promise of the hereafter\textsuperscript{131} is a very powerful metaphor. Even avowedly secular leaders such as Ataturk invoked the language of martyrdom and \textit{djihad}

\textsuperscript{127} Manipulative self-injurious behaviour’ (SIB) is normally used to describe skin-picking in children.

“Prader-Willi syndrome (PWS) is a genetic disorder usually caused by the deletion of a specific gene. One of the symptoms of PWS is self-injurious behaviour (SIB); a common form of SIB in PWS patients is skin picking”


\textsuperscript{129} A ‘voluntary’ act includes a detainee/prisoner obeying an order of a guard (accompanied by the Emergency Reaction Force (ERF), in the knowledge that if he disobeyed that the ERF would ‘make’ him carry out the order or else pin him to the ground in a very rough manner (or to use the new verb created at Guantánamo, the detainee would be ‘erfed’): Ibid 211. Such compliance would not be considered ‘voluntary’ under the \textit{shari’a} or the common law. The serious injury that can result from ‘erfing’ is identified by Smith. The American solider Sean Baker who was accidentally ‘erfed’ in an exercise was treated in the USA but eventually ended up with brain damage: Clive Stafford Smith, \textit{Bad Men: Guantánamo Bay and the Secret Prisons} (2007), 224.

\textsuperscript{130} At Guantánamo Bay the term ‘juvenile’ with respect to prosecution means that the person is less than 18 years of age \textit{when prosecuted}. If the actual prosecution occurs after the child in detention turns 18, the person can be tried as an adult. Against this, Article 1 of the Convention on the Rights of the Child New York, 20 November 1989 (which the USA has signed (16 February 1995) but not ratified) see: http://www.ohchr.org/eng/\textit{countries/\textit{ratification}/\textit{11.htm} } defines a child as one under 18 years unless the State party’s law states differently. The US Supreme Court decision on inter alia the meaning of juvenile (anchored on the 8th amendment (cruel and unusual punishments clause) and the 14th amendment (due process clause) however stated that a person under 18 years old was a juvenile: \textit{Donald P. Roper, Superintendent, Potosi Correctional Center, Petitioner, v Christopher Simmons.} (2005) 543 US 551, 125 SCt 1183.

\textsuperscript{131} Majid Khadduri, \textit{War and Peace in the Law of Islam} (1955), 61.
when convenient. Pragmatic contemporary leaders would be remiss to their cause if they passed up such a powerful motivating force and leaders of Hizbullah, Hamas, al-Qa'eda, and even Western secular leaders have at times used the 'language of martyrdom' to rally their people to support war and the sacrifice of young lives. In a spiritual sense however, while leaders may promise 'martyrdom', at least their Muslim followers should not uncritically accept what reasonably may amount to empty promises.

Emphasising this point, the Qur'an reminds Muslims that 'It is only God who knows His true solders'. Therefore, a mere claim by leaders of the 'martyrdom-creating' character of their operations alone, without more, should be insufficient evidence to mandate Muslim participation in such 'djihad'. Further, Freamon notes that the traditional Sunni approach (to martyrdom) was to 'emphasize survival and victory rather than death'. On the other hand, the declaration of an individual as a martyr has important social and temporal implications for his or her family. However, one clear legal implication is that one cannot, under the same law, simultaneously be a martyr and criminal for the same act.

Favourable characterisation is not solely restricted to Islamists. In contradistinction with 'Islamist brutality', the Coalition’s 'precision attacks' are characterised as legitimate force, or described as 'surgical attacks'.

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133 See n 126, 30.
134 See also the plight under Islamic theology for false ‘martyrs’ in Appendix 2.
135 Qur’an 74:31 (Wa la ya’lamu junudaRabbika ila huwa’), which is translated as ‘the Creator (God) alone knows His army’. See generally Khaled Abou El-Fadl, And God Knows the Soldiers: The Authoritative and Authoritarian in Islamic Discourses (2001); Izzeddin Ibrahim and Denys Johnson-Davies, Forty Hadith Qudsi (1991), 52.
136 Bernard K Freannon, 'Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History' (2003) 27 Fordham International Law Journal 299, 322. Note also Bukhari relates from the Prophet that a survivor of djihad who lives and fasts an extra Ramadan will have a higher status in God’s eyes than the martyr who dies in battle: Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 4 (1976), 52 'The Book of Jihad'.
137 Bernard K Freannon, 'Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History' (2003) 27 Fordham International Law Journal 299, 320. The question of whether such a declaration has legal validity is not addressed here but it is noted that Islamist groups instrumentally use such declarations to further their cause, an avenue that can largely be shutoff to the Islamists by the Tribunal discussed in Chapter 7.
138 A Sovereign has the monopoly on the legitimate use of force and the characterisation becomes ipso facto correct.
which tend to convey a very different mental image from the term ‘terrorist attack’ for Islamists, even though the resulting levels of violence or damage reflect the West’s vastly superior military power, as do the resulting numbers of dead and injured. In place of such emotional language, this thesis attempts to use more neutral terms such as ‘kamikaze operations’, in this case, to describe ‘suicide’/‘martyrdom’ operations.

Further, in contemporary language, *djihad* means different things to different groups, particularly among Muslims, who are variously called moderates, fundamentalists, modernists, fanatics, Islamists, secularists, terrorists, militants, *Sufi*, *Wahhabi* or any number of the other adjectives used to qualify groups of Muslims, but again a degree of precision and consistency appears elusive. Finally, as with all comparative legal works there is a problem of assuming the right amount of foreknowledge and as such, is unlikely to suit each reader perfectly. For this reason, (i) a

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139 For an Arab perspective of the word ‘terrorism’ see generally Chibli Mallat, *The Original Sin: "Terrorism" or "Crime Against Humanity"?* (2002) 34 *Case Western Reserve Journal of International Law* 245. States’ operations which fit the definition of ‘terrorism’ (‘shocking and awing’ the civilian population or anti-terror operations which themselves may fall within the meaning of ‘terrorism’) are generally outside the scope of this work. Professor Khan notes that ‘State terrorism’ is not recognised as such under international law. L Ali Khan, *A Theory of International Terrorism: Understanding Islamic Militancy* (2006), 15 n2.


141 This is the (relatively neutral) term used by *Le Monde* to describe the phenomenon and is also often used by other francophone publications but seldom seen in English publications. It is conceded that the term *kamikaze* is not entirely neutral as it has some negative connotation with respect to the Japanese in World War II. As an Australian friend and ally however, the once Japanese ‘menace’ no longer invokes general hate or fear. Other examples of the use of language that may not accord with its everyday meanings include the term ‘non-injurious physical contact’ to describe water-boarding: Clive Stafford Smith, *Bad Men: Guantanamo Bay and the Secret Prisons* (2007), 170.] or beatings: at, 201, ↔ or where minors are not detainees under 18 years of age but 14 years, and the ‘imam’ / *hodja* / Muslim prayer leader allocated to the Muslim worshipers is a fundamentalist Christian: at, 143. See also generally: Bernard K Fremon, ‘Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History’ (2003) 27 *Fordham International Law Journal* 299. Fremon also uses the term ‘self-annihilatory violence’ to describe the phenomenon (ibid, 308), although he carefully distinguishes the term used in the armed conflict context from *fana fil Allah* (self-annihilation in God) a term of art used by *sufis* to describe a state of exquisite spiritual attainment.

142 For example, the West supported the *mujahideen* (ie one engaged in *djihad*) in Afghanistan against the USSR but oppose with force, the same groups (sometimes the same people, such as Bin Ladin) as its strategic interests have evolved.

143 Some find the use of the term *Wahhabi* derogatory. Such an implication is avoided here, but the term is retained because of its widespread use in the literature.
Lastly, and without overstating the point, this thesis only examines the use of the shari'a because of its significance to Islamists. As an issue of plurality there are clearly other legal traditions that can equally be considered as making up the 'laws of civilised nations'. In a broader sense, it is only when we have at least actively considered the application of the major legal traditions for use on the international plane, that we can honestly say that we value, respect and embrace the legal traditions of humanity in a truly pluralistic manner. This thesis is one such contribution and in concentrating on the shari'a does not intend to diminish the value of other legal traditions. In a very broad-brush sense, Christian civilisation, which represents approximately one in three inhabitants on the planet, has had their civilisation positively represented in the international legal community and rightly so. The next step would be to examine the law of Muslims who make up the next most numerous class representing about one in five people on the planet.

Thesis Structure and Layout
In reading this thesis, Appendices 1 and 2 provide an introduction to Islamic law and concepts that provide a necessary shari'a background for the task of comparison. For the IHL/ICL scholar unfamiliar with shari'a terminology and methodology, it is recommended reading immediately after this introduction. Reading Appendix 3 is also recommended for an illustration of the application of the shari'a to the specific crime of genocide.

The general structure for this thesis is as follows:

Chapter 1 is this introduction, which outlines the broad themes covered in the thesis.

Chapter 2 defines and sets out the scope of djihad generally with an emphasis on the armed djihad, the area of particular interest in this thesis.

144 The Glossary (p 741) contains a list of Arabic words used and where appropriate, includes technical definitions.
Armed *djihad* is a religious obligation mandated in the independent sources and prescribes and identifies who may fight, those who are excluded and how hostilities must be conducted. Law relating to *ius ad bellum* under the *shari'a* is discussed and *ius in bello* introduced for discussion in the next chapter. Armed action that falls outside the scope of the armed *djihad* is considered in chapter 5.

**Chapter 3** examines *ius in bello* or the law regulating to the conduct of the parties during hostilities, under the *shari'a*. The *shari'a* identifies those who may be fought and those who may not be fought and these categories are identified and examined. Since the *shari'a* does not permit the intentional killing of those not identified as legitimate targets, the concept of collateral killing appears to be alien to the classical notion of *djihad*. This issue is discussed as an important area for reform with respect to the contemporary use of the *shari'a* in conflicts using modern weaponry.

**Chapter 4** continues with the *ius in bello* particularly with respect to the permitted means of taking life during conflict. Once again the prescribed means of warfare make the application of the *shari'a* ‘as is’ problematic for Muslims and areas for reform and modernising the law are examined within the (*maqasid*) or the spirit, object, purpose and intention of the law.

**Chapter 5** examines armed conflict characterised as ‘rebellion’ and other types of use of force recognised under the *shari'a*, which are prima facie outside the scope of conflicts properly characterised as armed *djihad*. This identification of the types of conflict helps to circumscribe the scope and limits of armed *djihad*.

**Chapters 6** identifies a three-step process through which *shari'a* can be identified, systematised and developed for contemporary use in the medium term.

**Chapters 7** identifies a fourth step through which the *shari'a* as developed in chapter 6 can be used for prosecution in the longer term. This chapter also discusses the creation of a *shari'a* based tribunal on the international plane. This tribunal will use *shari'a* law, as agreed to by consensus discussed in chapter 6, and used for prosecution of the serious crimes of
genocide, war crimes and crimes against humanity in their *shari'a*
formulations.

**Chapter 8** the conclusion, invokes the North American indigenous concept of ‘Spring Ice’, representing the notion of a fragile peace but one that is most enduring when peace is shared by the many, carry gently and carefully. In law it reflects peace, based on agreements deliberately, respectfully and fairly concluded and honoured in both letter and spirit by all parties. Spring Ice represents the notion that such agreements can contribute to the promotion of peace and security for all.

**Conclusion**

The use of armed force has always been a means of effecting change, and has been used by most if not all civilisations. Contemporary civilisations are no different from those of our ancestors in their deference to those possessing the greater means of inflicting this violence. A difference in our times, however, is that we also possess means of destruction and weapons delivery systems that are several orders of magnitude more lethal than those possessed by our forebears resulting in greater numbers of casualties and human suffering caused during and persisting even after conflicts have ended.

A key concept underlying this thesis is that ideas have the power to create positive change. It is posited that law — the recognition of a peoples’ values, giving expression to those values and examining peoples’ legitimate concerns inter alia by providing a neutral forum for the accused to present and defend their actions under a value system and legal tradition they recognise — has a great potential to reduce the subjective ‘need’ for violent action.

This is not a pandering to terrorism or being driven by violent Islamists’ agendas but, as will emerge, quite the contrary. The call is for all sides to a conflict to respect the rule of law, to accept plurality and to recognise that no civilisation has a monopoly on decency. The West must recognise that barbaric acts are criminalised in more than in merely
Western traditions and that barbaric acts are also carried out by those who would otherwise claim to be ‘with us’.

The fact that democracy and the rule of law do not in practice prevail in many Muslim jurisdictions provides an added impetus to provide rule of law based *shari’a* fora on the international plane. British, American or Australian authorities would not openly accept international standards that are lower for their own nationals if prosecuted under international law, and particularly not on the premise that some ‘common-law’ countries lack a rule of law and democratic framework. This is analogous to the position that many Muslims in custody face in the various wars spawned by the ‘war on terror’.

The case for including Islamic law in the framework of international law arguably has not been put very strongly in the recent past. As nations emerge from the colonial era to take their place as important international players, it becomes more difficult to exclude their legal traditions. Further, with the growing recognition of the importance of inclusiveness, and the need to cater for the sensibilities of non-Western peoples, legal plurality becomes an increasingly important consideration. Europe nonetheless is a wonderful, and while not perfect, example of how a once-warring set of tribes settled on plurality, law and political recognition and built institutions to reflect their core values. Accepting plurality, has brought both peace and economic prosperity to the vast majority of European peoples, whose leaders have had the vision and foresight to subscribe and give effect to this revolutionary idea.

A key policy aim of the ICC as described in its mandate is to prevent the recurrence of Statute crimes. The Statute echoes the words of

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145 For example, *United States Diplomatic and Consular Staff in Tehran (US v Iran) (1980) ICJ* 3. Here the Court invoked Islamic Law and referred to its treatment of envoys. There was therefore, perhaps a reasonable view among members of the Court that the invocation of Islamic law and precedent would in some way cater to the legitimacy of their decision vis-à-vis the Islamic Republic of Iran.

146 The ICC’s Mandate [http://www.icc-cpi.int/organ/otp.html (Accessed on 6 August 2007)] carries the following words: (emphasis added) By conducting investigations and prosecutions, the Office contributes to the overall objective of the Court - to end impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, and thus to contribute to the prevention of such crimes.
the chief prosecutor at the Nuremberg trials, US Supreme Court Justice Robert H. Jackson, of seeking to make 'the peace more secure'. The Statute is also arguably in this aspect aspirational and in one sense could be considered non-prescriptive, of creating the 'space' and opportunity for other legal solutions to be brought to bear in addressing this fundamental policy goal. In working towards this strategic aim, the use of a legal tradition recognised and considered fair and transparent by Muslims will help promote the rule of law thus aiding transformation in Muslim States and, as in Europe, must serve as an avenue for justice among this large segment of the world's population. Moreover, the added option of addressing long-standing disputes in a court rather on the battlefield must help to make the peace more secure for all.

The creation of shari'a instruments and institutions is premised on the existence of a body of shari'a humanitarian and criminal law and the subsequent chapters will attempt to identify this body of law. It is noted, however, that this is not purely a sentimental issue for Muslims. The West rightly takes pride in its institutions and civilisation as a great achievement and sets itself high standards. So do deeply committed Muslims who espouse and hold themselves to extremely high standards. Those who are willing to flout the Muslim ethic and rules in the name of Islam, appear to flourish but do so with the help of Western governments, a largely uninformed Western audience and their allies, among the unrepresentative governments in Muslim States, including many Western allies. Muslims who genuinely believe in their civilisation are marginalised and an instrumentalist version of what the West accepts and defines as 'Islam' thus shapes the better part of the discourse. The beneficiaries of this farce are small, powerful elites on both sides.

147 Clive Stafford Smith, Bad Men: Guantanamo Bay and the Secret Prisons (2007), 86. quotes Justice Jackson who stated at the trials that:

   The usefulness of this effort to do justice is not to be measured by considering the law or your judgment in isolation. This trial is part of the great effort to make the peace more secure.

148 As at December 2010, 114 of 192 UN member States were Party to the Rome Statute. Only 19 States party were also members of the OIC. See generally: Justice A. G. Whealy, 'Difficulty in Obtaining a Fair Trial in Terrorism Cases' (2007) 81 The Australian Law journal 743. Further, the collective aspiration of over a 1,000 million Muslims, committed to various degrees to have some recognition of the shari'a, is an important consideration given due weight in this thesis.
The issue from an individual Muslim defendant's perspective is the 'right' to a free trial that provides for both substantial and procedural justice which are positive rights under international law. While what constitutes a free trial may be different between international law and shari'a law, it will be shown during the course of this work that shari'a trial safeguards are likely to be construed as fair.

CHAPTER 2

SPEAKING TRUTH TO AN UNJUST LEADER: DJIHAD IN ISLAMIC LAW

Blessed are those who are persecuted in the cause of righteousness; theirs is the kingdom on Heaven.

INTRODUCTION

The next four chapters examine the proposition that there is a general body of shari'a law that can broadly (and as mentioned, for convenience be described as shari'a humanitarian law (SHL) and criminal law) be particularised. A key concept in SHL is that of an armed djihad. Djihad in its general meaning is a broad concept. In its traditional context djihad is a general technical term that includes the greater djihad and the (lesser or) armed djihad. Armed djihad is the only expressly legitimate category of fighting permitted under the shari'a, ipso facto making 'war' unlawful. This chapter and the next examine the broad concept of djihad, concentrating on armed djihad and its application in both ius ad bellum (chapter 2) and in ius in belo (chapter 3).

There are substantial differences between the shari'a and secular systems with respect to the use of armed force. The principal differences

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1 According to Michael Cook, Forbidding Wrong in Islam (2003), 75; Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 39. The Prophet said:

"The best djihad is the speaking of a word of truth (kalimat al-haq) to the unjust leader."

This hadith is confirmed in R L Euben and M Q Zaman (eds), Princeton Readings in Islamic Thought (2009), 330.


3 Sardar Ali Shaheen and Rehman Javaid, 'The Concept of Jihad in Islamic International Law' (2005) Journal of Conflict & Security Law 321, 321. Djihad (جهاد) covers (i) the greater djihad (djihad al-akbar (جهاد أكبر), which in this context can involve an armed struggle and has religious aims and underpinnings.

4 Qur'an 8:67, esp. n 1234; Rebellion (baghi) may in certain circumstances but not generally also be considered legitimate as discussed in Chapter 5, but subjectively,
arise in part from the different perspectives particularly with respect to reasons for human existence. Legitimacy too for Muslims ties in with this perspective. Thus, the sources of law, the means of deriving relevant laws and the phraseology used to characterise crimes will affect the legitimacy of applicable laws. The principled, open and transparent development of Islamic law will lead to a greater acceptance of the law among Muslims, even when the resulting crimes and elements of crime have significant commonality with their equivalents in secular legal traditions. The commonality that results is analogous to the similarities that exist between the common law and the civil law traditions, in spite of their not insignificant foundational differences. This overlap results because at least some underlying principles, of say, even secular criminal law, and particularly crimes universally considered egregious, derive from the abiding values of the Ten Commandments. From the shari'a perspective, Mosaic law is a sound source. On the other hand, developing SHL is not to be done as a matter of ‘window dressing’, a shallow concept which satisfies apologists but will never find broad consensus, and is likely to be rightly viewed as instrumental, dishonest and thus ultimately counterproductive. The broader concept of *djihad* helps distinguish and properly characterise a given conflict as an armed *djihad* or otherwise. Etymologically, *djihad* means ‘to strain, to exert or to struggle’, although in contemporary usage the term, quite inaccurately, is made synonymous with armed action. In clarifying the scope of *djihad*, the aims of its two constitutive components, (i) the greater *djihad* and (ii) armed *djihad*, are examined from both a theological and a legal perspective. The scope of the greater *djihad* is briefly examined and then armed *djihad* is defined, analysed and examined in some detail in order to establish some principles that can be used as a yardstick to identify limits to the means of combat
Chapter 2—43

that may legitimately be employed. In order to do this, however, the scope of armed conflict (some of which falls outside the scope of djihad) is also identified and discussed. This is done in chapter 5 by examining briefly the scope and meaning of aggression, war and armed conflicts generally, particularly in order to distinguish these forms of combat from armed djihad.

The Meaning and Scope of Djihad

Djihad has a primary ‘spiritual’ meaning. The meanings of its constituent parts, the greater djihad and the armed djihad are first identified then discussed separately. The armed djihad, which encompasses the means that may be employed in fighting, is examined in some detail as a matter of importance. All djihad should be motivated in God’s way alone, not for base motives and herein it is argued lies the key to peace.

The greater djihad is mandatory on all Muslims and aims primarily at taming a person’s animal soul, thus making it receptive to the ‘true’ concept of One God. The shari’a provides a path of self-discipline by which this animal soul can develop further to reach a point of spiritual development which is characterised by peace and satisfaction. The greater djihad is the means to achieving this end. An integral part of taming the

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7 Recall that al-Qa’eda or sometimes now called The World Islamic Front for djihad Against Jews and Crusaders (‘WIF’) broadly includes al-Qa’eda and other Islamist groups in different countries and as mentioned will be used as a case study or an example for the application of the shari’a rules. For information in English on the WIF please see: <www.library.cornell.edu/colldev/mideast/>. [Accessed in 30 June 2006].

8 Aggression is (’udawān ‘udūwān) and war is (harb ‘harb) both words are used extensively in siyar literature.

9 Djihad is composed of djihad al-akbar (الجهاد الأكبر) the greater djihad) and the armed djihad or djihad as-asghar (الجهاد الأصغر).

10 That is, in Qur’anic language ‘fi sabil Allah’ [فی سبيل الله] as discussed in Chapter 2.

11 IHL appeals to the ‘soldier’s honour’: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, vol 1 (2005), xxv. Islamic law would likely consider this criterion subjective and is unlikely to accept armed conflict as justified solely based on an individual’s belief that s/he was acting honourably for God, Queen, country or for that matter for family or tribal honour.

12 Qur’an 25:52; The exception of necessity applies as always for Muslims in duress except for the element of ‘faith’ which may outwardly be renounced under duress but never inwardly, and one then has the obligation to escape the oppression and emigrate to a better freer place.

13 Qur’an 12:53. The Qur’an refers to this soul as animal soul nafs al-ammara النفس لأمارة
animal soul is a type of altruism which requires sharing what is good. The Qur'an refers to the Prophet, inter alia, as a mercy to all 'worlds', Muslim, non-Muslim, animate, inanimate and beyond, including 'all that lies beyond human perception'. Further, Muslims, as the inheritors of the Prophet, must exhibit the quality of mercy, believe in God and remind humanity of their obligations to their Creator. One of the further duties of the Muslim is to convey the message, which means to ensure that as many people as possible hear the Prophet's message, with the aim of reaching every individual. To this end the domain of war (där al-harb) must, if possible be convinced to join the domain of peace (där al-Islam) or at least be neutralised. This 'containment' must be done legitimately. When considered in its broad, and particularly in its non-military context, the greater dijahad is, however, not the aspect of dijahad that is the root of contention in the deliberation of serious crimes.

The second component of the dijahad is the armed or lesser dijahad which when legitimately declared by an imam is a collective duty incumbent on some men in the community. The spiritual objective of an armed dijahad however, is:

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14 Qur'an 89:27. The Qur'an refers to this soul of peace and satisfaction as nafs al-mutmainna. 
15 The Prophet is referred to as rahmat al lil 'alameen' ie a mercy to ALL 'worlds' or rahmatan min rabbik (a Mercy from your Lord): Qur'an 17:87, particularly the footnote to this verse in Abdullah Yusuf Ali, The Holy Qur'an: Translation and Commentary (1980), 719. Kemali translates the word rahma when used in the context of Qur'anic description of the Prophet’s mission as a word that conveys compassion, kindness, goodwill and beneficence not only to humanity but to all creation: Mohammad Hashim Kamali, Shari’ah Law: An Introduction (2008), 27.
16 The Arabic word al ghaib (الغيب) is often rendered into English as “the unseen” by most translators. Asad however translates the word as ‘that which is beyond human perception’: Muhammad Asad, The Message of the Qur'an: Translated and Explained (1984), 4. This is a preferred translation for this concept and hence is adopted here.
17 Quran 3:104 refers to ‘order what is good, to prohibit what is bad (and to Believe in God), y'amruna bil ma'rouf wa yan sawma 'an il munkar. Qur'an 3:110; Qur'an 3:114. The Qur'an also condemns as hypocrites those who promote the converse, ie those who prohibit the doing of good and promote the doing of evil: Quran 9:67.
18 Qur'an 3:20.
19 Qur'an 16:125.
21 Qur'an 9:122; Qur'an 4:95; Qur'an 2:216. Note however, that armed dijahad is not only about protecting Muslims but also involves the protection of all peoples in Muslim lands, their property and houses of worship. Qur'an 22:40:
Neither the achievement of victory nor the acquisition of the enemy's property and, as with the greater *djihad*, it is rather primarily the fulfilment of a duty — the *djihad* in God's path — of universalising the Islamic faith.

The scope of *djihad* broadly thus includes creating a 'universal' environment conducive to contemplation so that each individual can make an informed decision as to whether to accept, to defer acceptance or to reject the Covenant. Universalising Islam is a means to this end. The key self-evident difference between the greater and lesser *djihad* in universalising Islam is the use of force. In juxtaposing the two specific meanings of *djihad*, on return from a battle the Prophet said:

"We have returned from the lesser struggle to the greater struggle."

They said "O Prophet of God, which is the greater struggle?" He replied "The struggle against the lower [animal] self [*djihad al-nafs*]"

The immediate aims of the lesser *djihad*, in this case during an ongoing conflict situation, are summarised in the following *hadith* from the Prophet:

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23 Note that conversion for pragmatic reasons is condemned. Unless conversion was made under duress such converts are labelled hypocrites. Please refer to text accompanying n 81, 51.

24 Javad Nurbakhsh, *Traditions of the Prophet* (1981), 77. Although often quoted, this *hadith* is not found in the two major Sunni compilations of *hadith* viz, Al-Bukhari and Muslim. Rudolph Peters, *Jihad in Classical and Modern Islam* (1996), 118.] refers to quotes contemporary Muslim scholars Hasan Al-Banna and Maududi, as claiming that this *hadith* 'cannot be regarded as authentic' and 'was spread to weaken Muslim combativeness' though they stop short of asserting that the *hadith* was fabricated. According to R L Euben and M Q Zaman (eds), *Princeton Readings in Islamic Thought* (2009), 342., Faraj held in his treatise *al-farida al-gha'iba* that this *hadith* was on the authority of Ibn Qayyim in *kitab al-manar*, fabricated to 'reduce the value of the sword' and thus weaken the Muslims. On the other hand Faraj (ibid, 330, para 51) accepts the *hadith* that 'The best *djihad* is the word of truth to a tyrant' but does not explain how speaking can be better *djihad* than fighting. Generally, the position adopted in this *hadith* is arguably similar to that taken by most nation States vis-à-vis those who do not submit to the 'law of the land'.

25 Armed *djihad* is better translated for meaning as a 'necessary struggle' within the meaning of the *shari'a*, this terminology is not used in this thesis for general consistency with the broader literature.
Chapter 2—46

“When you meet your heathen enemies summon them to three things. Accept whatsoever they agree to and refrain from fighting them. Summon them to become Muslims. If they agree accept their conversion. In that case summon them to emigrate to Medina. If they refuse let them know that they are like the Muslim Bedouin [...]. If they refuse conversion, ask them to pay the poll-tax (djizya). If they agree, accept their submission. But if they refuse then ask for God’s assistance and fight them [...]”

The three options are made in the order in which Muslims would negotiate, with the least attractive (i.e., the ambit position) given first, but with the key idea of ‘and refrain from fighting them’. The hadith shows, however, that the aim of the lesser djihad (and although a desirable outcome with respect to the heathen enemy27) is not primarily to convert people to Islam.

The Aim of Djihad Generally — Universalising Islam

The purpose of all djihad in its broadest sense is universalising Islam.28 Universalising Islam or making the law of God uppermost29 in this broad context is a contemporary description of Shaybani’s terminology of djihad as an ‘instrument which transforms the [domain of war] dâr al-harb into (a domain of peace) dâr al-Islam’.30 It involves the application of the Utilitarian Principle or the greatest good for the greatest number, and in the shari’a context, to the ‘tribe of Adam’31 i.e., humanity.32 The specific forms of djihad

26 Rudolph Peters, Jihad in Classical and Modern Islam (1996), 4 (emphasis added). This hadith also confirms the options granted in 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 God 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 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) God sees all that ye do.

27 The word enemy in ‘heathen enemy’ signifies the existence of a pre-existing conflict. Although faith is always an enemy of heathenism, the lawful possibility of peace treaties between heathens and Muslims, lends itself to negotiation on their differences.


29 Qur’an 9:40.


31 بني آدم (فِي آدم) literally means the tribe of Adam or the children of Adam and Eve i.e., humanity.

32 Javad Nurbakhsh, Traditions of the Prophet (1981), 76:
The best of you are those who are most useful to humanity.
employed in effecting this transformation include preaching,33 discussion,34 proselytising,35 as well as by the use of armed force.36 Civilisations from the Romans to the Americans have sought to globalise their values and interests through trade, politics and conquest and have done so on the basis inter alia of race, nationality or religious identity and Muslims have, in practice, acted in a manner not unlike other powers and civilisations, while paying lip service to the religious elements that served conquest. The Ottoman Empire, which lasted into the twentieth century provides a relatively recent example of Muslim hegemony in practice.

**Universalising Islam through the Greater *Djihad***

According to the Qur'an, the raison d'etre of all humans is that God created them for service and worship37 so that:38

*False worship is indeed the highest wrong-doing*

Worship is a broad and complex concept. It involves obedience,39 remembrance of God, understanding the true nature of things,40 and, through submission to God’s will,41 engaging in service to God (which in the case of an Omnipotent God, really means service to humanity and creation42). However, true belief requires *djihad* through obedience, self-criticism and submission. It is a lonely road, devoid of the glories of power, recognition and military pomp.43 God is All-Knowing44 so is cognisant of the intent and outcome of peoples’ free-willed actions, and ‘*djihad*’ or for that matter any positive act undertaken for base motives alone is ipso facto

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33 A Sanhouri, *Le Califat: Son évolution vers une Société des nations orientale* (1926), 150.
34 Ibid. The Arabic term is *djihad al-lisan* or *djihad al-qalam*.
35 Qur'an 16:125.
37 Qur'an 51:56.
38 Qur'an 31:13.
39 Qur'an 16:100.
40 Qur'an 20:40.
41 Qur'an 3:85.
43 Qur'an 93:2-3.
44 See for example, Qur'an 6:73; Qur'an 9:94; Qur'an 9:105. The phrase *'alim al ghaib* (علمي or ‘the knower of what is beyond human perception’), appears 48 times in the Qur'an.
false. Earthly life is, however, just a test for humanity’s use of freewill and all temporal tribulations are transient.\(^{45}\) For those who will persist in worshipping God alone,\(^{46}\) belief is a most rewarding undertaking.\(^{47}\)

Freewill\(^{48}\) however does not translate to ‘individual freedom’ generally in a Universal Declaration\(^{49}\) sense, although there is necessarily a practical connection between the concepts. The discussion of individual freedoms from a ‘rights’ perspective, while related, is outside the scope of this work. While freewill is extensive, humanity is still subject to binding natural laws, but in possessing total moral freedom, are not as ‘absolutely bound’ as say those who do not possess freewill (and therefore absolutely bound). From a shari’a perspective, disobedience is the sole prerogative of the djinn and humanity (the free-willed) and who therefore should have ‘unlimited’ moral freedom in order to truly be answerable for their actions. Qur’antically, God, Sustainer of all things, has in reality imposed few moral restrictions that apply absolutely and universally. Generally however, while Muslims shall strive to avoid prohibited acts, they must do so in the knowledge that human obedience only benefits humanity.\(^{50}\) The Qur’an states that on the Day of Judgment, individual behaviour will prove to each person that God’s foreknowledge was incontestably true.\(^{51}\) Universalising Islam thus means allowing an individual the moral freedom to act as she or he will, but the shari’a simultaneously reminds how she or he should ‘properly’ act.

\(^{45}\) Qur’an 2:155; Qur’an 5:48.
\(^{46}\) To the absolute exclusion of any other deity. See also the definition of monotheism in Islam: Qur’an 112:1-4.
\(^{47}\) Qur’an 4:100:
Whoever forsakes home in the cause of God finds in the earth many a refuge wide and spacious: should he die as a refugee from home for God and His Apostle his reward becomes due and sure with God […].

\(^{48}\) See Appendix 1.
\(^{49}\) Universal Declaration of Human Rights, 10 December 1948.
\(^{50}\) Qur’an 51:55.
\(^{51}\) Qur’an 23:99-100:
(In Falsehood will they be) until when death comes to one of them he says: "O my Lord! Send me back (to life) "In order that I may work righteousness in the things I neglected." "By no means! It is but a word he says […]"
Chapter 2 — 49

Universalising Islam according to the Qur'an and the practice of the Prophet is primarily by invitation 'correctly' to exercise freewill. For example the Qur'an urges Muslims to:

Invite (all) to the way of thy Lord with wisdom and beautiful preaching; and argue with them in ways that are best and most gracious: for thy Lord knows best who have strayed from His Path and who receive guidance and know that it is part of the Mercy of God that thou dost deal gently with them. Were thou severe or harsh-hearted they would have broken away from about thee; so pass over (their faults) and ask for (God's) forgiveness for them; and consult them in affairs (of moment) […]

Qur'anic examples of 'gentle' proselytisation include the means employed by the Prophets; Noah inviting his people, Abraham inviting his father to worship One God alone and the Prophet's mission in Mecca and Medina. Even the arrogant pharaoh was to be approached mildly, and generally, without ever reviling the beliefs of others. Further, Muslims must never refute the laws of the People of the Book, making 'direct' preaching to Jews or Christians problematic. Universalising Islam is not synonymous with everybody accepting Islam and certainly precludes coercion. Even the Prophets are not able to guide all those whom they love. Thus, while the Muslims must preach the message, it is not their

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53 Qur'an 3:159; Another innovation (bid'a) of recent times is the mutawe'en (or religious police) in Wahhabi controlled areas, harsh, violent and hard-hearted coercion that are at odds with the letter and spirit of the shari'a. This is not a practice of the Prophet or the salaf.
54 It is conceded that the Biblical and Qur'anic Prophets sometimes employed harsh language.
57 Aaron and Moses, who according to the Qur'an are both Prophets are instructed by God in the following terms in Qur'an 20:43-44:
   'Go both of you to Pharaoh for he has indeed transgressed all bounds;
   "But speak to him mildly; perchance he may take warning or fear (God)."'
58 Qur'an 6:108:
   'Revile not ye those whom they call upon besides God lest they out of spite revile God in their ignorance.
60 Qur'an 2:256.
61 Qur'an 28:56
   "It is true you will not be able to guide everyone whom you love: but God guides those whom He will and He knows best those who receive guidance".
responsibility to manage people's affairs, including their faiths. Thus, in this context, 'not managing peoples' affairs' arguably does not refer to laws of general application (mu'amalaat) but an instruction to Muslim leaders not to (micro) manage; and to leave each free-willed soul to make its own decisions with respect to its own moral and religious conduct ('ibadaat laws). Each individual remains personally accountable only to God. The Qur'an instructs the Prophet, and binds his followers, not to inquire into what people conceal.

The Qur'an states that there is much for which the free-willed should be grateful, although in practice humanity is generally less than thankful. Voluntary obedience to the shari’a’s moral laws and love for God represent expressions of this ‘gratitude’ but the key is the freedom to do so voluntarily. Coerced or insincere ‘gratitude’ is no gratitude and an All Knowing God cannot therefore be ‘cheated’ by coerced, insincere or hypocritical ‘thanks or worship’. Thus, forcing others into 'belief' is not only prohibited, but is also futile and arrogant because it attempts to defeat freewill and to ‘achieve’ what an all powerful God would not do. On the other hand, God will guide those who are ‘good’, ie those who ask for guidance/who posses taqwa and who are not deluded by their own self-righteousness. God grants this life to each individual so that no one will

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62 Qur’an 11:12; Qur’an 6:66.
63 Qur’an 11:12; Qur’an 6:66.
64 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 59 83.
66 Qur’an 32:9.
67 Please refer to the discussion on hypocrisy where it is argued that this sort of ‘outward’ compliance for fear of human sanction really amounts to hypocrisy.
68 Qur’an 2:256.
69 Qur’an 10:99 (emphasis added):
   If it had been the Lord's Will they would all have believed all who are on earth! Will thou then compel mankind against their will to believe!
70 Please refer to the discussion on taqwa in Chapter 3.
71 Qur’an 35:8; Qur’an 27:4:
   Is he then to whom the evil of his conduct is made alluring so that he looks upon it as good (equal to one who is rightly guided)? For God leaves to stray whom He wills and guides whom He wills. So let not
be able to deny his or her actual use of freewill\textsuperscript{72} and consequently avoid the individual consequences that attach. Thus, coercion of people in matters of faith is not only futile but is also counterproductive to a Muslim's own personal faith.\textsuperscript{73}

In the final analysis, however, in Islam, 'guidance' is God's sole prerogative\textsuperscript{74} and Muslim hegemony is not a pre-requisite either for guidance or for the practice of Islam.\textsuperscript{75} The only desirable state for the practice of the faith is that one is free to do so, and is able to do so to the best of one's ability. However, Muslims as the inheritors of the Prophet do have a pastoral duty to invite to faith,\textsuperscript{76} thus giving every human being the opportunity to hear and then to accept or reject the Prophet's message.\textsuperscript{77} Therefore, armed '\textit{djihad}' for the propagation of the faith, for the subjugation of peoples or for socio-economic reasons, has no intrinsic Islamic value\textsuperscript{78} either for the \textit{djihadist}\textsuperscript{79} or the 'new Muslim' because faith not sincerely and voluntarily accepted is no faith,\textsuperscript{80} because, 'belief' or 'conversion' for instrumental or 'worldly' reasons has little religious value. In Islam, hypocrisy is worse than disbelief\textsuperscript{81} and those who 'accept' faith...
for material reasons or for reasons other than a commitment to submit, are
forewarned of the dire consequences of this 'treachery' against
themselves.\textsuperscript{82} Thus, for the purposes of this analysis, conversion and
subjugation by armed means are arguably anti-ethical in the meaning of the
shari'a. The foregoing exposition is arguably a better Qur'anic meaning of
Universalising Islam.

This said, however, a subjugated people are more likely to hear the
message and to embrace the faith even if only for pragmatic reasons. With
no disrespect intended to their descendants, this may have been the 'real'
reason for a number of low-cast Hindus in India or of Nubian slaves
converting \textit{en-masse} to Islam, though the majority of people in India did not
embrace Islam during the 700 years of Muslim rule.

The analysis so far gives a broad 'pacific' gloss of the greater \textit{djihad}
as a struggle principally concentrating on the inner self. This analysis also
falls within a 'pietistic' view of Islam such as that expounded by the
European Court of Human Rights' view of faith as a matter for the 'private
sphere'\textsuperscript{83} sometimes referred to by Muslims as the 'modernist approach'.\textsuperscript{84}
Some Muslim scholars of the more recent past, such as Sayyid Ahmed
Khan (\textit{circa} 1871), did take a similar more 'pacific' view of \textit{djihad} as a whole,
which consequently and unsustainably greatly narrows the scope of the
armed \textit{djihad}.\textsuperscript{85} A problem however, arises when a pietistic view of Islam,
popular among Muslims in the West and in other minority situations,
places a low threshold on the meaning of the 'freedom to practise the faith'

\begin{footnotes}
\footnote{hypocrisy is not dissimilar to the Biblical view in which hypocrites 'will receive a
more severe judgment': John Carroll, \textit{The Existential Jesus} (2007), 90.}
\footnote{Qur'an 4:145.}
\footnote{See generally: \textit{Leyla Sahin v Turkey} (2004) ECHR 44774/98.; \textit{Kokkinakis v Greece}
\footnote{Rudolph Peters, \textit{Jihad in Classical and Modern Islam} (1996), 123. quotes the following
extract from 'The Pioneer' of 23 November 1871:
\textit{[...]} Ahmed Khan and the Indian modernists drastically restricted the
scope of the \textit{jihad} duty. Not only did they assert that \textit{jihad} was
essentially defensive, but they also limited this to defence against
religious oppression impairing the pillars of Islam, ie the five ritual
obligations of the Muslims [...]
}
\footnote{He specified a minimum level of religious practice that a colonial power was
required to permit at which point there is deemed to be no oppression and
therefore, that armed \textit{djihad} was no longer necessary (consequently accepting
British hegemony). He did so recognising the colonial power's overwhelming

arguably leading to al-Qa‘eda’s view that Western Muslims in the main are no better than heretics. Paradoxically critics of Islam and al-Qa‘eda have done much to popularise the armed view of *dji Cadillac as a solution to oppression, often at the expense of limiting *dji Cadillac’s broader perspective.\(^8^6\)

Contemporary ‘adversaries’ of Islamists and Islamism such as former President G. W. Bush, former Prime Minister Blair and even the Pope have arguably done much more to promote a global and universal Muslim identity than have the Muslim rebels, by consistently referring to Muslims as a single coherent and homogeneous group. Their statements have been widely disseminated by the media and have helped create the perception of a tangible sense of *umma from what was previously at best a weak undercurrent of unity in the last century. That they have ‘created’ this perception of unity out of a linguistically, socially, economically and politically diverse base demonstrates the power of modern media and communication methods and technologies. Religious leaders such as the Archbishop of Canterbury have demonstrated a much more sophisticated approach in dealings with the complexities of contemporary Islam in practice\(^8^7\) but have been ‘shouted down’ by fundamentalists of a different ilk, further assisting groups such as al-Qa‘eda by making strong (often inaccurate and unrepresentative) anti-Muslim statements which are widely (and disingenuously) distributed in the Muslim world as evidence of the West’s hatred for Islam and Muslims.

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86 Although from a faith perspective it is damaging to all Muslims, from a communitarian perspective the emphasis laid on the armed *dji Cadillac is particularly detrimental to Muslim minorities. The restricted view of *dji Cadillac as armed combat is further popularised and propagated in the media, which is not always a reliable source, and thus for crucial matters involving must be presumed ‘unreliable’. For Muslims however, when information is received through an unreliable source (*fasiq*) they are expected to verify such information and thus media disinformation is no excuse for Muslims: See Qur’an 49:6. In their exegesis of Qur’an 49:6 the *tafsir jalalain*: Muhammad bin Ahmed al-Mahalli Jalaladdin and Abdar-Rahman bin Abibakr al-Suyuti Jalaladdin, *Tafseer al-Jalalain* (n.d), 685. \(\text{تفسير الجلاليين}\) seem to be of the view that in bringing ‘bad’ news without a good reason, the bearer is ipso facto *fasiq* (iniquitous). This view is more explicitly taken in Asad’s translation: Muhammad Asad, *The Message of the Qur’an: Translated and Explained* (1984), 793.

Chapter 2 — 54

Universalising Islam through Armed *Djihad*

Islam however is not a pacifist faith which commands its adherents to ‘turn the other cheek’. Armèd *djihad* aims to humble and subdue the arrogant but most importantly includes subduing one’s own arrogance (through *djihad* generally). Islam encourages its followers inter alia (a) to fight oppression, (b) to serve God as required by the Qur’an and *sunna* and (c) to protect the homes, families and property rights of Muslims and those in their charge, issues covered in more detail below. These duties may be performed by using force if necessary, but only if a just outcome cannot otherwise be achieved through just means not involving the use of force. Determining what is ‘just’ is done by examining the practical aims of the use of force by identifying and discussing specific situations where the *shari’a* permits the use of force, including identifying those who may

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88 It is mentioned in passing that the comparison between *djihad* and a *bellum justum* or a just war is longstanding. Thus a convenient way of identifying common legitimate means is to see if a *bellum justum* approximates an armed *djihad*. However, Majid Khadduri, *War and Peace in the Law of Islam* (1955), 58., a Christian scholar of Islamic law, rightly notes that:

St Thomas Aquinas (d. 1274), who was acquainted with Muslim writings, formulated his theory of just war along lines similar to the Islamic doctrine of *djihad*.

This ‘circular’ comparison is not helpful for the current analysis because it deals with the concept of *djihad* as translated into a different (ie Christian) religious context with its attendant problems. Further, as war in general is prohibited in Islam it cannot ipso facto be reclassified as ‘holy’ or by implication, legitimate. St Augustine (d. 430) at a much earlier date – predating the birth of the Prophet (d. 632) – has had attributed to him a theory of just war although the principles nonetheless and arguably appear very similar to that of *djihad* in Islam: Charles Reed, *Changing Society and Churches Just War?* (2004), 35. However, that the concept of *djihad* was present in Christian theology or law does not usually pose a problem for Muslims who accept that what was taught by the Prophet is in many ways identical with what was revealed to the earlier Prophets.

89 The Gospel According to St. Matthew v.39. The other extreme is the depiction of Jesus as an angry person (and although nothing turns on this point here nor a view not supported by the text of the Qur’an) John Carroll, *The Existential Jesus* (2007). writes:

St Mark’s is the angry Jesus (ibid, 36-37), who curses fig trees (ibid, 82), casts out demons (ibid, 34), gives up on trying to teach his disciples anything (ibid, 100) and dies completely alone (ibid, 122).


90 Qur’an 41:34. See also the *hadith* (n 22, 45) referring to the greater and lesser *djihad*. Clearly taming one’s own animal instincts and arrogance is much harder than physically subduing the enemy and is a reason why the armed *djihad* is called the lesser *djihad*. 
legitimately participate in armed *djihad*, and the 'means' that a *djihadist* may lawfully employ.

**Practical Aims of armed *djihad***

The proper purpose of war generally, and of the means employed in its conduct, is to achieve a lawful military or strategic objective. To be legitimate, armed *djihad* must inter alia be conducted for the prescribed purposes and aims. In addition to the spiritual aims referred to above, the two main practical aims of armed *djihad* are (i) to create (capacity that provides) deterrence against attack and (ii) the capacity to subdue the enemy. The permitted reasons do not include fighting for either hatred or revenge.

**Deterrence**

The Qur'an recommends that Muslims should possess a terrifying deterrent military capacity to prevent any thought of aggression by the enemy and

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91 Qur'an 9:20:

Those who believe and suffer exile and strive with might and main in God's cause with their goods and their persons have the highest rank in the sight of God: They are the people who will achieve (salvation).


Here is a good description of *djihad*. It may require fighting in God's cause; it's a form of self-sacrifice. But its essence consists in (1) a true and sincere Faith, which so fixes its gaze on God, that all selfish or worldly motives seem paltry and fade away, and (2) an earnest and ceaseless activity, involving the sacrifice (if need be) of life, person, or property, in the service of God. Mere brutal fighting is opposed to the whole spirit of *djihad*, while the sincere scholar's pen or preacher's voice or wealthy man's contributions may be the most valuable forms of *djihad*.

92 The question of who constitutes the 'enemy' is a key question and a shorthand term for those whom Muslims might be permitted to fight under the *shari'a*.

93 Qur'an 5:8:

O ye who believe! stand out firmly for God as witnesses to fair dealing and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to Piety: and fear God for God is well-acquainted with all that ye do.


94 Deterrence of the enemy by possessing overwhelming military power is not conceptually problematic within the UN or the current international legal regime. It is a factual matter of capacity.
Chapter 2  —  56

instructs that some Muslims must train for *djihad* even in peacetime. This is arguably a matter of military technology and capacity which Muslims as a group do not currently possess at the 'highest' or most sophisticated levels. While this subject is a separate discipline it may not be out of place to note that civilisations in the past (and States in the contemporary age)

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95 Qur'an 8:60. The legitimacy of possessing the means of applying force by States is well settled. The actual use of violence outside purposes of the UN Charter by both State and non-State parties, as an instrument to achieve *ultra vires* ends is a legal, not a moral issue under international law. The practice and opinio juris of Muslim States — including States which refer variously to the *shari'a* - is the acceptance of an obligation to act in accordance with international law, primarily demonstrated by their membership of the UN and thus their acceptance of the UN Charter and are also bound by tacit consent under the *shari'a*.

Although al-Fahd later retracted this *fatwa*: Nick O'Brien, 'Could Terrorists Acquire and Detonate Nuclear Weapons? A Scenario' in K Michael and M G Michael (eds), *Australia and the New Technologies: Evidence Based Policy in Public Administration*, (2008) 89, 93., Shaykh Nasir Bin Hamd Al-Fahd, A *Fatwa on Using Nuclear, Biological and Chemical Weapons Against Infidels* (May 2003) <http://www.camegieendowment.org/static/npp/fatwa.pdf> at 10 March 2009. initially stated that Islamic law permitted the use of nuclear weapons in certain (limited) circumstances. While this view accords with the views of the ICJ in *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Reports 226., on the analysis of the *shari'a* in this thesis coupled with al-Fahd’s retraction of his *fatwa* the better view is that the use of such weapons cannot be legitimised under the *shari'a*, except perhaps in the most extenuating circumstances where Muslims have been first attacked with such weapons. Predominantly Sunni Pakistan does possess nuclear weapons capability. However, in a political and military sense it would put Pakistan at a great disadvantage if its enemies were confident that Pakistan was never permitted to use these weapons under the *shari'a*. This capacity is confined to the Pakistani military and at any rate is of an inferior quality as compared with the nuclear arsenal of ‘the West’ or even India or China. A reasonable practical solution would be to adapt the exception made against the prohibition on the use of fire and that is to permit the development of the weapon but to prohibit its use except in retaliation to the use of a similar weapon by the enemy. That is, to adopt a ‘no first strike’ policy. The disparities and capacities between States and also between States and non-State actors as in technology is significant in considering *shari'a* prohibitions against ‘collateral’ deaths, inasmuch as those possessing more accurate weaponry are bound to cause less collateral damage. This ‘rationale’ however, from a *shari'a* perspective, may give cause or even a pretence for Muslim nations to make or develop ‘better’ weapons under the guise of religious piety. In any event IHL favours the technologically superior side, for example in that the definition of ‘indiscriminate’ with respect to targeting as ‘methods or means which cannot be limited’: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol 1 (2005), 40., necessarily making the cruder weapons of the non-State actors ‘indiscriminate’ as compared with sophisticated and more accurate guidance systems, albeit more destructive weapons, of the militarily powerful. Generally, with respect to collateral deaths and the annihilation of the enemy, this is counter the *shari'a* not for ‘humanistic’ reasons but purely for practical reasons that it is a Muslim’s duty to bring Islam to as many people, and killing one’s enemy frustrates this purpose: see Subduing the Enemy, 57. The Iranian Supreme Religious Leader Ali Khamenei confirmed this position, in response to the West’s claim that Iran is developing a nuclear weapons capability, at the Nuclear Disarmament Conference in Tehran in April, 2010: Political Desk, ‘Weapons of mass destruction are *haram*: Leader’, *Tehran Times* (Tehran), 18 April, 1.
rise to power principally because others can do little to stop this happening. Further, the internal values of a civilisation arguably have a greater influence on its own behaviour than do external values. This is an important underlying theme of this paper. The relevant shari'a perspective is that Muslims must never oppress, must use their power actively to oppose oppression by Muslims as well as by non-Muslims and refrain from corruption.96

Subduing the Enemy
A strategic aim of djihad is to subdue97 but not to annihilate or destroy the enemy if at all possible, because a captured and subdued people can then ‘freely’ hear the call to Islam,98 thus fulfilling a Muslim’s obligation. ‘Religious freedom’ however, is not absolute for Muslims,99 and primarily is a right for non-Muslims only so that they freely may choose or reject Islam.100 Further, the requirement for djizya (a ‘tax’ which is mainly aimed at subduing or removing human arrogance101), demonstrates that conversion is not the aim of djihad. Arrogance, in the Muslim view, prevents people from the true path of God, which in turn leads to aggression, and the Qur’an holds that Satan, who before the fall was one engaged in conversation with God, possessed an overweening arrogance which caused his fall.102 If the enemy is disarmed or subdued and is thus unable to cause fitna or corruption, or if there is a peace treaty (ie that there

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96 See generally Gulzar Ahmed, The Battles of the Prophet of Allah Vol. I (1985), 129; Gulzar Ahmed, The Battles of the Prophet of Allah Vol. II (1986), 91. In this context, Muslims once ruled (among other places) Spain and India and did so for about 700 years before external pressure (aided by internal corruption) forced them out. Muslims gained and held power through military force even though they were numerically in the minority.

97 See hadith at n 26 above.


99 That is, when compared with freedom of religion as defined in the relevant UN Declarations and Covenants.

100 Qur’an 2:256.

101 Humility in all aspects of life is assumed on the part of a believer. The general command is, according to Qur’an 31:18:

And swell not thy cheek (for pride) at men nor walk in insolence through the earth; for God loves not any arrogant boaster.
exist guarantees of peace between the parties) then fighting is neither necessary nor permitted.\textsuperscript{103}

If Muslims do not possess sufficient defensive power and face oppression then they may, and if possible should, migrate.\textsuperscript{104} Migration could be (a) to another part of dār al-Islam or (b) to dār al-sulh (c) or failing the above, endure the oppression with patience — patience generally for which the Qur'an promises a great reward.\textsuperscript{105} Muslims who remain, must nonetheless not act treacherously.\textsuperscript{106}

While nothing turns on this point, it is noted that in practice it is very difficult to suppress the Muslim faith, as most aspects of belief are internalised and in a sense there is very little 'an oppressor' can do to frustrate the individual performance of the greater djihad.\textsuperscript{107} When speaking of oppression therefore, one speaks of oppression against the 'expressions of faith'. Qur'ically however, internal change must preceded external change,\textsuperscript{108} and warns Muslims that an over emphasis on the external manifestations of faith can lead to hypocrisy.

**Leadership and Checks on the Exercise of Muslim Power**

The Prophet characterised every Muslim as a leader, responsible for what is directly in his/her care.\textsuperscript{109} All Muslim groups must select a leader\textsuperscript{110} and the Qur'anic recommendation for election is by consensus.\textsuperscript{111} Since the time

\textsuperscript{102} Qur'an 15:28-40.
\textsuperscript{103} Qur'an 15:9.
\textsuperscript{104} While there are likely to be problems with this proposal, for those who seriously object to the oppression they face, the UNHCR could become involved in assisting with refugee placement in Muslim majority States.
\textsuperscript{105} Qur'an 76:12.
\textsuperscript{106} Qur'an 8:58.
\textsuperscript{107} L Ali Khan, A Theory of International Terrorism: Understanding Islamic Militancy (2006), 22. refers to the situation of the Chechens under Russian hegemony and the failure of Russian culture to assimilate the Chechens. He also quotes Alexander Solzhenitsyn analysis and acknowledgement of the Chechen's refusal to submit to the 'psychology of submission'.
\textsuperscript{109} Javad Nurbakhsh, Traditions of the Prophet (1981), 92.
\textsuperscript{110} Brynjar Lia, Architect of Global Jihad: The Life of al-Qaida Strategist Abu Mus'ab al-Suri (2007), 100; Javad Nurbakhsh, Traditions of the Prophet (1981), 92. While nothing turns on this point one hears the expression among Muslims that a 'leaderless group is, in effect, led by Satan'.
\textsuperscript{111} Qur'an 3:159. A group or congregation jama, is defined as the minimum number required to conduct the Friday congregational prayer and the specific minimum number that is required to form a jama varies according to the Schools. There is a
of the second caliph\textsuperscript{112} the term ‘caliph’ became synonymous with the political head of the (Sunni) Muslims while, after the fourth caliph, the title of imam was used for the head of Shi’i Islam.\textsuperscript{113} Neither the Prophet nor the orthodox caliphs considered themselves Sunni or Shi’i and this terminology being a latter-day development. Further, the Qur’an states that God unites the believers\textsuperscript{114} and knows His true soldiers\textsuperscript{115} and thus temporal leadership is of less direct consequence to the ‘true believers’. The office of ‘leader’ (imam/caliph) has been claimed by many contenders (often simultaneously),\textsuperscript{116} and the ‘best’ claimant to the title cannot in many instances readily be identified.

\textit{Taqwa},\textsuperscript{117} is meant to be the best ‘internal restraint’ on the exercise of Muslim power. In summary, in this context, the issue is whether power held by people possessing this quality of \textit{taqwa}, a heightened sense of justice and fairness, coupled with a unimpeachable belief that they would be expected explain their actions to God, uppermost in their minds, would be exercised fairly.\textsuperscript{118} It would however, be difficult and even unreasonable to expect non-Muslims or indeed the majority of Muslims, to rely on the

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\textsuperscript{112} Roy Jackson, \textit{Fifty Key Figures in Islam} (2006), 14. The full title is \textit{emir al-moumineen} or the Commander of the Faithful. The First Orthodox Caliph was Abu Bakr Al-Siddique and is universally recognised by Sunni Muslims. He is also recognised the Prophet’s closest companion and as a righteous companion by most (but not all) Shi’i Muslims: Baqer Moin, \textit{Khameini: Life of the Ayatollah} (2000), 15.

\textsuperscript{113} The Fourth Orthodox Caliph was the first Shi’i imam and is the only leader recognised as legitimate by both sects.

\textsuperscript{114} Qur’an 8:63.


\textsuperscript{116} Bruce Lawrence (ed) \textit{Messages to the World: The Statements of Osama Bin Laden} (2005), 110. For example, the Taliban Leader Mullah Omar took on this title in 2004. It is often quoted that the Prophet stated that his generation comprised the best Muslims and then the subsequent two generations, in decreasing order, the next best: Muhammad Al-Mughirah al-Bukhari, \textit{The Translations of the Meaning of Sahih al-Bukhari vol 3} (1976), 498. The means of selecting contemporary leaders therefore cannot \textit{ipso facto} be the same as that used by the \textit{salaf} in selecting a leader.

\textsuperscript{117} See fuller discussion of \textit{taqwa} in Appendix 2.

\textsuperscript{118} See fuller discussion of \textit{taqwa} in Appendix 2.
true expression of this proposition in the light of the record of contemporary Muslim regimes. Many Muslims might on the other hand identify the absence of *taqwa* as a major factor that accounts for the corrupt and despotic leadership regimes of many contemporary Muslim ‘leaders’.

Further, reasonable scepticism of Muslim power is exacerbated by ill-informed or apprehensive commentators. For example, Huntington, and although not entirely untrue, somewhat gratuitously, states that contemporary Muslim States have a propensity towards violence, militarism and repression, which in his view appears to be endemic.\(^{119}\) This is in spite of clear evidence that the overwhelming balance of military strength lies with (and knowing that the majority of the most serious armed conflicts of the last 100 years have involved) the five permanent Security Council members (P5) and their allies.\(^{120}\) Further, the use of emotive labels such as ‘islamofacism’\(^ {121}\) do not add much substance or clarity to the debate.\(^ {122}\) This simplistic view of Islam and Muslims is not representative of Western thinking but nonetheless provides al-Qa’eda *et al* with further ‘evidence’ of ‘Western hatred’ for Islam. Although in practice these simplistic minority views are countered by more fair, balanced,

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119 Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order* (1998), 34. While this statement may not in itself be untrue, it is less than useful because of its implication. The author does not show that there is a difference between the behaviour of Muslim and non-Muslim States with respect to their use of violence. Further, he does not show how the Islamic faith adds to this alleged propensity to violence.

120 Ibid. While this statement may not in itself be untrue, it is less than useful because of its implication. The author does not show that there is a difference between the behaviour of Muslim and non-Muslim states with respect to their use of violence. Further, he does not show how the Islamic faith adds to this alleged propensity to violence.


sophisticated and nuanced views, the 'Muslim/Arab' street tends to hear only negative Western opinions about Islam and its adherents.

The Composition of a Muslim Army

Armed \textit{djihad} is compulsory for some Muslim males except in the case of (\textit{ribat}) border security/defence when it is incumbent on all adult Muslims (male and female). According to the Maliki and Shafi'i Schools, only Muslims participate in \textit{djihad}. The Hanafi School in particular permits non-Muslims to serve in a Muslim army citing the precedent of the Prophet. Generally, non-Muslims living in Muslim ruled lands are not required to serve in the army but alternatively are required to pay \textit{djizya}. There are historical instances, however, where non-Muslims voluntarily joined the Muslims' army but in most cases this was because of the imminent nature of the opponent's armed attack. Although the practice is not sanctioned by the shari'a, the Mongols forced non-Muslims to serve in the Muslim army. Qur'anic verses on \textit{djihad} refer only to a \textit{mu'min}, a male believer. Therefore, it is likely that armed \textit{djihad} is not binding on

\textsuperscript{123} For example the more balanced views of people from within the US-Coalition's military establishment such as those of: Brigadier-General Nigel Alwyn-Foster, \textit{Operation Iraqi Freedom Phase 4: The Watershed the US Army Still Needs to Recognise?} (2005) <http://www.smallwars.quantico.usmc.mil/search/ Articles/britishpaperonusmiliniraq.pdf> at 7.

\textsuperscript{124} This is not accidental. Governments in Muslim States propagate Western anti-Muslim sentiments for instrumental reasons, often to deflect criticisms of their own corruption and ineptitude. People are often 'fed' opinions such as that of Huntington or the (then) head of Russian Foreign Ministry Sergei Lavrov who stated that it was the USA (and arguably its close Allies) who are engaging in a 'pattern of deceit and abuse of power in order to implement a unilateral policy of global hegemony': Scott Ritter, \textit{Target Iran} (2006), 109. Broadcasters in Muslim States are usually State owned and run. News services are not as balanced in the best Western tradition and arguably are more akin to Western tabloids selling simplistic, jingoistic platitudes.

\textsuperscript{125} See above n 21, 44 and n 132, 61.

\textsuperscript{126} Please refer to the discussion in the section on \textit{ribat} in Chapter 5.

\textsuperscript{127} Majid Khadduri, \textit{War and Peace in the Law of Islam} (1955), 84.

\textsuperscript{128} Ibid.

\textsuperscript{129} Non-Muslims living in Muslim lands are called \textit{dhimmi} (ديميم).

\textsuperscript{130} C G Weeramantry, \textit{Islamic Jurisprudence: An International Perspective} (1988), 76; Rudolph Peters, \textit{Jihad in Classical and Modern Islam} (1996), 171. \textit{Djizya} (ديزيا) is a poll tax payable by the \textit{dhimmi} (a non-Muslim resident of a Muslim ruled land).


\textsuperscript{131} Majid Khadduri, \textit{War and Peace in the Law of Islam} (1955), 85.
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Muslim women, although on the other hand they are not prohibited from participating, and have done so in the past.133

As opposed to the morally upstanding 'mu'min' for whom djihad is prescribed, Muslims who allegedly flout the basic Islamic teachings such as abstinence from alcohol and frequenting night clubs, are by their own standards, hardly the model Muslims entrusted with djihad, thus providing some support to Burleigh’s reasonable thesis that some Islamist fighters are just pathological killers.135 It is therefore the duty of Islamic groups to ensure that shari’a obligations operate both individually and as between themselves and that those with motives contrary to the shari’a are not permitted to ‘hijack’ their organisations, as in Islam the means are more important than whether one achieves one’s objectives.136

On the other hand, some contemporary Muslims perceive themselves as being ‘weak and oppressed’ resulting in a glut of sometimes poorly-reasoned polemical material decrying any form of resistance. El-Fadl argues persuasively that much of this material appears to be selective in the use of the sources. At the other end of the spectrum, bin Laden has also used the legal sources selectively to call Muslims to fight back in kind. Although bin Laden is particularly unpopular with the subservient end of the Muslim leadership spectrum, as an individual he is popular with the

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The verses of the jihad refer only to the mu’minin (believers that are masculine male) and the words mu’minat (which is feminine is not added to it). The thesis supports this view cognisant that the masculine plural can include the feminine but the better view is as presented by Professor Khadduri (ibid, 85). Women are included in the armed jihad in special cases such as in (border protection) ribat, and the exclusion from the djihad verses of mu’minat (feminine plural) while significant, can nonetheless encompass the exceptions.

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See n 132, above.

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Ibid, 356. According to Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004). Bali bomber Muklas describes ‘the pleasure of war’ as greater than the ‘first night [with his wife]’.

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See n 132, above.

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On the other hand this ability to publish and propagate their views must mean that if they really wanted help, then that they have the means and the resources to seek widely for help.

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Muslim masses. This is possibly because his call for justice, equity and deliverance from oppression strikes a chord. It is only al-Qa'eda's cruel methods of fighting and targeting that prevents them from receiving broader practical popular support. While most Muslims are not easily convinced of the need for an armed *djihad*, a sufficient number of young males appear eager to volunteer to 'help' Muslims in strife-torn countries such as The Lebanon, Iraq, Afghanistan, Bosnia and troubled regions such as Chechnya, Ingushetia, Ambon or Aceh. As a percentage however, these numbers appear to be small. On the other hand, governments in Muslim States also use Islam out of political expediency.

However, the Qur'an generally prohibits Muslims, and thus a *fortiori* Muslim leaders and governments, from seeking the aid of non-Muslims and in the present situation, to fight against Muslim rebels in

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140 According to R L Euben and M Q Zaman (eds), *Princeton Readings in Islamic Thought* (2009), 441. bin Laden states that his more active and forceful opposition started because his (ibid, 441) 'gentle reminders' to the Royal family and those in authority went unheeded.

141 Qur'an 4:77. See generally for example: Wael al-Abrashi, 'The Connection Between Wahhabism and Terrorism', *Raz Al-Yousef* (Cairo), 14 May 2003. Refer also to the *Organisation of Islamic Conference* website for an almost continuous stream of condemnations of 'terrorist' attacks. While (a) the fact situation surrounding them and (b) reasons for this condemnation are often quite complex, the only point made here is that Muslims are difficult to convince of the need for *djihad*. Even discounting the moral and justice considerations, a purely pragmatic view, puts the onus on every individual Muslim to join and/or contribute financially towards a legitimate and genuinely defensive *djihad* (*fard* 'ayn).

142 There is no evidence that 'locals' as a group sought specific help in the meaning of the Qur'anic concept of 'assisting those who asked for help'. For example, Sally Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* (2004), 188. documents the arrival of volunteers from many countries for training in the Philippines (Camp Hudaibiyah) then travel to trouble spots and integrate into the local fighting force. The seeking of help must have the agreement or acquiescence of the majority or at least a significant minority and is not clearly not in the hands of a small minority who may be ideologically aligned with the 'liberators' and therefore, reasonably being perceived as not being independent decision makers.


144 Qur'an 5:51. This is a general verse and there may be an exception for times of insecurity as referred in Qur'an 3:28 n146 below.
Iraq or Afghanistan. Al-Shafi‘i confirms this interpretation, a position that has now stood for a thousand years. On this basis, al-Qa‘eda contends that in this context the Saudi Government’s tolerance of US troops based in the Arabian Peninsula (and now in Iraq and Afghanistan) during and since the first Persian Gulf War, is unacceptable and that the Americans should be expelled. Since al-Qa‘eda did not consider the Saudi government, Saddam Hussain’s regime or the Iranian Government as ‘Muslim’, al-Qa‘eda’s key parochial objection to the presence of US troops is arguably that US military and intelligence were providing support to the Saudi, Iraqi and Afghan governments (as proxies for the USA) to enable them to crush al-Qa‘eda, which from al-Qa‘eda’s perspective was not an unreasonable inference.

On the other hand, al-Qa‘eda has not only survived but has expanded its geographical reach, in spite of the US military aid to Saudi Arabia, Iraq and its other allies, partly because the West has uncritically

145 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 152.

146 Against this interpretation of the Qur’an by al-Qa‘eda see Qur’an 3:28 (emphasis added):

Let not the believers take disbelievers for their friends in preference to believers. Whoso doeth that hath no connection with God unless (it be) that ye but guard yourselves against them, taking (as it were) security. God biddeth you beware (only) of Himself. Unto God is the journeying.

147 Al-Qa‘eda variously treats such regimes as heretics or sometimes as disbelievers thus justifying their own armed jihad against these governments. The problems for al-Qa‘eda are at least two fold (i) if the governments are not Muslim, there is no obligation on them to apply the sharia (ii) the overwhelming majority of Muslims consider these governments Muslim (albeit not always very observant ones). The position taken in this thesis is that these governments are Muslim and al-Qa‘eda’s struggle is akin to rebellion, and which is discussed in chapter 5.

148 It is not implied that al-Qa‘eda considered Muslims’ seeking non-Muslims’ help to fight (President Hussein or Iran, both heretics from al-Qa‘eda’s vantage) as legitimate. The Qur’anic prohibition is against seeking non-Muslim help independent of the enemy being fought. The point here is that Al-Qa‘eda was relatively quiet (only objecting to the presence of female troops but not on the principle of seeking help) during the first Persian Gulf War when it suited them to do so although in principle similar objections of ‘seeking help’ could have been raised in both Persian Gulf War situations.

149 The word ‘uncritically’ is used here in the context of a sharia based critique. Arguably this is the more important perspective for Muslims. The West’s criticism of al-Qa‘eda as ‘terrorists’ does not appear to have much traction in the Muslim world particularly when juxtaposed with the US’s inhumane treatment of detainees/POWs (including children, the elderly, and according to Maudou Habib (with Julia Collingwood), My Story: the tale of a terrorist who wasn’t (2008), 179. there was even a baby held at the Guantánamo detention facility, all protected classes under the sharia) and further the large number of civilians who have been killed in the various conflicts and in accidental collateral killings. Rahul Mahajan, ‘We Think the Price Is Worth It’: Media uncurious about Iraq policy’s effects--there or here
advertised al-Qa'eda's cause by exaggerating its successes and effectiveness.

**Muslims exempt from armed djihad**

To examine the use of force systematically, the fundamental question of who prima facie is required to or entitled to participate in an armed *djihad* is now considered. This is done by first identifying those who are explicitly exempt, arguably because inter alia this means that *djihad*, at least prima facie, is a mandatory collective obligation on the rest of the Muslims, an important pre-requisite being that this is only true in situations when *djihad* itself is mandatory.

**Individual Exceptions**

The Qur'an explicitly exempts certain Muslims from armed *djihad* including: those who are blind, lame, infirm or ill, children, slaves or the insane, those without resources to spend on the cause, or those who have no armour. Al-Qa'eda has not disputed the validity of individual Qur'anic exemptions but has not always honoured its prohibitions.

**Exempt Muslim Groups**

Muslim women are generally exempt from fighting although on the other hand there is no explicit prohibition; jurists agree and historically there appears to be a consensus at least that it is permissible for women to help

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150 FAIR November / December 2001. quotes Madeline Albright on the embargo against Iraq said to have resulted, according Madeline Albright's infamous comment, of 500,000 Iraqi civilian deaths. According to Geoff Simons, *Targeting Iraq: Sanctions & Bombing in US Policy* (2002), 63. the total death toll over the period of sanctions was closer to 1.6 million people.

151 Majid Khadduri, *War and Peace in the Law of Islam* (1955), 84. The use by Al-Qa'eda in Iraq of mentally incompetent people is discussed at 89n, 207 below.

152 Qur'an 9:91.

153 Qur'an 9:92:

154 Staff Correspondent, 'Hospital boss "supplied Iraq bombers"', *The Australian* (Melbourne), 12 February 2008. Al-Qa'eda in Iraq was also reported to have remotely detonated explosives strapped on mentally ill persons. (ibid.). Even if detonation was not carried out remotely, the mentally ill are not competent to consent to such action under the *shari'a* and are exempt from *djihad* (see n 151) and both cases must thus amount to murder. Martyrdom has a mental element and therefore, cannot be imposed.
particularly, indirectly in non-combat support roles, especially in helping to care for the wounded. This issue should be re-examined by jurists for contemporary application. Further, if the non-Muslim army is more than twice the size of the Muslim army, then according to the Maliki school, Muslims are not required to fight, although the Qur'an reminds Muslims that numerical strength is not the key to victory. That is, military strength and superior numbers are no guarantor of victory as was shown in the battle of Uhud where the larger Muslim army with the upper hand (militarily speaking) almost lost the battle because of the indiscipline of a few archers, indiscipline repeated at the battle of Hunain. In Afghanistan however, a Taliban force of 25,000 is at war against 140,000 strong US-led NATO force and appears to be doing so with some ‘success’ (defined here very loosely to mean that they appear to still be alive and are able to fight) in spite of the huge disparity in both the size of the army and the relative quality of their armour.

155 Majid Khadduri, War and Peace in the Law of Islam (1955), 85. This is a latter day restriction. Recall that in the early days for example Ayse, the wife of the Prophet, led an army against the Caliph Ali in the Battle of the Camel.

156 Qur'an 8:65 (emphasis added):

O apostle! rouse the believers to the fight. If there are twenty amongst you patient and persevering they will vanquish two hundred: if a hundred they will vanquish a thousand of the unbelievers: for these are a people without understanding. For the present God hath lightened your (task) for He knoweth that there is a weak spot in you: but (even so) if there are a hundred of you patient and persevering they will vanquish two hundred and if a thousand they will vanquish two thousand with the leave of God: for God is with those who patiently persevere.

While the verse speaks of a ratio of 1:10 it goes on to say that the ‘task is eased’ so that the new limit is 1:2. There is therefore an objective criterion in the relative size of the army (possibly with the underlying assumption that the capacities of the armies are relatively evenly matched in a technological sense). However, the characteristics of ‘patient perseverance’ clearly indicates a subjective element (arguably taqwa, that factors into the calculation).


158 Qur'an 2:249: “When David was told that many a small army has vanquished a greater army”. The Qur'an also makes this point at the incidents of Badr: Qur'an 3:123, and Hunain: Qur'an 9:25.

159 Qur'an 3:125, esp. n 442.

160 Qur'an 9:25.

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When Migration is Possible

The Qur'an urges oppressed Muslims to migrate.\(^{162}\) The Prophet encouraged persecuted Meccan Muslims to emigrate to Abyssinia (Ethiopia) and to Medina.\(^{163}\) Peters is of the opinion that it is mandatory for Muslims to move away from the territory of non-Muslim power,\(^{164}\) and is similar to the Maliki view,\(^{165}\) a position not endorsed in this paper. According to the majority of the Schools, however, there is no compulsion on Muslims to emigrate even if they are oppressed.\(^{166}\)

There is seldom a unified view on any aspect of migration but it is posited that the broad views of the Schools are as follows.

The Maliki opinion is that the Qur'an may not be taken into dār al-harb ipso facto making living in non-Muslim lands impossible.\(^{167}\) The Hanafi School states that a Muslim may travel to, but may not live in, a non-Muslim State but if there is widespread wrong practised in the community then the person should emigrate (to another part of dār al-Islam).\(^{168}\) In the Shafi'i School living in a non-Muslim State is permitted if there is no religious coercion. Hanbali's on the other hand criticise even the

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\(^{162}\) Qur'an 4:97.


\(^{165}\) Malik ibn-Anas, *The Beaten Path Al-Muwatta* (1979), 199. gives as the reason for not allowing Muslims to live in non-Muslim lands that 'lest the enemy should do acts of profanity (upon the Qur'an)'. This position does not appear to engage directly with the historical fact (i) that the Prophet lived in a minority situation for several years (ii) allowed his followers to migrate to Abyssinia and to live there as a minority and (iii) that one does not necessarily need to have a Muslim minority in one's neighbourhood to obtain a copy of the Qur'an.

\(^{166}\) This view is not unanimous as discussed in the next paragraph on the Schools' views on migration. The starting point here is about people born in this locality and who have then subsequently become Muslim as opposed to those who voluntarily migrated into the position in which they find themselves.


\(^{168}\) The reason for adding 'to another part of dār al-Islam is because Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (2001), 309. quotes a Hanafi source which states that 'Abu Hanifa held forbidding wrong to be obligatory by word and sword' which makes it unlikely that he envisaged living among people where non-Muslims held coercive power.
involvement of Muslims in trade with non-Muslim lands.\textsuperscript{169} Shi’i Muslims state only that living in a non-Muslim State\textsuperscript{170} is preferable if there is persecution of Muslims in a Muslim State. However, the majority of Muslims in minority situations, including in the West, do not all belong to the Shafi’i or Shi’i schools, signalling the emergence of a new norm on migration.

The Refugees Convention provides that religious persecution is a legal ground for the recognition of asylum seekers as refugees.\textsuperscript{171} Several Muslim-majority States are party to the Refugees Convention\textsuperscript{172} and in cases even States not party have been generous in hosting a large number of refugees, asylum seekers and displaced persons over the years.\textsuperscript{173} Bin Laden did not claim Convention refugee status; he migrated ‘internally’ from what he described as the oppression of Saudi Arabia, to the Sudan, Afghanistan and then probably to Pakistan.\textsuperscript{174} In general, some temporary economic migration appears to take place between Muslim States but widespread poverty in some States and the general lack of freedom even in wealthy Muslim States makes political emigration by Muslims to other Muslim lands unlikely. Migration from Muslim lands to non-Muslim lands for both political and economic reasons, however, seems significant.

\textsuperscript{169} Although (ibid, 176), states the proposition in slight different terms (ie as the ‘land of the polytheists’ and not as \textit{dar al-harb}) it characterised as appears here (and without altering its substantive meaning) for consistency.

\textsuperscript{170} The concept of a ‘minority situation’ refers to a contemporary context where Muslims make up a numerical minority and live in a system in which persons other than Muslims make up those in power. Muslims rulers in the past have been rulers even when Muslims were in the minority.


\textsuperscript{172} For example, Pakistan has hosted about 2 million Afghan refugees. Iran has hosted a similar number of Afghans as well as several hundred thousands Iraqi Kurds and Arabs. In these cases although unclear, it is unlikely that individual refugee determinations were made. It is also unlikely that the legal basis on which asylum-seekers were declared refugees was on the grounds of religious persecution.

\textsuperscript{173} This ‘internal’ (ie within the \textit{umma}) migration is not dissimilar to Ayatollah Khomeini’s migration from Iran to Turkey and then to Iraq. Ayatollah Khomeini was however expelled from Iraq and only then did he seek asylum in France, which is permitted in the \textit{Shi’i} Schools. For bin Laden however, a follower of the Shafi’i or Hanbali Schools, migration outside the \textit{umma} is not permitted.
despite the reluctance of some Schools to favour it, and would be higher but for the barriers to immigration in the industrialised non-Muslim States.

Given the levels of corruption, the inability to effect peaceful change, the absence of the freedom openly and safely to debate political or religious differences and issues and oppression generally experienced in many Muslim States, means that only either quiescence or rebellion against oppression become the almost inevitable remaining alternatives to migration, a scenario arguably borne out in practice. Where possible, Islamists sometimes seek to replace governments through both political and revolutionary means. On the other hand, al-Qa’eda, which in its view, having failed to effect peaceful change (on the Arabian Peninsula), and other such as Le Front Islamique du Salut (FIS) in Algeria or Hamas in the Occupied Territories have all escalated the struggle to include the use of force. Al-Qa’eda and other groups under its umbrella have also declared jihad against non-Muslims fighting in Muslim lands, and have in some instances extended this call to fighting in non-Muslim lands which prima facie appears to be within the bounds of reciprocity, but, more problematically, have declared civilians (including women, children and Muslims) as ‘legitimate’ targets.

Some of these ‘jihadist’ Islamist groups and individuals have been proscribed as terrorist organisations inter alia by the UN and this

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175 Leyla Sahin v Turkey (2004) ECHR 44774/98. Parti Islam in Malaysia is another example of a political party attempting to implement Islamic norms via democratic mechanisms.


177 Indonesia has recently escaped this foreign intervention and has been able to evolve as a free State. Some reasons could be because Indonesian Islam is perceived as being ‘moderate’ or alternatively Indonesia is too big and complex to control other than by proxy as was arguably done the case of Indonesia under President Suharto.

178 From an al-Qa’eda’s perspective the nexus with the West is created by the extensive Western support received by the Saudi State.

179 Abdul Bari Atwan, The Secret History of al-Qa’ida (2006), 54. It is however, unclear whether Al-Qa’eda (their subsidiaries or the groups they have inspired domestically in either the UK or Spain) have attempted political activity with an aim of effecting change. Al-Qa’eda are more likely to assert that the attacks in the US, UK, Spain etc were in response to those countries’ involvement in Muslim States.

180 Ibid, 223.

181 List of Proscribed Organisations in Australia, USA, UK, Canada, EU and the UN
characterisation coupled with the *mantra* of ‘not negotiating with terrorists,’ militates against peaceful or even any meaningful or constructive engagement. Absent other constructive alternatives or the possibility of a clear military victory for one side or the other, this approach is a recipe for continued violence. The question to be examined in some detail in chapter 5, is whether these Islamist non-State groups can, and notwithstanding the characterisation of some as ‘terrorists’, nonetheless be recognised as legitimate rebels under the *shari’a*. The next step then is to identify both legitimate means of *djihad* as well as the unlawful means of armed conflict. How the individual use of force falls within this spectrum on a case-by-case basis preferably should be examined by a judicial body competent to do this, an issue examined in chapter 7.

**Methodology — Conduct of Hostilities**

It is now convenient to examine the lead up to and the conduct of hostilities in two parts: *ius ad bellum* (considered next) and *ius in bello* (dealt with in the next chapter). The examination of *ius ad bellum* includes a treatment of the necessary pre-conditions legitimately to declare hostilities. Chapter 3, which considers the *ius in bello* also identifies the conditions under which these decisions can be effected, which hostilities may continue and when hostilities may cease. There is also a further question of who has legal

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182 The US-Coalition must however at some point in time look to other avenues to solve these disputes that are causing huge loss of life. The ABC Radio National presenter Ms Elizabeth Jackson *Correspondent’s Report Sunday 18 November 2007*, interviewed Professor Hugh White on the situation in Iraq, states at her web page:

One of Australia’s top defence experts says the United States-led coalition can’t win in Iraq or Afghanistan. Professor Hugh White says the coalition will eventually abandon Afghanistan. By contrast he says, the US can’t succeed in Iraq, but now it can’t escape from the tragedy America has created in the vital Gulf region.

183 On the other hand Professor William Maley, the director of the Asia Pacific College of Diplomacy at the Australian National University in Canberra disagreed with Professor White’s conclusion vis-à-vis Afghanistan: ABC Radio AM Programme 24 December 2007 with Ms. Alexandra Kirk

See n 147, 64.
authority to declare (the commencement of) hostilities and to identify the conditions that govern the making of such declarations. As a part of this overall examination, it will also be necessary to identify the means whereby hostilities may be conducted that are intra vires, or at least not ultra vires, matters that are discussed in chapter 4.
Chapter 2 — 72

**Ius ad bellum: Shari’a Laws Governing the ‘Right’ to Engage in Armed Conflict**

**Leadership and Vicegerency**

Sovereignty under the *shari’a* belongs to God. However, the Qur’an states that God has appointed humans as God’s vicegerents on earth who legitimately may exercise the prerogatives of sovereignty but who must do so with justice and within the scope of the *shari’a*. The proposition that the caliph/imam/leader can exercise sovereign power as the head of a Sovereign State, including the power to declare war, traditionally is consistent with international law.

After the death of the Prophet, the leadership of the four elected orthodox caliphs was approved in turn by a majority of the elders and the people pledged their allegiance to the leader (*baya’*). The Shi’i view is that the leadership rightfully belongs to an infallible imam and a successor of the Prophet through the Prophet’s daughter and her husband, the fourth orthodox caliph. However, after the death of Omar II (c. 720 AD) and the occultation/disappearance of the 12th *Shi’i* imam, while theoretical differences remain, the practical differences in leadership and succession issues between *Sunni* and *Shi’i* are not that significant, and are only

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185 Qur’an 2:230:

( Behold thy Lord said to the angels): ‘I will create a vicegerent on earth’.

(* inni ja’alun fil ardi khalifatan*)


187 Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005), 77 esp. n 19.


189 Ibid, 28. The irony in contemporary society however, is that *Shi’i* Muslim majority States (Iran, Iraq and the Lebanon) have elected governments whereas many Persian Gulf Arab states with *Sunni* majorities or regimes have hereditary succession systems (usually monarchies). The irony arises from the views on succession: *Shi’i* Islam held that the Prophet’s son-in-law (who was considered a worthy candidate universally) should have inherited the Caliphate whereas the *Sunni* Muslims said that the Caliph had to be elected from among the closest, most knowledgeable and pious companions (which also included the Prophet’s son-in-law).
discussed here when directly relevant. According to Khadduri the orthodox view with respect to declaring \textit{djihad} is that:\footnote{Majid Khadduri, The Islamic Conception of Justice (1984), 170.}

In theory only the Imam, enthroned to exercise God’s sovereignty on earth has the power to invoke the \textit{jihad} \cite{Article_12, Constitution_of_theIslamic_Republic_of_Iran} unless the Imam delegates his power to a subordinate, nobody has the right to exercise it without prior authorisation from him. Were the \textit{jihad} to be \cite{Article_107, Constitution_of_theIslamic_Republic_of_Iran} without authorisation it would be a secular war and not a valid or just war.

For the \textit{Djafari} School\footnote{Article 110(5), Constitution of the Islamic Republic of Iran.} this view is reflected in the Iranian Constitution, which provides that only the Supreme leader\footnote{Article 107, Constitution of the Islamic Republic of Iran. Supreme leader is referred to as the \textit{wilayat al-amr}.} may declare war.\footnote{Article 110(5), Constitution of the Islamic Republic of Iran.} On the other hand, it is unclear where al-Qa’eda derives its own legal authority\footnote{Brynjar Lia, Architect of Global Jihad: The Life of al-Qaida Strategist Abu Mus’ab al-Suri (2007), 34. succinctly and accurately summarises the level of ‘\textit{shari’a} knowledge’ even among the top al-Qa’eda strategists (ibid. 9) as ‘not being comfortable with the finer points of religious exegesis’ and generally:}

The choice of engineering [as the preferred course of tertiary study] rather than theology is consistent the fact that most Islamists have no formal training in theology and religion despite their voluminous writings and strong opinions on religious issues. Indeed, most are educated in secular sciences and qualify for prestigious middle class professions \cite{see_text_accompanying_n_190,72}.

A Muslim leader ideally should possess the qualities mandated by the Qur’an; ie be fair, just, merciful, kind and forgiving\footnote{International law has evolved political and legal mechanisms for dealing with rebel, insurgent and liberation groups.} while avoiding the qualities the Qur’an states are disliked by God; e.g. being aggressive, unjust, corrupt, cruel, ingrate, untruthful, arrogant or treacherous.\footnote{See text accompanying n 190,72.} The believer walks gently on the earth,\footnote{Qur’an 2:190; Qur’an 2:205; Qur’an 3:57; Qur’an 16:23; Qur’an 22:38; Qur’an 28:77; Qur’an 31:18; Qur’an 42:40 Qur’an 57:23. Khaled Abou El-Fadl, The Great Theft: Wrestling Islam from the Extremists (2005), 133.} clearly not a description of a

\footnote{Qur’an 25:63: And the servants of (God) Most Gracious are those who walk on the earth in humility and when the ignorant address them they say "Peace!"}

The word \textit{haw’nan} (\textit{الهوان}) means gently and the believer is described as ‘\textit{ibad ar-Rahman}’.
gratuitous warmonger but who on the other hand will not tolerate injustice or oppression. Leaders with the positive qualities referred to above are unlikely intentionally to commit or to command actions that will lead to injustice, oppression and unjust killing. A Muslim leader’s role is to provide for Muslims an environment conducive to fulfilling his/her Covenant, to give others the (repeated) opportunity to hear the Prophet’s message.\textsuperscript{200} should not take a life because, life is sacred,\textsuperscript{201} the taking of which is God’s prerogative alone,\textsuperscript{202} but also because life ipso facto provides a greater opportunity, for good works, for repentance and for those ‘considering’ the validity of the Prophet’s message, a continuing opportunity to become convinced of the ‘truth’. Further, everything else being equal, even Muslims killed in (legitimate) \textit{djihad}\textsuperscript{203} are of a lower status than the one who survives the \textit{djihad} and continues to do further good works,\textsuperscript{204} giving Muslims a theological incentive to survive and continue their good works thus making \textit{kamikaze} action difficult to justify purely on this basis.

\textbf{Contemporary Muslim Leadership}

The reality is that few, if any, contemporary Muslim leaders exhibit these exemplary characteristics. In this context, Lawrence states that bin Laden has successfully projected the ‘classical characteristics of a Muslim a leader’,\textsuperscript{205} one who is sometimes portrayed as ‘a visionary who exhibits an

\begin{itemize}
\item \textsuperscript{200} For a fuller discussion of forbidding wrong, see Sec. 5.1 in Chapter 5. This leadership role therefore encompasses not only maintaining a general peace and security but also maintaining a level of economic activity that enables people to live with dignity.
\item \textsuperscript{201} Qur’an 17:33.
\item \textsuperscript{202} Qur’an 3:156.
\item \textsuperscript{203} Although \textit{djihad} is meant to be \textit{ipso facto} legitimate, it is possible that a fighter was mistakenly but sincerely convinced of his involvement in fighting was \textit{djihad}. While he is subjectively ‘right’ the conflict would itself not be legitimate and as such consequences such as prosecution of leaders, scholars, financiers etc can flow.
\item \textsuperscript{204} Bernard K Freamon, ‘Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History’ (2003) \textit{27 Fordham International Law Journal} 299, 322. There is also authority for the effect that a survivor of \textit{djihad} who lives, fasts an extra Ramadan etc will have a higher status than the martyr who did not survive the battle: Muhammad Al-Mughirah al-Bukhari, \textit{The Translations of the Meaning of Sahih al-Bukhari} vol 4 (1976), 52 ‘The Book of Jihad’.
\item \textsuperscript{205} Bruce Lawrence (ed) \textit{Messages to the World: The Statements of Osama Bin Laden} (2005), xviii. A generally stereotyping of Islamists as bloodthirsty and engaged in wanton
Chapter 2 — 75

elegant piety'. Bin Laden's lieutenants however, who have brought the 'venom' of the harsh and bloody Egyptian and Algerian experiences to the struggle, are much less well viewed by the Muslim community and tend to keep a much lower profile. International shari'a prosecution of such individuals is likely to bear the most fruit.

However, in a spiritual sense, the Qur'an states broadly speaking that leaders will reflect the 'inner selves' of their peoples, irrespective of how leaders are s/elected and consequently that the leaders will not change for the better until 'the people' change for the better. Thus fighting, other than in self-defence or to ease oppression, without self-reform or to address social problems, cannot in the Qur'anic view be effective and if not counter productive, by causing anarchy is at least a waste of time. Non-Muslims sometimes, generally because of a very superficial examination, consider Muslims as 'fatalistic' perhaps because of such Qur'anic injunctions.

and indiscriminate violence can - while undoubtedly true in some cases — be counterproductive. For example when Western news programmes, in this case, Di Martin, Tackling Indonesian terror in Background Briefing ABC, 23 September 2007. depicts 'Islamists' such as Nasir Abas, a reformed convicted 'senior member of an extreme and secretive organisation' as:

'Belying every stereotype of a terrorist, Nasir Abas is charming, funny and unfailingly polite [...] The reason for this assertion is that even a shallow analysis would indicate that Abas did not become charming, funny etc because he stopped being a 'terrorist'. What extremist and militant organisations have been able successfully to do, is to tap into existing discontent inter alia among otherwise charming, funny etc people. It is not Western propaganda that 'turns' these people around, but in (in this case: ibid.) and many cases, is a deeper understanding of and a realisation of the scope of the armed djihad. This is not to minimise the effect of financial incentives and bribes in also turning terrorists and in gathering intelligence.

Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), xvii. See also Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 49.

Qur'an 13:11.

This concept prima facie provides a legal basis, and with development and 'refinement' can arguably provide for a basis for 'democratic' rule in the contemporary sense not discussed here as it is not an issue that contributes directly to the argument in this paper.

Qur'an 13:11.

Some groups such as JI in Indonesia State that cleaning up corruption (e.g. pubs, bars, brothels etc) will help Muslims by not tempting them: Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 10. This seems, however, to defeat the purpose of God's 'testing' people so they might individually choose to obey as opposed to not doing something for the absence of opportunity. The Taliban, al-Qa'eda: at, 10, take a similar view to JI.

See the discussion Universalising Islam through the Greater Djihad, 47. The Prophet was also instructed in Qur'an 11:12 and 6:66, not to 'manage peoples' affairs'.
In addition, the Qur'an only permits fighting against those who ‘fight you [Muslims]’ which is clear permission to fight in defence.\textsuperscript{212} Therefore, correction of one’s self or those ‘near us’\textsuperscript{213} is the better way of effecting ‘genuine change’ because this ‘internal’ change is not susceptible to oppression or external control. The shari’a emphasis for the Muslim undoubtedly is to concentrate on the greater djihad.\textsuperscript{214}

Thus, Islamically, political leaders, whether elected or otherwise, are always a reflection of the community they lead\textsuperscript{215} and hence bin Laden’s view that, like their subjects, Muslim leaders are given to hedonism.\textsuperscript{216} In Algeria, le Groupe Islamique Armée (GIA) too considered civilians a reflection of the corrupt leadership and therefore legitimate targets.\textsuperscript{217} Thus the view of many Islamists appears to be that unjust or bad leaders reflect the inner dispositions of the populace, who are quite content for leaders to do their ‘dirty work’ and must therefore share responsibility thus becoming ‘legitimate’ military targets.

However, notwithstanding this perhaps not unreasonable reading of the text of the Qur’an and sunna, an Omnipotent God — undoubtedly cognisant of such an interpretation — nonetheless still carries the Qur’anic confirmation that such acquiescence or quiescence will be punished only in the hereafter\textsuperscript{218} This reading is reinforced by the Prophet, who in Islam reflected God’s will on earth, who explicitly forbade the killing of non-combatants and other protected categories in armed combat.\textsuperscript{219} He could otherwise explicitly have instructed that those who acquiesce are legitimate targets. The GIA and al-Qa’eda’s reading therefore, with respect to the

\begin{itemize}
\item\textsuperscript{212} Qur’an 22:39-40.
\item\textsuperscript{213} See also the discussion on fighting the ‘near’ enemy. The concept applies to the greater djihad as a person’s animal soul is the ‘nearest’ and it is important to fight/struggle against its crude instincts, because it is a soul which is unjust to itself: Qur’an 43:76. This internal rectification of character faults and flaws is part of the greater djihad is also known as djihad al-nafs (the djihad against the soul).
\item\textsuperscript{214} See text accompanying n 24, 45.
\item\textsuperscript{215} Quran 13:11; Muhammad Al-Mughirah al-Bukhari, \textit{The Translations of the Meaning of Sahih al-Bukhari vol 1} (1976), 80.
\item\textsuperscript{216} Quran 13:11. Ibid.
\item\textsuperscript{217} Center for Policing Terrorism, \textit{Groupe Islamique Armée (GIA) Dossier}, 9.
\item\textsuperscript{218} Qur’an 14:21.
\item\textsuperscript{219} These issues are discussed in chapter 4.
\end{itemize}
Muslim or non-Muslim populations’ acquiescence to their leaderships’ misdeeds, must not be given any *shari’a* weight.

On the question of selecting / electing leaders, contemporary scholars such as Mawdudi (Maududi/ Maudodi), who played a major role in revival movements,\(^{220}\) consider democracy problematic because it translates to majority rule whereas Maududi said that the leader had to be a pious and knowledgeable Muslim man or Muslim woman.\(^ {221}\) Others such as Rachid Rida, have examined this issue of leadership within the broader Western ‘liberal modernist ways’ with the aim of reviving Islam’s ‘golden age’, but nevertheless, his ideas have not been widely accepted.\(^ {222}\) Nonetheless, legitimate Muslim leadership remains a central issue with respect to the use of force because it is fundamental to the lawfulness of a command. At present, there is not a universally-recognised political or spiritual leader who represents all, a majority or arguably even a significant minority of Muslims, thus making the codification of the legitimate means of combat under the *shari’a* by jurists even more urgent.

**Contemporary Islamist Leadership**

The practical effect of an absence of a broadly recognised leadership however, is that each Islamic group works under its own ‘local’ leadership. This leadership can then choose to arrogate for itself the ‘right independently to declare hostilities’, the ‘means’ it will employ in conducting these hostilities and independently making its own determination about what constitutes ‘necessity’. The plethora of non-State groups thus results in as many ‘leaders’ with competing aims and programmes.\(^ {223}\) There appears however to be a strategic underlying understanding of ‘the need’ to re-establish the *umma* particularly among al-


\(^{223}\) The absence of a single recognised leader as the head of ‘the umma’, however, does not pose a practical legal problem. This is because in an international system that in the main recognises States as the key international legal entities, a concept accepted by all UN member states (which includes all Muslim countries).
Qa’eda and its affiliates but translating this vision into reality has proven elusive, as it must under the shari’a, and has in its wake left destruction and carnage.

A further consequence of the absence of a broadly-recognised and accepted Muslim leadership means that non-State groups, and theoretically even States, cannot legitimately ‘declare war’ under the shari’a. Further, since these ‘leaders’ could not agree on a single unified Muslim leadership, they sometimes took the convenient step of declaring those not ‘with them’ as infidel, a mechanism used by Shukri Mustafa, to take just one Islamist leader, to condemn all those not belonging to his organisation. While most other Islamist leaders may not engage in takfir as explicitly or openly, or even deny that they practice takfir, their actions appear to show an utter disregard at times for the lives and property of both non-Muslims and Muslims, who are equally treated as non-feeling, non-human for the cruel methods of killing employed.

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224 See text accompanying n 215.

225 While leaders such as bin Laden are widely recognised and known among both Muslims and non-Muslims, it is a view of this thesis that his leadership style and methods do not enjoy popular support among Muslims. Other international groups or organisations, even such as the Organisation of the Islamic Conference (OIC) do not appear to enjoy much recognition or support in the broader Muslim community. The underlying crisis of confidence it is proposed in this thesis is the failure of Muslims to recognise their leaders as legitimate, credible and exemplary in the meaning of the Qur’an and the sunna.

226 In this sense, the Presidency of George Bush and his language of ‘you are either with us or against us’ which parallels the ‘terrorists’ own worldview and use of language is arguably partly a reason for the ‘success’ of these radical groups under the Bush administration. According to statistics from RAND quoted by Eric Brewer, ‘White House: Increase in terror attacks since 9/11 a success’, The Raw Story 10 January. Deaths due to terrorist attacks rose from under 1000 per year before Bush was elected to about 12,000 deaths in 2006.

227 Gilles Kepel, The Roots of Radical Islam (2005), 11. Shukri Mustafa’s organisation was called takfir wal hijra. The name implies that a ‘Muslim’ living among ‘kafirs’ should then declare ‘them’ ‘kafir and then emigrate, presumably to ‘dar al-Islam’ (whatever that subjectively meant to the members of that group). Recall that the group was based in Egypt which raises the question of what the group’s leadership meant by dar al-Islam, as they consider the Egyptian government as apostate and in effect failed to live up to their own name and move away (migrate hijra) from disbelief.

228 See discussion on takfir in Appendix 1.
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Power to Declare an Armed *djihad* and initiate hostilities

There is a Qur’anic prohibition against the taking of life by anyone but God. The Qur'an however provides a general exception to this prohibition and on shedding blood, if the cause is just. A just cause has historically been interpreted as for the welfare of creation, which prima facie appears to be very broad. On the other hand, the strict *shari'a* prohibitions on taking human life have not been ‘developed’ to cater for contemporary conflict situations and particularly for the availability of weapons of greater (and in cases indiscriminate) destructive capacity, and their collateral effects. The question is whether Muslims can deploy such modern weaponry, given that collateral death and injury is, if not inevitable, then at least clearly foreseeable, an issue discussed in chapter 4.

The *shari'a* grants the legitimate caliph/imam a wide discretion in determining *djihad*’s ‘content’ and ranges from proselytisation to the use of force. However, everything, including ‘life’, belongs to God and thus only God has the right to take life or to authorise the taking of life. Thus all acts that sanction the taking of life must be legitimised by the lawful leader (God’s vicegerent). If fighting is lawful (under the *shari'a*) then the soldier ipso facto is excused and may not lawfully be punished (under the *shari'a*) for death/injury/damage caused in fighting, while using intra vires means. Clearly, he or she may be punished for employing ultra vires means that are criminalised. If deaths are accidentally caused among enemy non-combatants, then compensation (*diya*) is due to the heir. The treatment of collateral deaths/injuries which are not entirely accidental, say because

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229 Qur'an 3:156.
230 Qur'an 17:33:
Nor take life which God has made sacred except for just cause. [...] Among the exceptions are the armed *djihad* and as discussed, as are capital punishments for *hadd* and *quiss* crimes.
232 Qur'an 2:115.
233 Qur'an 39:42.
234 See text accompanying n 185, 72.
235 Qur'an 4:92.
236 That is where a genuine military target would nonetheless result in some civilian deaths and where the person choosing the target knew or reasonably ought to have known of the possibility of civilian deaths occurring. The Prophet prohibited such attacks: Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of
such death or injury was reasonably or even clearly foreseeable is not as a matter of principle settled under the *shari’ā* criminal law and is an issue that needs *urgent* review. That compensation is payable in such cases, however, is settled.\(^{237}\)

While not dismissing Muslim critique of the ‘nation state’, the fact remains that the majority of Muslim non-State groups act and operate within the parameters of the nation State. In this context Jemaah Islamiyah’s General Struggle Guidelines include ‘defeating the power of sinful [tyrannical] rulers’\(^{238}\) and al-Qa’eda has fought what to the minds of their members are renegade/heretical leaders often of their ‘home’ nations, although an alternative explanation is that they were confronting the ‘near’ enemy.\(^{239}\) The reality is the existence of several State and non-State Muslim ‘leaders’ and the practical effect of this plurality is the competition for legitimacy among Muslims and ties in with the question of the lawful use of force which is now examined.

**Legality of Actions**

The relevant questions with respect to the legality of the leaders’ actions with respect to the use of force are:

(a) was the ‘leader’ authorised to make ‘the decision’? and

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\(^{237}\) Qur’an 4:92.

\(^{238}\) Greg Fealy, ‘Jihad’ in G Fealy and V Hooker (eds), *Voices of Islam in Southeast Asia*, (2006) 369. quotes the word used in the JI guidelines as *toghut* (in this context referring to the leadership) which is the Malay form of the Arabic word *al-taghut* which is occurs in for example, Qur’an 39:17, and is translated as ‘a false god, seducer, tempter (to error): Milton J Cowan (ed) *The Hans Wehr Dictionary of Modern Written Arabic* (1980), 561. The common meaning of ‘*taghut*’ is that ‘he exceeded the just or common limit or measure’: E W Lane, *Arabic English Lexicon* vol 2 (1984), 1856. The Qur’an 89:11–12, describes the (tyranny) *tughyan* (the verbal noun form of *tagut*) of yesteryear as ‘those who transgressed beyond bounds and heaped mischief on mischief’ and as ‘those who elevated themselves at the expense of others’ (*oulouan* /اولوان), such as the Pharaoh and describes their grievous punishment. The Qur’an also instructs Muslims not to worship ‘(excessive) power and corruption’.

\(^{239}\) See, 6(3) Fighting the ‘near enemy’, 142.
(b) was the actual decision intra vires (from a rule of law perspective)?
or at least not ultra vires (from an individual rights' perspective)?

(1) If the answer to (a) and (b) are yes then the command is prima facie lawful.

(2) If the answers to (a) and (b) are yes but the execution of the command involved ultra vires means, then the individual prima facie may be charged for each transgression, if there is a positive law to that effect.

(3) If the answer to (a) is 'yes' but (b) is 'no' then prima facie the leader is answerable (as is a soldier who carries out this unlawful command).

(4) If the answer to (a) is 'no' but (b) is 'yes' and the command is executed lawfully the situation is akin to rebellion which is considered in chapter 5.

It is settled, under the shari'a, that only a legitimate imam can authorise the commencing, continuing or ceasing of hostilities. The first limb of this test and the issue of obedience to leaders is now briefly examined.

Obedience to Leaders under the Shari'a
The substance of questions (a) and (b) above should be considered independently because Islam is a communitarian religion and generally requires obedience to the recognised leader. A further reason is that this obedience is not unconditional, as unconditional obedience is owed only to God, thereby not permitting an individual, and notwithstanding taqlid, lawfully to abdicate responsibility for his or her own decisions. The additional authority for this proposition is that even obedience to the Prophet, who was in Muslim belief the most just and truthful leader, was

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241 Qur'an 4:59. Please refer to discussion on taqlid in Chapter 3.
242 See n 245.
243 Some Muslims state that obedience to the Prophet was also unconditional (and it is a matter discussed below). Even if this statement is part of orthodox theology. However, since the passing of the Prophet, this condition is no longer an issue although the argument can be made that the Prophet's commands survive in text. This is usually the reason why Islamists concentrate on some (particularly 'djihadic hadith' at the expense of contextualising the statements and commands. Qur'an 4:59 which requires obedience to the leaders is also distinguished in that the obedience referred clearly is not unconditional.
244 Please refer to discussion on taqlid in Appendix 2.
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not unconditional.\textsuperscript{245} While the Qur'anic verse on qualified obedience to the Prophet addresses the believing women's, the men's pledge is similar\textsuperscript{246} and \textit{a fortiori}, therefore, must apply to Muslim men; and since the Prophet is to be emulated by all Muslims, \textit{ergo} all Muslim leaders.

It seems likely from both the text of the Qur'an and the practice of the Companions that obedience to leaders' unjust commands generally\textsuperscript{247} is not required\textsuperscript{248} as it entails disobeying God who commands justice unconditionally.\textsuperscript{249} That is, each individual command must be made by the legitimate leader and each individual command must be lawful. For the recipient of an unlawful command, perhaps the only way to prove to the Creator that an unjust leader or a leader issuing unjust commands is not acting in their name, is to disobey/oppose unjust commands, with force if necessary.\textsuperscript{250} In general however, the treatment of this issue under Islamic law is not conceptually dissimilar to the issue of 'superior orders'.\textsuperscript{251}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{245} Qur'an 60:12 (emphasis added):
    \begin{quote}
    O Prophet! When believing women come to thee to take the oath of fealty to thee that [...] they will not disobey thee in any just matter then do thou receive their fealty [...].
    \end{quote}
  \item \textsuperscript{246} Muhammad Asad, The Message of the Qur'an: Translated and Explained (1984), 858 n18.
  \item \textsuperscript{247} There are some exceptions, such as, if one is forced to comply with an unjust, ultra vires or even unlawful command for duress, an issue discussed under necessity.
  \item \textsuperscript{248} Khaled Abou El-Fadl, Speaking in God's Name: Islamic Law, Authority and Women (2001), 196.
  \item \textsuperscript{249} Qur'an 4:135. This concept of obeying what is good is accepted in International law although there is much less guidance provided on the international plane (as compared with Islam) as prospectively how to determine what law or laws are so immoral as to require disobedience. According to Antonio Cassese, \textit{International Criminal Law} (2nd ed, 2008), 36:
    \begin{quote}
    \textit{[the substantive justice]} doctrine favours society over the individual (\textit{favour societatis}). Extreme and reprehensible applications of this doctrine can be found in the Soviet legal system (1918–58) or in the Nazi criminal law (1933–45). [...] \textit{[Radbruch]} propounded the notion that positive law must be regarded as contrary to justice and not applied where the inconsistency between statute law and justice is so intolerable that the former must give way to the latter.
    \end{quote}
  \item \textsuperscript{250} While one has little difficulty finding authority on the 'intolerable' nature of the Soviets or Nazis in retrospect, one must remember that there were many governments that traded and worked with these regimes while still in power. There is much oppression in the world today and while no doubt many will criticise these regimes when they have fallen, these regimes do not seem to have much trouble trading and otherwise interacting with the majority of governments of the world. Those who do demonstrate against these 'yet-to-be-declared-evil' regimes are generally in the clear minority.
  \item \textsuperscript{251} Sally Neighbour, \textit{In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia} (2004), 84. Neighbour (ibid, 26) reproduces the \textit{bai'at} (\textit{baya'}), or the pledge of allegiance to the leader, in this case of the Indonesian Jama Islamiyya
\end{itemize}
\end{footnotesize}
Legal basis for hostilities

The UN Charter provides that States have an ‘inherent right of individual or collective self-defence if an armed attack ... ] until the Security Council has taken measures necessary to maintain international peace and security’. The Charter provides that the Security Council is the primary organ responsible for maintaining this peace and security. The formula used by the Security Council to permit the use of force is that States may use ‘all necessary means’ against the offending party, including against non-State parties. The use of force not authorised under the Charter therefore, prima facie remains unlawful.

Similarly, all use of force not sanctioned by the shari'a is prima facie unlawful. There is a tension here between international law and the shari'a (for example if use of force is lawful under the shari'a but is not sanctioned by the Security Council) and is briefly commented upon in the conclusion to this section but is an area that requires much further specific independent examination. The presumption under the shari'a, however is that Muslim States are bound by their treaty agreements, in this instance by the provisions of the UN Charter.

It is now convenient to examine the three specific cases, with respect to jihad, to identify the reasons legitimately for which:

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251 Article 33 of the Rome Statute.
252 Article 51 UN Charter.
253 Article 24(1) UN Charter.
(a) hostilities can be initiated
(b) hostilities may continue and
(c) when hostilities may or may not cease.

The law surrounding these three particular exigencies, particularly (a) is now considered as an *ius ad bellum* issue. Issues (b) and (c) are considered in the discussion of *ius in bello* in chapter 3

**(a) Reasons for which hostilities may be initiated**

According to Cottier the only legitimate use of armed warfare under international law is to weaken the military force of the enemy, but makes no mention of the reasons for which these armed attacks may be undertaken in the first place, and therefore, even with the Charter constraints, prima facie more permissive than the enumerated reasons for engaging in armed *djihad*. The validity or otherwise of this statement is now examined.

The Qur'an mentions four forbidden or sacred lunar months during which Muslims may not commence hostilities. The jurisprudence on Muslims fighting in the prohibited periods is quite settled and it is certain that armed conflict initiated during these prohibited times cannot prima facie qualify as *djihad*. Fighting in defence is not explicitly prohibited and would in any event be permitted for necessity.

Historically, some ‘legitimate reasons’ ‘necessitating’ armed *djihad* have included self-defence, the protection of the faith and the dignity of the Muslims, but only when they possessed an effective fighting force, as alternately, armed action would humiliate Muslims. The measure of efficacy with respect to *djihad* is arguably the degree of success of the action taken to right a wrong.

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257 Articles 2(4) and 51 of the UN Charter limit the scope of the legitimate use of force under international law.

258 Qur'an 9:5; Qur'an 9:36. The Qur'an nominates four sacred months which are (the lunar months of) Zul-Qa'bah, Zul-Hijjah, Muharram, and Rajab.


260 Ibid.
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The Qur’an permits fighting in verses 22:39-40,²⁶¹ reproduced below and contains the conditions under which fighting can commence.

To those against whom war is made permission is given (to fight) because they are wronged and verily God is Most powerful for their aid. (They are) those who have been expelled from their homes in defiance of right (for no cause) except that they say "Our Lord is God." Did not God check one set of people by means of another there would surely have been pulled down monasteries churches synagogues and mosques in which the name of God is commemorated in abundant measure.

While the ‘start’ of, or the aggressor in, a conflict is not always easy to identify with any degree of certainty,²⁶² the right of all parties to self-defence is recognised under the shari’a as it is under international law.²⁶³ Thus notwithstanding the proposition under the UN Charter that the use of force is only really lawful for States in the case of self-defence, this has not stopped the many wars raging around the globe. Analogously the Qur’anic prohibition on the use of force other than in defence has not been strictly observed by Muslims. Nonetheless, the notion that war is reserved for defence and is a last resort is uncontested. It is a moral and legal aspiration codified in the Qur’an, and predates the UN Charter.

Notwithstanding the ‘law’, and for the practical use of force by the USA against al-Qa’eda, and perhaps not entirely unreasonably, al-Qa’eda believed that it was entitled to attack US military interests (everywhere) in self-defence.²⁶⁴ The question of whether al-Qa’eda’s attacks or for that matter the US’s attacks were in ‘self defence’ is a question of fact. Al-Qa’eda legitimises its attacks against the US military on the Arabian Peninsula, where in al-Qa’eda’s view,²⁶⁵ Muslim sovereignty was ‘usurped’ through the US’s support for the ‘heretical’ Saudi monarchy.²⁶⁶ On the other hand,

²⁶³ Article 51 of the UN Charter.
²⁶⁴ Peter Bergen, Holy War, Inc.: Inside the Secret World of Osama bin Laden (2001), 105.
²⁶⁶ While the issue of the blanket legitimacy of fighting non-Muslims on the Arabian Peninsula is not absolutely settled it clearly depends on the factual situation surrounding each attack. There is prima facie shari’a legitimacy of such attacks in al-Qa’eda’s view, arguably based on Qur’an 2:191:
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the shari’a recognises the US’s reciprocal right to fight al-Qa’eda everywhere. The fact that the US has the far greater capacity to achieve its strategic goals, while al-Qa’eda may not, is on principle a secondary issue, although each party must be presumed to know its protagonists’ relative strengths and the consequences that can flow.267

Pre-conditions for armed djihad

If hostilities are likely to commence, there is an unanimous opinion that non-Muslims must first be invited to Islam, thus, if they accept Islam, presumably preventing war between the two ‘Muslim’ parties. In satisfying this first element the al-Qa’eda-World Islamic Front, through bin Laden, invited President Bush and through him the US-Coalition to Islam.268 Note however, that that the ‘disbelief’ of the other party, in the absence of molestation, oppression or persecution of Muslims or others,269 is not a ground for commencing an armed djihad. This thesis argues that Anglophone Western States are not oppressive towards its Muslim citizens, although their treatment of aliens generally is not included in this analysis. Secondly, Muslims must invite the enemy into a treaty relationship before actual fighting commences.270 In the current war against terror, this step may not be necessary because the Coalition has rejected this option.271

And slay them wherever ye catch them and turn them out from where they have turned you out; [...] 267 This issue is discussed further below when al-Qa’eda’s attacks on the WTC in New York are considered. See text accompanying n.

268 For example: Heba Kandil, Qaed urges Bush, non-Muslims to embrace Islam: video (2006) <http://www.swissinfo.org/eng/swissinfo.html?siteSect=43&sid=7029989> at 15 June 2006. The report (ibid.) stated that al-Qa’eda’s message was delivered by ‘an American convert named Adam Yahije Gadhah and [al-Qa’eda’s second in command] Ayman al-Zawahri’. There have been several similar calls by al-Qa’eda and associated Muslim groups.

269 American Muslims have not as a group complained of systematic oppression on grounds of their faith and the rate of conversion to Islam corroborates this assertion: Mbave Lo, Muslims in America: Race, Politics, and Community Building (2004), 29. The large numbers of African-American Muslims have complained of systematic oppression and discrimination but the oppression and discrimination predated their conversion to Islam: ibid. In any event there does not appear to be such an appeal from American Muslims to al-Qa’eda nor has al-Qa’eda publicly claimed that it was invited to ‘assist the oppressed’ in the USA.

270 Qur’an 17:15; Abu’l Hussain Muslim, Al Jam‘us Sahih vol 3 (1972), 943. See also the hadith commencing with the words ‘When you meet your heathen enemies summon them to three things. [...]’, 46 above; and Rudolph Peters, Jihad in Classical and Modern Islam (1996), 37.

271 See note and text associated with n 182, 70.
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Recall further that armed *djihad* is a collective duty and thus generally is not obligatory on any particular individual. This obligation however is to be read as follows: that armed *djihad* is mandatory on every eligible Muslim male who is capable of fighting and remains so until a sufficient number of people, that is, when the number of Muslim soldiers is half that of an evenly matched opposing army,\(^{272}\) have volunteered to satisfy a particular exigency. After this, it appears that there is no religious obligation on any individual to join the *djihad* though he may do is if he is able and wishes to do so, motivated by a duty to serve God and is cognisant of the huge reward for this effort. If an insufficient number of people volunteer then every eligible Muslim male is in breach of his Covenant obligation. In cases, if the strength and size of the enemy army are unknown, then the Qur'anic limits of 8:65 may (unlike the interpretation above) be read in a less literal manner.\(^{273}\)

The smaller size of the Muslim army also forces not only the leaders but also individuals to consider all the alternative options to war very carefully. In a very practical sense, however, even when the other *shari'a* conditions for fighting are otherwise satisfied, fighting only becomes binding when the Muslims are ‘strong enough’ to fight.\(^{274}\) This criterion is arguably based not only on the number of fighting men (noting that Muslims ‘who have no armour’\(^ {275}\) are exempt from fighting) but on whether they have access to weapons comparable to those possessed by the enemy. Contemporary Muslims are militarily much weaker than the US-Coalition or even other middle powers and therefore, even where migration is not possible for oppressed Muslims,\(^ {276}\) objectively, fighting is not mandatory.

\(^{272}\) See n 156, 66.
\(^{273}\) See text accompanying n 156, 66.
\(^{275}\) Qur'an 9:92.
\(^{276}\) Qur'an 4:97 requires Muslims to move away from oppression and is discussed below.
This may not be practical however, given the extent of brutalisation in pogroms such as *zakhistki* in Chechnya, and other atrocities carried out against Muslim civilian populations: L Ali Khan, *A Theory of International Terrorism : Understanding Islamic Militancy* (2006), 28. While nothing turns on this point, while some Muslims forcefully point out to injustices faced by Muslims at the hands of others, and while there is Prophetic commands to the contrary: Muhammad Al-Mughirah al-Bukhari,
The present hostilities in Iraq and Afghanistan, perhaps through a causally linked series of events, arguably resulted from the original Islamist attacks on the US Embassies in East Africa (which al-Qa'eda have not denied) and on the US mainland (although the US's own instrumental use of these attacks for its own political ends is also noted) and consequently have brought more foreign troops into Muslim lands. Since in this context al-Qa'eda arguably provoked the US into invasion, it too must share blame and liability for the ensuing carnage. On the other hand, it can be argued that previous Western interventions in the Arab world are also a clear factor in the several conflicts, including in the Yemen and Somalia and therefore are also culpable.

**Armed *djihad* and the individual**

The question in the case of confronting a much superior military force then becomes: whether there is a countervailing requirement on Muslims to examine ‘means’ of warfare that will help to equalise the significant military imbalance, such as the ‘asymmetric warfare’ means adopted by al-Qa'eda and other Islamists. However, while *djihad* can not be abandoned for mild inconveniences, it cannot on the other hand continue when fighting is criminal, unjust or results in humiliation or in *fitna*. Between these extremes, in determining whether fighting is ‘necessary’, there is a grey area urgently needing the attention of jurists as well as the broader Muslim community.

Al-Qa’eda’s solution to the problem appears to be by elevating the duty of armed *djihad* to a mandatory individual duty, next only to the requirement of ‘belief in God’. In elevating the armed *djihad* to this position of pre-eminence in the Islamic faith, al-Qa’eda appears to attempt to negate the legal ‘limit’ that armed *djihad* is not always individually

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**Notes:**

277 Al-Qa’eda has arguably has admitted that it miscalculated the strength of the American response in Afghanistan to the attacks on its own interests, although the language in which this ‘admission’ is made is unclear.; Bruce Lawrence (ed) *Messages to the World: The Statements of Osama Bin Laden* (2005), 150. The word ‘provoked’ is used in its ordinary sense and not as a legal term of art.

278 Ibid, 163. See further the discussion on this topic in chapter 5.
binding on all Muslims. Al-Qa'eda's position is not supported by this paper. It is not in line with the precedent of the Prophet or his Companions, and it is unlikely that such a fundamental matter would have eluded the Prophet and successive generations for over 1,400 years.

Al-Qa'eda has also adopted practical 'means' of counteracting Western technology by brutally and cruelly attacking soft targets. Even if the 'effectiveness' of these means is conceded, this is clearly not the only shari'a criterion and must fail on moral and legal criteria. Al-Qa'eda's position and means are unlikely ever to be accepted by Muslim consensus because the elevation of djihad to this new position appears to be usurping the rights of God and the Prophet, and the means of fighting adopted inherently are arbitrary and cruel.

In legitimately fighting injustice, a Covenant obligation (of fighting the 'near' oppressor or enemy) takes precedence. The broader obligation then for an individual Muslim can be characterised in the following terms. Muslims must:

(a) oppose injustice, peacefully or through the use of force and neither
(b) (i) help their leaders to perpetrate injustice, nor
(b) (ii) submit themselves to injustice.

Opposing injustice can take many forms, both involving and avoiding the use of force. In some cases passive, non-violent means may not be sufficient. The question then becomes, what level of injustice 'necessitates' individual armed struggle against unjust and oppressive leaders?

Determining the individual 'necessity' to fight
The threshold for 'necessity' that applies to individual Muslims living under non-Muslim hegemony, cognisant of the shari'a preconditions, is necessarily higher than for Muslim majorities. This is because Muslim minorities must first exhaust other options such as migration to dar al-Islam where presumably 'ipso facto' there is (supposed to be) greater religious

279 See discussion accompanying n 213, 76.
280 In understanding the content of an unjust command, the question really is: what is a just command? and begins with what is meant by 'just'? The starting point must be justice within the meaning of the shari'a. The Qur'anic word for 'just' is adl ('adl) and appears in the Qur'an: e.g. Qur'an 16:90.
freedom. This precondition is not likely to be satisfied in many Muslim States today, a view with respect to Indonesia a few years back, confirmed by Abu Bakr Bashir. However ‘necessity’ only becomes a relevant legal issue with respect to an individual’s duty after fighting generally has become collectively mandatory under the shari‘a. If fighting is not collectively mandatory then clearly an individual is not obliged to fight and a decision to do so is therefore purely subjectively formed. Factors that can touch these subjective factors are now examined.

This is the situation where Muslims are living as a minority (and living in oppressive conditions, a situation that must be established in fact) and:

1. on whom armed *djihad* is not mandatory by virtue of ‘the’ imam’s decision not to fight or
2. in the absence of a legitimate imam or
3. the conditions that make *djihad* mandatory have not yet been satisfied or triggered

That is, the question for an individual Islamist, absent the imam’s call to arms, is whether can an Islamist, or any male Muslim for that matter, can independently, subjectively decide whether or not armed *djihad* is mandatory or necessary (on himself), say for oppression. He must first exhaust all the pre-requisite prescribed *shari‘a* means, such as escaping persecution in the minority situation. The levels of analysis required, and the number of decisions that one has to make before arriving at the point at which, even subjectively, the use of force becomes ‘necessary’, is not

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281 Sally Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* (2004), 98. Bashir, purported to be JI Indonesia leader, encouraged Indonesian Islamists to seek refuge in Australia as a place which allowed them to practise their faith. It is acknowledged that with the fall of the Western supported Suharto regime that freedoms including religious freedom has greatly improved in Indonesia.

282 See Pre-conditions for armed *djihad*, 86.

283 The call by people like bin Laden cannot be considered to be equivalent to that of a rightful imam because it is almost universally accepted that he is not a lawful imam. The objective application of the ‘balanced person’ test: see text accompanying n 285, 91, *must* mean that, unless the fighter is a child or insane or in an exempted class for some other reason, the fighter knew or must have known that the overwhelming majority of the Muslims did not accept bin Laden or any of the other contemporary *djihadist* leader as the rightful imam. Thus any legal decision that is referred to ‘the imam’, *must* be referred back to the individual and treated as if the individual Islamist/Muslim acted on his own *idjihad* (see Appendix 2).
straightforward. Judging the application of these complex factors is clearly a question of law, best done on a case-by-case basis by jurists or judges.

The use of force not sanctioned by the *shari'a* (objectively or subjectively) is clearly unlawful and Muslims who genuinely consider their Covenant obligations cannot, even from the most selfish point of view,\(^\text{284}\) abdicate their responsibilities for a decision that can have such fundamental ramifications for their own faith and their position in the hereafter. Therefore, the issue of *shari'a* legitimacy is clearly vital. The decision of someone who subjectively feels compelled to fight, particularly if such a decision or perception was unreasonable, is a moot point and is now considered.

It appears settled that to minimise anarchy, in determining necessity, the requisite test and standard to be applied is that of a 'balanced and sensible person'.\(^\text{285}\) This test is composed of an objective 'balanced person' test with the further element of 'sensibility' which arguably has both objective and subjective components which can cater for factors such as age or level of education. The standard of the 'balanced and sensible' person is at minimum, arguably, comparable with the common law 'ordinary person'\(^\text{286}\) or in circumstances the 'reasonable person'\(^\text{287}\) tests, with some consideration of the notion of recklessness as a discrete issue touching on 'sensibility'. However, for some individuals in extremely stressful conditions, *shari'a* tests for the application of necessity, reciprocity or proportionality should apply, based on the accused's subjective

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\(^{284}\) Qur'an 2:286.

\(^{285}\) Michael Cook, *Forbidding Wrong in Islam* (2003), 55. According to Cook (Ibid.) the test is well established and not disputed by jurists. It is suggested here that insane or unbalanced persons taking up 'armed *djihad*' in a flight of fancy should be treated as an illness and perhaps not as a crime. On the other hand authorities need to balance public safety to avoid misled young people taking their own and the lives of innocent people such as in London and in many parts of the Muslim world.

\(^{286}\) *Stingel v The Queen* (1990) 171 CLR 312.

\(^{287}\) *Wilson v The Queen* (1992) 174 CLR 313.
knowledge,\textsuperscript{288} and in the light of the ‘conditions of the moment’ as it does in IHL.\textsuperscript{289}

The \textit{shari’a}, however, appears to set a high standard by including elements of what the person reasonably ought to have known in the circumstances. That is, an individual Muslim male may make a subjective decision but one which is likely to fall on a different point within a finite spectrum along which lies the decisions of ‘balanced and sensible persons’, ie decisions based on a combination of subjective and objective elements. The subjective element with respect to a decision may help determine whether the decision arrived at by a particular individual falls outside this ‘spectrum’.\textsuperscript{290} The resolution of these complex legal, political and factual matters is dependent on the specific circumstances. These are questions of law that should preferably be judicially, and not politically, determined.

It is noted that the two traditions of IHL and SHL may neither recognise similar justifications on one hand nor agree on what may be seen as appeasement on the other. There will clearly be differences in how ‘necessity’ will be determined in each tradition but for fairness, for Islamists on trial, the values of Islam must apply at least in the subjective elements. Mechanisms for doing this are explored in chapters 6 and 7.

\textbf{Legitimacy of Intervention by Muslims Against Oppression}

Opposing oppression, either individually or collectively, is not controversial when done in self-defence or in response to a treaty obligation and is clearly the case under both IHL and SHL. Intervening against the oppression of the ‘other’ (in the case of Muslim co-religionists


\textsuperscript{289} According to Jean-Marie Henckaerts and Louise Doswald-Beck (eds), \textit{Customary International Humanitarian Law}, vol 1 (2005), 50:

Numerous States have pointed out that those responsible for planning upon or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.

\textsuperscript{290} That is, the necessity of armed action must be carefully weighed up against all relevant factors, cognisant (as discussed above) that under Islamic law a genuine ‘best effort’ decision based on \textit{taqwa} is deemed ‘correct’ by the Creator.
by one not bound by treaty) is perhaps less uncontroversial and is now considered.

It is settled that the use of force not sanctioned by international law and analogously not sanctioned by the shari'a, prima facie is unlawful. Consider however the use of force, such as the US and Coalition used force in the Second Persian Gulf War, absent the Security Council's explicit authority, yet which was tolerated by the international community. Such cases include the so called 'humanitarian intervention' or the notion of the 'Responsibility to Protect' (RtoP) which arguably provide precedent, albeit very weak precedent, for the use of force to prevent what might broadly be described inter alia as oppression. The action of the international community under SC Resolution 1973 in Libya and under SC Resolution 1975 in the Côte d'Ivoire has arguably enlivened the question. These are still unsettled legal bases under international law and therefore not discussed in any detail.

Thus, while shari'a intervention to counter oppression is arguably not dissimilar in principle such intervention, they are controversial and unsettled areas of law to say the least, but nonetheless might provide a starting point for shari'a application on this issue of intervention against oppression. Careful and objective shari'a definitions and rules are important in this area as it is clearly open to instrumental and abusive interpretation and application and is likely to prove very contentious indeed, as it has under international law. While it is no doubt very controversial, it is an area that needs jurists' attention.

Oppression under the shari'a appears to be used in a broad sense but is not yet defined in a form that may be used for contemporary prosecution. It is, however, arguably a meaning that falls within or at least shares some commonality with the definition of crimes against humanity as

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292 These doctrines of humanitarian intervention and RtoP are areas of law in their own right and have been discussed extensively in the literature. As it is not directly to point, for reasons of space, the discussion of these points in this thesis is kept very brief.
defined in the Rome Statute. While such crimes, when proven, can be prosecuted, at present, international law provides no clear legal basis for intervening to prevent or pre-empt such oppression. The ICTY Appeals Chamber in the Erdemović Case held that a crime against humanity ‘may occur in peace or in war […] against the rights of all men’. Similarly, the shari’a does not limit the prohibition against oppression to ius in bello. May states that in situations where such crimes occur:

I propose two principles: one stressing that when a State will not or cannot provide for the security of its citizens, it loses the presumption of exclusive jurisdiction over criminal matters, and the other stressing that international bodies could intervene into otherwise sovereign affairs of States to prosecute crimes against humanity.

While this opinion is not a statement of law as such, it shows that the world community is willing to countenance such intervention in cases. One could presume that if intervention for prosecution of a crime was possible, then intervention to prevent such crimes should arguably not be abandoned for the pretext of sovereignty.

Shari’a law on oppression however, is a long way from international standards for many reasons alluded to above. Initially therefore, IHL standards should apply at least until a clearer shari’a jurisprudence emerges on the issue of how to combat oppression. Muslim consensus must be allowed to crystallise on the policy aspects as well as the practical application of shari’a law and practical tests emerge with respect to the concept of intervention against oppression.

Conclusion
The shari’a prohibits all armed conflict that is not djihad. Djihad is a very broad concept and may be considered as being made up of two discrete parts, the greater djihad and the lesser (armed) djihad. It is the latter form of
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djihad that is of greater significance for this paper. The aim of djihad generally is to universalise Islam.

Armed djihad must be lawfully authorised by the legitimate leader. Only lawful means must be employed during armed djihad. There are large gaps in SHL with respect to the means and methods that may be employed in contemporary fighting and should be addressed urgently.

There are shari'a pre-conditions that must be satisfied before hostilities can be declared. For example, Muslims living in oppressive minority situations must first seek to emigrate. When fighting becomes lawful and has commenced, a Muslim who is not exempt from fighting must fight without turning back and without concern for his own life. He must fight for God's sake alone and not for any other purpose. While the shari'a's ius ad bellum principles appear to be well articulated, the principles of ius in bello appear to be much less well articulated. This requires urgent reform and development as discussed in the following chapter.
CHAPTER 3

IUS IN BELLO LAW REGULATING THE CONDUCT OF HOSTILITIES

The Prophet said “He will not enter Paradise whose neighbour is not secure from his wrongful conduct”. 1

Introduction

Once hostilities have commenced Muslims must fight without turning back, 2 rightly motivated. 3 Muslims may slay enemy combatants until fighting can lawfully cease. Capture of the enemy is preferable if possible as it gives the Muslims a chance to invite them to Islam. In the past when slavery was lawful, the captured live person also had an economic value (and the spectre of slavery was on the other hand a great disincentive to Muslims to start a war as in many cases Muslim slaves were tortured until they gave up their faith). A Muslim soldier is reminded that victory is from God alone and employing foul or ultra vires means must be avoided assiduously as a ‘temptation’ 4 leading, at best, to a short term, illusory gain, with a possible longer term punishment likely for disobeying God. 5 Part 1 of this chapter very briefly examines the pre-conditions necessary for conducting hostilities, including identifying when hostilities can or must cease. Part 2 examines the question of war crimes under the shari‘a then leads on to the main question addressed in Part 3, of who may and may not lawfully be targeted during hostilities. Part 4 of this chapter examines the

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1 Abu’l Hussain Muslim, Al Jami’us Sahih vol 1 (1972), 32.
2 According to Muhammad Asad, The Message of the Qur’an: Translated and Explained (1984), 120. Qur’an 4:84 cannot be an incitement to war but can only refer to a war in train:
Then fight in God’s cause thou art held responsible only for thyself and rouse the believers. It may be that God will restrain the fury of the unbelievers: for God is the strongest in might and in punishment.
3 Qur’an 9:5; Majid Khadduri, War and Peace in the Law of Islam (1955), 60.
4 Qur’an 8:48. See also n 308, 169.
5 According to Muhammad Asad, The Message of the Qur’an: Translated and Explained (1984), 120. Qur’an 4:84 cannot be an incitement to war but can only refer to a war in train:
Then fight in God’s cause thou art held responsible only for thyself and rouse the believers. It may be that God will restrain the fury of the unbelievers: for God is the strongest in might and in punishment.
issue of fighting that takes place in 'mixed population' (civilian) areas and the issue of collateral death and injury.

**Part 1: Conditions for Ceasing an Armed Djihad.**
Generally, an armed conflict ceases when one party is defeated or surrenders, or the parties agree mutually to cease hostilities or perhaps through the exhaustion of the parties to the conflict. These are practical criteria. The Qur'anic criterion is that fighting should continue (and clearly only if it is lawful and practical to do so) 'until there is no more persecution' and the enemy subdued. The 'peace verse' on the other hand obliges Muslims to respond to overtures of peace. While Muslims must be aware that an offer of 'peace' might be a ruse, they should proceed with trust in God alone. Terms of peace that are negotiated by the Muslims must be fair, just and, whenever possible, ensure that the conditions of aggression or oppression that had triggered the fighting in the first instance have ceased.

An important issue in the context of *ius in bello* is how a soldier conducts him/herself during armed hostilities. IHL/ICL analysis of this issue centres around war crimes as defined in the Rome Statute and inter alia as interpreted in the jurisprudence of the ICTY and ICTR. An analogous analytical approach, drawing upon this jurisprudence together with the *shari'a* jurisprudence, is followed in this paper. A comparative analysis of a soldier's expected, legitimate, conduct during hostilities under the two traditions now follows.

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7 Qur'an 8:61:

> But if the enemy incline towards peace do thou (also) incline towards peace [...].

There is a view that this 'peace verse' was abrogated: Rudolph Peters, *Jihad in Classical and Modern Islam* (1996), 39.
8 Qur'an 8:62 (emphasis added):

> Should they intend to deceive thee verily God sufficeth thee: He it is that hath strengthened thee with his aid and with (the company of) the believers.
Part 2: War Crimes: Comparing IHL and the Shari'a — Methodology for Analysis

War crimes are defined as grave breaches of the Geneva Conventions or serious violations of the customs or laws of IHL. The Appeals Chamber in the Tadić Case clarified the scope of what was meant by 'serious violation' to include participation in such a violation through 'conspiracy, incitement, attempt and complicity'. Some war crimes are criminalised in a prosecutable form in the Rome Statute, as well as, but not limited to, the Statutes of the ICTR and ICTY. They include violations of laws during both international armed conflicts and armed conflicts not of an international character, a distinction that is given no weight under the shari'a.

For convenience, in this section, unless it is likely to be ambiguous, this qualifying phrase 'under international law' is omitted.


The Prosecutor v Duško Tadić (1999) Case No IT-94-I-A para. 189. The fuller statement of the Appeals Chamber is as follows (emphasis added):

As is apparent from the wording of both Article 7(1) [of the Statute of the ICTY] and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the actus reus of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or ordering to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including conspiracy, incitement, attempt and complicity).

Article 8 Of the Rome Statute. Cottier refers (ibid. 198) to the 1868 St Petersburg Declaration to establish the longstanding consensus on the extent of the permissibility of the use of armed force.


Article 8(2)(b) Of the Rome Statute.

Articles 8(2) (c), (d) & (e), Of the Rome Statute.
Fenrick lists the general elements of a war crime under international law as:

(a) an act prohibited by treaty or customary law
(b) committed during an armed conflict
(c) by a perpetrator linked to one side of the conflict and
(d) against a victim who is neutral or linked to the other side of the conflict.

These four elements are now used for convenience as a means for analysing the 'equivalence' of 'war crimes' under the two systems. Note that, notwithstanding Article 8(1) of the Rome Statute, which goes to jurisdiction and not the elements of the crime, evidence of a 'grander plan' is not required. This issue touches on considerations similar to those discussed under genocide in Appendix 3, which are not repeated.

In a very general sense this analysis creates a genre of shari'a 'war crimes' as *ta'zir* crimes, that is, committed during armed conflict (and whether characterised as armed *djihad* or otherwise) and follows a methodology similar to that employed in the analysis of the crime of genocide. The *shari'a* part of the comparison is done by identifying and considering the four broad Fenrick headings:

(a) Criminalising an act prohibited under the *shari'a* is not controversial or problematic. The issue for criminalising war crimes under the *shari'a* more broadly as discussed is that some serious *shari'a* crimes such as hypocrisy, do not find equivalence in the international sphere.

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17 Article 8(1) Of the Rome Statute (emphasis added):
   The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.


19 See discussion on Genocide in Appendix 3, the absence of a requirement for a plan and the reasons for this omission.

20 Please refer to Appendix 3.
international crimes therefore, it was suggested that one way around this impasse is, on the international plane, to only criminalise acts that are doubly criminal.

(b) Limiting a crime to one perpetrated during an armed conflict should not pose a problem.

(c) Limiting the jurisdiction of the prosecution to those involved in a particular armed conflict should also not pose a problem under the shari'a.

(d) This element, the most substantive of the four, can broadly speaking, be sub-divided into two sub-parts. The first is identifying a potential victim, an area that is likely to show up the greatest difference between IHL and shari'a humanitarian law (SHL). Secondly, under IHL the breach in question must, be reasonably characterised as 'grave' in the meaning of the Geneva Conventions. These two sub-parts are discussed in the context of war crimes broadly speaking as:

   d(i) Classes of combatants and

   d(ii) Lawful and unlawful means of warfare.

   (d)(i) Classes of combatants

   The shari'a 'classes' of both lawful ('combatants') and unlawful human targets ('protected persons', or 'victims') in war must be separately identified with the view to being able to prosecute war crimes. The intentional targeting of persons hors de combat may itself prima facie constitute a crime; a position that is likely to be supportable under the shari'a with respect to 'protected persons'.

   The victims of war crimes under international law are generally, but not exclusively, persons hors de combat. As a 'general' class of victim it prima facie is a much broader category than are those who may not be legitimately attacked, injured or killed during an armed jihad under the

22 Article 8(2)(a) of the Rome Statute.
23 This term 'protected persons' is used as a term of art and will be defined and discussed more fully below.
24 See for example, Articles 8(2)(b) & 8(2)(e), Of the Rome Statute.
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shari'a ('protected persons' discussed in some detail below\(^{25}\)). Cottier rightly notes that although the phrase 'persons hors de combat' does not appear in the Rome Statute's relevant provision,\(^{26}\) this is the proper contemporary reading of who may constitute a victim of a war crime.\(^{27}\) In identifying the principles behind and the intended beneficiaries of war crimes legislation Cottier states that:\(^{28}\)

[…] combatants who lay down their arms and surrender do not enjoy the protected status of a prisoner of war until they actually come into the power of the adverse party to the conflict, and the prohibition to attack persons hors de combat thus intends to provide protection for this interval.

For convenience, all persons who would be considered prisoners of war (POW) in the meaning of GCIII\(^{29}\) and IHL generally will be subsumed into the class of protected persons or those hors de combat. While this is likely to be uncontroversial and not adversely affect the analysis, it is acknowledged that the question of who can actually claim POW status and be recognised as such has been controversial in the war on terror.

(d)(ii) Lawful and unlawful means of warfare.

Identifying both the lawful ('permitted shari'a means') and unlawful means and techniques that may be employed in armed conflict is also an important aspect of identifying potential criminal behaviour. The reason why 'grave breach' has been rendered as 'means employed' is because IHL holds that killing a single person is sufficient to constitute a war crime,\(^{30}\) a position that is supportable under the shari'a\(^{31}\) and further discussed under both Cain culpability\(^{32}\) and genocide.\(^{33}\) That is, that breach of (or

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25 See below: Section 1: Who May not legitimately be killed in armed jihad ('protected persons'), 106 and also Who Can legitimately be killed in armed jihad, 109.
26 Article 8(2)(b)(vi) of the Rome Statute.
27 Ibid, 201.
29 See n 55,107.
   The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
31 Qur'an 5:32.
32 Qur'an 5:32. See also Cain Culpability in Appendix 1.
employing means that are ultra vires) permitted _shari’a_ means of fighting — which are discussed in chapter 4 — may also in cases be used as a legal basis to identify prosecutable war crimes under the _shari’a_. These two areas are now examined for each tradition.

The overarching question to be addressed then is, whether what is for convenience called the war crimes protection regimes under the two legal traditions, can in a broad sense be said to be roughly equivalent. This is, consistent with the methodology employed in this paper, an important consideration in creating a _shari’a_ law criminalising ‘war crimes’. As with the other serious crimes, this should ideally for practical reasons, be consistent or at least not significantly inconsistent with the present IHL/ICL regime. Generally it is clear that under both traditions that the means of injuring the enemy in war are not unlimited. The object here is to establish the degree of permissiveness in each tradition and to identify the overlaps and differences in their respective protective regimes.

**Creating a _shari’a_ war crime**

_Shari’a_ ‘war crimes’ are at present a non-existent specie of crime. These crimes should therefore be constructed in the category of _ta’zir_ crimes. Acts to be criminalised are in a broad theoretical sense now examined below, under the identified headings for convenience. The systematic examination of the enumerated war crimes of the Rome Statute is not undertaken in any comprehensive way for brevity and convenience and particularly for space but this précis should not adversely affect the validity of the discussion of the main principles, which as discussed are non-

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33 See Appendix 3.

34 While the crimes can broadly be equated, the threshold or the severity of the breach at which the perpetrator of a particular crime is tried on the international plane is a further matter that can be handled in a manner as is the present custom. That is, prosecuting leaders as well as those with the most ‘blood’ on their hands, on a case by case basis by an exercise of jurisdiction similar to that of Article 13 of the Rome Statute.

35 For example: International Convention with respect to the Laws and Customs of War on Land [Hague II], The Hague, 29 July 1899, :

Art. 22 The right of belligerents to adopt means of injuring the enemy

is not unlimited.

_Shari’a_ means of combat are discussed in chapter 4 but as will be shown are not so open ended as to not fit within the meaning of Article 22 of Hague II just quoted. In fact the _shari’a_ appears to be quite stringent on the permitted means employable in armed combat.
controversial. The two most contentious issues touch upon who is or is not a legitimate target. This, and the notion of collateral injury under the two systems are now discussed in Part 3 and Part 4 respectively.

**Making Intent a requisite fault element for 'war crimes'**

According to Cottier, the First Additional Protocol: 

[has changed] the Hague wording 'killing or wounding' to 'making the object of the attack' and [cites the literature] to make clear that what was forbidden was the deliberate attack against persons hors de combat, not merely killing or injuring them as the incidental consequence of attack not aimed at them per se.

The issue now addressed is whether it is the 'mere killing or wounding' of a person belonging to a protected category identified below or whether as in IHL the deliberate attack on persons hors de combat is or can be made unlawful under the shari'a. This raises two questions: first whether accidental killing can be taken out of this class of shari'a war crime and second, whether an act that does not result in the death of a person can be considered a crime of this magnitude.

On the first question there is no issue with respect to a serious crime, that intention is a requisite fault element under the shari'a. A shari'a crime must be deliberate and requires the intention element to be satisfied, say as opposed to injury caused by accident. The question of what constitutes an 'accident' is a separate issue. The shari'a is less tolerant of collateral death and injury and is discussed separately in Part 4 below. Notwithstanding this, the law relating to negligent or reckless attacks against protected persons must be addressed and developed under the shari'a so that issues such as the quantum of damages to victims or their families can be determined. Recall that unintentional (ie accidental) killing

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36 Please see Appendix 1.
37 See Appendix 2. The discussion on genocide in Appendix 3 is meant to show how the sources may be used, but which for space is not included here as it is not central to the main thrust of this thesis which is recommending institution creation.
39 See: Section 1: Who May not legitimately be killed in armed djihad ('protected persons') 106, below.
40 Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 7 (1976), 5. inna al a'maalu bil niyaat which is translated as "every act is judged by its intention [...]"
of non-combatants in armed *dihad* requires the payment of compensation (diya).\(^{41}\)

On the second question, the Qur'an states that in cases ‘tumult and oppression’ are worse than killing\(^ {42}\) which arguably lends some Qur'anic support for the proposition that is similar to the IHL notion that the mere targeting or attacking of persons *hors de combat* or protected persons (particularly with the intention of causing fear and terror) is culpable. The *shari'a* reasoning is arguably that the tumult and fear, and thus the oppression caused by the uncertainty, is in a sense worse than killing, from the perspective of minimising pain, suffering, terror or the apprehension of extreme fear to sentient beings, which as discussed below, is an important guiding *shari'a* principle.\(^ {43}\) Therefore, and although this issue does not appear to be settled under the *shari'a*, the mere targeting or attacking of a protected person should arguably be outlawed, because it is the very threat of a random attack that generates a sense of terror and insecurity in a population, and which falls within the scope of *shari'a* protection.

A *shari'a* position against terrorising civilian populations is arguably the presumption under law.\(^ {44}\) The tactic intentionally of terrorising civilian populations has nonetheless been pursued by the protagonists. Al-Qa'eda's actions broadly and rightly condemned in the West and by many Muslims. On the other hand, the US and Coalition’s ‘shock and awe’ tactics are more frightening and destructive, very well publicised, but perhaps less critically examined in the West. Both sides are blameworthy and if appropriate should be subject to prosecution or if this is not possible, then at least subject to universal condemnation. Therefore, the wording in Cottier's opinion is likely also to reflect the *shari'a* position.\(^ {45}\)

\(^{41}\) Qur'an 4:92.

\(^{42}\) Qur'an 2:191. The prohibitions against killing here are broadly comparable to the prohibition against wilful killing in Article 8(2)(i) of the Rome Statute.

\(^{43}\) See discussion on Operative *Shari'a* Criterion: Prohibition against Causing pain to Sentient Being, 210.

\(^{44}\) Qur'an 2:191.

\(^{45}\) See text accompanying n 38, 104.
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Part 3: Identifying Legitimate/Illegitimate of Targeting People in Armed Jihad

The shari’a prohibits the killing of some and permits the lawful killing of others during armed jihad. Such groups which are identified. The question of the development of the law relates to persons who may not fall within an explicit category. The presumption must be that if the taking of life during legitimate armed combat of a member of a particular group or class is explicitly permitted then this is lawful. If the shari’a explicitly prohibits or is silent on a group or class then it must remain unlawful to do so, unless in the latter case, some exception such as ‘necessity’ is identified.

This part is made up of two broad sections. Section 1 identifies those who may not be killed in armed jihad (‘protected persons’). Section 2 identifies the Qur’anic classes of people (combatants) who may be fought and, although capture is preferable, by clear implication may be targeted and killed when necessary.

Section 1: Who May not legitimately be killed in armed jihad (‘protected persons’)

Islam categorises the unjust taking of a single life, with no further qualification, as the slaying of all of humanity. Further, even in an armed jihad, which forms a general exception to the taking of life, the Prophet forbade slaying ‘hermits [and] the old and the decrepit, children or women’ and ordered Muslims ‘not to break promises, not to kill a child, a woman, an old man or monk praying in seclusion’.

The prohibitions of the orthodox caliphs are also considered binding or at least authoritative by the vast majority of Muslims. The first orthodox caliph Abu Bakr commanded:

Do not kill old men, women or minors, at the time of encounter of the armies, in the heat of the battle or at the time of an expected attack. Do not cut date palms; do not kill animals except for food, leave people in

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46 See n 74, 110.
47 Qur’an 5:32; See also Cain Culpability in Appendix 2.
49 Adil Salahi, Muhammad: Man and the Prophet (2002), 596. There are several similar hadith with slight variations not cited here.
50 Muhammad Hamidullah, Muslim Conduct of State (3rd ed, 1953), 314 (emphasis added).
convents and seclusion alone. Do not kill sick people or monks. Do not commit treachery, cheat, mutilate or show cowardice […] It is noted here for convenience and for future reference that these prohibitions can be abstracted as a general principle against killing those unlikely to fight against Muslims and also prohibiting the wanton or unnecessary destruction of enemy property. The second orthodox caliph, Omar I issued the following command to his armies:

Do not kill old men, women or minors, at the time of encounter of the armies, in the heat of the battle or at the time of an expected attack.

Permissiveness of means happened at a much later period, but by consensus at least was not before the death of the first imam/fourth orthodox caliph. The fourth orthodox caliph, Ali bin Abu Talib did not prosecute the *khawarij* even though they vociferously, and sometimes violently, opposed his rule. It was only when the *khawarij* killed the governor and they refused to surrender the killer that Ali fought them. For the orthodox caliphs, peaceful opposition or dissent was not ground for an armed response. Although Omar II, an Umayyad, was not an orthodox caliph, many Muslims also consider his precedent as authoritative. Omar II ordered his troops not to kill women or children, execute prisoners, pursue a fugitive or kill the wounded and based these decisions on the Qur'an. There is also consensus further, that the protected categories include visitors (*must'amin*), Scripturaries and persons covered by treaty. Generally the killing of women or children, provided that they are not fighters is prohibited under the *shari'a*. This position of the Prophet and

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51 Ibid, 315 (emphasis added).
53 Ibid, 152.
55 The many hadith that relate to this point on POWs provides a strong legal basis in principle for the validity in principle of GCIII under the *shari'a*. Specific provisions however, need to be individually examined for legal validity.
57 *Must'amin* are people granted temporary access to Muslim lands for trade, pilgrimage or transit and are protected. The word *must'amin* literally means ‘one granted security’: Milton J Cowan (ed) *The Hans Wehr Dictionary of Modern Written Arabic* (1980), 28.
58 Qur'an 2:177.
the orthodox caliphs will be referred to hereafter as the classical position on targeting.

Hashimi however, points out that hadith such as those of the orthodox caliphs referred above must be interpreted as: 'it is the [enemy’s] capacity to fight, not belief or rejection of Islam, that is the criterion for determining liability to damage in war', and goes on to state that these prohibitions do not find equivalence with the contemporary concept of non-combatant immunity. Peters' view, although not identical, is similar to that of Hashimi’s and states that all able bodied enemy may be killed.63 If Hashimi and Peters are correct, although this view does not enjoy a general consensus, then the mere possession of the capacity to fight makes a person a legitimate target and thus makes the shari’a more permissive than the IHL position where generally only combatants are the legitimate targets during an armed combat.

However, while Hashmi’s/Peters’ view appears, on its plain meaning, to be intra vires in principle, it appears much too broad in its scope. For example, the hadith holds that able-bodied hypocrites may not be killed if they are disarmed, even though they may still possess a capacity and more importantly even a clear and open desire to fight. Further, while old men and minors (whose killing is prohibited by the Prophet and the orthodox caliphs) prima facie may not have the capacity to fight, some hermits, women, the sick and wounded may possess a capacity to fight and this has been shown to be correct in say, Burmese or Tibetan priests taking up combat against the authorities in Myanmar or Tibet; or the inclusion of women in active combat positions, or the sick and wounded returning to active service after they have recovered. Nonetheless, the killing or injuring

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62 Ibid.
63 See text accompanying n 68, 109. See also the discussion of the killing of Muslim men in Srebrenica in Appendix 2.
64 See discussion at ‘7 Hypocrites’, 144 and particularly the text accompanying n 225, 144.
of who is explicitly prohibited arguably bringing the position of the *shari’a* on this issue much closer to that of IHL than is the case under Hashmi’s/Peters’ view.

Therefore, it is unclear whether ‘protected persons’ under the *shari’a* will as a class be identical with persons *hors de combat*. The gap, although prima facie not significant, is one that nonetheless needs explicitly to be addressed in a clear form of words and should not prove to be difficult in practice. A form of words that may serve as a starting position to reflect the *shari’a* position is that:

there is a rebuttable presumption that all people who are not directly involved in fighting against Muslims who are engaged in a lawful armed *djihad*, may not be killed and conversely that those who are may be killed if necessary but that capture is preferable.

and arguably is a form of words prima facie that fits in with the spirit of the classical position on targeting. Chapter 6 examines a process whereby consensus-building can occur on evolving norms and laws. The substantive issues are now examined in some detail.

**Who Can legitimately be killed in armed *djihad***?

The Qur’an permits fighting, and if necessary includes permission to kill those who fight Muslims,65 those who drive Muslims out of their homes,66 those who oppress,67 or in some circumstances, those who cause *fitna*.

Within these broad categories, all adult able-bodied unbelieving enemy males,68 including polytheists69 may be slain or taken prisoner in armed

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65 Qur’an 2:190. Muslims did not engage in fighting even under and during oppression in Mecca. The Christian perspective that fighting was prohibited, and in the absence of its explicit abrogation through the Qur’an at that time, was probably considered binding on Muslims as under Isaiah 2:4:

> Nation shall not lift up sword against nation; neither shall they learn war anymore.

It was only after the revelation of Qur’an 22:39 (in Medina) that Muslims engaged in self-defence (and who until then had legal grounds to believe that the law on the prohibition on war was still in force).

66 Qur’an 2:191.
67 Qur’an 2:191.
69 Qur’an 9:5. Muhammad Asad, *The Message of the Qur’an: Translated and Explained* (1984), 256 n8. There is a further condition that treaty arrangements between the parties are absent, suspended or revoked.
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djihad, a position not dissimilar to that under IHL. Further, the Qur'an states that when two parties of Muslims are in conflict, the party that has transgressed 'beyond bounds' should be fought, creating an exception to the prohibition against the slaying of Muslims, issues specifically discussed in chapter 5 under rebellion.

Capture of the enemy is preferable to killing however. A person who is no longer a threat or who seeks asylum must, as far as practical, be given asylum/sanctuary, so that he or she may hear the message of the Prophet. Those who are hors de combat may also be captured, and in the past wives and children of soldiers were taken captive. This was a clear deterrent to aggressive war but the discussion of this which is outside the scope of this paper.

Captives may be ransomed, used in prisoner exchange or used to bring literacy or other skills to the Muslim community. Through this they

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70 Qur'an 47:4. Unless the individual was invited to Islam (and have declined), then capture is preferable because the person concerned will then be in a position in which to hear the call to, be offered the opportunity to learn and then accept or reject the Muslim Covenant. Often a promise by the prisoner that s/he will study the Covenant is all that is required to discharge the Muslim's duty to da'wa (call to the faith): Qur'an 3:20. See the promise to study Islam extracted by the Taliban from Yvonne Ridley as a condition for her release: Yvonne Ridley, In the hands of the Taliban (2001), 209. In former times when slavery was a legal institution, in the old days, Muslims had the additional economic incentive to capture rather than kill an opponent for the potential economic value of the slave in good health.

71 This is a particular translation from the original Arabic and is discussed further in Chapter 5.

72 Qur'an 49:9:
If two parties among the Believers fall into a quarrel make ye peace between them: but if one of them transgresses beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of God; but if it complies then make peace between them with justice and be fair: for God loves those who are fair (and just).

The phrase two parties among the Believers refers to the '2 groups' in the Arabic dual construct, a very specific form that does not envision a set of warring tribes. The verse also uses the word 'believers as opposed to 'Muslims', the significance of which has been discussed.

73 Qur'an 2:193; Qur'an 8:39. Some exceptions to this rule include the permission to fight (and kill) Muslims 'who transgress beyond bounds against other Muslims': Qur'an 49:9, and for the execution of qisas and hudud punishments.

74 Qur'an 9:6:
If one amongst the pagans ask thee for asylum grant it to him so that he may hear the word of God and then escort him to where he can be secure: that is because they are men without knowledge.

may earn their freedom,\textsuperscript{76} a concept arguably not known to contemporary IHL. Prisoners of war of limited means may be conditionally released without ransom, for example on their own undertaking that they will not fight against the Muslims in future.\textsuperscript{77} This is an area of law in which the \textit{shari'a} can make a great contribution to IHL, and while outside the scope of this paper, is an issue that should be examined in some detail.

As mentioned, the Qur'an also enumerates, in what may be described as nine groups or heads of power, those who may be fought. The order in which the categories are examined does not either follow their textual order in the Qur'an or the chronological order of revelation but are arranged so that the grounds more easily recognised under IHL are discussed first. The IHL position is briefly mentioned, followed by the \textit{shari'a} position. Self-evident categories are simply named. Note also that in theory under \textit{Shi'i}, Islam all opponents of the legitimate imam may be fought.\textsuperscript{78} For the 'absence' (occultation of the rightful \textit{Shi'i}) imam,\textsuperscript{79} difference with \textit{Sunni} Islam is not relevant in practice.\textsuperscript{80}

1 'Those who fight Muslims'
The UN Charter in the main addresses Nation States and provides for collective security which in Charter terms generally means the preservation of international peace and security,\textsuperscript{82} and invoking an 'automatic' reaction against a potential aggressor.\textsuperscript{83} The UN Charter obliges States to settle their

\begin{itemize}
\item \textsuperscript{76} Adil Salahi, \textit{Muhammad: Man and the Prophet} (2002), 283.
\item \textsuperscript{77} Ibid. According to Yvonne Ridley, \textit{In the hands of the Taliban} (2001), 209., and although Ridley does not fall into the category of a poor POW, the Taliban nonetheless released her on her own undertaking that she would study the faith. Ridley tried to obtain a visa for Afghanistan (ibid. 62) but failing that she had entered Afghanistan clandestinely (ibid. 91) in circumstances that cannot easily be characterised as innocent passage.
\item \textsuperscript{79} H A R Gibb and J H Kramers (eds), \textit{Concise Encyclopaedia of Islam} (4th ed, 2001), 110. See Appendix 1 for discussion of the occultation of the 12th \textit{Shi'i} imam.
\item \textsuperscript{80} See the issue of the occultation of the imam n 189, 72 and associated text.
\item \textsuperscript{81} Article 2(1) United Nations Charter.
\end{itemize}
disputes peaceably and to do so with justice. To this end there is an international prohibition on the use of force but one which necessarily provides for two broad exceptions. States enjoy an inherent right of individual and collective self-defence in the event of an armed attack and this right appears to continue until the UN Security Council takes measures in the meaning of Article 51. On the question of what constitutes an armed attack the ICJ approved the customary definition of the term.

In discussing the scope of self-defence in international law, the majority of the ICJ in the Wall Case recognised that in the law as it stands, a State has a right under Article 51 of the UN Charter to self-defence when attacked by another State or by ‘irregulars […] sent by or on behalf of a State […] and [whose] armed activity would have been classified as an armed attack had it been carried out by regular armed forces’. The ICJ

86 (a) Article 51 United Nations Charter (Self-defence and Collective self-defence in the event of an attack) and (b) When authorised to use force by the Security Council under Chapter VII of the UN Charter.
87 Article 51 United Nations Charter.
88 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, (Judgment of 27 June) (1986) 14 ICJ Rep 1, para. 195: In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. Reliance on collective self-defence of course does not remove the need for this. There appears now to be general agreement on the nature of the acts which can be treated as constituting armed attacks. In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to" (inter alia) an actual armed attack conducted by regular forces, "or its substantial involvement therein". This description, contained in Article 3, paragraph (g), of the Definition of Aggression annexed to General Assembly resolution 3314 (XXX), may be taken to reflect customary international law. The Court sees no reason to deny that, in customary law, the prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State […]
90 Ibid.
reiterated this position in the *Congo Case*. Here, the Court found that circumstances for Ugandan self-defence were not present because:

there is no satisfactory proof of the involvement in these [anti-Ugandan rebel groups'] attacks, direct or indirect, of the Government of the DRC.

Higgins J. however, expressed her reservations with respect to the Court's narrower view of self-defence. Greig holds that the ICJ's view on Article 51 is 'confusing and legally unconvincing' and notes that the Article 51 right is not, on its plain meaning, qualified by the source of the armed attack, a view supported by Abadee and Rothwell who said that ' [...] rarely has the prima facie capacity to respond to the attacks of a non-State actor been challenged'. The view expressed by Higgins J., Greig, Abadee and Rothwell on self-defence is compatible with the *shari'a*, which permits Muslims to fight all those who fight them, which is subject to no qualification based on a nexus with a State or otherwise, and is the *shari'a* position adopted in this thesis on the right to self defence. Even post September 11, the ICJ did not relax this definition to encompass the armed activity of non-State actors not acting in concert with a State party.

Phillips extends the concept of 'collective obligations' (*fard kifaya*) to the armed *djihad* as a notion of collective security. Qur'an 2:190-191

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93 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion (2004) ICJ Rep 136, 188 per Higgins J. (references omitted).
96 Qur'an 2:190.
permits Muslims to fight in self-defence. However, according to Khadduri:

The classical doctrine of *jihad* made no distinction between defensive and offensive war, for in the pursuance of the establishment of God’s Sovereignty and Justice on Earth the difference between defensive and offensive acts was irrelevant.

This is not to say that the first wars fought by the early Muslims were offensive. To the contrary they were defensive wars. The Battles of *Badr* (2AH/624 AD), *Uhnad* (3 AH/625 AD) and *Khandaq* (5 AH/627 AD), were all battles fought by the Muslims within a few miles of Medina, in defence of their City-State against the Meccan enemy and their allied tribes whose homelands were much further away. It is noted for the purposes of this analysis that the minor expeditions, raids and skirmishes between the Arab tribes and the Muslims are in a definitional sense not considered ‘battles’ or ‘wars’.

In fact the first major battle fought by Muslims away from Medina was the battle for Mecca, at a time when the majority of Meccans were non-Muslims. The battle was not initiated by the Muslims, but was a case of Medina’s Muslims responding to an obligation under a pact of mutual

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99 Qur'an 2:190-191 (That is, those who legitimately may be fought in self-defence (جِنَابُ النَّفْسِ), Qur'an 2:190; Qur'an 2:191. The word *qital* is translated as fighting and also means killing.


101 The distance between Mecca and Medina is over 200 miles.

102 Some armed confrontations are characterised as (1) *sariyah* [سَرِيَّةَ] a word which does not appear in the Qur'an but shares the same triliterals (س يث) with the word *isra'a* (the Prophet’s the night journey: Qur'an 17:1, and historically share the common feature of something that happened at night and in this case a small night expedition by part of an army of between 5 - 400, or according to other sources 1 person (a *hadith* related from the Prophet) to 500 people (*fath al-Bari*), but in contemporary usage in a military sense, is not limited to a night expedition: E W Lane, *Arabic English Lexicon* vol 1 (1984), at 1355., and (2) *ghazwa* (غَزْوَةَ) which in pre-Islamic Arabia was an expedition or a raid seeking booty in the enemy territory and can comprise an army of varying size: E W Lane, *Arabic English Lexicon* vol 2 (1984), 2257. After Islam, the word means a campaign in which the Prophet participated: Muhammad Shanafiyyah Ghrabal, *The Concise Arabic Encyclopaedia* (al-*Mawsouah al-Arabiyyah al-Missriyyah*) (1965), 1256. The word *ghazwa* appears in Qur'an 3:156 but not in the context of the conduct of an armed conflict, but to remind Muslims that a person’s time of death is fixed by God and cowardice, or avoiding fighting would not have caused them to live longer. The word *ghazwa* is here used in the Islamic context and for example, used in the vernacular to describe *djihad*, as in the reference to the *ghazwa* *Badr* (غَزْوَةٌ بَدرَ although *Badr* was fought by Muslims in defence of Medina. (Badr is a few miles out of Medina and over 200 miles from their Qureishi opponents home town of Mecca.)

defence with the tribe of *Khuza'ah*, which required their mutual allies to
defend each other in case of aggression (and in this particular instance
Meccan aggression).\(^{105}\) Further, the magnanimous treatment afforded to
the vanquished Meccans by the Prophet,\(^{106}\) many of whom had been guilty
of serious crimes against the then minority Meccan Muslim community,
indicates that even in the face of the most egregious and dire conditions,
even in self-defence, revenge was not, and arguably therefore, should never
be, a motive for the armed *djihad*.\(^{107}\)

On the contrary, Muslims must sue for peace whenever possible,\(^{108}\)
not only in their capacity as individuals, but also collectively as groups,
including States. The Qur'anic obligation is on every Muslim to avoid war
on 'righteous' pretexts, particularly when the 'real goal' is economic, or in
Qur'anic parlance, for 'worldly gain'.\(^{109}\)

Peters explains that on the text:\(^{110}\)

\begin{quote}
It is unclear whether the Koran allows Muslims to fight the
unbelievers only as a defence against aggression or under all
circumstances.
\end{quote}

He goes on to conclude that despite some verses that 'allow the
Muslims to fight the unbelievers unconditionally [that] classical Muslim
Koran interpretation, however did not go into this direction', which is the
better interpretation that has now crystallised into a customary norm,\(^{111}\) but
one that al-Qa'eda and their supporters are attempting to reverse or at least
modify. The presumption, however, is that the status quo remains valid

\(^{104}\) This historical event is often referred to as *fath makkah* (or the opening of Mecca).
\(^{105}\) Adil Salahi, Muhammad: Man and the Prophet (2002), 608.; Martin Lings, Mecca
\(^{107}\) The record of armed conflicts after the death of the Prophet and his early
companions, seems to make defensive nature of Muslims' wars much more
ambiguous. While there are some notable exceptions, as the Muslim community
are chronologically further removed from the time of the Prophet, their record with
respect to their rulers engaging in purely defensive wars becomes less clear. Later
Muslims become more like contemporaries with respect to the use of war in
settling disputes and acquiring territory and power although they used the epithet
of *djihad* arguably to give the ruler greater credibility among the ordinary Muslims.
\(^{108}\) See n7,98.
\(^{109}\) Qur'an 4:94. Farhad Malekian, The Concept of Islamic International Criminal Law:
A Comparative Study (1994), 50.
\(^{111}\) Ibid.
until its opponents can successfully displace the current custom and firmly establish a competing norm.

Note that Qur'anic permission to fight in self-defence or against oppression does not require the aggression to have a nexus to a State, as is the case under international law. Nor does the Qur'an provide States a monopoly on the use of force, nor is it interpreted as such by custom (although Muslim States, which as discussed in the main are secular, operate in accordance with the UN Charter with respect to this issue). The scope of the shari'a interpretation on self-defence is arguably problematic on the international plane, and is an issue that must be settled by negotiation between scholars and jurists of both international law and shari'a law, then left to the consensus-forming process.

At present, al-Qa'eda is at war with the American, British, Australian, Afghan, Iraqi and other military forces which are in turn actively fighting against al-Qa'eda and its allies. Al-Qa'eda, which is now almost universally recognised as a distinct entity, may have a genuine claim to be acting in self-defence. Bin Laden includes Australia and Australians in his list of target nations particularly because of Australian military involvement in East Timor, Iraq and Afghanistan. Bin Laden said that Sweden is not targeted because they did not support the attacks.

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112 While self-defence is recognised under international law this body of law will not be considered here particularly because none of al-Qa'eda's wrongs does it cite colonialism as a relevant factor and for space and for context this issue is not considered here. This issue of the ICJ requiring 'self-defence' to be against a party with some nexus to a State is discussed below. See text accompanying n 90 & n 91,113.

113 Article 51 UN Charter. As a legal issue however, ascertaining (a) the existence of an armed conflict (including border protection), are questions of law fact. Self-defence is permitted under the UN Charter: Article 51 UN Charter, in general international law: R Y Jennings, 'The Caroline and McLeod Cases' (1938) 32 American Journal of International Law 82; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, (judgment of 27 June) (1986) 14 ICJ Rep 1, 14. as well as in Islamic law: Qur'an 2:190. While Article 51 is silent as to the 'source of the aggression', it is not limited to aggression emanating from a Member State: D W Greig, 'Invalidity and the Law of Treaties' (2006), 110. The Qur'anic 'right' of self-defence is not limited to a 'Member of the United Nations' and is enjoyed by all injured or oppressed groups.

114 Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 175. Note however, that the Australian involvement in some of these countries is claimed to be in a peacekeeping or infrastructure construction role and not a combat role, a distinction not addressed by either JI or al-Qa'eda.
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on Muslims.115 There are also reports, after Spain's withdrawal from the US-Coalition, that al-Qa'eda had informed the Spanish government that it was no longer a target.116 Spain's withdrawal from the coalition followed al-Qa'eda's attacks on the Spanish homeland and demonstrated that they constituted an effective military strategy, in dividing its enemies, and therefore, arguably, retrospectively legitimising its action for 'military necessity',117 under IHL. If this is correct, it unfortunately appears to reinforce Normand et al's view of IHL having 'facilitated rather than restrain[ed] wartime violence'.118 The exclusion of Sweden from its list of


"We fought you because we are free people who want to regain the freedom of our nation. As you undermine our security, we undermine yours".

This argument counters the U.S. contention that al-Qa'eda is confronting the USA and the West generally because al-Qa'eda 'hates Western freedoms'. The accommodation with Sweden and Spain quoted also show the U.S. statements on al-Qa'eda's rationale for fighting as either wrong or at least overstated. It is noted however that Sweden has peacekeepers in Afghanistan and bin Laden's position vis-à-vis Sweden is not entirely clear: AFP, Swedes want troops out of Afghanistan (2010) at 20 October 2010.

It would however be interesting to see if al-Qa'eda's position on Sweden changes if the minority Islamophobic Democrats share power in the government. 'Sweden's minority government woos Greens', The Guardian (London), 20 September:

The Sweden Democrats, a nationalist Islamophobic party, entered parliament for the first time, winning 20 seats to hold the balance of power.


The unprecedented and blatant interference in U.S. internal affairs by a EU-member nation shocked the globe, but delighted Al Qa'eda [...] has sent messages to Zapatero informing him that if he does in fact pull out of Iraq and Afghanistan [...] Al Qa'eda will make Spain a "terror-free zone", an unprecedented terrorist cease-fire per se.


[Permitting] the destruction of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflict

According to William J Fenrick, 'Article 8 Part 2. Jurisdiction, admissibility and applicable law' in O Triffterer (ed) Commentary on the Rome Statute of the International Criminal Court, (1999) 173, 183, that such destruction 'not justified by military necessity' is a war crime but goes (ibid) on to clarify that this is subject to 'the information available to the perpetrator at the time and without regard to hindsight'.

target countries provides some evidence that, as is sometimes alleged,\textsuperscript{119} it is not Western culture or institutions that are the subject of al-Qa'eda's attacks. That al-Qa'eda will only fight entities with which it is in active conflict appears to be a legitimate position under both IHL and the *shari'a*.

From a *shari'a* perspective, al-Qa'eda does not specify the legal basis on which bin Laden acquired the pre-requisite rights of an imam, authorised to declare war on the enemy. For those who accept his leadership this is a matter of fact, although for the Muslim majority which does not accept his leadership this is an important matter of law. From this point of view bin Laden has usurped the rights of an imam to declare war, particularly against its 'neighbours'\textsuperscript{120} and to spill the blood of Muslims, of those with a right to Muslim protection (*dhimmis*), as well as of those who have been given guarantees of security (*must'amin*\textsuperscript{121}) in Muslim majority States.

This raises the issue of whether al-Qa'eda is itself a legitimate entity and further, whether this is in any event a relevant question. That is, the question is not only whether al-Qa'eda's existence and its actions are legitimate themselves, but whether al-Qa'eda and its armed action can ever attain to legitimacy in the eyes of the *shari'a*. Under international law, once 'terrorist groups' and 'terrorists' such as Zanu PF, Fretlin or the ANC and their respective leaders have received *de jure* recognition after coming into power in their respective countries and demonstrates the rehabilitation of terrorists in the international plane.

In practice, as the serious crimes under consideration are individual crimes under both international law and the *shari'a*, an answer to the question on the legitimacy or otherwise of al-Qa'eda under the *shari'a* is itself not an element of any of the crimes being considered and therefore not required at this point.\textsuperscript{122} That Al-Qa'eda exists, whether recognised as a

\begin{itemize}
  \item \textsuperscript{119} John Loftus, 'The Muslim Brotherhood, Nazis and Al-Qaeda', *Jewish Community News* 4 October 2006
  \item \textsuperscript{120} See text accompanying n 4, 41. See also *hadith*, the reference and text accompanying n 128, 119.
  \item \textsuperscript{121} See note n 262, 247.
  \item \textsuperscript{122} As an established contemporary precedent, Nelson Mandela led the ANC, once a banned terrorist group. However, neither the ANC's then lack of legitimacy nor
\end{itemize}
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de facto organisation, a legal entity or through almost universal recognition, is an issue of fact. Whether al-Qa'eda possesses legal personality under international law is a separate question, although, as discussed, legal personality is never an issue for Muslims under the shari'a, and is not a relevant factor for the serious crimes being considered under IHL/ICL.

2 Ribat (Border Protection)
The territorial integrity, political independence and the right of a State to protect its own borders is settled under international law.123

Ribat (رباط)124 is the safeguarding of the frontiers of dār al-Islam. Ribat is lawful, including by force if necessary, and constitutes a special category of self-defence.125 It is highly commended under the shari'a.126 Permission of the imam or his delegated authority is a necessary element of ribat127 and thus is different from general self-defence which does not require the imam’s authority. The reason for this difference for ribat is to avoid inadvertently causing problems with neighbours, who are given a special status under Islamic law.128

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were any of its illegal acts sheeted home to its key leaders once they received international legitimacy.

123 Art. 2(4) of the UN Charter.
124 Qur’an 8:59-61:
Let not the unbelievers think that they can get the better (of God): they will never frustrate (them). Against them make ready your strength to the utmost of your power including steeds of war (ribat al-khayl) to strike terror into (the hearts of) the enemies of God and your enemies and others besides whom ye may not know but whom God doth know. Whatever ye shall spend in the cause of God shall be repaid unto you and ye shall not be treated unjustly. But if the enemy incline towards peace do thou (also) incline towards peace and trust in God: for He is the one that hears and knows (all things).

126 Rudolph Peters, Jihad in Classical and Modern Islam (1996), 47. according to Abu'l Hussain Muslim, Al Jami'us Sahih vol 3 (1972), 1059. hadith number 4703:
The Prophet said that ‘[...] a day in ribat is better than a thousand days spent elsewhere’

Further, according to Bernard Lewis (ed) Islam from the Prophet Muhammad to the Capture of Constantinople: Politics and War (1974), 211. the Prophet said ‘A day and night fighting on the frontier (ribat) is better than a month of fasting and prayer’.

128 Abu'l Hussain Muslim, Al Jami'us Sahih vol 1 (1972), 32. reports that:
The Messenger of God (may peace and blessings be upon him) observed: He will not enter Paradise whose neighbour is not secure from his wrongful conduct.
In practice, this authority for ribat was delegated to governors in the remote regions of the umma, and 'particularly those bordering the enemy'.\textsuperscript{129} In this sense, when the Taliban were the recognised government in Afghanistan, they could have authorised al-Qa'eda to 'protect its borders' with say Pakistan (viewed by some Afghans as a State occupying a large swathe of Afghan territory), making al-Qa'eda a de facto part of the Afghan military. The US attacks on al-Qa'eda in Afghanistan (with its direct links to the Afghan government) post al-Qa'eda's attacks on the US Embassies in East Africa, would be legitimate under international law and as discussed, also under the shari'a.\textsuperscript{130}

3 'Those who violate their peace treaties'
In the context of contemporary international norms violation of a peace treaty does not trigger a right to fight and is not an exception under the Charter. Depending upon the seriousness of the breach it may in cases provide ground for self-defence under existing exceptions. The shari'a too would be interpreted quite narrowly so that only a serious violation will triggers a right to self-defence and that other remedies, not involving the use of force, actively considered before fighting is permitted. The shari'a authority for this category is from the Qur'an.\textsuperscript{131}

4 'Those who expel people from their homes'
This head of power, legitimising armed djihad, is a form of self-defence but is separately and explicitly permitted in the Qur'an,\textsuperscript{132} whether or not the expelled persons are Muslim or otherwise. The Qur'anic test\textsuperscript{133} is arguably stricter than one against expelling people from their 'land' or 'country'\textsuperscript{134} as it includes people normally classified as 'internally displaced'. Violators may be fought.\textsuperscript{135} The underlying shari'a 'right' however, is for the

\textsuperscript{129} Majid Khadduri, War and Peace in the Law of Islam (1955), 95.
\textsuperscript{130} See discussion on the ICJ interpretation of Article 51 of the UN Charter, 112. The non-State entity, al-Qa'eda, appears to have the necessary nexus with a State in this instance.
\textsuperscript{131} The authority for this head of power is at Qur'an 9:12.
\textsuperscript{132} Qur'an 2:191.
\textsuperscript{133} Qur'an 2:191.
\textsuperscript{134} See discussion on border protection (ribat) above, 119.
\textsuperscript{135} Qur'an 2:193; Qur'an 8:39.
protection of religious freedom and is not a property right. 'Expelling people from their homes' is a phenomenon that also occurs in Muslim majority areas, is sometimes widely and uncritically publicised and resonates with many Arabs and Muslims as a phenomenon that must be remedied. In this context the situation in the (Israeli) Occupied Territories is gratuitously invoked by al-Qa'eda, a point ignored generally by the West, arguably in its efforts to link some Palestinian groups with al-Qa'eda, to al-Qa'eda's benefit as it has increased al-Qa'eda's standing with Muslims but has been at the Palestinians' expense. Bosnians expelled from their homes and the massacres at Srebrenica attracted many so-called 'Afghan-Arabs' to fight alongside Bosnian Muslims against the forces of Radovan Karadzic and Vlatko Mladic.

In the Lebanon, Hezbollah, arguably the 'most effective guerrilla army in the world', also classifies itself as a group which at a time was fighting to expel the Israeli occupying forces who had displaced Shi'ites from their homes in Southern Lebanon. Hezbollah is linked to the Lebanese State and sometimes to Iran therefore arguably establishing the necessary nexus between Hezbollah and a State for prosecution for alleged crimes under international law.

On the other hand, after the demise of the Taliban Government in Afghanistan, al-Qa'eda does not appear to be sponsored or be closely linked with a State as such. This might make self-defence action by States against al-Qa'eda problematic under international law and therefore, perhaps prosecutions for related (alleged) crimes arguably less secure at the

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136 Qur'an 22:40.
137 Zaki Chehab, Inside Hamas: The Untold Story of Militants, Martyrs and Spies (2007), 182 quotes PLO Chairman Yasser Arafat stating that: Bin Laden has damaged the Palestinian cause more than any other being [...] 
138 Ibid.
139 Hezbollah is listed as a terrorist organisation by the US Department of State: see Foreign Terrorist Organizations (FTOs) <http://www.state.gov/s/ct/rls/fs/37191.htm> [Accessed 7 May 2006].
140 Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 80.
141 See text accompanying n 90 & n 91, 113. See also n 139, 121.
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ICC. On the one hand this is a possible reason as to why al-Qa’eda leaders and sympathisers who are US nationals and in US custody, have been tried in domestic military tribunals. While this is a practical solution, it does not engender confidence among Muslims about the Coalitions’ commitment to the rule of law as expressed through the civilian court system, and an even greater concern with respect to prosecution of non-US nationals (and to take a parochial view, Australians such as Hicks and Habib), is an area that is in need of urgent reform.

5 ‘Those who oppress’

The Qur’an obliges Muslims to assist the weak and persecuted (Muslim or otherwise). The Prophet commanded Muslims to oppose oppression everywhere, including oppression by Muslims. The specific meaning of ‘oppression’ has not been judicially examined in the contemporary context and this thesis uses the word in its ordinary dictionary meaning. Specific shari’a tests need to be developed.

Rendering assistance to the weak and oppressed is necessary only when external help is sought by the oppressed and arguably recognises

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142 This issue of the ICJ requiring ‘self-defence’ to be against a party with some nexus to a State is discussed below. See text accompanying n 90 & n 91,113.

143 Qur’an 4:75:

And why should ye not fight in the cause of God and of those who being weak are ill-treated (and oppressed)? Men women and children whose cry is: “Our Lord! Rescue us from this town whose people are oppressors; and raise for us from Thee one who will protect; and raise for us from Thee one who will help!”

The term used is: (assist the) weak mustad’dī’afen and not only the ‘oppressed’. This is because if the Muslims are not weak they should have their own means of responding and/or moving away from oppression.

144 This idea that Muslims are required to oppose oppression irrespective of the religious affiliation of either the oppressor or oppressed is deeply ingrained in the general Muslim community, even among ‘ordinary people’: see for example Mamdouh Habib (with Julia Collingwood), My Story: the tale of a terrorist who wasn’t (2008), 31. Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 4 (1976), 70. Narrates:

The Prophet said, “Help your brother whether he is an oppressor or an oppressed.” A man said, “O Prophet! I will help him if he is oppressed, but if he is an oppressor, how shall I help him?” The Prophet said, “By preventing him from oppressing (others), for that is how to help him.”

145 Qur’an 8:72. It is not suggested that help must be requested by the Muslim leadership who may be corrupt or acting in concert with the repressive Government in question (Muslim or non-Muslim). On the other hand, nor is it suggested that any small or unrepresentative group (of say al-Qa’eda supporters who) may subjectively or instrumentally claim to be ‘oppressed’. For example, Abu Bakr Bashir’s frequent visits to Australia and his arguably desire to seek refugee
the notion that unsolicited 'help' can exacerbate problems. In the absence of an imam, the question is: who is authorised to call for help? A further question is how this 'help' is delivered. The Qur'an limits this 'right to seek aid', particularly if there is a treaty of mutual alliance between Muslims and the oppressing party. The Muslims would openly and lawfully have to revoke the treaty for the proven oppression before they could proceed to assist the oppressed seeking help.

Muslims must be presumed to know of this shari'a requirement. The absence of an explicit term in the treaty or a clear and unambiguous reservation to this effect must mean that the Muslim States had elected to remain bound.

Under the shari'a, the failure (for corruption, ignorance or other such similar reason) of the 'State' to articulate or to provide for the rights of people does not deprive the individual of this right. This is an issue that must be considered during the trial of an individual and addressed on a case-by-case basis until some consensus emerges on the issue of implied rights in a State's positive law. The obligation to provide assistance when requested, read in conjunction with the verse urging Muslims suffering...
oppression to emigrate,\textsuperscript{150} based on the Prophet’s precedent in Medina,\textsuperscript{151} places a concomitant obligation on Muslims in areas allowing free worship, to re-settle oppressed Muslims.

Thus, Muslims living in free (eg Anglophone States) have an obligation, based on the Prophet’s precedent in Medina, not so much to (militarily) fight their own States, which certainly is unnecessary, or at least has not been shown to be necessary. Fighting these States where Islam is freely practiced is thus prima facie unlawful, given the freedom Muslims enjoy openly to practice their faiths. Instead, arguably they should engage with Western governments to allow further migration from oppressive situations (including for non-Muslim minorities also being persecuted) and also bring political pressure to bear through these governments on free Muslim majority States such as Bosnia and Herzegovina, Senegal, Indonesia and other less oppressive Muslim States to open their gates at least to religious refugees in the meaning of the Refugees Convention.\textsuperscript{152} Further, since many non-Muslims assist people fleeing oppression it also ipso facto makes their blood inviolable.\textsuperscript{153} Muslims in free States, although perhaps not necessarily legally obliged to do so,\textsuperscript{154} and subject to the applicable treaty law between the States in question, could use their own positions to bring economic or political pressure directly to bear on oppressive (Muslim and other) States to help stop their excesses.

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\textsuperscript{150} According to Khalid Muhammad Abdul-Qadir, \textit{Jurisprudence for Muslim Minorities} (2003), 79:
\begin{quote}
Whoever was able to immigrate and did not do so is committing a sin that may lead to apostasy and disbelief
\end{quote}
\textsuperscript{151} See \textit{hadith} at n26, 46.
\textsuperscript{152} To be fair, some Muslim states do not need to be pressured into taking oppressed Muslims, Malaysia providing refuge to Bosnians, Southern Filipinos and Chechens, Egypt providing refuge to Sudanese, Jordan to Palestinians and Chechens, Iraqis and Afghans in Iran are a few contemporary examples. See generally: <http://www.unhcr.org/cgi-bin/texis/vtx/home>. [Accessed January 2009].
\textsuperscript{153} The Prophet refers to a pre-Islamic treaty called \textit{hilf al-fudul} (صلح الفضول) which pledged to come to the aid of the denizen who was mistreated in Mecca. The Prophet said that the treaty would be honoured after Islam as it was consistent with the aid for the \textit{must'amin} under the \textit{shari'a}. Non-Muslims produce much of the most excellent contemporary scholarship on Islamic legal theory for example. The honour and dignity of at least such exceptional people must be considered inviolable. Clearly these are rare individuals, but in principle, people belonging to the class of people who live peacefully among Muslims must be considered inviolable under the \textit{shari'a} under the precedent of the legal effect of the \textit{hilf al-fudul}.
\textsuperscript{154} See n 160 below.
\end{flushright}
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The famous Prophetic *hadith* on the ‘three modes’ of change, prescribes change, although not synonymous with ‘help’, by the sword.\(^{155}\) However, as in the *hadith* dealing with heathen enemies referred to above,\(^ {156}\) it is arguably an ambit position. Since Muslims are urged to emigrate in the first instance, the better view arguably is that, if possible, a peaceful outcome is preferable.\(^ {157}\)

That is, ‘armed fighting’ in these circumstances is not an unreasonable interpretation of the Qur’anic phrase ‘and why should you not fight in the cause of God’.\(^ {158}\) It is posited however, that what the ‘three modes’ *hadith* means in this context is that if fighting is permitted, then a *a fortiori*, aiding the oppressed through non-military means, such as through migration or economic pressure on the enemy, is also permitted\(^ {159}\) as more faithful to the more fundamental Qur’anic requirement of not spilling innocent blood, \(^ {160}\) a view that is also consistent with Muslims’ (*shari’a* treaty) obligations under the UN Charter.

Even strong proponents of the use of force and armed *djihad* for the liberation of Muslims, such as Faraj, who was convicted and executed for...
the assassination of then Egyptian President Sadat and whose work is
described as possessing ‘remarkable influence’, has admitted in line with
a Prophetic hadith that ‘a spoken word of truth to a tyrant is the best
djihad’. Faraj qualified his quote from the Prophet adding that this ‘must
not be an excuse for cowardice’ or arguably even as an form of appeasement
to the oppressors in power. This view of ‘best djihad’ may not accord with
his general overall practical approach to djihad or that of al-Qa’eda who
favour armed djihad. At minimum however, Faraj concedes that peaceful
means may not be excluded from the options available in a djihad.

6 ’Those who suppress faith’
Those who suppress (in practice the Muslim faith, although not the plain
and ordinary meaning of the provision) may, subject to pre-conditions now
discussed, also be fought. Most jurists agree that there is binding
obligation on each Muslim to defend the Muslim faith when attacked,
even absent the imam’s authorisation. While defence can take many forms,
they must all be intra vires. This is arguably why al-Qa’eda characterises an
attack on itself as an attack on Islam thereby, and are able to draw the
support of such Muslims as are persuaded by its rhetoric, into the conflict,
in al-Qa’eda’s defence. It has been noted that the West has greatly aided al-
Qa’eda’s task uncritically by accepting Al-Qa’eda as Islamic and its
struggle as a djihad and thus ipso facto legitimate, although both Presidents

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161 R L Euben and M Q Zaman (eds), Princeton Readings in Islamic Thought (2009), 321.
162 Note that ‘speaking’ or using one’s tongue is the second option in the three modes
hadith: See n 155, 125, and shows that the order of the recommended action does
not carry a particular significance.
163 R L Euben and M Q Zaman (eds), Princeton Readings in Islamic Thought (2009), 330
para. 51 (emphasis added).
164 Ibid, 330.
165 Qur’an 2:191. The reason for this interpolation is that the Qur’an states that ‘faith’
in God’s eye is Islam: Qur’an 5:3, but Islam in its broader sense also means
’submission to God’s will’ (and covers the faith of believing Scripturaries: Qur’an
2:62.) The former interpretation however, is less ambiguous.
166 Majid Khadduri, War and Peace in the Law of Islam (1955), 95. It is unclear in the
circumstances what ‘attack’ means but it must mean a physical attack because
otherwise any criticism of Islam can be deemed an attack. This is not the precedent
of the Prophet when Islam was verbally attacked responded with patient
exposition and almost always gentle rebuttal. This precedent can be set up in
contrast with some contemporary Muslims reacting violently to criticisms
(sometimes vile and unwarranted criticisms but verbal criticisms nonetheless)
against Islam.
Bush and Obama have clearly and usefully made the distinction that the Coalition is fighting al-Qa'eda and not Islam. 167

In this regard, President Bush's allusion to a 'Crusade' initially helped al-Qa'eda and his withdrawal of the term to describe the Coalition's war against al-Qa'eda, while helpful in reducing the tensions between the Coalition and Muslims, still left an unnecessary residual ambiguity and animosity in the minds of many Muslims, which has been ably exploited by Islamists. Some Muslims in the West who understand its political process, concede that our leaders do make mistakes, at times inadvertently using inappropriate language, and understand that some individuals are more prone to such slips. On the other hand, the Arab or Muslim street is generally told of the superiority of the West and therefore, take such slips as expressions of a calculated and considered policy. Unfortunately, a major slip is akin to opening Pandora's Box. 169

A small but steady flow of young men to al-Qa'eda shows that its strategy has had and continues to enjoy, some success although on the other hand arguably no civilisation has had difficulty in enticing eager young preconditioned men seeking adventure into fighting wars on the broadest of emotive terms such as 'for God, Queen and country' or 'the mother-fatherland' or 'for your faith' among many other such euphemistic and emotive catch cries.

This enemy 'that suppresses faith' is similar although not identical to those who oppress. 170 'Those who oppress' constitutes a broader category. This is because 'suppress' is qualified by 'faith' while help is not

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168 Bin Laden refers to the call for a 'crusade' by former President Bush, on 16 September 2001, on the lawns of the White House, Washington D.C. as demonstrating the religious character of the struggle in the light of the expression’s historical significance.
169 In fact it is arguably because so much thought is given to the naming of 'wars' for 'political spin' that the use of the word 'crusade' was considered inadvertent (although perhaps a Freudian slip) by many Muslims. For a journalist’s view for the naming of naming wars see: Rob Sharp, 'War of Words, Why the Naming of Conflicts is a Serious Business: Them's Fighting Words', Canberra Times (Canberra), 26 February 2010, Times 2 page 5.
170 See heading: 5 'Those who oppress', 122.
limited to, (other than in some cases by construction by Islamists), against only those who oppress Muslims. The better meaning here would also be for Muslims to protect all faiths, although in this context it probably opens the door for more carnage and is a political, but perhaps not legal justification for narrowing the scope of its meaning.

On the other hand, Islamophobia or gratuitous anti-Islamic rhetoric, at one level, could be interpreted as an attempt to demonise or suppress the faith. At an individual level, Islamophobia (or expressed in a less emotive way, anti-Islamic views) can be passed over as bigotry or considered part of free expression which while arguably discriminatory under legislation in some jurisdictions, is difficult to eradicate. Nor should people be prevented from exercising free will. The Prophet was called a madman, a person possessed and other unflattering names which are enshrined in the Qur'an for posterity. While he tirelessly carried out his ministry, he did not attempt to silence his critics, whom he sought to convert to Islam.

Some politicians however, have opportunistically exploited the freedom in the system and have succeeded in using Islamophobia in small vulnerable pockets but have not generally been successful in convincing the majority or even a large minority of the broader Western population of the value of their alarmist policies. The Netherlands is perhaps an exception in this regard, where an openly anti-Islamic person such as Mr Geert Wilders was elected by a significant percentage of a country traditionally considered tolerant. Ironically however, Mr Wilders is a powerful voice for Muslims (in Muslim states) who are trying to convince the West of an identical message: which is ‘leave us to our culture and law, and when you are amongst us, respect and follow our laws’. The rise of Mr Wilders bodes well for pluralism on the international plane, because if a significant minority in a powerful, liberal and tolerant State is convinced of his arguably not unreasonable message (of respect for the rule of law as

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171 See discussion at page 122.
173 There is also no evidence that his close Companions sought to silence the Prophet’s opponents (or, against themselves, during their own rule).
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*defined within a cultural context*) the identical argument made by the ‘other’, in this case Muslims in Muslim majority States, is also strengthened.

However, when some elements of Islamophobia are institutionalised or coupled with specific legislative prohibitions on Muslim and other faiths’ religious practices, there *must* come a point when such action becomes a systematic impediment to the free practice amounting to its suppression. This is a threshold legal question and some examples of such impediments are now examined. The legal question is whether impediments to faith where present in various countries (both Muslim and non-Muslim), constitute a suppression of faith. And, if so, is it liable to be fought? And again, if this is the case, it is then necessary to identify a point or an objective test where peaceful opposition can reasonably escalate openly into armed action. These tests can then be applied in retrospect when such cases are brought before a judicial committee or court.

The WIF and al-Qa’eda have, for example, cited the banning of the *hedjab* (headscarf) among French public schoolgirls,\(^{175}\) in some institutions in Turkey\(^ {176}\) and Singapore,\(^ {177}\) the use of usury in Saudi banks, the declaration of a crusade by the US-Coalition\(^ {178}\) and the publication of some

174 Mark Davis, ‘Mr-Controversial’ in Dateline Special Broadcasting Service, 29 August 2010.


178 Bin Laden refers to the call for a ‘crusade’ by former President Bush, on 16 September 2001, on the lawns of the White House, Washington D.C. as demonstrating the religious character of the struggle in the light of the expression’s historical significance. Such pronouncements from a leader notorious for his choice of inappropriate language should not be considered conclusive as to Australian motives by Muslims particularly when so many Muslim and other innocent lives are at stake.
uncomplimentary cartoons of the Prophet,\textsuperscript{179} as ‘evidence’ of provocation and the suppression of faith.\textsuperscript{180} The objects of these allegations (ie the States responsible) do not, however, appear to match the ‘successful targets’ of al-Qa’eda’s attacks, the USA, UK, Spain etc, although it is possible that some secretly planned attacks against Singapore, France or Turkey could have failed, other attacks called off for prevailing conditions and other planned attacks still in the ‘pipeline’.

Al-Qa’eda’s call for attacks in Australia and on Australians by (Australian) Muslims is now examined. Such attacks by al-Qa’eda members must however be legitimate (\textit{idjma}, consensus, being a useful yardstick here) under the \textit{shari’a} and two broad cases with respect to this issue are now considered. In principle this analysis can, \textit{mutatis mutandis}, be applied to most other non-Muslim jurisdictions.

6(1)(a) \textbf{Military Activity by Muslims without Formal Australian Links}

(a) Al-Qa’eda and Taliban soldiers have in the past fought Australians in Afghanistan and have attacked Australian targets and vice versa. Many of these fighters are foreign nationals with no allegiance to Australia. Australian Muslims belonging to these organisations are separately considered below. Therefore, attacks on legitimate targets within Australia

\begin{footnotesize}
\begin{enumerate}
\item Some instrumental use of ‘Islamophobia’ by Muslims is also quite manipulative and dishonest. An example of this is the Danish cartoon affair [ie the controversial and insulting cartoon depicting the Prophet in the Danish newspaper \textit{Jyllands-Posten} on 30 September 2005.] Protests occurred in March 2006 \textit{several months after} the actual appearance of the cartoons [total deaths: 139 and total injured: 823 according to the Body Count website: <http://web.archive.org/web/20060720144601/www.cartoonbodycount.com/node/56 >. at 25 March 2006]. What is highlighted here is the delay between the publication of the cartoons and the reaction and resulting demonstrations several months later. While nothing turns on this point, it is alleged that the issue was only raised when some Danish Muslims fundraising in the Middle East sought an example of their maltreatment in Denmark as a means to spur-on the generosity of their hosts. This is an example of the instrumental use of Islamic sensibilities that has helped those on the extremities of Islam and who have at times been able greatly to manipulate the media to their advantage.
\end{enumerate}
\end{footnotesize}
or overseas by overseas based (non-Australian) Muslim groups should prima facie be:

(i) ‘near’ those who are being fought by Australian troops, or alternatively, missions undertaken by ‘foreign’ Muslims who are not normally legally resident in Australia and who are not indirectly bound through formal treaty or other agreements with Australia or its allies (or treaties which have become void through a declaration of war) or, where such agreements exist, who have openly renounced these agreements with the Australian government (or its allies),\textsuperscript{181} or;

(ii) ‘near’ Australia and who are responding to a legitimate call for help by a significant group of Muslims facing Australian attack, and subject to the use of intra vires means and avoiding treachery, resistance and armed \textit{djihad} in their home territory against a foreign invader (including Australian forces and interests), in these cases prima facie is likely to be considered legitimate self-defence under the \textit{shari'a}\textsuperscript{182} and also under IHL.

\textbf{6(1)(b) Military Activity by Muslims with Formal Australian Links}

The situation for ‘Australian Muslims’ fighting against Australian forces is more complex under the \textit{shari'a} and two distinct categories of Australian Muslim are now considered (this again arguably applies \textit{mutatis mutandis} to other Muslim minorities).

\textbf{6(1)(b)(i) Military Activity by Those born on Australian territory}

People born in Australia (or on Australian territory) and deemed Australian nationals under domestic law and who have subsequently converted to Islam, can be seen in a very theoretical sense, to have shifted their allegiance \textit{from} Her Majesty the Queen and her heirs and successors,

\textsuperscript{181} ‘Formal agreements’ would cover such matters as seeking and accepting citizenship or applying for a student visa, tourist visa or asylum etc where the Muslim gives undertakings as to future conduct. For example Muslims who have been deported from a country could reasonably state that all their (indirect) treaty or contractual relations with that country are at an end. Further, Muslims who wish to attack Australia (or any other State) should arrive specifically for that purpose without giving any undertakings of peace or non-hostility or for practical reasons, say arrive on false passports or ‘sneak’ in without a visa, thus clearly signalling a disregard for the laws of that enemy jurisdiction.

\textsuperscript{182} Qur’an 9.5.
who in the English tradition are God's legitimate representatives on earth through the Church of England, to (the Muslim) God and Prophet (although Islam does not make this distinction, the extrapolation is produced here for clarity). Continuing to live in Australia would require converts to adopt, and appropriately adapt, the legal opinion of a School (ie Shafi'i or Djafari) that permit Muslims to live as a minority or emigrate. Neither of these Schools (or for that matter other Schools) permit treachery, which means that, if they decide to do so, war or jihad against Australia must be principled and lawful and must always be declared openly. The prerequisite is of course that they first denounce legal ties, including contractual obligations with Australia.

The case of Ms. Hutchinson who was in a position of wanting to fight against Australian interests is discussed below. A key factor in her case is that she made an error of judgment in prematurely declaring her intentions to join Australia's open enemy, before leaving Australian shores. Australian authorities for their part have done what is reasonable with respect to a declared enemy and placed her under surveillance and have imposed travel restrictions, which is really a very humane option towards an open enemy, relatively mild treatment more akin to how the Qur'an would expect Muslims to act as opposed to that of the 'disbelievers' as Australians are sometimes derogatorily characterised by reactionary Muslims.

The nexus between the Queen as the Head of State and as the Head of the Established Church was severed by the Australia Act 1986 (Cth), but she nonetheless remains Head of the Church of England and the Anglican Communion worldwide, including in Australia. The analysis appears correct for at least those Muslims who were eligible for Australian nationality and born before 1986. Clearly this analysis would apply to those once belonging to the Church of England who then subsequently convert to Islam. For people of other faiths who convert to Islam their religious alliance would have already been to other than the Head of the Established Church. In a sense all Abrahamic faiths place God at the Apex and therefore in a sense no change of allegiance needs to be effected as the faiths refer to the same God. Secularism in States and the separation of religion complicates this simple notion of the ultimate allegiance being to the One Abrahamic/Judaic/Christian/Muslim God. Nothing specific turns on this issue and for this reason these distinctions of to whom or what an individual owes their 'primary allegiance' is not examined in any detail.

The Australian intelligence authorities generally are a sophisticated operation with close relations not only with Western partners but also very close links with Muslim majority nations in our immediate vicinity. On the other hand Ms Hutchinson's very public expression of her views and complaints to journalists and
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For Muslims born in Australia and raised in that faith by their parents (or guardians), a similar analysis applies as for that of converts except that the ultimate ‘allegation’ to the Crown as God’s representative is ‘transferred’ away at the age of majority, determined as according to their particular School. The general process for declaring war is not dissimilar to those who migrated here voluntarily, which is now discussed in that context.

The third category of Muslims with imposed ties to Australia are indigenous (say First Nations) Australian Muslims who have through the generations not recognised the suzerainty of Her Majesty and her heirs and successors, but they constitute such a small minority at present that this case is not considered any further. This may become a significant issue in the future and is best addressed by stakeholders and other interested parties when the time arrives. Thus far however, calls by al-Qa’eda and other Islamists for a jihad in Australia by Australian Muslims collectively appear to lack a valid shari’a legal basis and is a call that has been ignored by the majority of Australian Muslims. Although nothing in this thesis turns on this, it appears that a small number of Muslims have appeared to have joined radical groups and some have even been tried and convicted, but because of the ‘poor’ anti-terrorism legislation that appears to criminalise thought rather than action it is difficult to know the extent of their actual intent to destroy or kill Australians in Australia.

6(1)(b)(ii) Military Activity by Australians by Choice
Attacks on Australian interests by ‘Australians by choice’, ie those who have voluntarily migrated to or sought asylum in Australia, are even more difficult to justify as such attacks are clearly treacherous, a characteristic

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185 Not all immigrants to Australia follow the Shafi’i or Djafari Schools, notwithstanding the other Schools’ position on Muslims living as minorities under non-Muslim hegemony. This is however a matter that is not examined in any detail. See also discussion at: ‘When Migration is Possible’, 67.

186 The onus of proof here should rest with the prosecutor to prove that the individual had freely made an informed choice to transfer his or her allegiance to Her Majesty. Necessity is a key issue in this context and First Nation peoples forced by
forbidden to Muslims by the Qur’an. Muslims living in Australia by choice are effectively living under treaty in the *shari’a* sense (and are arguably analogous to *must’amin* travelling/living in Muslim lands). They cannot therefore, while that treaty is on foot, directly be militarily involved with against Australia or Australia’s allies. If they wish to do so legitimately, they must first go through the proper processes of giving notice (of their intention to fight against Australian interests or their treaty allies anywhere) and denounce the contractual obligations (ie including conditions of residency or citizenship). There is no requirement that they attempt to do this on Australian soil as they may be arrested or prevented from leaving. However, once they get to a territory that will not extradite to Australia for this or related acts, they may then take the proper *shari’a* steps of providing notice from afar but should not be involved in hostile activity until clear notice is given.

Al-Qa’eda states that one of its strategic aims is to rid the *umma* of all ‘oppression’. For a Muslim this is a legitimate claim. It has not, however, defined oppression objectively, thus arguably usurping or at least claiming for itself the ‘right’ unilaterally to declare and to fight what it deems to be oppression. Further, it has done so through processes which appear to be more political than legal. Paradoxically, al-Qa’eda does not appear to address the issue of, nor can it can explain how, they have themselves created or at least contributed to the miserable conditions, including of oppression and bloodshed (ie *fitna*) in many Muslim lands, that has resulted in a large number of Muslim deaths, destruction of Muslim property and whose actions have resulted in a stream predominantly of Muslim refugees. They have not liberated even a
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square inch of Muslim land and to the contrary have created the conditions that have resulted in the ceding of large swathes of Muslim territory to a non-Muslim hegemon. None of these results, devastating from a Muslim perspective, accords with their pious rhetoric.

Is Al-Qa'eda's Call for djihad in Australia lawful?

Nonetheless, in order to examine al-Qa'eda's allegations with respect to Australia, some specific examples as to whether there is evidence of oppression of Australian Muslims is now considered. On the important question of whether Australia has the capacity to suppress Islam on its territory, while the real answer is likely to be much more nuanced and complex, for the purposes of this analysis the question is answered in the affirmative.

A former leader of the Australian Liberal Party, the party then in government ('deputy leader'), said that Muslims wishing to follow the shari'a in Australia might be better advised to leave. While this is an obnoxious comment aimed at a 'red neck' constituency this statement was, as reported, also erroneously or mischievously construed by some in the Australian Muslim leadership as a possible call for expulsion of Muslims.

Pakistan is very well documented. The Afghan situation predated al-Qa'eda and the Taliban but the actions of these actors has exacerbated the situation of refugees and internally displaced people.

The then Australian Liberal Party Deputy Leader stated that "was no place for Islamic shari'a law in a secular society like Australia." <http://www.abc.net.au/am/content/2006/s1577241.htm>. [Accessed 10 December 2006].

For a copy of the then Deputy Leader's Speech see: Peter Costello, Joint Press Conference Parliament House Canberra (2005) <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=transcripts/2005/150.htm&min=phc> at 22 November 2007. The then deputy leader made no distinction between 'ibadat and mu'amalaat obligations, although he implied this distinction by referring to shari'a law that is used to 'run the state'. The fact remains that Muslims are relatively free to practise their shari'a obligations classified as 'ibadaat; and that the Australian government even funds (directly through Australia's aid programme, AUSAID, and indirectly through tax deductibility status through Muslim Charities) the construction of mosques overseas . Australia's aid agency AUSAID funds both secular and Islamic schools in Indonesia. <http://www.indo.ausaid.gov.au/aboutausaid.html at 21 January 2008.>. See also: Peter Costello Interview with Tony Jones, 'Australian values, Muslim clerics, anti-Americanism, Telstra' in Lateline ABC Australia, 23 August 2005.

The reporting on this issue does not appear to have been challenged.
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from their homes in Australia.\textsuperscript{193} In doing so they exhibited an ignorance of or a distortion of the \textit{shari’a}, placing their own actions and statements on at least a less than moral par with those of the deputy leader. The better view of the deputy leader’s speech was that he was calling for voluntary migration of such Muslims to \textit{dār al-Islam}, which, as already pointed out,\textsuperscript{194} but probably unknown to him, is a proper Muslim response to grievous cases of oppression under the \textit{shari’a}.

There is, however, ignorance or more likely a reckless lack of precision by these Australian leaders, both Muslim and non-Muslim, in dealing with matters of Islam. However, non-Muslim Australians’ words/actions must be judged by the relevant Australian secular standards, and not by \textit{shari’a} standards, (which they appear to oppose).\textsuperscript{195}

\textsuperscript{193} Some Muslim leaders referred to the ‘deportation of Muslims’ by senior Government leaders and Members of Parliament. This is an unjust reflection of the deputy leader’s speech and misconstrues both the deputy’s and the Qur’an/\textit{shari’a}’s position on oppression: Ross Peake, ‘Muslims hit back at Costello attack’, \textit{The Canberra Times} (Canberra), 25 February 2006. The Muslim leaders’ reading of the various references to Muslims (and particularly to deportation) by politicians is not a fair reflection of the latter’s words. There is however, a reason for Muslim leaders’ instrumental characterisation of the politicians’ words in this form, as it provides a \textit{shari’a} legal basis for ‘Muslims to fight back’. In practice, however, these Muslim leaders’ words amount to political posturing which increases the leaders’ standing within the Muslim community, exploiting both an uninformed mainstream community and the vulnerability of the Muslim community already feeling under siege. Muslims are not prevented from performing their \textit{’ibadat} (worship) in Australia, and the deputy’s statements must therefore be construed as referring only to Muslims calling for the application of \textit{mu’amalat}. In a sense, these statements such as the deputy leader’s statement offer a simplistic view of violence inspired by religious beliefs and sometimes downplaying (or being uninformed about) the complex social conditions which give rise to these conflicts: see generally Patrick J McInerney, ‘Religion and Violence’ in J Inkpin (ed) \textit{Religion and Violence}, (2007) 4.

\textsuperscript{194} See text accompanying n 162, 67.

\textsuperscript{195} There are no Federal anti-religious vilification laws in Australia to prevent vilification and taunting of Muslims on the grounds of religious affiliation. On the other hand according to Simon Bronitt and Bernadette McShery, \textit{Principles of Criminal Law} (2 ed, 2005), 779, the federal offence of sedition in Australia does cover the urging of inter group violence. While the Australian Constitution (s. 116) states that [Australia shall] ‘not make any law for establishing any religion, or for imposing any religious observance, does not allow the State to favour a particular faith over other […]’, the Head of State in Australia was for the greater part of Federation, HM the Queen/King of the United Kingdom and Australia who was also the Head of the Church of England. Further, the Monarch of England must be of the Established Church, and as mentioned serves as its Spiritual head. The English Sovereign is also Sovereign of each of the separate Australian States. Unlike say \textit{laïcité} in Francophone States, the ‘separation’ of Church and State in Australia has however, not been as strictly enforced, allowing politicians to bring in notions of Christian morality and charity into public debate, and is an avenue not denied to adherents of other faiths. Stephen Crittenden, ‘Kevin Rudd:
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On the other hand, and not withstanding the deputy leader’s ill-considered invitation for such Muslims unconditionally to leave Australia, Ms Rabia Hutchinson, an Australian-born Muslim convert, was prevented from doing just that. However, and notwithstanding the deputy leader’s unilateral ‘offer’ to such Muslims to leave Australia, this ‘offer’ did not bind the Government.

While this is not an established shari’a view, it can be argued that when prevented from leaving Australia, an individual, or to take Ms. Hutchinson case (to join what she called her ‘community’ overseas196), she is prima facie entitled under the shari’a to seek help to do this. This best, least damaging help in this case arguably is not so much, in the first instance, to shed blood in Australia, but perhaps in the first instance with help to escape from Australia to dār al-Islam, thus helping her to compensate for her error of judgment, prematurely in declaring her intentions to Australian authorities, by declaring her intention to fight Australia before leaving our shores.

Generally, oppressed Muslims must first seek to emigrate,197 and there are no general, practical or legal impediments at the Australian end to Muslims exercising this choice. Further, as it stands, Australian Muslims have not as a group called for any help against oppression and in any event such a call would not, it is posited, be justified.198

Bonhoeffer and ‘the political orchestration of organised Christianity” in The Religion Report ABC RN, 4 October 2006. for instance, cites PM Rudd stating: [... you can’t deny Christians having their voice, just as you can’t deny anyone else having their voice, and the single purpose of my intervention in this debate, apart from honouring the memory of Dietrich Bonhoeffer, is to say that when Christians inject their voice into the public political debate in Australia, to be mindful of this continuing social justice tradition of the church, rather than simply have a single voice of privatised conservative Christianity [...].

196 Lisa Millar, ‘Jihad sheilas’ speak out’ in 4 Corners ABC Australia, 2 February 2008.
197 See text accompanying n 162, 67.
198 These requirements apply equally to attacks in other countries such as Spain and the UK. Thus, Spanish Muslims who feel that they are oppressed may move freely and without much effort to other freer parts of Europe. On the other hand, not only have Australian Muslims as a group not called for external help but to the contrary Australian Muslims have condemned al-Qa’eda attacks. It is conceded that these statements of condemnation are sometimes made by unelected and often non-representative groups, sometimes ‘selected’ by governments for their ‘cooperativeness’ may be seen as self serving: ‘Selling anti-terrorism laws ‘not up to Muslims” in ABC News 6 October 2005. On the other hand, the majority by their silence have at least acquiesced in these statements. This is arguably because there
Therefore, in conclusion, if this analysis is correct, it would prima
facie make attacks by Australian or resident Muslims, on Australian
interests or those of its treaty partners, unlawful under the shari’a unless the
necessary notice requirements discussed are satisfied. The subsidiary issue
of military training undertaken by a Muslim minority who choose not to
emigrate (for whatever reason), is now examined.

6(2) Military training By Muslim Minorities
Military training by Muslims inter alia with a view to using these skills to
oppose oppression is now considered. Military training by private
individuals in both Muslim or non-Muslim States’ forces during peacetime
is not unlawful or controversial. However, an important contemporary
issue related to not just military training but to participation in armed
activity of any sort, including armed djihad, by individual Muslims, outside
a State’s military monopoly is problematic. Such insurrection is generally
an ‘internal matter’ to be prosecuted under the municipal laws of the
contemporary State-based international order. This issue is particularly
important in cases involving Muslims living in minority situations.

A Muslim may subjectively believe that he is obliged to receive such
training and in cases lawfully may do so by engaging in fitness
programmes or health clubs and receive arms training in licensed gun
clubs and by purchasing and owning arms under government permit. The
acquisition of this skill is not controversial.

Exercising this acquired military skill in armed djihad is now
addressed. As a matter of Islamic law, armed djihad is a collective
obligation. Ideally therefore, Muslims who objectively do not face

is no doubt that most Australians enjoy freedom of expression. This ‘freedom’
however is not respected globally, even by ‘Western’ institutions or companies. A
case in point is the self-censoring by Yahoo and Google in China. Thus although
invoked as a matter of course freedom of expression is curtailed when necessary
for example for the profitable running of a business. The only point made here
however, is that freedom of expression is often overstated as a ‘fundamental right’. The
issue of non-State organisations targeting commercial (or other non-State
organisations) is beyond the scope of this paper.

Recall that the armed djihad in the view of the majority is a collective duty (fard
kifayah). Al-Qa’eda have declared the armed djihad an individual duty (fard ‘ayn)
which is a minority view.
oppression and who therefore, are not permitted to fight against their societies. They should formally, and as of right, be explicitly exempted from armed *djihad* (in preference to say emigration) against their ‘oppression’, particularly in their own societies so that their own positions of trust in society, cannot legitimately be exploited by foreign or even local Islamists who disregard the *shari’a*. Further, Muslims who (secretly) betray their near neighbours, for example by colluding with Islamists overseas, can then, where there is positive law to this effect, legitimately be prosecuted under the *shari’a* for what is broadly described here as treachery. This position with respect to Muslim minorities living in a non-oppressive society clearly reflects the view of the overwhelming majority. A mechanism for delivering positive law to reflect this view is discussed in chapter 6.

This position, while defensible under the *shari’a*, is controversial from the view of some Islamists. Thus a relatively straightforward principled position, it is posited, is that Muslims living in minority situations, wishing to participate in armed *djihad* against their ‘own society’, should first move to *dār al-Islam*, but should not commence hostile action, again as discussed above, until they have declared their open enmity to their ‘home’ State. If captured during battle, they should be treated as prisoners of war. On information publicly available, for example, Mr Hicks, if it is true that he had elected to fight against Australia

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200 Please refer to Appendix 1 & 2 where it is discussed and concluded that in places where Muslims are permitted to pray, to fast, to pay their tithe, to travel on the *hajj* and perform other religious rites and requirements such as wearing the *hedjab* etc., as is the case in the Anglophone West, this thesis posits that such Muslims are not oppressed by the State. Muslims who do subjectively believe are oppressed are not prevented from migrating. The position of countries such as France, China, Turkey and Singapore etc where women are not permitted to wear *hedjab* freely, and migration away from some of these countries may not always be a practical option must be considered separately by the jurists.

201 Clearly, a positive law with respect to this crime is required for fairness, transparency and legitimacy and is discussed in principle in chapter 6.

202 There appears to be a consensus however, that Western Muslims who have exercised this option, albeit in a confused manner such as in the case of David Hicks and Rabia (Robin) Hutchinson, but consequently and arguably have not been equitably treated after capture by secular justice systems (both in the West and in Muslim majority States). For example, and as evidence of maltreatment, Rabiah Hutchinson claimed that the authorities took away passport and prevented her from leaving Australia: Lisa Millar, ‘*Jihad sheilas* speak out’ in 4 Corners ABC Australia, 2 February 2008.

203 See discussion above on notice requirements, 134.
or its allies, would not as a Muslim under the shari'a be allowed to invoke the protection of the Australian State under Australian law. Further, if a prima facie case is made that they have committed serious prosecutable crimes during armed conflict, could and should, be prosecuted for such crimes in a fair manner, and if the parties agree, then prosecuted under the shari'a.

From an Australian perspective, the relevant law with respect to people who wish to fight against their own societies is arguably encapsulated in spirit in the UK Foreign Enlistment Act which, in its long title, states that it is 'an Act to regulate the conduct of Her Majesty’s Subjects during the Existence of Hostilities between Foreign States with which Her Majesty is at peace'. While the analogy is inexact, as the majority of Australian Muslims are at peace with the Australian Government some parallels may be drawn. The Act in effect mutatis mutandis can apply to the Hutchinson situation. The Foreign Enlistment Act requirements do not appear to be very different from the shari’a requirements for the treatment of Muslims’ enemies residing among peoples with whom the Muslim have friendly treaty relations, as long as those hostile to Muslims are disarmed.

Say therefore that an Australian Muslim decided to emigrate from Australia for oppression to a Muslim jurisdiction with friendly treaty relations, then that Muslim should be disarmed by reciprocity and not permitted to fight or act treacherously against Australia. If that Muslim moved to a jurisdiction at war with Australia then she or he, having

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204 This issue is less clear for women who are in the opinion of most juries not required to fight in other than ribat.
205 Foreign Enlistment Act, 9th August 1870.
206 The long title is considered a part of an Act: Birch v Allen (1942) 65 CLR 621, 625.
207 Her Majesty, and her heirs and successors represent the Constitutional Head of the Australian State: sections 2 and 61, The Australian Constitution. Notwithstanding the Australia Act (Cth) 1986 which gives Australia Judicial independence, the Foreign Enlistment Act 1870 is nonetheless indicative of the operative legal principles in this regard.
208 See text accompanying n 202 above.
209 Qur’an 9:90:

[...] therefore if they withdraw from you but fight you not and (instead) send you (guarantees of) peace then God hath opened no way for you (to war against them)
renounced their ties with Australia, be free to join in armed combat against legitimate Australian forces and interests, and is in a situation similar to that under international law. The *shari'a* basis for this analogy is the issue of asylum granted to 'hypocrites' from Muslim States, who living as refugees, in non-Muslim States which are at peace with Muslims; as such hypocrites are expected to be disarmed\(^{210}\) and to not participate in any hostilities against Muslims. Thus by both analogy and reciprocity, Muslims living in non-Muslim States can be expected *mutatis mutandis* to be held to similar conditions.\(^{211}\) ‘Hypocrites’ in the Muslim view require legal sanction to hold them to their word whereas Muslims will do so for their fidelity to and fear of God. Notwithstanding this, Muslims should not as a matter of principle, oppose a positive law to this effect.

Churches with centralised canon development processes such as the Papacy, the Anglican Synod or the Orthodox Churches with a ‘Head’ capable of sanctioning law have all faced this issue of followers of Canon law coming into conflict with domestic laws. Muslims, like others, should resolve this dilemma. Thus for Muslims electing to remain as minorities (or at least for those in the Shafi‘i or Djafari Schools), jurists can, in the form of *fatwas*, restate the *shari'a* in a legitimate but appropriate contemporary manner and form, unambiguously to be exempt and further, prohibited

\(^{210}\) Qur'an 4:88-4:91. See also n 225, 144.

\(^{211}\) As discussed Muslims are exempt from fighting (1) hypocrites under the protection of Muslims’ treaty partners (where the ‘renegades’ would be disarmed and rendered harmless) and (2) if they withdraw and give guarantees of peace: n 225, 144. Muslims acting contrary to the agreement can be returned to *dār al-harb* (including for prosecution). But the treaty can be strictly literally interpreted. The case in point is the agreement to return a Muslim leaving Mecca and seeking sanctuary in Medina. The Prophet returned a Muslim (man) but refused to return a *muslima* (Muslim woman) as the agreement only specified the return of men. Thus death threats or bounties for the killing of ‘apostates’ such as Salman Rushdie, Taslima Nasrin, and others: [http://www.apostatesofislam.com/apostates.htm](http://www.apostatesofislam.com/apostates.htm) (accessed January 2009), thus appear to be *ultra vires* the *shari'a*. However, Muslim leaders are able to gain significant political advantage by such oppressive threats based not on *shari'a* law but by following Western precedent, law and custom (such as the bounties placed by the West) on al-Qa’eda operatives, Taliban or Baathist leaders or the use of individual targeted killings to eliminate opponents. A possible critique of this proposition is that Muslim minorities should be compared with *dhimmi* and not hypocrites. The point is that Muslims are not compared with the hypocrites, only that Muslims can on reciprocally expect only what they consider binding and thus the analogy with hypocrites protected by treaty is apt. Another critique is perhaps that it allows Muslim minorities ‘off the hook’. Again this argument is not tenable as the call is for Muslims wishing to fight to be given
from fighting against their ‘own’ societies. Such clarification will benefit both Muslims and their host communities, particularly if such fatwas can be adduced as evidence, not as law but as issues of fact and will help to prosecute terrorism cases.

On the other hand, Muslims who can show that they reasonably believe that Islamists engaged in armed conflict have gone ‘beyond bounds’ and for this reason should be fought, could lawfully fight against such renegades, an issue considered in the chapter 5. Many Muslim States have fought Islamists, including those involved in killing and injuring civilians. It is generally in the interests of secular governments not to force Muslims (or any other group for that matter) to fight against their co-religionists. Muslims are not required to serve in the Australian defence forces. The perception among Muslims in Muslim-majority States however is that the governments are themselves corrupt and therefore not authorised to fight the errant rebels who, although sometimes guilty of horrendous crimes, may also have legitimate grievances and be not much worse than the governments they seek to depose, and is a root cause of the endemic levels of violence.

6(3) Fighting the ‘near enemy’

On the other hand, when the legitimate imam grants permission for armed djihad, Muslims are, in the first instance, authorised to fight the enemy who are ‘near’. Fighting this ‘near’ enemy is however subject inter alia to the laws against treachery and notice requirements.

For completeness, the scope of ‘near enemy’ is now considered. Helminski interprets the word ‘near’, albeit in a different Qur’anic verse and context, as love for humanity. Not to put too fine a point on the

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212 This is not a matter of importance in contemporary Western society where conscription is not mandated. Muslims who elect to join the armed forces are clearly exercising their own choice through idjihad.


214 Qur'an 42:23 (emphasis added):

That is (the Bounty) whereof God gives Glad Tidings to His Servants who believe and do righteous deeds. Say: “No reward do I ask of you for this except the love of those near of kin.” And if anyone earns any
issue, presumably love can encompass admonishing loved ones, although clearly this permission cannot reasonably (and notwithstanding the notion that one must love one’s enemy), extend to hurting or killing them as the enemy. The Zaidi school holds that ‘near’ means a radius of a mile. ‘Near’ could also mean near the city of the Prophet or oppressed Muslims who are geographically ‘near’. Prima facie however, ‘fighting the near enemy’ appears in this context to grant Muslims a legal basis to fight against oppression ‘locally’. Permission is also qualified by ‘oppressors fighting you’ and in contemporary language can reasonably be translated into ‘combatants’. The WIF and al-Qa’eda appear to interpret ‘near’ disbelievers as the foreign forces occupying the Arabian Peninsula, which is not an unreasonable interpretation of ‘near’ for a group primarily composed of men from the Arabian Peninsula. This is also arguably the basis on which al-Qa’eda justifies the attacks on US military interests including the WTC in New York and the Pentagon in Washington D.C. Most of the 9/11 hijackers were Saudi nationals or Arabs from around the Persian Gulf.

Broadening of the scope of attacks to include targeting civilians (near or far), however, is an extension to the law that must be separately good We shall give Him an increase of good in respect thereof: for God is Oft-Forgiving Most Ready to appreciate (service).

Kabir Helminski (ed) The Vision of the Qur’an (2004), 280. While, Helminski does not expound his reasoning, loving ‘near of kin’ may arguably appear natural enough. However, loving all people does not appear to follow from Qur’an 42:23, in the manner in which he states, other than in the context that all humanity in the Qur’anic view are descended from Adam and Eve, and thus are ‘kin’ in the broader sense.

While nothing turns on this point, notwithstanding that this statement is from the Christian Gospels, but not having been explicitly abrogated, is arguably binding on Muslims. See Interpretation of the Qur’an, Appendix 2.


This is confirmed by (1) the leeway granted to principled rebels as discussed in the next Chapter. (2) the requirement of weak Muslims to emigrate and failing this to then request help. (which need not be military)


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and independently justified.\textsuperscript{221} This permission to fight 'near' enemy combatants further also clearly excepts those with pre-existing obligations such as peace treaties (that have not (yet) been denounced or violated).\textsuperscript{222} Extension of the current SHL positions which have crystallised through consensus must lawfully be sanctioned. If Muslims reasonably feel that this is disadvantageous, the SHL should formally be suspended, temporarily, by those who choose to do so, in preference to IHL rules until SHL becomes acceptable to a majority of the Muslims. Those who want to abide by current SHL standards should actively be encouraged to do this.

7 Hypocrites
The Qur'an grants Muslims permission to fight 'renegade'\textsuperscript{223} hypocrites.\textsuperscript{224} This permission specifically excludes:

(1) Hypocrites under the protection of Muslims' treaty partners, where the 'renegades' are required to be disarmed and rendered harmless, or

(2) If the hypocrites withdraw and give guarantees of peace.\textsuperscript{225}

\textsuperscript{221} Al-Qaeda's interpretation of 'near enemy' appears to be very particularised. It however gives a hint of its racist approach to Islam which, and contrary to the explicit command of the Prophet, appears to put Arab Muslims at the apex. They appear to view only Arabs (and even among Arabs favouring Arabs from the Arabian Peninsular) as being able to attain to 'true Islam', a view that has no theological or sharia support. It shows al-Qaeda as a very Arab phenomenon, born out of the particular exigencies of the Middle East and its recent history. This is perhaps its greatest weakness and 'but for' American incompetence in dealing with al-Qaeda and making it a global phenomenon it would arguably have remained a purely regional player.

\textsuperscript{222} Qur'an 9:7.

\textsuperscript{223} The term used in the Qur'an 4:89 is (fa' intawallaw IjljZüfy. This means 'he turned around' or 'is no longer with us' but generally means one who was given the message, was part of our community but his enemy turned him around and then have decided to fight against the Muslims; and is rendered into English here as 'renegade'.

\textsuperscript{224} Qur'an 4:88–89.

\textsuperscript{225} Qur'an 4:88–4:91 (emphasis added):

Qur'an 4:88 Why should ye be divided into two parties about the hypocrites? God hath upset them for their (evil) deeds. Would ye guide those whom God hath thrown out of the way? For those whom God hath thrown out of the way never shalt thou find the way.

Qur'an 4:89 They but wish that ye should reject faith as they do and thus be on the same footing (as they): but take not friends from their ranks until they flee in the way of God (from what is forbidden). But if they turn renegades seize them and slay them wherever ye find them; and (in any case) take no friends or helpers from their ranks.

Qur'an 4:90 Except those who join a group between whom and you there is a treaty (of peace) or those who approach you with hearts
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That is, permission to fight is contingent on the hypocrites actually taking up arms or preparing to fight against the Muslims and is again therefore a specific form of self-defence. The Saudi government is fighting al-Qa’eda, although the charge of hypocrisy, corruption and oppression in this instance is made by al-Qa’eda against the Saudi Government and not vice versa. A-Qa’eda’s struggle and perspective are addressed in chapter 5 in the discussion on rebellion.

This head of power however is intrinsically problematic as ‘the (‘Muslim’) enemy’ can pragmatically be classified as hypocrites, alleged to be armed, and thus ‘legitimately’ fought. As discussed, a hypocrite, unless self-proclaimed, is according to the Qur’an and sunna known with certainty only to God. It is proposed here therefore that Muslim jurists could urge Muslims, on the precedent of Omar I, to come to a consensus that this ‘class’ of first declaring someone a hypocrite (with the intention and purpose of fighting), be frozen until it clearly becomes enlivened by practical circumstances, in a way that will be self-evident to the majority of Muslims.

8 ‘Leaders of Unbelief’

Muslims are also instructed to fight the leaders of unbelief, when

\[\text{restraining them from fighting you as well as fighting their own people. If God had pleased He could have given them power over you and they would have fought you: therefore if they withdraw from you but fight you not and (instead) send you (guarantees of) peace then God hath opened no way for you (to war against them).} \]

\[\text{Qur'an 4:91} \]

\[\text{Others you will find that wish to gain your confidence as well as that of their people: every time they are sent back to temptation they succumb thereto: if they withdraw not from you nor give you (guarantees) of peace besides restraining their hands seize them and slay them. Wherever ye get them: in their case We have provided you with a clear argument against them.} \]


\[\text{227 Qur'an 29:11.} \]

\[\text{228 The reason for this convoluted means of achieving a freeze is because to Muslims the Qur’an is unalterable and therefore its provisions while dormant or temporarily invalidated for practical necessity will not be considered obsolete. See discussion on nask (abrogation) in Appendix 1.} \]

\[\text{229 Recall that every person is called a leader in Islam with respect to what is in his/her care: n 109, 58. Does this mean that there is a legal basis to fight every person on this pretext? It is posited that this is not a reasonable interpretation of Qur’an 9:29, although jurists should clarify these unnecessary ambiguities.} \]
(1) they violate their peace treaties and
(2) taunt Muslims.\textsuperscript{231}

Permission to fight is contingent on the violation of peace treaties plus an element of provocation and is a specific form of self-defence. That is, ‘ordinary people’ who cannot in their usual capacity be characterised as leaders in a political, military or industrial sense, or arguably who are in contemporary language civilians, appear to fall outside the scope of people that Muslims are permitted to fight.\textsuperscript{232} Their leaders however, prima facie\textsuperscript{233} legitimately could be fought if these and other necessary pre-requisite conditions for armed \textit{djihad} are satisfied.

While a requisite element of ‘taunting’\textsuperscript{234} Muslims arguably is present in many Western countries, including Australia, Muslims are not ‘fought’ or prevented from practising their faith, thus violating the agreed rights of free worship and practice of faith, negating this requisite element of armed \textit{djihad}. On the other hand, the treatment of non-citizens such as by the US at Guantánamo, the alleged torture of Mr Habib in Egypt\textsuperscript{235} or Mr Binyam Mohamed in Pakistan and other places,\textsuperscript{236} satisfies the definition of torture, which is a form of oppression and are an impediment to free worship.\textsuperscript{237} Others have also suffered oppression in foreign (mainly ‘Muslim’) lands, but with the apparent acquiescence or even active assistance from the US, Australian and UK government agencies.

\textsuperscript{230} Qur’an 9:29. See also discussion on \textit{kafir} (disbelievers) in Appendix 1.
\textsuperscript{231} Qur’an 9:12–13.
\textsuperscript{232} See n 229, above.
\textsuperscript{233} See text accompanying n 191, 135 for an example of taunting and mocking by the deputy leader. His behaviour is however not directly aimed at Muslims as such as he acts in a similar manner within his own political party: Annabel Crabb, ‘Cheshire Cat Costello grins again’, \textit{Sydney Morning Herald} (Sydney), 8 August 2009.
\textsuperscript{234} See discussion of 8 ‘Leaders of Unbelief, particularly text accompanying n 231, where the elements and the implications of taunting are considered.
\textsuperscript{235} Mamdouh Habib (with Julia Collingwood), \textit{My Story: the tale of a terrorist who wasn’t} (2008), 106.
\textsuperscript{236} \textit{The Queen on the Application of Binyam Mohamed v Secretary of State for Foreign and Commonwealth Affairs} [2008] EWHC 2048 (Admin). (Revised on 31 July 2009).
\textsuperscript{237} The word ‘oppression’ is here given the broader dictionary meaning as opposed to a judicially defined meaning. Oppression of an individual through torture etc while odious and is symptomatic of general oppression is clearly not always an indication of the broader use of torture or oppression.
respectively, and while reprehensible, is not proof of systematic oppression.

There is little doubt or opposition to the fact that Muslims in Western Anglophone States face little if any institutional opposition to the free and open practice of their faith, negating this ground for armed djihad. Muslim citizens and residents of these States who clandestinely engage in or aid and abet armed activity against their 'home' State are prima facie acting unlawfully under the shari'a and should bear the onus of proving otherwise.

9 The 'Friends of Satan'
The Qur'an permits Muslims to fight 'the friends of Satan'. Generally Satan's friends are described as treacherous and given to 'bad acts', which must be countered when manifest and are discussed below. Muslims, however, are required to 'fight' or combat evil with what is good and the command is not one to fight an individual bad person. However, in essence, 'the friends of Satan' are souls given to 'diseases of the heart', most but not all of which are not generally visible to humans and thus only punished in the Hereafter, unless the person reforms or receives absolution in God's eyes.

The term 'friends of Satan' is used to describe those with particular evil characteristics and perverse views, given to causing fitna. These are visible and objective transgressions that can be opposed and overcome, although the means that may be employed are not prescribed but, on the other hand, are not limited. They are variously described as people with certain negative characteristics including those involved in 'cruel practices' such as slitting the ears of animals, but it is noted that some of these

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238 What is meant here is that such Muslims have not gone through the process of severing their contractual ties with the State and giving notice of their intentions in an open manner.

239 Qur'an 4:76: ﷲ ﷲ ﷲ ﷲ ﷲ ﷲ — fight the friends of Satan.


‘cruel practices’ are not unlawful in the OECD States while further noting that conditions of animal welfare in the less developed, if not most, Muslim countries is in many instances much worse. Prima facie it would appear that perpetrators of such animal cruelty fall within the meaning of this category of ‘friends of Satan’ and Muslims are permitted to fight them arguably, again by encouraging them to desist from such cruel or satanic practices and to combat them economically, for desecrating nature. Muslim animal rights NGOs, if they exist, do not appear to have taken the fight to help curb such cruel practices. Notwithstanding this omission, the Qur’an encourages Muslims to fight these practices as they affect humans and nature. From a ‘pastoral care’ sense, Muslims appear duty bound to inform Muslim and others including farmers and abattoirs that such practices breach the letter of the Qur’an, although it should not in this instance be a pretext to support economic or armed action against farmers or others.

Notwithstanding that while this example is relevant to animal welfare, some of these tortuous practices and worse are applied to human beings, as set out in the many reports of human rights organisations. Regimes which are directly or indirectly responsible for such practices against humans could therefore justifiably be categorised as friends of Satan and appropriate action taken.

This is also a category that can more easily be misused and thus needs careful interpretation and elucidation inter alia to prevent it from become a ‘catch-all’ category used by Muslims to fight everything they subjectively may categorise as ‘satanic’, or to create problems between farmers and others, and Muslims where none now exists. It would however appear banal to conflate the serious grounds of fighting against human oppression with the important but nonetheless not catastrophic issue of animal rights. It would appear disingenuous to use this ground to take human life for the protection of animal rights, important as that issue might...
be, particularly under the *shari'a* when none of the species protected or referred is according to the Qur'an imbued with the quality of freewill.

However, such practices when used in Western States inform the genesis of criticisms and lend weight to statements such as that by Ayatollah Khomeini that the USA is the 'great Satan' and the implication that its allies such as Australia are the little Satan, but Satan nonetheless, involved in cruel and inhumane practices. The utterly hypocritical stance by a majority of Muslims generally is the atrocious state of affairs, not just of animal rights but also human rights in the majority of Muslim States. It is not suggested that the OECD should run its animal welfare or any other policies or practices according to Qur'anic norms, it is foreseeable that one must be sensitive to the cultures of nations with which one deals, trades and has diplomatic relations.

**Summary of Groups that may be Fought under the *Shari'a* **

The Qur'an and the *sunna* encourage armed *djihad* in certain circumstances, with boundless rewards for participation with the correct intention and motive, and, notwithstanding the natural human dislike for fighting (even 'pure' *djihad*). Further, the promise of 'God's pleasure' for those with the right intention, engaged in pure *djihad*, is coupled with a threat of drawing God's displeasure on those who avoid *djihad* absent a valid excuse. Engaging in *djihad* however is not simply participating in arbitrary, whimsical or random violence as it is sometimes portrayed. Armed *djihad* is bound by a set of rules and circumscribed by what is Qur'anicly right and good and never has and never can legitimately subscribe to the notion that the 'ends justify the means'. *Djihad*, generally is a deeply spiritual exercise and the armed *djihad* aspect is not an exception.

The members of each identified class may legitimately be fought separately or together in any permutation or combination, provided that the means employed in combat are intra vires. The Qur'an provides for nine heads of power that legitimate fighting. These grounds or reasons may

243 Qur'an 2:216.
244 Qur'an 4:77.
be abstracted into three broad, but sometimes overlapping categories, as fighting:

(a) in self-defence (heads 1, 2, 4, 5, 6 and 8);

(b) against oppressors, that is against those who use their position of power to deny individuals the right to exercise their freewill (heads 3 and 7); and

(c) against those who act cruelly towards sentient beings (head 9).

Category (a) is not generally controversial under contemporary international law, and fighting in self-defence falls within the meaning of the term in IHL, which ipso facto makes such fighting legitimate under both traditions. However, the shari’a and does not limit self-defence to attacks by States or groups with a nexus to a State. The right to self-defence appears to be independent of the source of the attack. Since ‘States’ as such do not have a significant position in the shari’a, limiting the shari’a right of self-defence to coincide with the ICJ’s position does not appear to be necessary or legitimate.

The legitimacy of Category (b) is likely to prove somewhat controversial in a secular world and is akin to the position of humanitarian intervention or the ‘responsibility to protect’ (‘R2P’) doctrines, which is mentioned here for completeness only and not discussed any further. However, in practice the international community is moving towards legitimising or at least acquiescing to intervention for humanitarian reasons (Bosnia and Kosovo) or perhaps less enthusiastically for ‘regime change’ against oppression in Iraq. Western largess and generosity has, for the most part been greeted with Muslim ingratitude. Article 51 Charter of the United Nations.

Clearly the means by which a defensive war is fought must be intra vires. The essence of war crimes in the meaning of Article 8 of the Rome Statute can be summarised as prohibition and criminalisation of unnecessary suffering that causes pain to a sentient being, an issue considered below.

This doctrine of R2P is a study in its own right and has its own broad literature. For the purposes of this thesis however, it is noted only, that the doctrine is still in the process of crystallisation into custom.

While nothing turns on this, Javad Nurbakhsh, Traditions of the Prophet (1981), 86. hadith cites a hadith from the Prophet that:

Whoever does not express his gratitude to people will never be able to be grateful to God.
Kosovo, Bosnia and Iraq appear to be permissible or even recommended under the *shari'a* because Muslims living in the affected area sought external help. There is a concomitant obligation on other Muslims to come to their assistance if their call was ‘just’.

It appears uncontested that both al-Qa’eda and the US responded to Muslims’ cries for help and, notwithstanding the mixed messages or intentions involving some economic motives (with respect to the US’s intervention), the US’s actions could be seen as ‘righteous’ in principle according to Islamic criteria. Notwithstanding the strength of its media machinery, the West has done a very poor job of ‘selling’ its message of support for Muslims. Groups such as al-Qa’eda have benefited enormously from this omission by highlighting only the more obvious shortcomings of Western intervention.

Category (c) is likely to prove the most controversial. However, notwithstanding the genesis of this category with respect to animal welfare, the fact that humans are treated in a worse manner in instances must mean that this category can in justifiable instances be applied to those who engage in violating the integrity of the human body in order to cause pain and suffering. ‘Fighting’ here however, in its broader meaning could not be extended to constitute permission for the wilful or reckless taking of human life for protecting the rights of animals.

Permission to fight however, does not automatically translate into an obligation to fight. As discussed, for example, Muslim armies which are less than half the number of the opponent, are not required to fight.\(^\text{249}\) The Qur’anic grounds for fighting are not absolute and discrete (even under their more atomised nine heads of power) and the ‘enemy’ may ‘contain’ various permutations of the protected groups. Further, in conventional conflict situations, enemy fighters are not entirely separate from their host populations. This intermingling of legitimate targets and protected categories, and remotely-deliverable weapons systems with significant

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\(^{249}\) Qur’an 8:66.
destructive capacities which are arguably a universal phenomenon, raises the questions of how the *shari'a* will deal with fighting among these 'mixed populations', an issue that is now examined.
Part 4: ‘Mixed’ Military – Civilian Areas: Classical & Traditional Positions on Collateral Damage

Introduction
This part identifies the classical and traditional shari’a limits and prohibitions on the means of taking human life during an armed jihad, particularly those involving conflict situations in ‘mixed areas’, ie in IHL terms where civilians, or in shari’a terms where protected persons, live or work among military installations, personnel and other legitimate military targets. Weapons of ever greater destructive capacity are of particular concern because they cause indiscriminate death and destruction. Better weapons delivery systems have enabled a much more accurate delivery of the payload and but for such improvements in targeting the destructive forces of weapons would result in even greater carnage.

This is however not a level playing field, as those with the ‘better’ weapons, guidance systems and delivery mechanisms are the wealthy industrialised States. Their weapons, if used as the yardstick, would automatically and ‘unfairly’ make those poorer ‘freedom fighters’, the oppressed combatants, not supported by a powerful backer, often armed only with unsophisticated and even ‘home made’ weapons, look relatively ‘worse’ on this criterion. ‘Freedom fighters’ without access to sophisticated weaponry are likely to be and in may cases are demonised by those with the media power to project the undoubtedly often truly barbaric attacks to their own political advantage, and prosecuted and punished disproportionately. Clearly more sophisticated legal tests than are presently employed in IHL are therefore required in adjudicating these matters to prevent the automatic privileging of the rich and powerful over the poor even when they have an objectively just cause.

The Classical SHL Position
The original shari’a position on targeting in warfare is derived from the Qur’an and the practice of the Prophet. This position, which was the prevailing law at the time of the Prophet and his Companions, was useful for war among the Arabs of the Peninsula, most of whom had similar weapons and methods of warfare. As the desert Arabs moved out of the
Arabian Peninsula and encountered other cultures with different weapons and means of warfare Arab Muslims (whose wars could better be described as a series of raids that ‘war’ as such) were somewhat disadvantaged by the strict classical position as interpreted by the early Muslims. As the classical position was developed, similarly the shari‘a, the eternal Muslim law, must be applicable to Muslims of today a position that is not contested and therefore continues to evolve.

The classical SHL position holds that killing protected persons strictly is prohibited, except in cases of dire necessity or genuine mistake of fact, and in which cases diya (compensation) becomes payable.250 Thus, a shari‘a analysis of intentional, indiscriminate, reckless or negligent killing of protected groups, even when this occurs collaterally as a result of an attack on a legitimate target, is most likely to impose, as a minimum requirement the payment of compensation,251 in addition to the criminal charges that should attach for death and injury not resulting other than accident or dire necessity.252 Strict adherence to this position would disadvantage Muslim combatants vis-à-vis those bound by IHL standards.

The Traditional SHL Position
The traditional shari‘a position on warfare was an evolution of classical law and was ‘developed’253 in the main, as was most law of that time, by the eponyms and the Schools. The primary driver for change was necessity. The law on targeting mixed areas as developed by the eponyms is referred to in this thesis as the ‘traditional’ position. Jurists of that time, however, must have become quite concerned at what they may have regarded (even then) as the increasingly permissive nature of killing, and rather than evolving the shari‘a in deliberate incremental steps to match their enemies’ positions for necessity, about 500 years ago froze the development of SHL. SHL became moribund by the strict prohibitions, because of a process jurists may have regarded, perhaps rightly, as a dangerous development.

250 Qur’an 4:92.
251 Javad Nurbakhsh, Traditions of the Prophet (1981), 89.
252 See text accompanying n 150, 220.
253 The term ‘developed’ in this instance is used for convenience. It is fact moving the law into a retrograde position and is an euphemism for permitting the lawful
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What appears to have happened then however, is that the rulers, again perhaps for necessity, matched or adapted means of warfare similar to those around them and when possible even exceeded the levels of violence used. Meanwhile the majority of jurists have stuck their heads in the sand. The opportunity to use SHL as a restricting force to such rampant development was therefore missed. This thesis urges the reawakening of this process of improving restraint in combat.

The slow development of SHL, also is arguably a key reason why the vast majority of Muslim combatants of today bypass, not engage with, or simply pay lip service to SHL limits which are in the main, observed in the breach. On the other hand, it is difficult for some Muslims to accept that the shari‘a is anything but utterly ‘complete’ and which, for this constituency was confirmed by the ‘closing of the door’ of idjtihad.\(^{254}\) Notwithstanding the well-known individual efforts of giants in the fields of shari‘a legal theory and criminal/siyar laws in the last 50 or so years, the shari‘a has not been developed in a comprehensive manner in this area. The result is that the development of shari‘a laws on warfare and crime generally has continued to stagnate. This issue of targeting mixed areas, therefore, is not settled in a manner that would provide practical contemporary guidance, either for combatants or victims. This leads to fighters paying lip service to SHL because openly to disobey or challenge the shari‘a will leave Islamists open to a charge of heresy (particularly by other Islamists or State-sponsored imams).

Obeying and adhering to classical or traditional limits in toto would leave Muslims utterly vulnerable in contemporary conflicts as was, say, the case of the attack by rebels on Mecca in 1979, which is discussed below.\(^{255}\) Therefore, traditional limits will almost inevitably be ignored by most modern, more pragmatic, less observant Islamists. Such Islamists, however,

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\(^{255}\) See Contemporary Traditional SHL Position and Meccan Rebels, 160.
have perhaps inadvertently been assisted by the Western media (which still have a strong and influential presence in the Muslim world) in both Muslim and Western States by helping Islamists to mask their violence by characterising brutal and random attacks against civilians as ‘djihad’, thus covering their transgressions by giving both the attacks and the attackers the invaluable epithet of ‘Islamic’.

Many ‘ordinary’ Muslims in Muslim States are quite dependent on electronic media and for the low rates of literacy among many Muslims in Muslim States, strong censorship rules, regime propaganda etc, arguably have few independent means of verifying the scale or scope of Islamist attacks. As with people in the West, while suspicious of the media, they tend to believe the media anyway, perhaps for the absence of alternative credible sources of information. Many Muslims dismiss legitimate Western criticisms of al-Qa’eda and other Islamists as ‘anti-Islamic prejudice’. Except among a minority of Muslims, this shallow analysis works in favour of Islamists

On the other hand, while Muslims know that attacking civilians is unlawful under the shari‘a, they appear content to come up with and support an almost endless supply (usually of American) conspiracy theories as cited in President Ahmadinejad’s address to the UN General Assembly256 in 2010, which cited and highlighted US conspiracy theories alleging US Government involvement in the 9/11 bombings. Further, the shallowness of the vocal elements of Muslim world is demonstrated, and strengthens the above analysis, in that the effigies burn257 after the Pastor Terry Jones’s threat to burn the Qur’an, were not that of the Reverend but that of President Obama, a person who spoke up in support of the construction of the Manhattan Mosque and called on Pastor Jones to abandon the burning of the Qur’an258 Burning effigies is a new

257 Note that there is no precedent in the Qur’an or the sunna for burning effigies in protest.
258 Another example is that the Taliban were able to rouse Afghan Muslims into throwing stones against Australian troops who were burning rubbish by claiming that they were burning copies of the Qur’an: Fran Kelly, ‘Australian Troops Stoned by Afghans: Qur’an Burning Allegations Fabricated of by the Taliban’ in ABC
development as a remedy or even as a protest. It has no documented precedent in previous centuries perhaps because of the unacceptability of icons resembling 'graven images'.

There is a significant gap between the traditional position and IHL on the issue of permissible 'means' of combat. Ironically, if peace and security are to flourish in Muslim States, SHL can and must further be evolved to accommodate contemporary wartime situations to arrest and then reverse the obscene levels of permissiveness that IHL tolerates as 'not-unlawful'. To highlight this point note that civilian deaths in wars have risen from 5%, at the turn of the last century to about 90% of those killed in 2000.

The related question is absent a 'church' in Islam, who will perform this critical and imperative task of examining and developing SHL to cover the use of modern weapons and techniques? The answer under the shari'a is clearly 'the jurists'. The absence of institutions, through which the jurists will provide their opinions and decisions in a free and frank manner is still an issue that needs to be answered. This thesis posits that this task is nonetheless vital in helping to bring Islamist violence under some semblance of control.

The eponyms evolved or developed the classical position on humanitarian law 'to fit' or suit prevailing circumstances. The Schools did so with respect to collateral deaths till about the time when the 'door' of

Radio National 18 September 2010. The simplicity of these Muslims coupled with the high levels of distrust does not bode well for peace and security for all parties concerned.

259 See discussion of the negative connotations surrounding bida' or innovation among Islamists: Appendix 1 (discussion on Wahhabis and Neo-Salafis).

260 'ABC News 24' in ABC News ABC Television, 11 September 2010. See also n 308, 169 and n 308, 169.


See also discussion of the shari'a as a jurist's law in Appendix 1.
As articulated by contemporary commentators, there appears nonetheless to be some uncertainty of the Sunni legal position with respect to causing collateral deaths. According to the Maliki School, Muslims may not (intentionally) kill the insane or hermits. Abu Hanifa agreed with Malik but Hanafi jurists such as al-Thawri and al-Awza‘i held that only the aged in these groups may not be slain. Al-Awza‘i also stated that peasants may not be killed. Differences in opinion also occur based on the motive of the slayers. The religious status of the slain in the Arabian Peninsula is presumed to be mushrik/polytheist. However, killing polytheists (unless they fight Muslims) generally is not supported under either the classical or traditional positions.

Shafi‘i stated, however, that any protected persons may be slain out of necessity. It is very unlikely that such great scholars sought explicitly to disobey or circumvent the letter or spirit of the Qur’an or even the classical position, but, as is the case today, developed suitable and appropriate exceptions. There is, nonetheless still a significant degree of uncertainty in the law with respect to the scope of the exceptions and with respect to the use of weapons which have technologically advanced quite considerably since the time of Shafi‘i.

It is not the intention here to critique the standing conclusions and religious opinions which were proffered several centuries ago under conditions which are incompletely documented or presently unknown.

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263 While the legality of the use of force is a crucial aspect it is certainly not proposed that legality alone, is sufficient under the shari‘a. Legality must co-exist with what is just. The legal use of force by Nazi Germany, by the German law of the time against Jews and others (such as disabled and gay people and non-Saxon minorities) solely on the basis that a person belonged to this group, and is an example of ‘legal’ but immoral use of force.
265 Ibid.
266 Ibid.
267 Although this point is outside the scope of this present work, it can be said that all Abrahamic faiths as a matter of both theology and law permit the use of force though such force is always tempered with and ‘under-laid’ by mercy.
268 See above n 266, with respect to fighting on the Arabian Peninsula.
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What is important is that there is an established principle that, when there is a need for the development of those aspects of the shari‘a dealing, say, with ‘contemporary weapons’ in general use, there is scope for this to be done with care. Even the traditional position is quite impractical in a time of nuclear weapons and other seriously destructive weapons (including cluster bombs, fire bombs, bombs each with thousands of pounds of explosives, delivered by missiles and delivery systems) that give technologically advanced peoples a great advantage in their ability to ‘take out’ their opponents with relatively little danger to themselves.

Consequently, it is clear that there is a need to develop SHL (and consequently also IHL) in a comprehensive way to cater for and to regulate the use of ‘contemporary weapons’.

What appears settled under the Schools, and is not in dispute even today, is that for accidental or wrongful slaying there is a general obligation on the killer (or vicariously their family or ‘tribe’) to pay diya, particularly when a formal state of war did not exist, or the accidentally injured party was not party to the conflict, as is the case of collateral deaths of ‘bystanders’.\(^{271}\) The substantive Qur’anic right to obtain a settlement or alternatively a waiver of the payable compensation is established.\(^{272}\) The question of who is ‘party’ to a conflict generally is a question of fact and is an issue that needs to be addressed by jurists on a case by case basis, although the evidentiary onus should rest on the individuals asserting their status as a non-combatant. The most controversial issue is whether this Qur’anic right can be suspended for the difficulties of establishing liability until the necessary infrastructure can be put in place. This creates an incentive for Western States to support the proposition made in chapter 7 and that is to support the creation of the international shari‘a infrastructure necessary to try Islamists. While Al-Qa‘eda has sometimes issued a

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\(^{271}\) Qur’an 17:33:
Nor take life which God has made sacred except for just cause. And if anyone is slain wrongfully We have given his heir authority (to demand Qisas or to forgive): but let him not exceed bounds in the matter of taking life: for he is helped (by the Law).

\(^{272}\) Qur’an 4:92.
'statement of regret',\textsuperscript{273} it does not cite authority for the proposition that such a statement alone, without more, satisfies 
\textit{shari'a} compensation requirements.\textsuperscript{274} The question of permitted weapons and means also touch on this issue of large-scale causing of injury, but will be addressed separately in chapter 4.

\textbf{Contemporary Traditional SHL Position and Meccan Rebels}

A relatively recent example of Islamist use of force, broadly falling within the traditional scope of SHL, is the capture and possession for a short time of the 'Sanctuary' in Mecca by rebels who wanted to overthrow the Saudi government and replace it with (in their view) a more observant Islamic government. It is conceded that these rebels' generally subjective view of Islam is not likely to be acceptable to the majority of Muslims. However, apart from their actual use of arms in the Sanctuary,\textsuperscript{275} their care not to kill arbitrarily, arguably reflects a degree of care and is a better view of the classical application under \textit{shari'a} law on principled targeting within the traditional scope of SHL. According to Trofimov, the rebels who captured the Sanctuary did not shoot civilians, even when they suspected that trapped \textit{Saudi military personnel were escaping in civilian clothes} given to them by onlookers.\textsuperscript{276}

The rebels, perhaps because of their Bedouin ways, had a limited, knowledge of the outside world and displayed an almost utter indifference to the West, its customs and morés, or IHL for that matter. The rebels emerged from a society which Trofimov describes as comprised of a group where\textsuperscript{277} 'hardly any Saudis were sufficiently qualified – or disciplined –

\textsuperscript{273} Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 262. where bin Laden is reported as saying: We do not anathematise people in general nor do we permit the shedding of Muslim blood. If some Muslims have been killed during the operations of the mujahidin then we pray to God to take mercy on them; this is a case of accidental manslaughter, and we beg God's forgiveness for it and we take responsibility for it.

\textsuperscript{274} Qur'an 4:92.

\textsuperscript{275} Hunting by a \textit{muhrim} (or one in a state of \textit{ihram} or broadly speaking, a pilgrim) is prohibited: Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of \textit{Sahih al-Bukhari} vol 3 (1976), 28. Although nothing turns on this issue, it appears that the rebels were careful not to breach these religious laws.


\textsuperscript{277} Ibid. 23.
for private sector employment [...]. The rebels were nonetheless relatively well informed of the Qur’an and of the sayings of the Prophet, accepting their literal principles as ‘law’. They accepted these as unilaterally binding, even in the knowledge that the Saudi military inevitably would ignore these traditional limits of warfare (because, in the rebels’ view, of the latter’s allegedly ‘un-Islamic’ bent), and were proved right according to Trofimov. This fidelity on the part of the rebels to the observance of the letter of (what they believed was) ‘the shari’a’, by giving the words of the Prophet and the orthodox caliphs a strict and narrow construction of who may and who may not be killed in warfare, is the approach that one would expect from principled literalists.

The rebels’ cautious approach is contrasted, again by Trofimov, with both the US and French-trained Saudi troops presumably versed in IHL, who appeared to shoot at ‘anything that moved’ resulting in significant civilian casualties. The application of ‘necessity’ in the acts of the rebels appeared to have been defined as ‘necessary to achieve what was prescribed in the Qur’an and sunna’. They did not respond in kind and did not interpret ‘necessity’ as informed by proportionality or reciprocity in either the arms used or collateral damage caused by the US, French and Saudi Arabian enemy, and this is posited as the better view of SHL. This strict position is likely to be ‘liberalised’ for utility by jurists for contemporary weapons and conflicts. While unfortunate for humanity, this is inevitable for practical reasons.

There is little contention that modern warfare generally is significantly more complicated than in the early history of war when many battles took place in a battlefield away from populated areas. Notwithstanding this, however, as demonstrated by the rebels who captured the Sanctuary, minimising loss of life is not unachievable in even a very congested setting. At the relevant prayer time, during the hajj period in Mecca in which the rebels’ attack first took place, there would have been over a million people in an area perhaps not much more than a square mile.

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278 See text accompanying n 279, below
The fact that the rebels were trounced in this confrontation had less to do with their targeting policy than by the huge military disparity between the Saudi Government, strongly supported by the West, and the ill-equipped and disorganised rebels. It should be noted however, that notwithstanding the near certainty of their deaths in the operation, the rebels at the Sanctuary did not use *kamikaze* methods although the Japanese innovation was known to the Arabs but had not yet been adopted as a weapon of war by the *salaf* in 1979, nor even to take the lives of a large number of people.

**IHL Position**

Dinstein reasonably recognises that 'a brazen act of shielding a military objective with civilians (albeit a war crime) can effectively tie the hands of the enemy by barring attack' and cites with approval Doswald-Beck's acceptance as legitimate the Israeli bombing of Beirut in June and July 1982 'given the fact that military targets were placed amongst the civilian population'. Beirut is a largely civilian city with an ineffective State military apparatus but at the time, and to a lesser extent even at present, with many warring factions fighting each other with crude weapons.

If the characterisation of the IDF (Israel Defence Forces) attacks as being justified is correct, then the IHL concept of a 'legitimate military objective' can...
target’ is broad indeed. Confirming this view, in his survey of the leading authorities in the field, Fischer too recognises that it is difficult to distinguish and discriminate between combatants and non-combatants, thus legitimising or at least providing a rationale for tolerating significant collateral injury in ‘mixed areas’.

The principle of distinction, where the parties in conflict are required to distinguish between protected civilian objects and military objectives, is central to IHL, and has served a very useful purpose and rightly will no doubt continue to play an important role in IHL. As currently defined, however, the distinction is perhaps less useful to the pilot of a bomber at 40,000 feet, or for those launching ICBMs or drones from hundreds of miles away, unless the intelligence with respect to the nature of the target (distinction) is accurate and reliable. The US, which had perhaps the most sophisticated intelligence, weapons and guidance systems, accidentally still bombed the Chinese Embassy in Belgrade. Civilian deaths caused by unmanned US drones appear to be quite significant. This does not bode well for the safety of civilians during war, particularly against non-State actors with unsophisticated weaponry and poor military intelligence.

Perhaps, for the vast resources and sophisticated weapons systems available to developed countries, they should be allowed much less leeway with respect to collateral injury than is extended to States with less sophisticated weapons guidance and delivery systems, and perhaps further an even greater leeway for liberationist groups with ‘home-made’, out-

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285 See n 283, 162.

286 This difficulty does not however diminish the responsibility of the belligerents in IHL to make a distinction between combatants and non-combatants: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol I (2005), 3.

287 Article 48 Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977: In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

288 It is acknowledged that the event occurred over a decade ago and that it is not entirely right to judge the incident according to quality of technology available today.
dated or ‘old’ weaponry and with poor training in the ‘correct’ use of their weapons.

The indicator perhaps that advanced states have ‘given up’ on the quest to reduce civilian deaths is perhaps illustrated in its training techniques. To this end the US uses desensitising and effectively dehumanising techniques289 arguably to help the soldiers psychologically cope with the difficulties of mass killing in war.290 Al-Qa’eda employs its own means, by demonising the West and its peoples, thus desensitising its own cadres to the pain and suffering their attacks cause to both Muslims (who are first declared as ‘heretics’ for not joining up with al-Qa’eda) and non-Muslims (particularly ‘white’ Westerners) subject to its attacks.

‘Even the US’s allies concede that it can employ a strategy of annihilation that has become characteristically the American war’,291 and is one that is assisted by the USA’s ‘Rules of Engagement (ROE) [which are] more lenient than other nations, ‘thus encouraging earlier escalation’.292 Notwithstanding this critique, the USA’s ROE must be considered to fall within the lawful scope of IHL. Generally however, it appears that from the perspective of States, the US’s tolerance of collateral killing is quite permissive. While the US has greater technical and military capacity to strike anywhere, al-Qa’eda has, also in the same vein, exercised its albeit much more limited ability to strike on the US homeland and in other Coalition States with varying degrees of ‘success’. Both sides have collaterally killed and injured considerable number of non-combatants.

Development of the Shari‘a

Contemporary IHL is less restrictive from the perspective of combatants or belligerents than are either the classical or traditional shari‘a positions. The comparison of IHL with a stagnant law is perhaps not entirely ‘fair’ or even

290 These mind altering techniques, for reciprocity or otherwise, are not permitted by the Qur’an: Qur’an 95:4.  
useful, but nonetheless provides a starting point. Making the simple, pragmatic leap to equate the IHL and SHL positions, while likely to be acceptable to a majority of Islamists, is not a humane or principled position. It denies humanity the benefits that can accrue through co-operation and adopting the best and most humane standards among the many civilisations. To this end it is argued that there are clear prima facie practical grounds for developing the shari'a, in incremental steps by arguing for specific limited exceptions to the traditional limits.

It is crucial, that development is carried out in a manner that does not do violence to the language or spirit of the shari'a sources on one hand while not depriving Muslims the right of self-defence on the other. What Muslims must do is to question the permissiveness of the IHL, critique these positions for what they are, which in the view of this thesis is an irresistible deference to the rich and militarily powerful. Muslims must through their ‘power and numbers’ bring IHL back to a more ‘humanitarian’ position and if for nothing else, to allow humanity to fulfil its purpose on earth in the meaning of the Islamic Covenant, which explicitly binds every Muslim including Islamists.

By analogy with the IDF’s Beirut attacks, the World Trade Center (WTC) contained businesses with significant defence interests that arguably fit within a ‘dual-purpose’ category. Further, since the US military-industrial complex is clearly more sophisticated and better integrated into the US business community than, say, is the Lebanese, the Doswald-Beck test under IHL may arguably lend some support to the

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293 The justices of the High Court of Australia had to contend with similar criticisms with respect to racial discrimination. In the High Court decision of Mabo v State of Queensland (No 2) (1992) 175 CLR 1, 41:

It is imperative in today’s world that the common law should neither be nor be seen to be frozen in an age of racial discrimination

294 Qur’an 22:39:

To those against whom war is made permission is given (to fight) because they are wronged and verily God is Most powerful for their aid

295 See n 283, 162.

296 Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004), 82, dealing with services, industries, buildings etc that can serve in both a civilian as well as military capacity.
'lawfulness' of al-Qa'eda's 9/11 attacks on the WTC and the Pentagon. When compared with The Lebanon, this nexus between parts of US industry and its military (or the US military-industrial complex) is even closer. Bin Laden claimed that the WTC and the Pentagon and those who worked in them were all legitimate targets, but nevertheless 'hit' the buildings early in the morning while they were largely relatively empty, and on the Dinstein view, arguably intra vires IHL. It is noted that the 9/11 attacks were deliberately targeted and the 'weapon' more precisely delivered than some of the attacks in Beirut. Further, al-Qa'eda's attacks in Iraq's 'green zone', which is a highly protected enclave where civilians are housed amongst the military objects, would also very likely constitute a legitimate IHL target.

Many of their other targets are much more problematic, as discussed in chapter 4 in dealing with kamikaze attacks. Further, the Dinstein/Doswald-Beck tests and interpretation are under IHL and

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297 See for example <http://edition.cnn.com/SPECIALS/2001/trade.center/tenants1.html>, and the clear connection between the Pentagon and the military, and that the attacks were more precisely targeted than some of the attacks in Beirut. On the other hand, it is difficult to see how Professor Doswald-Beck position would be sustained under the shari'a where the starting point is Qur'an 9:36 (see below, n 66) requires restraint in a Muslim's application of reciprocity in fighting and it is al-Qa'eda's task to do this under Islamic law and not to defer to IHL when it suits. Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 119. It is possible that al-Qa'eda made an error of judgment in expecting that the US would have retaliated militarily against Saudi Arabia for the WTC attacks thus making revolution easier for al-Qa'eda in Saudi Arabia. It is unclear as to why al-Qa'eda thought that the US would attack such a close and strategic partner. While mistakes are possible, and while the US's instrumental use of the 11 September attacks to bring troops into the Middle East were perhaps not reasonably foreseeable, al-Qa'eda must nonetheless accept some responsibility for the resulting deaths and carnage among the Muslims. The issue of foreign troops is more complicated and embarrassing to al-Qa'eda because senior Islamic scholars importantly including from the Muslim Brotherhood stated that the stationing of US troops in Saudi Arabia was legitimate under the shari'a: Brynjar Lia, Architect of Global jihad: The Life of al-Qaida Strategist Abu Mus'ab al-Suri (2007), 96. There are more US troops on the Middle East after the attacks of 11 September 2001 so that al-Qa'eda has in effect made things worse by its actions, as its strategic aim is to drive foreign troops out of Muslim lands.

298 Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004), 131. The two basic questions here are whether the protagonists were in a 'time of war' and whether the work (of some unspecified percentage of the workers in the WTC and Pentagon) fell within the meaning of being 'of a military character': Article 15(b) Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287. The Clinton Administration had already bombed al-Qa'eda bases in Afghanistan and there was therefore a state
therefore, cannot legitimately be invoked by al-Qa'eda. This is because, from its perspective, IHL is not good law, although Islamists appear to use broader IHL limits in practice, without specifically citing IHL. Nonetheless, since the West does not recognise shari'a criteria, from a Western perspective al-Qa'eda's claims that the 9/11 targets in New York and Washington were legitimate appear to fall within IHL criteria as articulated by Dinstein et al, and is the standard for present international courts and tribunals.

Further, al-Qa'eda must be presumed to know, that is, have constructive knowledge, that the US would retaliate, and arguably do so disproportionately as it did in Vietnam, thus bringing death and destruction to many Muslims whether in Saudi Arabia. Al-Qa'eda may have hoped that Saudi Arabia would be the US's main target given that the vast majority of the 9/11 bombers had Saudi nationality, Afghanistan, because al-Qa'eda were suspected of hiding out in Tora Bora, North Waziristan (Pakistan) or less predictably elsewhere. Thus al-Qa'eda must share at least some responsibility for contributing to present problems due to US's retaliation in the several Muslim States. It cannot characterise the US's reasonable retaliation as 'shari'a aggression'.

It is perhaps the disproportionate scale of the US's retaliation that led convicted Bali bombers to reject the US's attacks on Afghanistan and Iraq as precipitated by the 11 September bombings. Further, the Clinton administration's attacks against the Taliban predated the 11 September attacks but which on the other hand, took place after al-Qa'eda's attacks on US Embassies in East Africa. Respected Western legal scholars such as

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302 This denial is not entirely unreasonable. The White House 'counterterrorism czar' Richard A. Clarke, Against All Enemies: Inside America's War on Terror (2004), 30. was of the view that the USA was going to attack Iraq irrespective of the 9/11 attacks: 'Rumsfeld and Wolfowitz were going to take advantage of this national tragedy to promote their agenda'.
Greig\textsuperscript{303} and Shearer,\textsuperscript{304} based on what was then known, reasonably stated that the US’s second war in Iraq was legitimate under international law, and notwithstanding disingenuous denials by Indonesian Islamists, is a position arguably in accordance with the \textit{shari‘a} laws on self-defence.\textsuperscript{305} An examination of the tactical utility or the strategic wisdom of such attacks is a separate issue and lies outside the scope of this thesis.

As a matter of law, targeting of ‘mixed’ civilian-military areas is permitted under IHL,\textsuperscript{306} and the scope for taking life collaterally as

\textsuperscript{303} D W Greig, ‘It would be legal to attack Iraq’, Canberra Times (Canberra), 17 March 2003, raised the issue of whether States could act to enforce breaches of Security Council Resolutions if the Security Council did not appear willing to do so, particularly when the resolutions took something of the form and nature of an armistice. Australia’s support for the USA may therefore stand for the proposition that Australia supports the enforcement of Security Resolutions, even absent specific authorisation.

\textsuperscript{304} Commonwealth Of Australia, Parliamentary Debates, House of Representatives, 6 March 2003, at 12420 (Williams, Daryl, Attorney-General).

\textsuperscript{305} Other Western scholars (Group of 43) questioned the war, labelling it illegal. The main contention appeared to be the insufficient nexus between the 9/11 attacks and the Government of Iraq and the scope of prevailing Security Council Resolutions vis-à-vis Iraq: Andrew Byrnes, ‘Law, Lawyers and Lattes: The (Ir)relevance of the Chattering Classes in a Time of Insecurity’ (2007) [2007] UNSW Law Review, 6. These various scholars were only examining the legitimacy or otherwise of the attack on Iraq under international law and not its legality under the \textit{shari‘a}.

This analysis will therefore, not directly engage with the reasoning and analyses of these scholars except incidentally to the extent required for comparative analysis. While the majority of Western Muslims are likely to endorse the views of the Group of 43, and to reject the conclusions of Professors Greig and Shearer, Muslim acceptance/rejection arguably is based on a broader emotional ‘desire for justice’ and for the adverse initial impact of the attacks for the people of Iraq as opposed to because their opinions are rooted in either international law or the \textit{shari‘a} or both. Muslims would not in general deny the \textit{shari‘a} right of the USA to defend itself, subject to reciprocity and proportionality, although this ‘right’ may not be so clearly available to the USA under international law. This is because of the absence of a clear nexus between al-Qa‘eda and a State, although Professor Greig’s view on Article 51 of the UN Charter is consistent with his legal opinion here (on the legitimacy of the Coalition’s intervention in Iraq) and is one endorsed in this paper: See discussion at Article 51 of the UN Charter, 112.

The faulty/misuse of intelligence by the USA and its allies is a separate issue, but one that does not affect the principle of what is discussed here: AAP, ‘Bush says Iraq war right, facts wrong’, The Age (Melbourne), 15 December. On the other hand, al-Qa‘eda’s public criticisms of the Saudi ‘Monarchy’ as unislamic must be tested as against al-Qa‘eda’s actual/practical relationship with the Monarchy both as a source of funding and as a source of support outside Saudi Arabia. Clearly, al-Qa‘eda’s position vis-à-vis the Saudi Monarchy has evolved over time. There are allegations of the once close relations between elements of the Saudi Royal family and al-Qa‘eda, although senior royals have admitted that these links were a mistake: Yaroslav Trofimov, The Siege of Mecca: The Forgotten Uprising in Islam’s Holiest Shrine (2007), 243.

\textsuperscript{306} Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, vol 1 (2005), 71.
discussed, is quite broad, with the tolerance of the number of ‘acceptable’ civilian deaths growing steadily. ‘Incidental damage’ is not considered a direct attack on civilians under IHL. For example, al-Qa’eda estimates that by 2006 over a million civilians had been killed (by the West) in the wars in Iraq alone and are not dissimilar to the figures quoted in the West. It appears that Iraqi lives were lost not due to an incapacity to protect civilians but a matter of the priorities set, as during the same period, the Iraqi oil trade was protected perhaps because oil has both an economic and strategic value, as did some ‘special’ prisoners.


To put the civilian deaths caused by al-Qa’eda in perspective, the escalation in civilian deaths is not a recent Islamist phenomenon alone. The growth in civilian deaths in the 20th Century according to *Children Under Arms*, *The Economist* 10 July 1999, is summarised as:

The civilians’ share of casualties in war has rocketed this century up from 5% in WWI to 48% in WWII and to around 90% today.

See also text accompanying n 118, 117 and n 260, 157.


That is, 650,000 civilians killed according to *The Lancet*: David Brown, ‘Study Claims Iraq’s “Excess” Death Toll Has Reached 655,000’, *Washington Post* (Washington), 11 October 2006. A12. Brown quotes the original article in *The Lancet*. The study was conducted by researchers at the Johns Hopkins Bloomberg School of Public Health and *Al Mustansiriya* University in Baghdad. The US, British and Australian Governments initially dismissed *The Lancet* article as being based on a flawed methodology. Subsequently however the BBC extracted the relevant British Civil Service’s Advice to the British Government and their view was that the methodology used by the researchers was sound and accurate: Fran Kelly, ‘ABC Radio National Breakfast Show Programme (News Report)’ in The Australian Broadcasting Corporation, 27 March 2007. A previous example on the large number of civilian deaths is the death of 500,000 Iraqi children who were said to have been killed during the UN mandated sanctions, and were deaths to which the then Secretary of State Madeline Albright infamously referred to as being ‘worth it’: John Pilger “Squeezed to death” Saturday March 4, 2000. <http://www.guardian.co.uk/weekend/story/0,3605,232986,00.html>. [Accessed December 2006].

‘Oil ministry an untouched building in ravaged Baghdad’, *The Sydney Morning Herald* (Sydney), 16 April 2003. Further, significant war profits have also been documented: See generally: Dan Briody, *The Halliburton Agenda: The Politics of Oil and Money* (2004); Pratap Chatterjee, *Iraq, Inc. A Profitable Occupation* (2004). The many prisoners incarcerated at Guantánamo Bay also appear to have been sold to the US, for example Mr David Hicks, and Australian who was sold to the US: Hugh Selby, ‘Outrage over Hicks: A Beacon for Justice’, *Canberra Times* (Canberra), 5 March 2007. 17. by US allies, the Northern Alliance. This ‘value’ in effect helped preserve the lives of the ‘Western Taliban’ while so many other Afghans were killed. There is no evidence whether the payments to the Northern Alliance were a bounty, but it is not submitted here that the USA acted contrary to the *Slavery Convention* or the *Protocol amending the Slavery Convention*, 182 UNTS 51, entered
While accidental killing as well as murderous, indiscriminate and random rampages were not unknown in past centuries, the scale of collateral deaths in contemporary wars is unprecedented, undoubtedly as a consequence of more ‘effective’ weaponry. IHL therefore recognises the almost inevitability of collateral civilian deaths, a position accepted by Australia,313 but which has a more humane view on this issue than most other States and is a useful compromise position on which to aspire to find common ground on this issue between IHL and SHL.

Re-defining Legitimate Contemporary shari’a Targets
In seeking to expand SHL with respect to the classes of people who legitimately may be killed or injured collaterally during armed combat, the first question is whether the concept of collateral damage can find any legitimacy under the shari’a. To this end Hashimi cites the example where the Prophet authorised the use of mangonels against a fort in Ta’if (against a mixed population),314 and while it is unclear whether there were actual collateral deaths in that case, the probability that this could have happened is not zero and for this reason the principle of causing accidental collateral death or injury can not said to be ultra vires. Unlike in IHL however, specifically identifying each victim as a ‘combatant’ or ‘protected person’ is clearly necessary under SHL as the question of compensation must be settled in a temporal forum. Principles, rules and policies to make such determinations must be developed and infrastructure, institutions and the means of addressing this issue are considered in chapter 7.
Note that later general prohibitions against attacks on mixed populations by the orthodox caliphs must be viewed in the light of the fact that they were all present at and were all aware of the special circumstances necessary at Ta’if, which leads arguably to the conclusion that armies should only resort to attacking mixed populations when all other reasonable alternatives are exhausted. Generally, for consistency in the use of methodology to avoid producing arbitrary instrumental outcomes, the traditional position must be developed very carefully.

A distinction must be made about whether SHL would seek to narrow the classes of protected persons or to redefine, say, a civilian working in a support industry as a legitimate combatant, thus not requiring the payment of compensation in the case of collateral death. This is a very difficult issue in practice as there are many defence support industries that have dual-use technology with some people in an enterprise working on civilian contracts, others working on defence-related contracts and some working on both types of projects. The development of a ‘dominant purpose of employment’ type test may help to determine and settle compensation claims in practice. Further, jurists must also examine questions such as whether administrators working for defence forces and defence industries constitute legitimate targets. It is posited that a key criterion is whether the accidental or collateral death of a particular individual during armed *djihad* would require the payment of compensation under the *shari’a*. The preliminary position posited here is that, as with IHL, it may be necessary to classify such workers as ‘paramilitary’ and therefore ineligible for *shari’a* compensation if killed in legitimate conflict. However, death caused during an unlawful war may require the payment of compensation.

As is the case with the evolution of IHL, and arguably for similar reasons, Muslims found that the strict classical limits made them vulnerable against a technologically superior enemy. In this light the eponyms carefully broadened the scope of SHL from the classical position. Strengthening this argument are the analogous cases of the Qur’an’s unconditional prohibition on consuming blood or dealing in usury, both of
which were softened by the Prophet, and discussed above.\textsuperscript{315} These developments lend some support to the proposition that in some limited exigencies the unconditional prohibition on the killing of protected peoples can be adapted for necessity. Permissiveness is a very dangerous path to traverse and the matter must be discussed and examined carefully and extensively both by jurists and the Muslim public.

**Collateral Injury in our Times**

During peacetime, civilians live in large cities among some military infrastructure because of convenience and the economic benefits of co-location, and wartime contingencies are possibly not foremost in the minds of town planners. Notwithstanding this, IHL requires States not to station military objectives within proximity of densely populated areas.\textsuperscript{316} 'Population density' is a relative concept, considered differently by the various States. In Islam the Prophet and the orthodox caliphs conducted warfare in areas of mixed populations by laying siege, but not attacking, except in extreme situations such as at Ta’if.\textsuperscript{317}

Although not a perfect analogy, laying siege is arguably the present day equivalent the application of economic sanctions. Chapter VI of the UN Charter provides for its use and is supported under the *shari’a*.\textsuperscript{318} In practice, however non-State groups such as al-Qa’eda or even small non-aligned States without the backing of a P5 hegemon are unable to access such Charter remedies and for this reason will no longer be considered as a practical means of redress for non-State actors.\textsuperscript{319}

It is not disputed that al-Qa’eda and affiliated entities killed many more civilians than they have ‘enemy soldiers’, however (reasonably) characterised, in several countries including Pakistan, Iraq, Afghanistan,
Spain, the UK, Russia, the USA and Indonesia. The death and destruction caused by al-Qa’eda of many Muslims, civilians and non combatants, has not been accepted as legitimate by the overwhelming majority of Muslims.\footnote{Spain, the UK, Russia, the USA and Indonesia. The death and destruction caused by al-Qa’eda of many Muslims, civilians and non combatants, has not been accepted as legitimate by the overwhelming majority of Muslims.} In Bali, JI attacked bars and nightclubs which were selected as targets where the local JI leadership claimed there were ‘no Muslims’\footnote{In Bali, JI attacked bars and nightclubs which were selected as targets where the local JI leadership claimed there were ‘no Muslims’}, but did not go further and clearly identify these targets as legitimate \textit{shari’a} military targets.

Drinking alcohol under the \textit{shari’a} is not prohibited to non-Muslims, thus delegitimizing JI’s choice of bars as a class of ‘military’ target. Further, JI referred to ‘Westerners’ as legitimate targets,\footnote{Drinking alcohol under the \textit{shari’a} is not prohibited to non-Muslims, thus delegitimizing JI’s choice of bars as a class of ‘military’ target. Further, JI referred to ‘Westerners’ as legitimate targets.} which is not adequate to characterise them as legitimate category. Further, even if JI did not consider the sanctity of non-Muslim lives, there were also Muslims and civilians working at or near the targets. Whether foreign visitors to Muslim States should be considered \textit{must’amin}\footnote{Di Martin, ‘Tackling Indonesian terror’ in Background Briefing ABC, 23 September 2007. As Muslims are not permitted to consume alcoholic beverages or to trade in the substance, JI’s assumption that there were ‘no Muslims’ at the ‘target’ was not perhaps entirely unreasonable. It is noted however, that even though the consumption of alcohol is prohibited to Muslims, the consumption of alcohol does not put one outside the pale of Islam as is evident by the punishment mandated under the \textit{shari’a}, and is one that \textit{does not} put the person who has consumed alcohol, convicted or otherwise, outside the pale of Islam. However, as discussed there are people in other prohibited categories who legitimately may consume alcohol, trade in alcohol and be present on the premises, but whose blood may not legitimately be spilled. There is a debate whether JI exists at all: Peter Symonds, \textit{The Political Origins of Jemaah Islamiyah Behind the Bali Bombings} (2005) \url{http://www.globalresearch.ca/index.php?context=viewArticle&code=20051002&articleId=1030} at This debate stems mainly because of the nebulous character of the term \textit{Jemaah Islamiyah} (JI), which merely means Muslim Community, is a term widely used in the Muslim world. For the purposes of this paper, the term JI will be used in the form popularly used in the English speaking world.} is an important question to be addressed.

\begin{itemize}
\item avenue and Muslims (as well as others) have also suffered the ill effects of sanctions.
\item The vast or overwhelming majority of Muslims disavow terror tactics: Greg Fealy and Virginia Hooker, ‘Interactions: Global and Local Islam; Muslims and Non-Muslims’ in G Fealy and V Hooker (eds), \textit{Voices of Islam in Southeast Asia}, (2006) 411, 470; Adam Robinson, \textit{Bin Laden: Behind the Mask of a Terrorist} (2001), 287; though avoiding the issue that such attacks are contrary to Islamic law.
\item Di Martin, ‘Tackling Indonesian terror’ in Background Briefing ABC, 23 September 2007. As Muslims are not permitted to consume alcoholic beverages or to trade in the substance, JI’s assumption that there were ‘no Muslims’ at the ‘target’ was not perhaps entirely unreasonable. It is noted however, that even though the consumption of alcohol is prohibited to Muslims, the consumption of alcohol does not put one outside the pale of Islam as is evident by the punishment mandated under the \textit{shari’a}, and is one that \textit{does not} put the person who has consumed alcohol, convicted or otherwise, outside the pale of Islam. However, as discussed there are people in other prohibited categories who legitimately may consume alcohol, trade in alcohol and be present on the premises, but whose blood may not legitimately be spilled. There is a debate whether JI exists at all: Peter Symonds, \textit{The Political Origins of Jemaah Islamiyah Behind the Bali Bombings} (2005) \url{http://www.globalresearch.ca/index.php?context=viewArticle&code=20051002&articleId=1030} at This debate stems mainly because of the nebulous character of the term \textit{Jemaah Islamiyah} (JI), which merely means Muslim Community, is a term widely used in the Muslim world. For the purposes of this paper, the term JI will be used in the form popularly used in the English speaking world.\footnote{Di Martin, ‘Tackling Indonesian terror’ in Background Briefing ABC, 23 September 2007. As Muslims are not permitted to consume alcoholic beverages or to trade in the substance, JI’s assumption that there were ‘no Muslims’ at the ‘target’ was not perhaps entirely unreasonable. It is noted however, that even though the consumption of alcohol is prohibited to Muslims, the consumption of alcohol does not put one outside the pale of Islam as is evident by the punishment mandated under the \textit{shari’a}, and is one that \textit{does not} put the person who has consumed alcohol, convicted or otherwise, outside the pale of Islam. However, as discussed there are people in other prohibited categories who legitimately may consume alcohol, trade in alcohol and be present on the premises, but whose blood may not legitimately be spilled. There is a debate whether JI exists at all: Peter Symonds, \textit{The Political Origins of Jemaah Islamiyah Behind the Bali Bombings} (2005) \url{http://www.globalresearch.ca/index.php?context=viewArticle&code=20051002&articleId=1030} at This debate stems mainly because of the nebulous character of the term \textit{Jemaah Islamiyah} (JI), which merely means Muslim Community, is a term widely used in the Muslim world. For the purposes of this paper, the term JI will be used in the form popularly used in the English speaking world.} According to Greg Fealy, ‘Jihad1’ in G Fealy and V Hooker (eds), \textit{Voices of Islam in Southeast Asia}, (2006) 372:

\begin{quote}
The reason why Bali was chosen as a target was not hatred for Bali’s non-Muslims or because of the ‘vice’ conducted in the bars: according to the bombers this happened everywhere in Indonesia. The reason given by JI was because Bali was frequented by Australians and other Westerners.
\end{quote}

\item \textit{Must’amin} are people granted temporary access to Muslim lands for trade, pilgrimage or transit and are protected. The word \textit{must’amin} literally means ‘one
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by jurists, and if they decide in the affirmative then Muslim guarantee of such safety is binding on Muslims. The explosions resulted in the death or injury to many persons in protected categories including Muslim passers-by in the adjoining public streets in Bali, and to very few military personnel. Note that the shari'a crime of drinking wine, even when proved against Muslims, does not carry a sentence of death, punishment by fire or maiming. Some convicted JI bombers in Indonesia later accepted that killing civilians was wrong.

Bin Laden and Imam Samudra (of the Bali bombing) concede that killing Muslims, women and children and ‘innocents’ is prohibited under the shari'a. They do not appear however to honour this prohibition during war. However bin Laden, contradicting his general position, considers all non-Muslims legitimate targets. Even if his view is correct, a position not supported in this paper, the WTC also housed Muslims, the killing of whom under all Schools of the shari'a must specifically be authorised and legally justified. While bin Laden discusses the collateral

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324 Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 4 (1976), 158. According to Di Martin, ‘Tackling Indonesian terror’ in Background Briefing ABC, 23 September 2007. and in response to the question by Ms Martin ‘Is killing civilians just?’ Convicted Bali bomber, Ali Imron said that killing civilians was unjust; and although he did not specifically say that this decision was based on the shari'a, it could not conceivably have been a decision he reached other than under the shari'a. As pointed out in n321, the victims of attacks on premises in Bali where alcohol was served may have avoided injuring Muslims on the premises, though those injured would certainly have belonged to other protected categories, though casualties amongst passers by would almost certainly include Muslims as proved to be the case in practice.

325 According to Jonathan Garland, ‘Bali Bombing Instant response’, Army – The Soldiers’ Newspaper (Canberra), 15 October 2002: The whereabouts and wellbeing of all ADF personnel in Bali has been established. Two soldiers were injured, one seriously and one slightly, and no ADF personnel were killed in the blast.

326 Any such claim by Islamists is void ab initio, and the onus is on them to prove otherwise.


killing of ‘Muslims’, he circumvents the prohibition by declaring ‘Muslim’
victims as:

(a) heretics or
(b) martyrs to the cause in a battlefield

He does not provide a legal basis in support of his blanket and
unprecedented declaration of some (unspecified number of) ‘Muslims’
killed by al-Qa’eda as ‘heretics’, a spurious and unsupportable claim at
best. His alternative and contradictory claim is that some who were killed
were ‘martyrs’ is also problematic in an Islamic sense as only God is able to
declare a person a martyr. In any event these ‘martyrs’ appear to lack the
necessary discernable mental element of intention and, as a class, do not
appear to fall into a category of persons considered ‘non battlefield’
martyrs under the *sunna*.331 In any event, the specific targeting of civilians
(including Muslims332) is both a political problem and a problematic legal
issue for al-Qa’eda, JI and other Islamists who target civilians.333

It is difficult to see how a Dinstein interpretation of collateral deaths
could be reconciled, even in ‘retaliation’, under Qur’an 9:36,334 which
requires *restraint* in a Muslim’s application of reciprocity in fighting and
therefore not to defer pragmatically to more liberal IHL limits when
convenient. In advance of international community opinions and as a
contemporary ‘red line’ under the *shari’a*, Ayatollah Khomeini, better
known in the West for his *fatwa* on Rushdie, and at any rate whose *fatwas*

331 Battlefield martyrs are distinguished here from other martyrs: see above
‘Terminology and Language Issues ’ in Appendix 1.
332 There are claims that al-Qa’eda has warned Muslims of pending attacks. However,
these broadcasts are not public (or have been ‘intercepted by the FBI’) and it is
unlikely reasonably to constitute a ‘warning’ or ‘reasonable notice’. For example,
according to James Robbins, *Tone-Deaf Terrorists* The National Review Online 22
May 2003.

Terrorist e-mails intercepted by the FBI gave Muslims a deadline (if I
can use that word) of yesterday to clear out of New York, Boston,
Washington, and ‘the commercial coastline’ area.

333 The targeting of civilians by al-Qa’eda because of the nexus between supporting
the government by paying taxes and voting’ is historically invalid. Non-
combatants in the past were also compelled to pay taxes to their king/leader but
the Prophet did not use this nexus as a reason for targeting non-combatants.

334 See below n 66.
are not considered binding by al-Qa'eda or Sunni Muslims generally, has opined that the use of nuclear weapons specifically, but all weapons of mass destruction generally, is absolutely contrary to the shari'a in all circumstances. There is not yet a Muslim consensus on this issue and the fatwa is therefore not binding. Iran is accused of developing nuclear weapons, which appears difficult for the internal legal effect of Ayatollah Khomeini’s fatwa, but nonetheless may be a ruse on the part of its political leaders to help it attain to its broader strategic goal of a nuclear-free Middle East.

However, some Islamists are content to ignore shari’a traditional limits and prohibitions partly because neither Muslims nor the West hold them to these standards. Al-Qa’eda’s part shows up a degree of duplicity for capitalising on either the West’s ignorance or arrogance, which should in any event not be a relevant consideration in its decision-making under the shari’a. The unavoidable issue however, is that al-Qa’eda and other Islamists seeking to establish shari’a-based rule, are at least arguably

335 Pakistan, a majority Sunni State, possesses a nuclear arsenal. Although the US president George W. Bush’s administration accused Iran of developing nuclear weapons capacity in 2007, the US intelligence services later confirmed that Iran ‘had discontinued’ its nuclear programme in 2005: Jim Brady, ‘Intelligence on Iran’, The Washington Post (Washington D.C.), 5 December 2007, A28. The relevant shari’a question however, is not that the programme was discontinued but whether the programme was commenced (or continued) after the fatwa by Ayatollah Khomeini, declaring the shari’a prohibition: see n 336, below. <http://www.militantislammonitor.org/article/id/1178>. [Accessed December 2006]. The sources used in the Shi’i fatwa are arguably applicable to Sunni Muslims as well and an advisory opinion from the Tribunal could extend the prohibition to Sunni Muslims. Pakistan is likely to continue to maintain its nuclear power position for necessity. It would arguably make it more difficult for al-Qa’eda to obtain or threaten to use nuclear weapons given a clear prohibition, without damaging its standing in the Muslim community. According to Sohail H Hashmi, ‘Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation’ in S H Hashmi and S P Lee (eds), Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives, (2004) 321, 332. and after a loss of a large number of Iranians to chemical weapons in the Iran-Iraq war and during the terminal illness of Ayatollah Khomeini, younger Iranian clerics appeared to reverse the strict moral Khomeini position prohibiting the production and use of WMDs. For a Sunni view see Shaykh Nasir Bin Hamd Al-Fahd, A Fatwa on Using Nuclear, Biological and Chemical Weapons Against Infidels (May 2003) (2003) <http://www.carnegieendowment.org/static/npp/fatwa.pdf> at 10 March 2009. The better view is that of Ayatollah Khomeini and is a position supported by both Sunni and Shi’i scholars: see n 95, 56.

336 Iran call for nuclear-free region’ in BBC News Monday, 27 February 2006. Australia has in principle appeared to support a nuclear free Middle East: Daniel Flitton, ‘Australia brings Israel, Iran together’, The Age (Melbourne), 16 October 2009.
estopped from invoking IHL interpretations. The absence specific positive contemporary SHL limits to which it can reasonably be held, and therefore be seen and judged by the Muslim community for its own fidelity to the shari'a, has also helped al-Qa'eda to escape Muslim censure.

Indonesia has used a modified formulation of some traditional 'means' employable in a djihad to try to defeat violent extremism. In reinforcing the efficacy of Indonesian methodology, convicted JI bombers have admitted that killing civilians is ultra vires and therefore wrong, and these admissions have been used to help break a cycle of violence. An Indonesian precedent may not however be acceptable to a majority of non-Muslims and even Muslims. Therefore, as a general practical compromise 'starting position' on acceptable levels of collateral damage and means, perhaps SHL can draw from a relatively neutral Western source such as the Australian Defence Forces, so that '[armed djihadists do] every feasible [to] verify the targets' and confirm that the targets are legitimate, within the resources available, before proceeding with an attack. It is proposed that this is a practical compromise until a more humane and

338 While estoppel has not been shown or discussed as being a shari'a concept, it is noted that the prohibition on hypocrisy under the shari'a would also sustain the position made.

339 Di Martin, 'Tackling Indonesian terror' in Background Briefing ABC, 23 September 2007; Greg Fealy, 'Jihad' in G Fealy and V Hooker (eds), Voices of Islam in Southeast Asia, (2006) 372. The reason why Bali was chosen as a target was not hatred for Bali's non-Muslims or because of the 'vice' conducted in the bars: according to the bombers this happened everywhere in Indonesia. The reason given by JI was because Bali was frequented by Australians and other Westerners: Greg Fealy, 'Jihad' in G Fealy and V Hooker (eds), Voices of Islam in Southeast Asia, (2006) 382. Michael Burleigh, Blood and Rage: A Cultural History of Terrorism (2008), 461. claims that the target was about "Sheer racial hatred [...] it was about killing whitey and nothing else". Burleigh does not provide substantiation for this statement nor does he provide the Malay/Indonesian words purported to have been used (by implication) by one of the convicted terrorists. While nothing turns on this, it is common for Indonesians/Malays to use the term 'orang putih' (white person) although the term does not convey the negative connotations ascribed (and in the past may have even had connotations of superiority). However, if Burleigh is correct, it raises the element of racism and whether this is the 'motivating force behind the attack', and as racism is not a valid legal basis for djihad, it would render the armed attack something other than djihad.

340 Not everyone will consider Australia an impartial party. This is not however the right question. The main issue is the starting point for developing a firm SHL position and the right question to ask is whether the Australian position is just, relatively speaking, with respect to IHL more broadly or with respect to the utterly restrictive nature of the traditional SHL position.

objective test of practical SHL evolves, some mechanisms for the development of which are discussed in chapter 6. A further interim solution would be for Muslim groups involved in armed *dijihad* or *bugha* to adopt a IHL strategy of whenever possible, honestly in good conscience, and practical, giving sufficient *reasonable* advanced warning nominating a reasonable locality of possible attacks on mixed targets.\(^{342}\)

**Conclusion**

The starting point for Muslims considering the lawful use of force is vested in the position and acts of the lawful imam. The *shari'a* mandates that an imam should first seek peaceful options such as negotiation or encouraging migration to escape persecution and oppression. If these options fail, and the legal conditions for the armed *dijihad* are met, then Muslims are permitted to take up arms. Once armed *dijihad* has commenced, however, Muslims should fight without turning back, motivated by God alone in the aim of subduing the enemy, to bring an end to oppression.

In conducting an armed *dijihad*, the *shari'a* mandates both those who may be killed and protected. On this analysis there is not an exact match in terms of the protection regimes between the two systems. There is a very significant gap between IHL and the classical *shari'a* position on the key issues of (i) the classes of people who are protected and (ii) those who can be fought under the *shari'a*. The ‘gap’ between the classical *shari'a* position and IHL has been reduced for necessity by the eponyms in what is referred here as the traditional position. There is, still very broad scope to move the two regimes closer on the issues of determining who or what constitutes a legitimate target, who may be fought and also determining ‘acceptable levels’ of collateral injury that can result. The means of combat explicitly prohibited by the *shari'a* are quite stringent (which are discussed in some detail in the next chapter) and therefore weapons and means that are permitted by the *shari'a* remain quite narrow. While theoretically this task of moving the two systems closer is not likely to prove difficult on the principles of law discussed, the practical difficulties for the politics remain quite significant.

\(^{342}\) Ibid. 62.
In addition to the legal uncertainty that inheres in the absence of clear rules in the relevant aspects of the *shari’a*, al-Qa’eda has also quite cleverly capitalised on this uncertainty. Al-Qa’eda mirrors the practices of its enemies in the weapons employed, targeting practices and permissive tolerance of collateral deaths and injury while simultaneously espousing the virtues of the *shari’a* and calling on Muslims to fight for its implementation in Muslim States. The Western media have helped al-Qa’eda to ‘sell’ this broad and permissive position as a ‘new’ development of the classical or at least a traditional *shari’a* position. This deception has not been completely successful. Muslims are yet to move from the traditional SHL position to consensus around this ‘new’ position. It has on the other hand created some or even perhaps reasonable doubt in the minds of many Muslims that al-Qa’eda has by necessity been forced to adopt these extreme measures because of the overwhelming military, economic and political power of its enemy, but nonetheless has still for most part remained intra vires the *shari’a* to the extent that even its greatest enemies cannot refuse it the epithet of being ‘Islamic’. The West has greatly assisted al-Qa’eda in this task.

Generally it would appear that the people who may be fought in armed *djihad* in most of the enumerated categories considered above, except perhaps for categories of hypocrisy and the ‘Friends of Satan’, are prima facie not greatly different from the enemy who may be fought under IHL. It was argued that hypocrites as a class of people who may be fought should temporarily be suspended. The category of the ‘Friends of Satan’ also needs to be interpreted with particular care and in a manner that is true to the *maqasid* (the purposes of the Qur’an) and not easily to become a ‘catch all’ category for arbitrarily declaring groups and peoples as ‘enemies’ and therefore liable to be fought in an armed *djihad* and killed when necessary.

The classical and traditional SHL positions appear to favour protecting civilians and non-combatants during war. In its present formulations SHL is not entirely practical for contemporary armed conflict situations. The categories of who may be fought and killed under IHL appear narrower than under SHL but the exemptions appear broad, for
example for collateral damage, thereby making IHL less restrictive in the
taking of life or causing injury. The US’s practical position as seen in its
recent wars is arguably the most permissive with respect to a high degree
of tolerance of collateral deaths. The US position with respect to collateral
killing, which is logically flawed, appears much too permissive. Al-Qa’eda
it appears have adopted the US position cannot singly be condemned from
an IHL perspective but can be under SHL. On the other hand, al-Qa’eda’s
position of exploiting Muslim ignorance and Western indifference is
arguably morally wrong on the Islamic yardsticks discussed, intellectually
dishonest and perhaps even politically counterproductive.

This SHL position on collateral damage and the means of warfare
are unlikely to find support among many States, including Muslim States
and particularly the P5, their allies or those with access to advanced
weaponry such as Australia. In the meantime, interested parties should
work with the weaker stakeholders including peace activists, NGOs and
women’s groups and (notwithstanding the ICRC’s aversion to the shari’a)
the ICRC, in order to make IHL much less permissive on these issues. As a
compromise, Australia’s position of carefully considering each significant
target in the light of IHL, prior to raids being conducted, is perhaps the
better middle ground and the world community initially should try to
move towards this as a preferable compromise position, although if
possible, a stricter test should be preferred.

While nothing turns on this, it is an absence of a fear of death, a
belief that their death will not be in vain or that they are actually rewarded
for their efforts, that sets Islamists apart from their more secular
protagonists and makes them formidable foes. On the other hand, their
belief that they will see a God who is pleased with what is ‘good’ (however
defined), who will question them on their behaviour, becomes a strong
internal regulator of their actions which is based on their subjective beliefs.
For best effect, this thesis recommends tapping this source of internalised
authority, through clear legal expansion of shari’a legal positions, to help
reduce the carnage, by practical adoption of the relevant shari’a norms,
through greater and better education of Muslims on the shari’a.
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The 'average' Islamists, such as those in a non-leadership position in al-Qa'eda generally, but clearly not always, are for the most part not 'Bedouin' in the sense of the 1979 attackers of the Meccan Mosque. They are in cases paradoxically much more 'Westernised', in a very superficial sense. They are imbued with Islamic values but again, this appears for most part to be a fairly superficial level or, perhaps more accurately, in a cultural understanding of Islam rather than in its legal sense. In this light, the approach of bin Laden, a Saudi with his 'desert roots', has a much greater reluctance to kill and can be contrasted with the followers of Ayman Zawahiri, an urban Egyptian, brutally repressed by Egypt's secret police and thus conditioned to react swiftly and hard and with a greater propensity for violence. They have moved al-Qa'eda towards its present bloodier position because of bin Laden's (weak) leadership and Western media support for Zawahiri's position as 'Islamic'. What is needed to improve international peace and security is to reverse this trend. Mechanisms to do this in both the medium and longs terms respectively are discussed in chapter 6 and chapter 7.
CHAPTER 4

MEANS THAT MAY & MAY NOT BE EMPLOYED IN CONDUCTING AN ARMED DJIHAD

If some poor devil steals a belt buckle, he is decapitated. If a powerful politician takes possession of a whole country, the professional moralisers flock to him to put their 'wisdom' at their disposal. The natural conclusion is that, rather than wasting time on small thefts one should steal a whole country. Then one will not have to go through the trouble of further thefts or fear the executioner's axe. Chuang Tzu

As soon as men decide that all means are permitted to fight an evil, then their good becomes indistinguishable from the evil that they set out to destroy. Christopher Dawson

Introduction

Asad notes that the conditions that make fighting legitimate are specified in the Qur'an at verses 2:190-195. Once the need and legality, for the use of force has been determined by the legitimate imam, the emphasis then shifts to the legitimate means that must not be exceeded in achieving ipso facto just ends.

In commanding the duty of armed jihad, the Qur'an provides some guidance on the 'means' that may be used. The principles governing these means and prohibitions as well as some important 'exceptions' to these

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1 For a Muslim's view of this perspective see: Khaled Abou El-Fadl, The Great Theft: Wrestling Islam from the Extremists (2005).
2 Muhammad Asad, The Message of the Qur'an: Translated and Explained (1984), 264. He states that the conditions for war are specified in Qur'an 9:12-13 and Qur'an 2:190-195 which read as follows (emphasis added):
   
   Fight in the cause of God those who fight you but do not transgress limits; for God loveth not transgressors.
   
   And slay them wherever ye catch them and turn them out from where they have turned you out; for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque unless they (first) fight you there; but if they fight you slay them. Such is the reward of those who suppress faith.
   
   But if they cease God is Oft-Forgiving Most Merciful.
   
   And fight them on until there is no more tumult or oppression and there prevail justice and faith in God; but if they cease let there be no hostility except to those who practice oppression.

prohibitions are examined in this chapter. The Qur’an and sunna urge Muslims to be trustworthy and to act honourably and honestly; this is clearly the spirit in which legal principles surrounding ‘exceptions’ must be examined. Thus ‘the means’ shall not ever be used to justify ‘the ends’ and simply stated, the object of armed *djihad* must be lawful, the means used in achieving the object must be lawful and every command that goes to both the means and the object of armed *djihad* must be lawful.

Examining the parameters that regulate and influence the means employable in combat will help circumscribe legal activity and thereby identify unlawful activity which in turn will help to identify the more serious breaches with a view to criminalisation in positive law. There is a continuum of unlawful actions on a battlefield that can range from relatively minor infractions (drawing non-serious disciplinary sanctions) to serious ‘criminal’ activity. Commanders must retain the prerogative of disciplinary action in the field in taking immediate steps to mitigate the effects of certain acts. On the other hand, armed *djihad*’s significant impact on the broader community must mean that there are some egregious acts that must be punished, generally after the end of hostilities. There are also further issues with respect prosecution, including the preservation of evidence and the identification of witnesses, although these general issues are common to most field situations and do not have necessarily have a direct and specific *shari’a* aspect, intrinsic to the *shari’a*. Nonetheless, strict rules of evidence under the *shari’a* such as the privileging of oral evidence, can and will create special challenges in practice.

The starting point for the development of substantive law on the lawful means of combat are the classical limits on the means employable in armed *djihad*, which are binding on all Muslims. In practice, and apart from the early years, observance of these aspects of the *shari’a* are (and have always been) ‘variable’. The instrumental as well as the practical reasons

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4 Qur’an 2:173:
That is, one who honestly acts out of necessity but ‘without wilful disobedience nor transgressing due limits (is guiltless)’

5 *Shari’a* limits are in a sense much like International Humanitarian Law (IHL) in its binding effect. IHL (which had not already become binding through custom) is a matter for voluntary accession, although such accession by parties at some stage
why the shari'a criminal laws were neglected in the past were discussed. For similar reasons, the areas of law concerned with limiting the means employed in war were avoided by Muslims in the past, while they were in power. Those in power (Muslim or otherwise) voluntarily, generally will not curtail or apply limits to the exercise of their own power, or will not do this until compelled to do so by law or other means backed up by sanctions. An exception to this general statement is a group’s internal values, which can be a useful regulating force, in inhibiting the use of force and limiting excesses and is arguably an even more effective restraint than are ‘external’ constraints. For best effect, even these internal constraints need to be enforced. There do not, appear to be any positive directly enforceable\textsuperscript{6} temporal shari’a sanctions for breach of shari’a humanitarian law (SHL) with respect to ‘means’ of warfare.

At present, the most obvious and perhaps only sanction is the ‘moral pressure’ that can be brought to bear on armed or ‘liberation’ Islamist groups such as al-Qa’eda. On the other hand, silencing the ‘moral’ voices in society is the age-old strategy of those in power or those abusing power, for maintaining their own positions of privilege. To this end, Islamists have managed to silence or at least mute the coercive force of Muslim public opinion, which effectively and cleverly has been neutralised by Islamists. This ‘neutralisation’ has sometimes been achieved through calculated and strategic application of terror and force by Islamists and, while there does not appear to be a ‘smoking gun’, sometimes through what appears to be collusion with the West, particularly when their separate strategic aims converge.

On the other hand, the development of restraints in warfare, whether through international humanitarian law (IHL) or otherwise, is largely of benefit to the weak, usually at the ‘expense’ of those in power.

*What is meant here by ‘directly enforceable’ is referring to laws that have evolved separately through shari’a processes, directly as opposed to customary laws such as IHL that have become binding on Muslims through shari’a methodological means (such as treaty law) but which may not have been developed by shari’a jurists turning their minds directly to a problem.*
Consequently, now that Muslims are militarily weak, they should use this opportunity to develop their own law and further, to seek to influence the powers of the day (the Americans or perhaps the Chinese) and also to pressure the non-State Islamist entities in their midst to adopt strong self-regulating mechanisms. The Americans and the important Coalition States are by and large rule-of-law nations with strong, mostly effective, Constitutional restraints on the exercise of power and therefore not in principle as averse to such SHL/IHL development, as have been the ‘superpowers’ of the past. On the other hand, since Muslims have ignored their own laws of restraint on power and warfare, they should not be surprised or ‘cry poor’ if the Americans and Chinese are reluctant to support the significant restraints prescribed by SHL. The benefit to those ‘in’ power are not obvious or immediate, but any restraints placed on Muslims, which as has been shown endures in time, will aid other civilisations should Muslims ever again become a dominant ‘power’. For the present, it will help regulate Islamist violence. Once again, the lack of legal development on the means of combat is a key reason why Muslim combatants (for self-defence) bypass, not engage with, or simply pay lip service to the classical and traditional shari’a prohibitions as it leaves them quite vulnerable. Therefore, if legal grounds can be identified for doing this, there are clear reasons for creating exceptions to the strict shari’a prohibitions.

Muslim-majority States are inferior to the leaders in the fields of military technology and know-how. They generally rely on a P5 ally, at least with respect to access to more ‘advanced’ weaponry. As a result of their technological backwardness coupled with a disregard for the shari’a, in most cases the weapons they have acquired or have developed do not conform with the shari’a but their purchases may be required to conform with IHL military obligations if imposed on them (by say a P5 seller).

Further, the use of such weapons in armed conflicts, and of means that breach shari’a limits and would, ‘but for’ the absence of positive law, be considered serious prosecutable crimes, for Muslims must remain grounds

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7 The Permanent Members of the UN Security Council (‘P5’).
for shari'a prosecution. This positive law must be articulated, discussed and
promulgated as soon as practical and treated by Muslims as a matter of
great urgency. It was noted that SHL is an area of the shari'a's that has
suffered neglect, and apart from a few very fundamental and broad-
reaching statements of principle, has experienced very little specific
development. Hashimi confirms that shari'a discussion of ius in bello and
the means of warfare is 'sparse'. In order for prosecution to take place in
practice however legal limits must first be set out as positive law and
procedure. These laws must be applied prospectively, although if the
resultant shari'a war crimes are near-identical to Article 8 of the Rome
Statute, then a narrower reading of 'retrospectivity' becomes possible, a
position strongly recommended in this paper.

Grounds for derogation from shari'a limits on 'means'

The means of armed combat are further regulated by three important legal
principles. For convenience the legal principles of necessity, proportionality
and reciprocity are now considered, together with some exceptions to the
principle position. These discussions are followed by an examination of
some means of regulating contemporary warfare in Islam

Necessity

Introduction

As mentioned in Appendix 2, necessity can create a general lawful
exception under the shari'a. Necessity is also a general principle recognised
under international law. However, the application of necessity in the two	
traditions can vary significantly in certain situations and circumstances.
These differences arise due to the nature and origin of the two systems and

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8 Sohail H Hashmi, 'Islamic Ethics and Weapons of Mass Destruction: An Argument
for Nonproliferation' in S H Hashmi and S P Lee (eds), Ethics and Weapons of Mass

9 The common law in Australia does not draw a distinction between justification and
excuse in homicides: Zecevic v DPP (1987) 162 CLR 645. According to Antonio
Cassese, International Criminal Law (2003), 221, 'it is unclear whether [international
criminal law] draws a distinction between the two' although (ibid, 219) he notes
that the distinction is '[...] widely accepted in most national criminal systems,
particularly in civil law countries [...]'. Islamic law does not appear to make a
distinction between justification and excuse but recognises the legal concepts akin
will be explored below. There are also similarities and overlaps between the two systems with respect to the application of necessity.

In general international law, the application of necessity would take place in the following manner. A soldier, or the lawyers assisting, would identify all the positive treaty and customary obligations that are binding. These obligations are binding on nationals of parties to a treaty or *erga omnes* with respect to customary law. Identified exceptions and defence form an integral part of the law. A soldier’s actions are objectively governed by these obligations (and prohibitions). Breach of norms and serious crimes, prima facie can be prosecuted when appropriate.

The examination of whether ‘necessity’ can apply as a subsidiary consideration depends on whether there is a novel situation which was not contemplated within that existing body of law, exceptions and defences, or if a person was placed in a situation ‘that would deprive [him] of his moral choice’ and would therefore, prima facie permit temporary derogation. In circumscribing the scope of necessity, Cassese notes, citing the US Military Tribunal in Nuremberg that:

> A law or governmental decree could not be urged as a necessity unless, in its operation, this order was ‘of a character to deprive the one to whom it [was] directed of a moral choice as to his course of action’

The Nuremberg position is one that is likely to be considered as reflective of the *shari’a* position on necessity. The operation of necessity will, as a first step and, unless it is clearly inconsistent with the *shari’a*, be as per general international law to the extent that the two laws are consistent with each other.

The application of necessity under the *shari’a* could be envisaged as applying to or superimposed on ‘contemporary SHL’ which for convenience is notionally to consist of two parts:

(a) First is the *shari’a* obligation arising under international treaty and customary law: that is, obligations that have become binding under the *shari’a* through its recognition of existing ‘just’ treaty obligations and custom. There is an issue of what objectively will constitute ‘just law’. As a

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start, and for practicality, let what the jurists agree is 'just' serve as a base but then be subject to both Muslim consensus and. This position is not uncontroversial as it is sometimes viewed as the imposition of Western law on Muslims, an obstacle that is arguably overcome through mechanisms discussed in chapter 6.

(b) Secondly, obligations arising from the primary or independent shari'a sources, and which over time have formed a body of jurisprudence, is discussed in some detail below, say, the prohibition on the use of fire under the classical view, or as developed in the traditional view of using fire only 'in dire need', when responding to an attack by fire. Here, in the Islamic view, Divinely-mandated prohibitions are eternally and absolutely binding on the individual with no possibility of permanently altering or superseding such law. Temporary derogation for shari'a necessity is permitted. The following is an example of necessity's practical operation: during dire exigencies, and while pig meat which is absolutely and unconditionally otherwise prohibited; can in circumstances become permitted for necessity, if this is the only food available or the consumption of which would save one's life.

For cases that fall between the clearly identified criteria, which are sparsely articulated in writing, the lawfulness or otherwise of an act in cases is relatively clear through consensus. Notwithstanding this, SHL is in dire need of development, which may be done partly through the positive codification of existing consensus and partly thought the development of new law for emerging exigencies.

As a matter of principle, SHL, whatever its contemporary content, remains binding on every Muslim engaged in armed *djihad*.

**Application of the Principle of Necessity **ad bellum

Recall that 'The' legitimate imam has the authority to declare an armed *djihad*. Fighting then becomes mandatory on some Muslim males. The

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14 See n 8, 187.
question of the legitimacy of the imam’s decision would rest on whether armed *djihad* was permitted in the circumstances, say for self-defence or *ribat* and was not otherwise prohibited, say for commencing war in a prohibited month or that fighting was for materialistic reasons or for revenge.

The principle of the *Caroline Incident*,\(^\text{15}\) that the use of force in self-defence was circumscribed by the limits of *necessity* and *proportionality*, was confirmed by the ICJ as the correct position under international law.\(^\text{16}\) For reasons discussed, in a broad sense, it is also a valid statement of Islamic law. The issue of proportionality is also discussed separately below.

It is settled that there is ‘very little’ positive *shari’a* law available (including some exceptions and defences for necessity and other reasons) over which there is general consensus (and thus certainty). The area over which ‘necessity’ can operate in a subjective manner as a lawful discretion, concomitantly is very broad. The converse of this proposition is also arguably true, in that if there was more positive law covering the field, that then, the scope for the discretionary application of necessity would decrease proportionately. This is the direction in which the Muslim community should be moving.

As a general statement therefore, developing clear *shari’a* rules will reduce this broad scope over which discretionary subjective ‘necessity’ can apply. Further, this absence of positive law has given groups such as al-Qa’eda a self-proclaimed authority to make quite outrageous claims which, in the absence of clear rules are sometimes ‘presumed’ to be ‘necessary’, and must then be proven against them under the principle of legality. Since there is not at present an internationally recognised *shari’a* judicial body competent to do so, the contest becomes a ‘battle of opinions’, a phenomenon clearly evident today.

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\(^\text{15}\) R Y Jennings, 'The Caroline and McLeod Cases' (1938) 32 *American Journal of International Law* 82.

In any event, while Islamists will never win the greater ‘war’ they can in the meantime win significant battles along the way, creating a swathe of death and destruction in the process. They will not rule the Muslim world but they will cause enough trouble adversely to affect international peace and security, thus usefully validating the West’s military industrial complex’s existence but at a horrible human cost. In principle, the elimination of Islamist violence is relatively easy. In practice, the battle is not only against al-Qa’eda but against secular mistrust of Islamic law and vested interests in the military establishment.

Subjective determination of Necessity in bello: decisions made on the means employed during armed djihad

The basic shari’a test for necessity with respect to determining the legality of armed action during a conflict can for convenience of analysis be considered in two parts:

(1) That each decision made with respect to the means required with respect to the armed action and to achieve a lawful military outcome is made by a legitimate leader;

(2) (a) That the ‘means’ were lawful or necessary under the shari’a and (2)(b) for the recipient of the ‘command’, whether

(2)(b) (i) That obedience to the command was lawful or necessary and (2)(b) (ii) if so, whether the command was carried out lawfully or, if the act was not intra vires, then for necessity in the circumstances.

There will always be gaps that require constant attention with evolving contingencies. On the other hand, recall that the problem with the application of the shari’a is a dearth of established positive law, ie law over which there is a clear and definite consensus or is codified in some manner. This paucity of law creates a broad scope for the invocation of necessity.

As an example of what is meant by this statement, the overwhelming majority of Muslims believe that taking one’s own life is generally unlawful, and is law that is clearly articulated in the hadith and over which there is Muslim consensus. This prohibition operates in peacetime and in war. During war however, the specific examples in the hadith only refer to prohibitions of those injured in war taking their own

lives (suicide) in order to minimise pain and suffering. On the other hand, going into war brings with it the clear possibility or in cases even near certainty of death, which is not ordinarily equated with suicide. Being killed to achieve a strategic or even tactical outcome is not prohibited and clearly is lawful.\(^{18}\) The ambiguity arises because there is not a clear rule distinguishing between going into battle, where there is a very high chance of death, and of a \textit{kamikaze} decision, where the death is triggered \textit{by the individual} and where death is almost inevitable, but where the aims and motives are quite distinguishable from ‘ordinary’ suicide.

Notwithstanding this distinction, the taking of one’s own life in \textit{kamikaze} actions, even for necessity, has not received a clear consensus but on the other hand leaves doubt as to its lawfulness,\(^{19}\) and the onus of proof rests with those who assert (in this instance, the \textit{kamikaze}). This element of doubt in the scope of law as applicable today, and the invocation of necessity for Muslim military weakness, leaves the field open to those who would also use \textit{kamikaze} actions for instrumental purposes. This thesis distinguishes between two broad types of \textit{kamikaze} action to help stimulate discussion on this subject. Uncertainty about the law as it stands makes the invocation of necessity ‘not unreasonable’, and at present creates a comparative advantage for Islamists.\(^{20}\) The reasons for the existence of a strong opposition to developing the SHL by Islamists, therefore, are self-evident.

\textit{Shari'a application} of necessity requires that the objective component that circumscribes ‘necessary’ actions must be reasonable, just\(^{21}\) and equitable.\(^{22}\) The decision maker,\(^{23}\) however defined, must examine further

\(^{18}\) Ibid.
\(^{19}\) See discussions on \textit{kamikaze} action below, 232.
\(^{20}\) According to Bernard Lewis, The Crisis of Islam: Holy War and Unholy Terror (2003), 119:
   
   The resulting [Muslim] anger is naturally directed first against their rulers, and then against those whom they see as keeping those rulers in power for selfish reasons.

\(^{21}\) Qur’an 16:90; Qur’an 38:26; Qur’an 55:9.
\(^{22}\) Qur’an 5:42.
\(^{23}\) That is judge, jurist or other person with the skills and knowledge necessary to make a decision on whether ‘necessity’ was correctly determined in a particular fact situation.
whether *ittiba'* was reasonably and (subjectively) honestly exercised (perhaps and as recommended in this paper, in accordance with the Ibn Rushd test to be discussed in chapter 525). The tests are exacting, as must necessarily be the case, for the Qur'an depicts the unjust taking of life very seriously26 and in the Muslim view has eternal, damming consequences. More sophisticated and comprehensive contemporary tests will — and must — no doubt evolve from these broad incomplete or even perhaps ‘overly strict’ tests.

The broader question nonetheless remains as to the legality of the use of contemporary weapons, which do not appear to accord with SHL requirements and means of fighting. This is particularly the case where weapons intrinsically are also capable,27 perhaps cruelly, although sometimes unavoidably, of killing indiscriminately, including protected persons,28 and therefore appear to be ultra vires the scope of SHL as

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24 Far a discussion on the concept of *ittiba’* see Appendix 2: ‘A short Critique of *Taqlid’*. The Prophet qualifies *ittiba’* (in circumstances when a leader’s command (or decision) is legally questionable, to make up one’s own mind in whether to follow/obey the command or decision) with the positive quality of truth (*haqq* which in Arabic includes the connotations of honesty and reasonability) and which does not apply to *batil* (wrong doing). *Ittiba’* may be applied as according to an invocation commonly used on Muslims on Fridays, with respect to following commands:

الله أرنا الحق حقة وأرنا بذاعة وأرنا البياء وأرنا اعتباً

[God] show us the Truth and guide us to follow it and show us falsehood and guide us to avoid it.

25 This test, which is discussed further in chapter 5, states that: ‘it is not permitted for a Muslim to kill another while acting on speculative belief rather than certainty (the Ibn Rushd test)’: Khaled Abou El-Fadl, *Rebellion & Violence in Islamic Law* (2001), 45.

26 Qur'an 5:32:

On that account: We ordained for the Children of Israel that if anyone slew a person unless it be for murder or for spreading mischief in the land it would be as if he slew the whole people: and if anyone saved a life it would be as if he saved the life of the whole people.

27 What is meant by this qualification is that, say while a bayonet or rifle can be used to kill indiscriminately but on the other hand must be so used with that intention to employ the weapon to kill indiscriminately. Other weapons such as cluster bombs or mines can by their nature kill both the target but also unintended victims because of the inability say for a mine to discriminate between a soldier or a non-combatant or a cluster bomb selectively to explode only in the presence of military personnel.

28 Contemporary weapons such as bombs, cluster bombs (with lingering effects), nuclear weapons, remote bombing, rapid fire guns, grenades, chemical weapons, biological weapons are all weapons possessed by military forces of today. Most of these weapons kill or maim through ‘fire’ and/or burning. Biological weapons while not specifically discussed arguably must be considered in the light of a Muslim’s *obligation* (from Prophetic hadith) to contain and thus sequester, contain and avoid spreading biological or other infectious agents.
defined so far. On the other hand, the traditional tests appear impractically narrow from a contemporary perspective. Thus a decision that Islamist means of combat are ultra vires SHL, will not be considered fair and just by Muslims, notwithstanding a consensus that it was taken ‘under the shari’ā’.

That is, the question then becomes whether there are legitimate grounds to broaden the scope of the classical and traditional exemptions to meet contemporary exigencies for necessity. The established prohibitions, say against the use of fire, are now examined to ascertain whether they are lawful defensive uses of weapons by Muslims? In practice, these issues and questions are a complex combination of law and fact, best specifically determined on a case-by-case, weapon-by-weapon basis. An aim of this exercise is to identify shari’ā bounds, broadened for necessity. In order to maintain consistency with IHL (if possible to a narrow reading of IHL) this initial compromise position strikes a balance between Islamists being left defenceless on the one hand and a broad permissiveness they now exploit on the other.

Establishing and articulating these fundamental principles is crucial for those who believe in the shari’ā as a matter of faith. Since, in the Qur’anic view, victory is granted by God alone, a pyrrhic, unlawful ‘victory’ devoid of justice and honour at any rate is not likely to please God, the ultimate aim of the believer, and therefore, ipso facto counterproductive.

**Proportionality**
Under international law the proportionality principle inter alia is codified in Articles 35, 51(5)(b) and 57 of Protocol I Additional to the Geneva Conventions (API), which applies to international armed conflicts, and is

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29 See discussion at p 218.
30 The works of publicists inform and are a source of international law: s38(1)(d) of the ICJ Statute. The shari’ā as discussed a jurist’s law and is hence clearly informed by the writing of jurists.
31 Qur’an 110:1.
32 Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 51(5)(b) 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.
similar in wording to the principle as codified in the Rome Statute. The demarcation between international armed conflicts and conflicts not of an international character are significant under IHL but has no particular relevance for SHL.

Groups such as al-Qa’eda are globalised and simultaneously are fighting against more than one State, although each ‘conflict’ may not ‘spill over’ an international border as such. Consequently, APII which deals with non-international armed conflicts and is likely to apply to conflicts between governments and non-State entities, does not contain explicit reference to the proportionality principle. Nonetheless Henckaerts and Doswald-Beck, set out reasons why the proportionality principle must be considered ‘inherent in the principle of humanity’, arguably is the better view, and is adopted here.

The Qur’an establishes the proportionality principle (‘proportionality verse’) particularly in the context of the use of force. The proportionality verse applies to self-defence only as opposed to ‘proportionality in attack’ in IHL with respect to a military advantage that can be gained, and noted here, as a significant difference between the two

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33 Article 8(2)(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
   (iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

34 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, vol I (2005), 49. According to the authors (ibid, n 20,48) Australia is not among the ‘many States [that] have adopted legislation making it an offence to violate the principle of proportionality in attack in any armed conflict’.

35 Qur'an 16:126 (‘proportionality verse’, emphasis added):
   And if ye do catch them out catch them out no worse than they catch you out: but if ye show patience that is indeed the best (course) for those who are patient.

systems.\(^37\) The proportionality verse also sets an upper qualitative limit to the means employable in armed *dijahad even in defence* as ‘no worse than’ in the means employed by the enemy’s aggressive attack.\(^38\) Thus the Qur’anic principle that can be drawn is that the means of causing death must be proportionate.

Further, with respect to the means for combat under IHL, other considerations further constrain the meaning of what constitutes a ‘proportional’ strike. White rightly posits that: \(^39\)

Per se prohibitions on the use of certain types of weapons may occur if either treaties or custom proscribe their use in armed conflict.

Even if no such prohibition exists, certain uses of novel instrumentalities of warfare may still constitute war crimes under international treaties or customary law in certain conditions.

While White’s statement\(^40\) captures IHL’s position on newly developed weapons, it also describes SHL’s broad principles. Such assertions, no matter how much they ‘ring true’, do not detract from the view in this thesis that the ‘independently’ derived SHL\(^41\) is nonetheless an

For proportionality under IHL see generally Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol I (2005), 46; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol II: Practice pt.1 (2005), 297. However, in its decision in the *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Reports 226, 244, the ICJ reiterated its earlier decision in the *Nicaragua Case* that the ‘right to self-defence under article 51 [of the UN charter] is subject to certain constraints [and that the proposition that, this right to self defence is subject] to the conditions of necessity and proportionality is rule of customary international law. The UN Charter however, outlaws the use of force except in self-defence or when authorised by the Security Council, and the meaning of attack is therefore, informed by this second Security Council authority.

37 The language of the proportionality verse (see n 35) is clearly reactive, and is a command on how to respond in the case of an *ultra vires* attack: Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), 25. It is noted that discussion in IHL generally refer to proportionality in attack: Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, vol II: Practice pt.1 (2005), 297.

38 Proportionality here is similar to the common law doctrine which posits that legislation or administrative action should not excessively or unjustifiably impinge upon constitutionally guaranteed rights: *Cunliffe v The Commonwealth* (1994) 182 CLR 272.


40 See n 39, above.

41 What is meant here is that IHL has become a part of the *shari’a* (or SHL) through the ratification of relevant treaties by Muslim States. Separate, ‘independent’
incomplete positive legal framework. This raises the question of how one can effectively prosecute breach not codified in positive law. The answer, for the time being for SHL must lie in a formulation of the crime based on shari'a custom or the ‘Islamic common law’.42

This Islamic common law too is wanting on SHL. Open and transparent trials of Islamists or their protagonists in the war on terror are uncommon. In practice, particularly when the aggressor is a P5 State or one of their close allies, for both legal and political reasons they are generally beyond the ‘reach’ of ICL. On the other hand, non-State aggressors, such as those of al-Qa’eda, are in the main ‘dealt with’ extra-judicially. The current ‘war on terror’ regime appears to represent a ‘law of the jungle’ scenario except for the citizens of the poor or the States not closely allied with the P5. This results in a paucity in the jurisprudence. Fair trials would allow both sides to put make their best case. Islamists will have the opportunity to articulate their shari’a positions as there is nothing to stop them from doing this, notwithstanding the fact that the trial is not being held in a shari’a court. Generally however, and notwithstanding the political difficulties, it is time to move this ‘law of the jungle’ situation back to a ‘laws of civilised nations regime’ as envisioned in the Statute of the ICJ.

Determining the Lawfulness of Weapons
Attempts to outlaw particular individual weapons under IHL have had mixed results. While dum-dums43 and asphyxiating gases44 are (rightly) prohibited, they clearly are not the only modern weapons that fit within the

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42 John Duncan Martin Derrett, *An Introduction to Legal Systems* (1968), 55. On the other hand, according to: David F. Forte, *The Comparative Lawyer and the Middle East* (1978) 26 *The American Journal of Comparative Law* 305, 305. and while not denying the title of a ‘common law’, rightly points out however that (in practice) ‘there seems to be no Islamic ‘common law’ to fill in the gaps found in the modern codes. The existence of a single ‘common law’ for Muslims also sits comfortably with the notion in Australia where despite the several separate State, Territory and Federal jurisdictions their Honours noted that ‘the [High] Court has spoken with respect to ‘the common law of Australia’, ie as a single common law: *Lipohar v The Queen* (1999) 200 CLR 485, 506. See Appendix 2 for a discussion of the notion of an ‘Islamic common law’.


44 *Declaration Prohibiting the Use of Asphyxiating Gases* (Hague Declaration II), The Hague, 29 July 1899.
meaning of Article 23(e) of ‘causing superfluous injury’,\(^{45}\) nor, in shari’a terms, of not ‘causing unnecessary pain to sentient beings’.\(^{46}\) On the other hand, the ICJ in the *Nuclear Weapons Opinion*,\(^ {47}\) produced a variety of opinions on the legality of the threat or use of nuclear weapons. A majority of the judges in the *Nuclear Weapons Opinion*\(^ {48}\) conceded that ‘there is in neither customary nor conventional international law, any comprehensive and universal prohibition of the threat or use of nuclear weapons as

\(^{45}\) Article 23(e), *International Convention with respect to the Laws and Customs of War on Land* [Hague II], The Hague, 29 July 1899. Article 35(2) Protocol I Additional to the *Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977.

\(^{46}\) See discussion on this *shari’a* principle below, 210.

\(^{47}\) *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* (1996) ICJ Reports 226.

\(^{48}\) Ibid.
such’. This horribly accommodating advisory opinion was brought down despite the significant, indiscriminate harm that a nuclear attack poses to non-combatants. In this context the ICJ conceded that ‘the proportionality principle may not in itself exclude the use of nuclear weapons in self-defence in all circumstances’, and is a position that is difficult to reconcile with the shari‘a principle that explicitly and unilaterally mandates proportionality in defence. Shari‘a jurists must therefore either reiterate Khomeini’s view or at least critique his view to begin a process to evolve a new position (perhaps for necessity). A plausible and pragmatic case may perhaps be made for ‘necessity’ as did the majority in the Nuclear Weapons Opinion, but that is a specific exercise that must be undertaken separately.

49 Ibid.
50 Majority Decision 11:3, on the question of whether “there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such”:
   IN FAVOUR: President Bedjaoui (Algeria); Vice-President Schwebel;
   Judges Oda, Guillaume, Ranjeda, Herczegh, Shi, Fleischhauer,
   Vereshchetin, Ferrari Bravo, Higgins;
   AGAINST: Judges Shahabuddin (Guyana), Weeramantry, and
   Koroma (Sierra Leone).
   Judge Andres Aguilar Mawdsley passed away before the decision was delivered.

The countries represented on the bench and from where the judges would be considered ‘Muslim’ are given in brackets. The majority of judges from the Muslim constituencies or jurisdictions voted ‘against’ and is a result that is arguably, significantly influenced by the Muslim ethic or ethos; and while not depending on this assertion, it nonetheless falls within the result one would expect on the shari‘a analysis of this paper.

50 For example, if one compared even the death, injury and destruction caused by the nuclear weapons attacks on Hiroshima or Nagasaki, the number of deaths that resulted is significantly greater than as compared with the Iraqi chemical attacks on the Kurds of Halabja (Northern Iraq (using asphyxiating mustard gas, a blistering agent, together with nerve agents such as sarin and VX) in the period 15 March–19 March 1988 during the Iran-Iraq War: Christine Gosden, Saddam’s Chemical Weapons Campaign: Halabja, March 16, 1988 US Bureau of Public Affairs 14 March 2003. While it is conceded that the advanced economies may have much more lethal chemical weapons than did Iraq, it is noted that chemical weapons were called the ‘poor man’s bomb’ (ie nuclear weapon): Richard M. Price, The Chemical Weapons Taboo (1997), 143.

52 See notes and text accompanying n 95, 56 and n 141, 218, for shari‘a views on the use of nuclear weapons.
As Khomeini’s view was confirmed by the Supreme Shi’ite leader the opinion is prima facie binding on Shi’i Muslims. The evolution of this law to match the ICJ’s position could come from Sunni Muslims, perhaps led by Pakistan, a nuclear weapons State, but Muslims should not, for humanity’s sake, allow the formation of consensus around such law or give it explicit preference over the Shi’i position.

On the other hand, as mentioned in the Nuclear Weapons Opinion, the US’s use of the first crude thermonuclear weapon may arguably be justified as saving many lives by bringing the Pacific War to a rapid end. Further, and notwithstanding the broad and general prohibitions of Article 23 [of Hague II], IHL limits as represented in enforceable positive law are also quite incomplete and inadequate, as manufacturers continue to develop ever more lethal and destructive weapons. The ‘rearguard’ action against arms manufacturers however, appears largely ineffective in practice and what would be better is that law must guide the creation of weapons, (not vice versa, as is the case with API). However, the reality is that SHL while stronger in principle, is utterly ineffective even among Islamists, Muslims or others who profess to follow its guidance. Further, Muslim States are amongst the most enthusiastic consumers of both ‘modern weapons technology’ as well as other cruelly used technology such as ‘cutting edge’ implements for inflicting torture.

Current methods of banning weapons are slow and difficult, while weapons development appears to ‘progress’ unimpeded, driven by greed, fear, insecurity an insatiable demand and handsome profits. The international treaty to achieve a moratorium on the making and deployment of land mines is an example of a global effort towards the aspirational aim of eliminating weapons that persist in the environment,

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55 See n 53, above.
57 Article 23, International Convention with respect to the Laws and Customs of War on Land [Hague II], The Hague, 29 July 1899.
58 Article 36 API.
causing great harm to civilians, sometimes years after the conflict has ended. The move to ban cluster munitions, weapons which disproportionately and adversely affect civilians, also falls into this category of governments and civil society trying to minimise the carnage caused by weapons in modern warfare.\(^{60}\) This phenomenon of expanding the list of banned weapons is a slowly evolving process, but it simultaneously highlights the problems of the prevailing mistrust as seen even in the current frustrating attempt to ban the use of white phosphorus,\(^{61}\) an utterly contemptible and cruel means of killing, which literally slowly burns the victim while still alive.

The means, and arguably ‘excessive’ means, of contemporary warfare that States employ are often portrayed as ‘effective’ in ‘taking out’ enemies.\(^{62}\) However, notwithstanding this, the highly destructive power of

\(^{60}\) NZPA, ‘Conference on cluster bombs set for capital’, NZ Herald (Wellington), 11 February 2008. NZ Disarmament and Arms Control Minister Phil Goff said: New Zealand, in hosting this major event, is making an important contribution to achieving an ambitious vision of a ban on cluster munitions that cause unacceptable harm to civilians. [...] Many cluster munitions fail to explode on impact and lie dormant ... until unwittingly stumbled upon, often by children, to devastating effect. [...] I am particularly encouraged by the high number of registrations from the Pacific and Southeast Asia, including those from states that continue to suffer cluster munitions contamination.


\(^{61}\) According to Joseph Marguilies, Guantánamo and The Abuse of Presidential Power (2006), 10., Vice President Dick Cheney foreshadowed ‘going to the dark side’ in its dealings with prisoners in the War on Terror. (ibid, 89–95) refers to so called ‘Torture Memo’ produced by Jay Bybee and John C. Yoo for Attorney-General Gonzales which authorised the use of means which could amount torture in the meaning of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force June 26, 1987, Joseph Marguilies, Guantánamo and The Abuse of Presidential Power (2006), 89. states that ‘within months the guidance provided by Yoo and Bybee would govern all interrogations in the war on terror’. The Torture Memo is reproduced in Karen J Greenberg and Joshua L Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005), 172. Further, according to Stephen E. White, ‘Brave New World: Neurowarfare and The Limits Of International Humanitarian Law’ (2008) 41 Cornell International Law Journal 177, 187 (footnote omitted):

Pursuant to its treaty obligations, the United States has recognized only three weapons that are per se illegal to use in war: poison, chemical weapons, and exploding (dumdum) bullets.

Further, President Bush’s speech on the 5th anniversary of the invasion of Iraq in which he praised the US’s efforts as very effective.
contemporary weapons and the issue of the proportionality of attacks on purely military targets will not be considered directly here, possibly as a lost cause in the present permissive environment. This is because, proportionate or otherwise, the conduct of such attacks is still within the scope of IHL and while proportionality limits no doubt still apply in theory, attacks on purely military targets appear to be considered ‘lawful’ in practice. It is taken as legitimate under SHL, which permits (the issue of cruelty being set aside for the moment) the slaying of enemy combatants. The important, still negotiable issue is the proportionality of attacks on mixed targets, whether directly, indirectly or collaterally, resulting in the death or injury of those hors de combat under IHL or protected persons under SHL.

The SHL proportionality principle appears to be more restrictive than that in IHL. This is an area in which the shari'a must be developed but perhaps again not going quite as far as IHL, which does not appear to prescribe proportionality for first use, eg for attacks authorised by the Security Council, but balancing the development in a practical manner so that Islamists will not reasonably ignore the SHL position for impracticality.

Reciprocity

For reciprocity, the starting point must be that the number of collateral killings one sets for one’s self as a ‘reasonable’ limit as against one’s enemy, can be accepted as a reasonable approximation of the number of deaths and injuries the adversary can cause in response. This ‘baseline’ is presented cognisant that non-P5 (and allied) States who are not protected by the

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President Bush said “victory in Iraq demonstrates American resolve and will prevent attacks on targets in the United States.”:


The Qur'an 8:48 reminds Muslims however, that ‘victory’ achieved by ‘any means’ can be soul destroying:

Remember Satan made their (sinful) acts seem alluring to them and said: "No one among men can overcome you this day while I am near to you": but when the two forces came in sight of each other he turned on his heels and said: "Lo! I am clear of you; lo! I see what ye see not; lo! I fear God; for God is strict in punishment.

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See text accompanying n 51, 199.
significant intelligence resources of the P5 may rightly have their military indiscretions exposed while the P5 and their allies are able to hide their faux *pas* under pretexts of national security or mask them in euphemistic terms. This masking is possible because although ‘free’, the media tends on occasions to self-censor in times of national emergency or when politicians bring considerable pressure to bear. A consequence is that IHL standards set by governments have been allowed to gain levels of liberal latitude which in principle must be seen as unacceptable under SHL.

Reciprocity is an established *shari’a* principle that allows for some qualified leeway in the means of combat relative to the means used by the adversary. The Qur’an states in what can be called its ‘reciprocity verse’: 

So wrong not yourselves therein and fight the pagans all together as they fight you all together. But know that God is with those who restrain themselves.

While, the verse specifically refers to ‘pagans’, the broader principle here clearly includes any other, ‘Muslim’, ‘People of the Book’, or anyone else who behaves in an unprincipled manner and for whom the word ‘polytheist’ is a metonym.

There are other strict limitations on reciprocity’s scope. For example, the Qur’an unconditionally and unilaterally prohibits Muslims from responding to treachery with treachery, or reciprocating in kind to

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64 Qur'an 2:191.
65 Qur'an 2:194; Qur'an 9:36, and the technical term for reciprocity is *muqabala bilmithl*.
66 Qur'an 9:36 (part verse).
67 The Arabic word used for ‘pagan’ is *mushrik* which should really be translated as ‘a polytheist’ (rather than pagan) or one who having known one God chooses to ascribe Divinity to others in addition to the One True God. The English or French translation of *mushrik* as ‘Pagan’ unfortunately brings different connotations deriving from that tradition in the UK or in Norman France and which do not match the (negative) cultural traits of the *mushrik* of Mecca.
68 Although ‘all together, appears to refer to unity, the Qur'an 59:14 it is stated that:
They will not fight you (even) together except in fortified townships or from behind walls. Strong is their fighting (spirit) amongst themselves: thou wouldst think they were united but their hearts are divided: that is because they are a people devoid of wisdom.
On the other hand, according to Qur'an 8:63, God has united the believers.
69 See n 67 above.
70 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 God loveth not the treacherous.
oppression,71 rape or injustice. These acts are unconditionally prohibited under the Muslim Covenant, no derogation being permitted in the hadith. Further, 'softening' such law, it is posited, can never be permitted or even remotely appear to be 'necessary'. Hence, and until SHL can clarify its 'true' position, reciprocity must be viewed as an absolute upper limit for Muslims, to respond to the use of weapons or the means of warfare employed by the enemy. For 'first use' there is a further condition that the means or weapons used in combat, unilaterally must not be prohibited under the shari'a, unless a further lawful exception is available.

The US-Coalition, for its own part, with its much greater intrinsic military, technical and financial capability ('capability gap'), and while not imputing a specific intention to do so, have killed (and through proxies have tortured) many more people than has al-Qa'eda.72 There are no real73 allegations of torture against al-Qa'eda (particularly directly after release by those captured and later released). Further, IHL if applied, say, using the Dinstein limits, appears to make the attacks on the WTC and the Pentagon intra vires IHL for the closer integration of the military-industrial complex in the USA,74 but would perhaps have failed for reciprocity when considering the US's pre-9/11 attacks on al-Qa'eda or the Taliban.

Further, no single act by the US-Coalition or al-Qa'eda in this current 'war on terror' has resulted in the number of civilian lives that were lost in either of the nuclear attacks on Japan. If the Nuclear Weapons Opinion75 is correct, arguably it provides at least a practical upper limit on the number of collateral deaths that is 'acceptable' in achieving a strategic military aim, perhaps say on the assumption that such use of

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72 Sabya Farooq et al, Continuing Collateral Damage: the health and environmental costs of war on Iraq, Report No Medact Report 11 November (2003). Further, the US government under President Bush legitimated acts that could be construed as torture: Joseph Marguilies, Guantánamo and The Abuse of Presidential Power (2006), 10. and (ibid, 33) repudiated some of its obligations under the four Geneva Conventions and (ibid, 72) did so against the legal advice from the State Department but with the approval of the Attorney-General.
73 See text accompanying n 125, 215.
74 See text accompanying n 299, 166. Dinstein's baseline was formulated in Beirut, in the Lebanon.
overwhelming force will help to end a war sooner and thus save even more lives.\textsuperscript{76} From a shari'a 'reciprocity' or any other reasonable perspective (that is not given to utter helplessness in the face of legal impotence) however, this level of permissiveness to take so many innocent or non-combatant 'enemy' lives must be considered utterly unacceptable leeway in a moral if not the legal sense. At a stretch, the attack on Hiroshima may be viewed as reciprocal for Japan's attack on Pearl Harbour. The use of the second nuclear device on Nagasaki is more problematic, and arguably but for 'victor's justice', even criminal.

On the other hand, the 9/11 attacks on the US homeland, while utterly despicable, are an opportunity for the world community to recognise IHL's shortcomings and thus to move to tighter standards for all, rather than only the rich and strong. In terms of pure numbers anyway, independent of colour, race or the domestic legal standing of a race, many more 'people'\textsuperscript{77} were killed in internal conflicts in Australia, Cambodia, Bosnia, Rwanda, Burundi, Burma, Germany, the USA, the USSR or countless other places than were at 9/11. It appears however, that it is only when the rich, powerful or racially similar are adversely affected that the necessary impetus to initiate change can be mustered and marshalled. That is, the almost universal condemnation of the attacks on the US homeland, and perhaps much less-well-publicised condemnations of Western excesses, must mean that the vast majority of the world's 'ordinary people' do not approve of 'liberal' IHL standards for enemy deaths. These limits must be re-examined, particularly while the leaders of the rich and powerful remain sensitised to the issue.

Notwithstanding the West's shortcomings, for al-Qa'eda, these permissible IHL standards cannot be accepted as a lawful measure of what is permissible because it is not based on the shari'a and therefore, ipso facto not 'good law'. Bin Laden accepts that the limits on reciprocity were generally absolute, but contends that these limits are subject to the dictates

\textsuperscript{76} See text accompanying n 51, 199.

\textsuperscript{77} A 'person' in this context is defined in this thesis as one who can produce fertile offspring with another 'human person' irrespective of whether or not such a 'person' is counted in the statistic of a nation.
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of necessity for non-Muslim intransigence. This statement appears to be an accurate re-statement of SHL. In support of his position, he cites the precedent and authority of ibn Taymiyyah that the killing of innocents is permissible as a deterrent and as a defence when non-Muslims do the same.

There are clearly instances where US Marines have killed civilians for ‘revenge’ or ‘for fun’ or have tortured suspects who have turned out to be quite innocent of any wrongdoing in the war. The US has however gone some way to punishing these miscreants, more at the lower ranks and perhaps not as enthusiastically as it pursues its perceived enemies. Notwithstanding this, it is extremely unlikely that the US administration, as opposed to rogue soldiers, intentionally targets civilians as a matter of policy, but on the other hand is largely able to hide its mistakes and collateral damage through what is popularly called ‘political spin’. Nonetheless, the USA’s shame and embarrassment at its poor behaviour can be compared and contrasted with al-Qa’eda’s unashamed boasting vis-à-vis its intentional targeting of civilians. Paradoxically, the shame that

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79 Ibid.
80 Ibid. The facts of the purported cases in which reciprocity was permitted were not cited and the blanket proposition, devoid of detail, appears unacceptably broad.
81 See n 310, 169. According to Jerome Starkey, ‘NATO comes clean in Afghanistan’ in Sunday 11 April 2010:
   NATO admitted that its forces were responsible for the deaths of three women, two of them pregnant.
   Further, the US government has been reluctant to release intentional targeting of civilians. According to Nima Maghame and Rebecca Bowe, Chilling footage of journalists getting shot in Iraq San Francisco Bay Guardian Online 11 April 2010:
   The chilling footage shows the helicopters firing on seemingly unsuspecting Iraqi civilians — and includes the helicopter crew’s comment, which are even more chilling.
   unmanned US drones kill 10 civilians for each ‘targeted person’ in Pakistan.
83 AFP, ‘Four Indonesian soldiers stand trial over torture video’, Sydney Morning Herald (Sydney), 5 November 2010. Australia and the US rightly condemned Indonesia for its prosecution only of junior officers who received relatively light penalties. It must mean however, that both Australia and the US are aware of their own wrongdoing in only prosecuting junior officers for murder, torture and humiliation of Iraqis, Afghans and many others.
drives the US to ‘spin’ its foibles makes it the better party under the shari’a, which condemns the shameless, ignorant, vainglorious, boasting of one’s own cruelty, shortcomings and sins.85

Nonetheless, al-Qa’eda speaks ad infinitum about the shari’a, of virtue and of its aim to please God and must in this context, therefore address the issue of Cain culpability, a crucial issue for a Muslim who must answer to God for his or her own actions. Al-Qa’eda has not addressed this crucial issue publicly and shows little if any remorse for the deaths and destruction for which it is responsible and in cases gloats about its cruel wickedness. As practical matter however, al-Qa’eda’s approach also seems counterproductive and self-defeating from the much weaker military side and shows that they do not value ‘human life’ which the Qur’an characterises as sacred, or even ‘a Muslim life’, if the provision is read down.87 While courage and valour in the face of a Leviathan foe is no doubt valued across most human cultures, one does not show one’s courage by placing the lives of the innocent in certain, mortal danger. Another possible explanation is that al-Qa’eda provokes a disproportionate response and carnage in order to mask and thereby to justify its own brutal means, issues discussed below along with the categorisation of kamikaze attacks.

In this vein, 19th century scholars such as al-Sawi (d. 1826) observed that the ‘Wahhabi’ have ‘adapted’ the Qur’an and sunna concepts of fighting in order to ‘legitimise’ its indiscriminate killing, including predominantly of Muslims.88 In the final analysis however, as a matter of law, al-Qa’eda’s recourse to acts of considerable violence in civilian areas, among the poor, in mosques and the use of mentally disadvantaged ‘kamikaze’ bombers or

84 While nothing turns on this point it is posited that the USA is too open a society to be ever able keep such a policy, if it ever existed, a ‘secret’.
86 See text accompanying n 6 in Appendix 3.
88 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 333.
89 See n 154, 65.
the *doli incapax* in conducting such operations, appear clearly to breach *shari’i* legal requirements.

Recall further the *salafi* objection to innovation (*bid’a*), in the use of ‘non-Muslim’ concepts such as democracy. These *bid’a* arguments must apply equally to military ‘means’, whether cutting edge Western military technology or the ‘poor (non-Muslim) man’s means’ of combat. It appears, however, that the use of innovative (*bid’a*), often inhumane ‘means’ of fighting, are enthusiastically embraced by Islamists in practice as are Kalashnikovs or rocket propelled grenades (RPGs) and paints some Islamists as pathological killers well aware of their lies. In short, the degree of permissiveness sanctioned by al-Qa’eda, even in defence, is prima facie incompatible with *shari’i* reciprocity and should formally be criminalised, and punished to the full extent of the *shari’i*. Prosecution will serve as an important aspect of finding avenues for reducing this orgy of killing. However, as discussed in chapters 6 and 7, prosecuting Islamist militants must be done under the *shari’i*, as prosecution under a system of law other than the *shari’i* is most likely to prove politically ineffective vis-à-vis Islamists and provides them with an easy ‘get out of gaol free’ card.

Thus the related question with respect to ‘means’ here, in applying (necessity and) reciprocity, is whether Muslims can legitimately adopt the commercially available weapons of non-Muslims or, having being denied the most ‘effective’ weapons, use the option of employing alternative means developed by other militarily weak non-Muslims groups to help equalise the asymmetry. Such means include the *kamikaze* techniques of Japanese or Tamil Tigers cadres, or ‘home made’ rockets made by

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90 See n 244, 243 & n 249, 244.
91 See discussion of the negative connotations surrounding *bid’a* or innovation among Islamists: Appendix 1 (discussion on Wahhabis and Neo-Salafis).
92 These *kamikaze* attacks which in recent cases involves in the self-sacrifice of the soldier, was developed in more recent times by the Japanese and (notwithstanding civilian casualties) later used against political targets by the Tamil Tigers: Nadesan Satyendra, *India & the Struggle for Tamil Eelam Rajiv Gandhi Assassination – The Verdict* (1997) <http://www.tamilnation.org/intframe/india/rajiv/index.htm> at 7 September 2006. Even the use of gunpowder which was discovered and developed by the non-Muslim Chinese and later by the non-Muslim West should by right in the anti ‘innovation (*bid’a*)’ mindset of the *neo-salaf*, prima facie be considered ‘*bid’a*’ until the matter is judicially examined and legitimised (perhaps for necessity) by the scholars and before the use of such weapons and techniques can be declared legitimate under the *shari’i*.
Hezbollah or Hamas which are utterly inaccurate, unpredictable and therefore most likely, when compared with the sophisticated guided missiles of the P5 and their allies, to be quite indiscriminate.

Prosecution for the ‘means’ employed by fighters, one that takes into account the technology available to each side, would appear to be more just. This will allow situations where rebels are provided high quality weapons, such as the Stinger missiles the US provided to the Afghan and al-Qa’eda mujahedeen against the Soviets, to be taken into account in any prosecution. On the other hand, ‘low grade’ weapons may be all that is available to other rebels and be their only means of defence. Prosecution that cannot recognise this imperative is bound, rightly, to be viewed as being partial to the rich and powerful.

There are, perhaps reasonably, ‘weapons bans’ and other sanctions legitimately imposed against ‘terrorist’ or ‘liberation’ groups, restrictions not always faced by their protagonists, particularly the P5 and their allies. For the purposes of trying war crimes however, all these factors with respect to the means employed in fighting should be considered as relevant issues. When the poor and the rich, the powerful and the weak are all held to standards that greatly favour the rich and powerful, this is not ‘just’, and importantly and will rightly be seen by the broader Muslim population not to be just. Further, it appears unlikely that liberationist groups will be dissuaded in their use of what is available to help equalise the imbalance in power or the significant ‘capability gaps’ by what they would consider ‘an unjust law’.

Conclusion — Necessity, Proportionality and Reciprocity
It appears clear that necessity, proportionality and reciprocity are all principles supported under the shari’ah, although their application and scope may not be identical with their respective application and scope under IHL. The next issue is to identify the ‘means’ that may be used in armed combat. The relevant principles are now examined.
Operative Shari'a Criterion: Prohibition against Causing pain to Sentient Beings

A convenient starting point for examining the rules of restraint on the means of war is by examining the 'end effect' of weapons. While the shari'a permits the killing of the enemy there are limits. The operative principle in setting limits is that Islam categorically prohibits the causing of unnecessary pain to any sentient being whether human or animal, even in the case of the slaughter of an animal for food, as cruelty is a characteristic of the 'friends of Satan'. This specific shari'a position can be abstracted to derive the principle that the shari'a does not permit unlawfully causing pain to any sentient being. While this proposition might not entirely be uncontested, a constant feature of a jihad is that causing unnecessary pain to sentient beings must be avoided or at least minimised even when trying to defeat an existential threat, as were the precedents of the Prophet in both Mecca and Medina.

Further, and cognisant that killing the enemy in armed combat is permitted, the Qur'an recognises that there is a 'fate worse than death'. This acknowledgment provides a shari'a criterion that can serve as another yardstick or perhaps baseline, employed as a matter of urgency, to identify the means of warfare (using contemporary weapons) that will clearly fall within what is intra vires the shari'a and equally identifying weapons and means that are ultra vires. This formulation is only useful in the abstract but can form a basis for criminalising and particularising 'acts' and 'means' of warfare. At an absolute minimum, it should mirror the Rome Statute crimes. It is clearly open to Muslims to challenge these assertions.

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93 Qur'an 2:191: Tumult and oppression are worse than slaughter [...].
95 Abu'l Hussain Muslim, Al jami'us Sahih vol 3 (1972), 1078.
96 Qur'an 4:76.
97 This formulation of words arguably captures the spirit of the prohibitions of Article 8 of the Rome Statute quite adequately.
99 Recall that Qur'an 2:191 states in instances (perhaps such as in war) that tumult and oppression are worse than killing. See n 2, 183 and n 93 above..
Fleshing out this skeleton set of specific SHL principles into a workable law is a much more significant a task than is possible in this modest undertaking. As is demonstrated in this paper, what is reasonably clear is the existence of shari'a principles that are similar to the well-known and accepted ICL/IHL principles. These principles can and should independently be developed into more concrete rules of what may then be formulated as positive law, directly related to the ‘means’ of combat permissible under the shari'a. In order to establish the prima facie practicality of this enterprise, three specific ‘means’ are prohibited in the shari'a, which practically demonstrates the principle of avoiding causing pain to sentient beings applied under the shari'a and which can, broadly speaking, be said also to capture the spirit of the prohibitions of Article 8 of the Rome Statute.100 The ‘means’ examined below are the use of:

1. Torture
The use of torture is generally prohibited under international law.101 There is an absolute prohibition under the shari'a on desecration, mutilation (mithla) or arguably the physical (although not perhaps yet shown to include psychological) ‘torture’ of human beings.102 What constitutes ‘torture’ under the shari'a is not entirely clear. For example, collecting taxes from dhimmis out in the hot sun was described in terms of torture by the Prophet, that he warned the Muslims on not only the immorality but also the futility of torture.
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Prophet’s Companions. On the other hand, penalties such as amputation and flogging are punishments permitted (against Muslims) under the shari‘a, although the issue of capital punishment should be considered in a separate analysis under that legal category. Muslims (mainly) are in cases treated harshly under hudud law. The law on the psychological means of causing pain to humans is also in urgent need of development under the shari‘a, although one could reasonably argue that there is no real need to read ‘causing pain’ down to cover only physical pain.

There is not much more written analysis specifically on torture in the shari‘a other than what has already been mentioned. Where Muslim States have ratified the Convention Against Torture (CAT), this instrument could now serve as a contemporary baseline, although in a strict shari‘a sense CAT is not sufficiently narrow. The prohibition against torture might even possess the character of a ius cogens norm, and if so, is

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103 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 61, quoting the hadith of the Prophet that “Those who torture people in this world will be tortured by God in the next”.

104 The Ottoman qadis had the authority to use torture although it is unclear what constituted torture: Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (2005), 188. Further, shari‘a punishments such as amputation can reasonably be classified as unusual punishments (to the contemporary Western sensibilities anyway, and arguably even in Muslim lands is ‘unusual’ in the sense that it is not the usually prescribed punishment. Although ‘unusual’ punishments have been known to other cultures and at other times, for example, the many offences for which a person could be hanged in English law, to which ‘deportation’ to the Colonies was a preferable alternative. While the difference may appear semantic, the difference between a punishment and the extraction of evidence by torture, is that the pain and suffering of a punishment applies after a due process of law, while torture seeks to extract information based sometimes on reasonable suspicion but at other times, and according the ICRC cited by Joseph Marguilies, Guantanamo and The Abuse of Presidential Power (2006), 83. detained and subject to treatment tantamount to torture, on mere suspicion.

105 Note however that salb or crucifixion under Islamic law is after death (as distinguished from Roman crucifixion) is permitted as a punishment for the hadd crime of hiraba as discussed in Chapter 5. For such acts to be lawful however, there must however be a proper legal process leading to such a punishment.

106 While not directly to point, and nothing turns on this point, harsh penalties for Muslims only is to teach them the seriousness of undertaking the Covenant and that God’s punishment for those who accept the Covenant and then ‘trade it’ for worldly gain is so bad that they will be at the ‘bottom of hell’, that is ‘lower in hell’ than those who openly rejected the Covenant in the first place.

107 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1).

108 See text accompanying n 103, 212.

Anecdotally, Muslims appear to consider such a prohibition self-evident under the shari'a, a view not shared by the many Muslim rulers who appear to practice torture. A similar situation exists in the West, where most people believe that torture is wrong but in practice where implements of torture are manufactured and exported to less developed countries and where ‘torture victims’ of the West have also been ‘exported’ and is discussed below.\(^{110}\)

Notwithstanding this practice, as CAT is one legal yardstick under which [US-Coalition] prisoners’ treatment by al-Qa’eda or other Muslim groups will be measured under international law, it is arguably a useful starting point in establishing an equivalent shari’a body of a law on the ‘use of torture’ as a shari’a crime. Against this, it would however not be an overstatement to say that the general performance of many Muslim States with respect to the abuse of torture is abysmal.

**Torture and the Detention of ‘Unlawful combatants’**

Alleged al-Qa’eda operatives, but in many cases ordinary Muslims of ‘middle-eastern appearance’, have been transferred to facilities in the so-called ‘liaison partner’ countries through ‘extraordinary rendition’, where ‘confessions to crimes’ were allegedly extracted under torture.\(^{111}\) These States include not only allied Muslim (client) States but also Syria,\(^{112}\) a member of the so called ‘axis of evil’,\(^{113}\) and poor European States such as

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109 The concept of *erga omnes* however, does not fit in comfortably with the *shari'a* because obligation derives from a Covenant and each Covenant is different. On the other hand there are principles such as that of the Unity of God and arguably the 10 Commandments, that are universal and therefore, arguably carries the meaning or the intent of *erga omnes*. The concept that some things are binding on all *Muslims* is however, well established.

110 See n 111, below.


112 Charkaoui v Canada (Citoyenneté et Immigration) [2007] 1 R.S.C. 350, 374 [para. 26].

113 For other alleged examples of Israeli and US deference to Syria please refer to A. R Norton, *Hezbollah: A Short History* (2007), 75.
Poland\textsuperscript{114} and Romania\textsuperscript{115} who are arguably more susceptible to US political and economic pressure. Prisoners/unlawful combatants, however characterised,\textsuperscript{116} but including children,\textsuperscript{117} held by the US-Coalition at Guantánamo,\textsuperscript{118} Bagram and Abu Ghraib and the several 'undisclosed CIA facilities' have been tortured,\textsuperscript{119} ill-treated,\textsuperscript{120} 'disappeared' and/or killed.\textsuperscript{121}

On publicly available information, Anglophone countries, arguably with the exception of the USA in Guantánamo, firmly governed by rule-of-law regimes, have not permitted these excesses on their soil.\textsuperscript{122} The US however appears to have used the information obtained under torture in prosecutions and under conditions in which this evidence could not be tested under cross examination.\textsuperscript{123} Breach of some rules of IHL also fall

\begin{thebibliography}{9}
\bibitem{114} John Goetz and Britta Sandberg, \textit{New evidence of a secret torture prison} Der Spiegel 20 April 2009.
\bibitem{115} BBC, 'Bush admits to CIA secret prisons ' in BBC News 7 September 2006.
\bibitem{116} Michael Ratner, Ellen Ray and Stephen Kenny, \textit{Guantánamo : What the World Should Know} (2004), 23. cite with approval the Red Cross’s categorisation of relevant Guantánamo Bay prisoners as: those who were captured in combat are considered prisoners of war (POW). The authors also reproduce the correspondence from the Secretary of State to the Attorney-General (as Counsel to the President) (at 128) which shows initially that there were those within the administration who viewed those captured in combat as POWs. This view that the captured Muslims were POWs however, did not prevail: See Memorandum from Alberto. R. Gonzales to the President, at 121.
\bibitem{117} Ibid, 68. Note however, that 'children' under US law may not always translate to children in the meaning of the \textit{shari'a}. Recall that the Schools had differing ages for majority and some of the 'children' held by the US may well be considered 'adults' under some Schools.
\bibitem{118} Ibid 38.
\bibitem{119} Karen J Greenberg and Joshua L Dratel (eds), \textit{The Torture Papers: The Road to Abu Ghraib} (2005).
\bibitem{121} Two deaths investigated at the 'high value' camp at Bagram and at least two deaths, investigated at Abu Ghraib which were according to the US military sources 'not isolated incidents': Michael Ratner, Ellen Ray and Stephen Kenny, \textit{Guantánamo : What the World Should Know} (2004), 51.
\bibitem{122} Technically, the USA arguably did not carry out any torture, such as waterboarding on American soil. The instances of torture admitted to by the President Obama apparently took place at Guantánamo Bay and while discussion of this particular issue is outside the scope of this paper, may not, properly characterised, be 'US soil'.
\bibitem{123} Secret evidence was made disallowable for immigration cases but the Act has an exception for ‘terrorists’ against whom such evidence can still be used: \textit{Secret Evidence Repeal Act of 2001} (USA H.R.1266).
\end{thebibliography}
within the jurisdiction of the ICC. However the US has not yet and in the foreseeable future is unlikely to submit to the jurisdiction of the ICC in the foreseeable future.\textsuperscript{124} It is therefore unlikely that US citizens will be prosecuted for serious crimes at the ICC, although there is some effort to prosecute criminals in domestic military tribunals.

On the other hand, Western prisoners of al-Qa’eda who escaped, were released or ransomed did not claim to have been tortured, although some were killed sometime after capture.\textsuperscript{125} There is evidence, however, al-Qa’eda harshly treated ‘Muslims’, those it considered hypocrites and collaborators, and that although specifically prohibited under the shari’a,\textsuperscript{126} by the desecration of their corpses,\textsuperscript{127} an ultimate show of disrespect under


\textsuperscript{125} There are reports that al-Qa’eda possessed equipment to gouge out the eyes of its prisoners: Robert Spencer, Torture, Al-Qaeda Style (2007) <http://www.jihadwatch.org/archives/016604.php> at 18 February 2008. However, there are counter claims that the ‘prison’ referred to by ‘Jihad Watch’ is really an Iraqi Interior Ministry secret prison, not an al-Qa’eda safe house. <http://news.bbc.co.uk/2/low/middle_east/6124806.stm>. Further, US-Coalition prisoners who were released or rescued from al-Qa’eda prisons did not have limbs amputated, eyes gouged or other marks of torture, although this does not exclude the possibility of humiliation and psychological torture. Captured ‘prisoners’ were sometimes ‘executed’ by al-Qa’eda by beheading and the footage sometimes played on public broadcasts. Torture by either side should if possible be prosecuted. There is documented evidence of the use of torture by Coalition partners: Karen J Greenberg and Joshua L Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005). ‘Torture’ however is distinguished from the desecration of human remains by both sides: Bradley Graham, ‘Alleged Desecration of Bodies Investigated: U.S. Military Acts to Control Muslim Backlash After Incident in Afghanistan’, The Washington Post (Washington), 21 October 2005, A16. It is settled that desecration of human remains is a clear ‘sin’ but perhaps not yet a crime under the shari’a.\textsuperscript{126} See text accompanying n 102, 211.

\textsuperscript{126} Muslim prisoners have had their executed corpses desecrated: Matthew Carr, ‘Brutality: the conqueror’s syndrome’, The First Post (London), 18 February 2008. Note that desecration of human bodies is contrary to the Prophet’s explicit prohibition: Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 3 (1976), 394. Although crimes are attributed to al-Qa’eda – and there appears to be some agreement that the allegations are not untrue – the US and Iraqi government forces have also been involved in torture as has been documented (and have blamed al Qa’eda: see n 125 above), and some of these references are cited in this paper. Non Muslim prisoners have in cases been held by Muslims (Israeli Corporal Gilad Shalit by Hamas in Gaza for example) for some
Arabian custom and now perhaps also arguably under broader Muslim culture.\(^{128}\)

Paradoxically, al-Qa’eda and other Islamist groups’ record on torture appears to be much better than that of their secular counterparts in Muslim States. If this version of the avoidance of torture by Islamists is correct, it also arguably provides a subjective view of what Islamists believe are the shari’a rules on torture. These are clearly selective examples. However, although al-Qa’eda is in the main run by non-lawyers, albeit those with a reasonable knowledge of the basic law, this practice bears some nexus with the shari’a and is arguably representative of non-State Muslim practice and ‘opinio juris’ (the mental element), if the term can reasonably be used in this context. These ‘norms’ in practice would provide a useful yardstick for criminalising acts, although al-Qa’eda’s desecration of corpses of ‘Muslims’ it has declared hypocrites is prohibited under the shari’a, but at present is a ‘sin’, punishable by God, as opposed to a crime. There is no reason however, why these acts of desecration cannot be declared ta‘zir crimes by the jurists.

A question also arises as to whether the shari’a permits Muslims to reciprocate, for example with ‘enhanced questioning techniques’ or ‘robust’ treatment (which while not quite torture in the meaning of CAT was meted out to Muslim captives by the US-Coalition) and do so in order to deter such future treatment of Muslims by the Coalition and its allies.\(^{129}\) As

\(^{128}\) The US-Coalition however, has held ‘prisoners’ for longer periods, without due process. While nothing turns on this point, (an example demonstrating the shari’a care required on a deceased) Muslims are required to wash the dead with warm (not cold) water and to perfume them with musk as a sign of respect so that visitors paying their last respects would find the deceased with a pleasant smell even in the warm climates where Muslims predominantly live.

\(^{129}\) The Muslim dead are required to be interred and cremation is not practiced and deeply rejected in a cultural sense, although it is unclear if there is a specific positive shari’a law prohibiting cremation. The body of a dead human person must be treated with respect. Al-Qa’eda however, burned the bodies of Muslims (but not White or African-American Coalition soldiers) it first declared as ‘hypocrites’ generally because the worked for the Coalition.

See for example Michael Ratner, Ellen Ray and Stephen Kenny, *Guantánamo: What the World Should Know* (2004); Karen J Greenberg and Joshua L Dratel (eds), *The Torture Papers: The Road to Abu Ghraib* (2005). According to Mamdouh Habib (with Julia Collingwood), *My Story: the tale of a terrorist who wasn’t* (2008), 203. Australia’s consul-general in Washington Mr Derek Tucker reported to the Australian PM that the treatment of Mr. Habib (who when he met Mr Tucker, was bleeding, had
proportional retaliation 'no worse than' that meted out to Muslims is permitted in cases, the starting point must be 'yes'. On the other hand, while non-combatant Muslims (including women and children) were killed or tortured by the non-Muslim Meccans during the time of the Prophet, he did not claim this as an exception for the purposes of retaliating in kind and did not do so after the capture of Mecca, even though those who tortured Muslims were now under his political authority. It is unlikely that either necessity or reciprocity can alter a clear binding precedent for the kindly treatment of captives by the Prophet, including those who had been exceedingly cruel to Muslims. The better answer to this question under the shari'a, in the view of this paper, must prima facie be 'no'. If punishment is legitimately due against the Coalition's torturers then talion becomes relevant in principle, but strongly is discouraged in favour of forgiveness in practice. To create a deterrent against such behaviour however, Muslims should be encouraged to wait until the trial is complete and the law against torture and other cruel practices is established and to defer forgiveness until just before punishment becomes applicable.

Reciprocity may, however, be applicable with respect to the period of detention of prisoners of war as long as they are treated humanely. That is, Islamists may hold US-Coalition prisoners for periods comparable to the detention of Muslim prisoners, as one interpretation of continued detention is that in the view of that party the war is 'not yet over'. Detaining legitimately captured persons hors de combat does not per se appear to be

swollen feet and could hardly stand) and Mr. Hicks at Guantánamo Bay was 'not unacceptable'.
130 Qur'an 16:126.
132 Ibid 633.
133 Ibid 278. The 'better' or at least 'true to text' behaviour of al-Qa'eda, the Taliban and other Islamists has served Islam well if the 'conversion to Islam' rate is any indicator of 'success'. See generally James Yee, For God and Country: Faith and Patriotism Under Fire (2005), 117.
134 Muslim prisoners and slaves were tortured and killed by the Meccan non-Muslim enemy during the time of the Prophet. Retaliation in kind was however not permitted. Purchasing the freedom of Muslim captives in these conditions is permitted, even encouraged: Adil Salahi, Muhammad: Man and the Prophet (2002), 116.
135 Please refer to the discussion of Quisas (talion) crimes in Chapter 2.
136 Section 2 of Part IV Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135.
ultra vires,\textsuperscript{137} and can be treated as discussed above.\textsuperscript{138} The holding of non-combatants hostage, as is the case in Afghanistan by both sides of the war (for clearly financial advantage only), is unlikely to be proven legitimate under the shari'a even for reciprocity\textsuperscript{139} and unless it was a reasonable error of fact,\textsuperscript{140} must be treated as kidnapping (or the tort of false imprisonment in common law terms). The victims or their families thus are arguably eligible for compensation and the perpetrators should be punished under the shari'a.

2. The use of Fire as a Weapon

The use of fire in warfare was prohibited by the Prophet under the classical shari'a position,\textsuperscript{141} a prohibition not known to IHL. The Prophet said that such 'a 'punishment' was reserved for God alone.\textsuperscript{142} In 'developing' a practical position from this absolute rule, the eponyms turned their minds to the pressing issue of being confronted by an enemy that was not bound by shari'a restrictions. To this end, Shafi'i states that while fire may not be used first, Muslims may resort to its use in case of dire necessity.\textsuperscript{143} Shafi'i defined dire necessity as arising if the enemy used such weapons first or using the Prophet's precedent at Ta'if, for cutting off all supplies, if the

\textsuperscript{137} Article 3(1) Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135.
\textsuperscript{138} See text accompanying the discussion on literacy, 110.
\textsuperscript{139} The shari'a does not permit Muslims (in this instance al-Qa'eda) to use the detention of civilians by the USA (say at Bagram, Guantánamo Bay or Abu Ghraib) as reason for reciprocity in kind. This is because such an act is oppressive and unjust, and is as discussed, unconditionally prohibited to Muslims. What it does authorise Muslims to do however, is to fight the enemy until such oppression ceases: see above at 5 'Those who oppress', 122, for the Qur'anic authority for Muslims to fight against oppression.
\textsuperscript{140} In such cases compensation becomes due together with the captors required to seek the victim's forgiveness.
\textsuperscript{142} "Then God said to the Fire, 'You are my (means of) punishment by which I punish whoever I wish of my slaves.': Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 6 (1976), 354.
\textsuperscript{143} Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 152.
enemy was occupying a fortress, and as a result were targeting and 'picking off' the Muslims with ease.

Today's wars use such indiscriminately destructive weapons as 10,000 pound, phosphorous or cluster bombs, which burn people alive and cause a relatively slow and painful death by fire over a very large geographical area. However, the total prohibition on the use of fire, if promulgated, would in practice effectively outlaw the use under the shari'a of most contemporary weapons. As the use of 'fire' in the form of gunpowder, bombs and other explosive devices has become so commonplace, the shari'a prohibition against the use of fire has been ignored by Muslims in practice.

On the other hand, developing new shari'a norms by extending its limits to accommodate 'potent' contemporary weapons should carefully be supervised by Muslim jurists who must set clear limits on the lawful use of each new permitted weapon, even if these conditions disadvantage Muslims in a military sense. These new shari'a limits could be based on an 'objective necessity'. On a related issue, jurists progressively should also identify the conditions under which Muslims may develop, test, stockpile and/or use contemporary weapons and weapons systems, including chemical and nuclear devices and other weapons not prohibited under international law. Muslims should take the opportunity to join in weapons ban treaties, particularly weapons that cause slow painful deaths to animals and humans, thus hastening the crystallisation of international custom on these issues.

The resulting legal guidance will assist the umma to judge the legality of the means used not only in Islamist military action but also those

144 Ibid.
145 Recall that the Qur'anic notion is that for Muslims, 'victory' is in God's hand alone. Another authority for this proposition is that a Muslim army is allowed to fight when it is half as numerous as that of the enemy, a clear numerical disadvantage.
146 The aim here is to have an authoritative and regularly updated text for Muslim lawyers and dealing with weapons means etc in the meaning of Article 36 of AP I and without being prescriptive, something not dissimilar to the UK's, UK Ministry of Defence, The manual of the law of armed conflict (2004). The authority for the proposition that ('organic' matter or) 'chemicals' and 'nuclear' weapons can 'burn' like fire and hence included in the discussion at this point are from Qur'an 44:43 and Qur'an 24:35 respectively.
of Muslim States engaged in war with each other. Until new legal tests are developed and are accepted by consensus, the longstanding Shafi’i-test of ‘dire necessity’ must arguably stand as the sole legal exception to the total prohibition on the use of fire as an offensive weapon. Until these tests are developed and articulated in positive law Muslims must be judged under IHL as the default position unless Islamists, as a matter of faith, are allowed to nominate the application of SHL standards. In this case it could be left to the judges to draw the ‘law’ from the un-codified common law of Islam as did the ICJ judges in the Nicaragua Case and will help in the process of developing the positive law.

On the other hand, even a huge disparity in military power should not automatically equate with dire necessity. The prohibition on shedding blood must mean that Muslims should first be required to exhaust all reasonable non-coercive means of dispute resolution before resorting to the use of force. However, even when the use of force becomes lawful, the lawful use of fire should not automatically vest but the principle of only retaliating (ie a no first use policy) with fire should become the aspirational Muslim norm in practice, as it is in the law books. While a war that does not comply with these shari’a requirements may nonetheless still be permissible under international law, such armed action should not be allowed to be characterised as an armed djihad. This will help to divert Muslim support away from Islamists electing IHL standards (purely) because they are more permissive.

Al-Qa’eda unilaterally has carved out unprincipled and arbitrary but legally unsubstantiated ‘legal exceptions’ for themselves for the ‘first use’ of fire, including killing women, children and other protected persons, and are clearly ultra vires. In Indonesia, convicted Bali

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147 Some recent armed conflicts between Muslim States include the Iraq-Iran war, the Iraq-Kuwait war and the Malaysia-Indonesia conflict.
149 See chapter 5, Section 4, Banditry or Armed or Highway Robbery (hiraba).
150 It is not suggested that Muslims cannot make decisions out ‘dire necessity’ for the first use of fire against combatants. The case of use of fire in the form of weapons using gunpowder and other ‘fire’ line means, against combatants while highly likely to be made out for necessity for example, but is nonetheless a case that Islamists must make. Decisions however must be of narrow scope, and in not the
bomber Imam Samudra admitted that killing civilians was wrong.\textsuperscript{151} Indonesian authorities have used the confessions and remorse of contrite convicted terrorists who had been involved in the use of force to help change the culture among young Indonesians. The authorities have done this through education and by distinguishing mayhem, carnage and cruelty from lawful \textit{dijihad.}

Russian authorities have however, arguably reluctantly, admitted to the patently obvious fact that their own deployment and use of force and cruel methods of fighting against Islamists in the Caucasus has in fact turned out to be counterproductive.\textsuperscript{152} The West is yet to admit that its own sometimes questionable practices have also proved counterproductive. On the other hand, good intelligence in the West has kept the terrorist threat quite manageable while still providing a useful political catch cry. The Western elites therefore may not be too uncomfortable or unhappy with the \textit{status quo}. There is a reluctance for powerful nations to admit that their military strategies are on occasions wrong, and in this case, that their military campaign against Islamic violence is not working. Like the Emperor’s new clothes, the blindingly obvious appears to be apparent to all but those in power.

3. The Use of Human ‘Weapons Delivery Systems’ in \textit{Kamikaze} attacks.

The use of troops by generals as ‘cannon fodder’ for the achievement of a greater strategic goal is well known and \textit{kamikaze} attacks, broadly speaking, may fall into this category.\textsuperscript{153} The question of the legitimacy of the use of \textit{kamikaze} attacks can in one sense thus be considered along with other general ‘means of war’. Martyrdom, which is linked to both \textit{dijihad} and

\begin{footnotesize}
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  \item[151] Michael Sheridan, ‘We didn't mean to kill so many: bomber’, \textit{The Australian} (Melbourne), 3 March 2008.
  \item[152] ‘Bombs kill 12 in Russia, days after metro attacks’ in Seven News, 1 April 2010.
  \item[153] On the other hand, Australian Author Colin Thiele observes that, 18 year old males are perfect for this sort of job because they think they are invincible: Michelle Rainer, ‘Interview with Colin Thiele’ in Verbatim ABC Radio National, 3 May 2010. It is therefore, within the bounds of reason that all armies, secular or religious, will try to tap into this population segment to do its most daring or stupid acts.
\end{itemize}
\end{footnotesize}
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kamikaze attacks, has a particular significance in contemporary Islamic discourse\(^{154}\) and is a subsidiary issue that is important in Islamist (or other religiously motivated) attacks. These issues are now examined as part of an overall discussion of kamikaze attacks.

The principle that fighting in self-defence is permitted is settled in both international law and under the shari‘a. The question of what exactly constitutes self-defence in these circumstances was canvassed, although it is perhaps still an open question. In a conventional war, the overwhelming ‘capability gap’ ensures that Muslim States and non-State actors are reliant largely on P5 technical and military assistance. Muslim nations or freedom fighters are only powerful when supported by a powerful State (the USA as in Kuwait and Saddam’s Iraq, or the USA in Afghan mujahideen against the Soviets) but otherwise relatively are ‘powerless’ in a conventional sense, as shown in Iraq (under Saddam against the Coalition) and the Taliban against the USA. These differences are perhaps less marked when a conflict is between two developing countries such as with the Iran-Iraq war or the konfrontasi between Malaysia and Indonesia,\(^{155}\) notwithstanding the differences of their populations and stages of development.

In an unconventional guerrilla tactical sense however, the battlefield appears a little less unequal, partly because the fighters have adopted novel means of combat to neutralise this ‘capability gap’ asymmetry.\(^{156}\) To this end Baer notes with an analogy from the past that ‘[kamikaze] attacks have forced U.S troops behind blast walls and into heavier armour, isolating them [...]’.\(^{157}\) Muslims, including Wahhabis, despite their selective aversion to ‘innovation’ (bida‘), have assimilated non-

\(^{154}\) Note however, that while martyrdom is a religious concept, ‘martyrdom attacks’ are not a phenomenon entirely associated with religion. As noted Attaturk (see n 190 below) used martyrdom to exhort his soldiers. The PKK, a ‘socialist’ anti-religious party also used martyrdom in its rhetoric to spur its cadres: Justus Leicht and Ute Reissner, *The Kurdish Tragedy – PKK activists on trial for murdering a Kurdish couple in Bremen* (2000) <http://www.wsws.org/articles/2000/aug2000/kurd-a26.shtml> at


\(^{157}\) Robert Baer, *The Devil We Know: Dealing With the New Iranian Superpower* (2009), 107.
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Muslim military knowledge, technology and methods. On the other hand, technology arguably is the common heritage of humankind, notwithstanding the Islamists' purported aversion to 'innovation'. The Prophet, however, permitted and even encouraged the adoption of useful non-Muslim knowledge, although the practical application of this knowledge still has to be legitimate.

There is a significant disparity in power and military capability between the protagonists. A strict and absolute application of an objective standard with respect to weapons or collateral damage that is 'permitted' under SHL would effectively leave freedom fighters legally impotent, as is presently the case with respect to most Islamists fighting significant oppression. On the other hand there must be some means of checking arbitrary, reckless or negligent use of force by all sides. Shari'a evidence law provides that subjective limitations of the weaker party must be considered but that this factor is not entirely determinative of the issue. Applicable SHL would therefore ideally consider the weaker

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158 This is not to say that adoption of 'foreign' technologies was without controversy. For example some Muslims debated the permissibility of the use of electricity in mosques: Greg Fealy and Virginia Hooker, 'Interactions: Global and Local Islam; Muslims and Non-Muslims' in G Fealy and V Hooker (eds), Voices of Islam in Southeast Asia, (2006) 411, 426.

159 For example while the acquisition of the knowledge of whiskey making is not specifically prohibited in the Qur'an or sunna, Muslims by analogy and consensus have accepted this as a prohibited profession for a Muslim. A similar examination is proposed on the acquisition and the use of weapons technology.

160 The disparity in technology is significant in that those possessing more accurate weaponry, that everything else being equal, are bound to cause less collateral damage. In this regards IHL favours the technologically superior side in that the definition of 'indiscriminate' with respect to targeting as 'methods or means which cannot be limited': Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Customary International Humanitarian Law, vol I (2005), 40., necessarily making the cruder weapons of the non-State actors 'indiscriminate' as compared with sophisticated and more accurate guidance systems, albeit more destructive weapons, of the militarily powerful.

The practice and opinio juris of Muslim States — including States which refer variously to the shari'a — is the acceptance of an obligation to act in accordance with international law, primarily demonstrated by their membership of the UN and thus their acceptance of the UN Charter. The use of violence by non-State parties however, is the main point of interest here.

161 While nothing turns on this point, the many in the P5 and allied States may well ask the 'so what?' question. It is as is one person riding in a boat who thinks that making a hole under his seat because he is thirsty is okay because the hole is away from the rest. The earth is a single boat in which we all ride and at a point we may all sink together because of the short term thinking of the leaders of powerful States.

162 Quran 2:286.
party’s ‘military capacity’. As SHL norms crystallise, Islamists must in addition be held to the standards of the *shari’a*, if these standards are higher,\(^{163}\) or at least not allowed to claim compliance when there are reasonable doubts as to the veracity of their claims. If they want general (and perhaps lower) IHL standards to apply in their case, they ipso facto become *ineligible* for trial under the *shari’a*. This will force Islamists to confront and expose their own often arbitrary use of laws, including use of the *shari’a*.

‘Effectiveness’ of *kamikaze* Attacks on the Military

While the question of the legitimacy or otherwise of *kamikaze* attacks still remains to be discussed,\(^{164}\) former U.S. President Carter – arguably reflecting the majority view — acknowledged and pointed out the clear *efficacy* of *kamikaze* attacks as the means of the removal of French and U.S. military forces by *Hezbollah*\(^{165}\) from The Lebanon.\(^{166}\) ‘Effectiveness’ here *must* mean that of achieving a strategic goal and *not* in the taking of as many lives as possible. Attacks with respect to civilians and ‘mixed’ target areas are now discussed.

‘Effectiveness’ of *kamikaze* Attacks on Civilians and Mixed Targets

Bin Laden refers to the general failure of peaceful means to achieve any useful results in the Israeli-Palestinian conflict and said that the West only responded positively on that issue after the 9/11 attacks on the World Trade Centre (WTC),\(^{167}\) by announcing the ‘two-state’ solution within a

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\(^{163}\) It is noted that this requirement is not discriminatory as it is a *shari’a* requirement independently and unilaterally accepted by Muslims as binding upon them.

\(^{164}\) See discussion on *Kamikaze*, Self-Martyrdom or Suicide Bombings, 232.

\(^{165}\) See n 218, 235.


\(^{167}\) It may be contended that Al-Qa’eda has not directly attacked civilian targets in Saudi Arabia. This more a matter of characterisation as, in the case of the Khobar Towers attack in 1995, the towers housed "service members from the United States, Saudi Arabia, France, and the United Kingdom as well as Saudi military families in the Southern section of the complex: Global Security, Khobar Towers 26°16'N 50°12'E (2008) <http://www.globalsecurity.org/military/facility/khobar.htm> at 1 March 2008. Further, while Al-Qa’eda condemn the Shi‘i as apostates: Robert Baer, *The Devil We Know: Dealing With the New Iranian Superpower* (2009), 126. Baer posits that the attackers were trained by Iran (ibid, 162), although the author states (ibid.) that this was Iran’s ‘final terrorist attack as of this writing [in 2009]'.
month of the 9/11 attacks. Al-Qa‘eda/bin Laden’s ‘financial analysis’ of the impact of the 9/11 is discussed below. Further, al-Qa‘eda claims the credit for driving out the Soviets from Afghanistan as proof of the effectiveness of its struggle and methods, but arguably does so greatly by underplaying Afghan and Western contributions. Bin Laden said that Arab/al-Qa‘eda action in jihad has increased Muslim dignity (in the case of the Soviet union) presumably by defeating ‘the godless (Communist) ideology’. However, the methods of war used by al-Qa‘eda against the Soviets were less critically scrutinised, analysed or publicised by the Western press. On the other hand, when similar ‘Afghan’ tactics have been used against the West they have been criticised, and surely rightly so, when used by the Palestinians in Israel against Israeli civilians, by the insurgents in Iraq and elsewhere, when civilians directly are targeted or the levels of death and collateral injury caused are utterly unacceptable by traditional shari‘a standards.

The differential Western reaction to similar means with regard to different people, however, highlights and betrays a highly relativistic mindset. Western behaviour does not provide Muslims with a legitimate excuse under the shari‘a for not treating all people with, in the language of the Qur’an, their God-given dignity and position in the universe.

With regard to attacks against Israeli civilians, former President Carter also noted that these ‘dastardly acts have brought widespread condemnation and discredit on the entire Palestinian community and are almost suicidal for the Palestinian cause’. Such a critically negative appraisal from a pre-eminent commentator must impact negatively both on

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170 Neither the Arab States nor the West challenged al-Qa‘eda’s self-characterisation as mujahideen (ie those engaged in a legitimate jihad) against the Soviet Union.

171 The dehumanising of the Russians (by bin Laden, the mujahedeen and the West) was immortalised by the British band Sting in the words of the song ‘Russians love their children too’.

172 Qur’an 95:4.

the dignity of the Muslims in that conflict and also, in the longer term, on
the efficacy of such means against non-combatants, even if legitimate under
the shari'a.\textsuperscript{174} While Palestinians have appeared to have abandoned
kamikaze attacks, the reason for such a shift was not attributed to what is
Islamically 'good' under the shari'a.

As a matter of substantive justice to victims however, when Muslim
fighters admit to\textsuperscript{175} (or there is admissible evidence establishing)
transgressions which will amount to serious shari'a crimes, such as in the
case of the first use of fire against civilians in 'the Bali bombings'
mentioned above,\textsuperscript{176} Muslim perpetrators must be required to accept their
criminal liability, and if necessary, pay (diya) compensation to the families
/victims. Fortunately for al-Qa'eda, JI and others, uninformed families and
the disparagement of the shari'a have deprived victims or/and their
families of at least the possibility of an alternative avenue for some form of
justice.\textsuperscript{177} The absence of a 'diya type' remedy as a matter of right is a
disadvantage to victims, and should be considered as an item for IHL
reform.

Further, if al-Qa'eda sought to sway Muslims' opinion in its favour
through its actions, it failed miserably. Attacks on the USA resulted in a
public backlash and consequently approval of the USA say in Indonesia
rose to 75\%.\textsuperscript{178} Since then, however, in spite of Islamists' continuing

\textsuperscript{174} In this paper, it is posited that such attacks against civilians and protected
categories are not defensible under the shari'a. Attacks against purely enemy
military targets appear prima facie legitimate although each case should be
examined on its individual merits and on a case by case basis. Such attacks against
purely military targets appear to be legitimate under general international law.

\textsuperscript{175} See Imam Samudra's admission above n 151, 221.

\textsuperscript{176} See text accompanying n 151, 221.

\textsuperscript{177} Although nothing turns on this point, one would expect reasonable people to ask
the question: 'If these people (ie Islamists) are fighting (inter alia) for a legal
system; what remedies would we find under their system?'

\textsuperscript{178} Tracy Dahlby, \textit{Allah's Torch: A Report from Behind the Scenes in Asia's War on Terror}
(2006), 5; Empathy for the US was almost unanimous in the Muslim world and
brought motions of support for the US and condemnation of al-Qa'eda. It is noted
in passing, and while nothing turns on this point, that, while the countries
conveying condolences to the U.S. included Iran and Iraq, it would not be
unreasonable to surmise that their condemnation of al-Qa'eda was linked not so
much to empathy for the USA (which in Iran's case was the 'Great Satan'), but for
their own internal purposes as al-Qa'eda had labelled both these governments
'heretic' and therefore subject to legitimate attack by Muslims.
unlawful and unpopular actions, the U.S.'s approval rating in the Muslim world has slumped, due mainly to the U.S.'s own unwise, disproportionate responses which have reversed empathy. Dahlby notes that Indonesians expressing friendly feelings towards the USA went from about 75% to 15% three years later. If al-Qa'eda foresaw the US's overreaction as mentioned previously, then al-Qa'eda's culpability and callousness are clearly made out. However, importantly from a Muslim perspective, anti-Muslim sentiment has grown in many countries and, according to the Australian Muslim Civil Rights Network, is demonstrated in punitive legislation which, although nominally prescribed in neutral terms, in the main has impacted disproportionately on Muslims.

Further, there has been little if any real progress in the Occupied Territories and social and economic conditions appear to have deteriorated since 9/11, particularly in Gaza. The Palestinian leadership confirms that al-Qa'eda's armed action has adversely affected their cause. While the economic effects of the 9/11 attacks from al-Qa'eda's perspective are 'effective', from a broader overall perspective the attacks are a failure because of the misery it has brought about in Muslim States, a failure in preserving Muslim dignity because it has humiliated Muslim States such as Iraq and Afghanistan. The events of 9/11, as at 2010 anyway, are a military failure because, notwithstanding Western military and financial losses, it has increased the number of foreign troops in Arab/Muslim lands. Not a square inch of Muslim land was liberated. Conversely, there

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179 Al-Qa'eda receives the credit among Muslims for the errors made by the US administration. On the other hand, the US's military incompetence bolsters al-Qa'eda's claims of necessity.
181 See text accompanying n. 291, with respect to the US's propensity to overreact.
185 According to Michael Cook, Forbidding Wrong in Islam (2003), 55., an adverse impact of an act on the 'dignity of the faith (i'zaz al din)' is a relevant criterion on whether or not to proceed with an act.
are now more US and US-Coalition forces not just on the Arabian Peninsula but also in the Middle East generally and Central Asia, not to mention the expanded military and intelligence dependence between the P5 and a majority of Muslim States, greatly diminishing their semblance of independence. On the other hand, al-Qa’eda, as it openly claims, has demonstrated that many Muslim leaders are lackeys of the P5.

However, given al-Qa’eda’s own claims of its effectiveness, the question is whether the initial subjective (implicit) invocation of ‘necessity’ under the shari’a was justified, or whether these claims of ‘effectiveness’ are mere ‘puff’ in attempting to cover up its own strategic errors. However on balance, civilian attacks (even if subjectively lawful) appear to be not just politically ineffective but also counterproductive. From a shari’a perspective however, ‘effectiveness’ must always be the subsidiary issue to the primary question of legitimacy, which on this analysis is not made out so far.

The Road to Martyrdom
Martyrdom is key concept in Islam as it is in other Abrahamic faiths. The Qur’an refers to martyrs, as does the Holy Bible. The Qur’an states that Muslim martyrs, as well as others who fulfil the requirements of martyrdom under their own Covenants, are resurrected on the Day of Judgment as transfigured bodies free of disease, pain, suffering and the ravages of age. Even avowedly secular leaders such as Ataturk invoked the language of martyrdom and jihad. Pragmatic contemporary leaders would arguably be remiss to their cause if they passed up such a motivating force.

It is mentioned as a matter of completeness that many secular or only nominally religious cultures, that may not normally subscribe to the notion of martyrdom in its strictly religious sense, still do however, through the shrines of the tombs of the Unknown Soldier, pay homage ‘Lest We Forget’ and give thanks to those who have laid down their lives for God,

187 Qur’an 3:140.
Queen and country. On the other hand, modern secular materialistic societies do not create a desire in individuals to become one of the revered dead. The other side of the coin therefore is that in order to save lives on one's own side, minimising casualties on the other becomes a secondary priority. Thus dropping a bomb from 30,000 feet with little or no danger to the physical well-being of the pilot or aircraft from ground fire is from this vantage, more important than the chance of the missile hitting the wrong target, with its attendant consequences.

Similarly, sending out a drone to 'take out' a terrorist, that may in all likelihood accidentally 'take out' those at a wedding party or vegetable market, as has been reported many times in the press, is the practical, preferred option. From the ordinary military viewpoint however, one must err on the side of caution with respect to one's own soldiers, and explain an increasing tolerance of collateral injury. It shows however, and while in no way approving such base tribalism, that the US and the Coalition value 'their own' much more than does al-Qa'eda the lives and dignity of Muslims, both made sacred in the Qur'an. Theologically, on the other hand, protecting Muslim and property at all costs over that of the enemy is not as important as not taking life unjustly within the meaning of the shari'a.

Islam however, values and praises martyrs. From an Islamic perspective, the Qur'an states of martyrs:

Islam however, values and praises martyrs. From an Islamic perspective, the Qur'an states of martyrs:

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191 Michael Sainsbury, 'A true martyr to free speech', Australian (Melbourne), 11; Reuters, 'North Korea threatens 'sacred war', Sydney Morning Herald (Sydney), 24 December 2010.
192 While nothing turns on this point it is mentioned that there is an old Australian adage that says 'I don't want to die for my country. I want the other bastard to die for his'.
193 As discussed, the duration of a Muslim's life is pre-determined and cannot be advanced or delayed by a fraction of a second. Doing a great wrong, in order to 'alter' what is unalterable is therefore counterproductive to a Muslim's spiritual wellbeing.
194 Qur'an 4:95; see also Qur'an 3:169. Further according to Izzeddin Ibrahim and Denys Johnson-Davies, Forty Hadith Qudsi (1991), 108. the hadith refers to the special position of the 'true martyrs' in the following terms, unlike Western literature which emphasises the Muslim paradise in more sensual terms:

None of the citizens of paradise except for the true martyrs would ever want to come back to earth, because they are so honoured by their creator that they would wish to be martyred manifold in His cause. And when God asked the martyrs what they further desired they said: O Lord, we would like for You to put back our souls into our bodies so that we might fight for Your sake once again. And when He saw that they were not in need of anything they were let be.
Not equal are those who stay at home and those who strive or fight in God’s cause. However, *shari’a* martyrdom is not limited to those killed in battle, but extends inter alia to those killed in ‘God’s way’, a broad category including those killed by inundation, those buried alive in natural disasters, or those who die on their journey to the pilgrimage or in the pursuit of knowledge.\(^{195}\) Others working in ‘God’s way’ include teachers, preachers, physicians, scholars or jurists. Finally, martyrdom through armed *djihad* while lauded, is not the position of greatest privilege in Islam. Of the scholars involved in the greater *djihad* the Prophet said ‘the ink of the scholar is holier than the blood of the martyr’ ,\(^{196}\) thereby placing learning rather than martyrdom at the apex of a Muslim’s aspirations. This broader category of martyrdom however is not the one of interest in this context of armed *djihad*.

**Oppression**

The Qur’an describes *fitna* as being worse than slaughter\(^{197}\) and is a complex concept that warrants at least a brief examination. It describes the Muslim belief that the absence of violence alone does not equate with peace. Opposing and even fighting against oppression is encouraged when it is just. The Muslim must therefore overcome a natural dislike for fighting, injury or death generally, to establish what is ‘good’ and ‘right’.

The Qur’an’s view on death is very relevant to this issue. It states that everyone’s *time of death is predetermined*\(^{198}\) and nothing one does or does not do will alter one’s allotted term of life even by a fraction of a second. Consequently cowardly or unwarranted avoidance of one’s duty,

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\(^{197}\) Qur’an 2:191.

\(^{198}\) Qur’an 2:243–244; Qur’an 7:34. This variable duration is to account for an individual’s personal subjective requirements to demonstrate their individual acceptance or rejection of the Covenant. How a person dies is not however, predetermined and therefore, martyrdom, murder, manslaughter or suicide are all forms of crimes under the *shari’a* for which one is accountable. This Qur’anic claim cannot be ascertained objectively and its acceptance or rejection is a faith based matter. The concept is not dissimilar to the moral of the *Story of the Rich Fool* who hoarded up his riches but whose life was taken by the Lord before he could enjoy the fruit of his wealth: The Gospel of St. Luke, Chapter 12:16–21. The rich man avoided his religious obligations and in the end lost both his wealth and his happiness in the hereafter.
on this ground alone, is counterproductive in the hereafter.\textsuperscript{199} Thus ‘true believers’ will never seek exemption from armed \textit{djihad} for fear of death only,\textsuperscript{200} but will act in ways, including by not fighting, in order to avoid and prevent \textit{fitna} and to promote justice. In this vein, the Qur’an condemns those who, without just cause, seek exemption from legitimate fighting.\textsuperscript{201} If Muslims unjustly rejected fighting mandated by the Qur’an, then the Qur’an states that God will replace them with others who are humble among themselves\textsuperscript{202} but mighty and steadfast against the oppressors.\textsuperscript{203} This is how al-Qa’eda and other Islamists seek to be portrayed in the eyes of Muslims. On the other hand, if fighting can be avoided without compromising just outcomes, then peaceful settlement is to be preferred.\textsuperscript{204} Patience during adversity according to the Qur’an is a great virtue that is highly rewarded, particularly if one chooses this option.

One ground that can be used to justify the involvement of Muslim fighters in an armed \textit{djihad}, and of interest here — \textit{djihad} leading to martyrdom,\textsuperscript{205} — depends on a key threshold question of whether the political circumstances confronting the Muslim community (in any given locality) is ‘so bad’ that it would legitimise and trigger permission to fight against the near enemy, ie against the source of oppression.\textsuperscript{206}

However, another key necessary criterion for commencing \textit{djihad} is whether the Muslims are militarily strong enough not to suffer humiliation in an armed \textit{djihad}.\textsuperscript{207} That is, that armed action against the near ‘enemy’ has become necessary because the oppression or injustice experienced was sufficiently severe,\textsuperscript{208} and that for Muslims migration was not possible, and

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{199} Qur’an 3:156.
\item \textsuperscript{200} Qur’an 9:44.
\item \textsuperscript{201} Qur’an 4:77.
\item \textsuperscript{202} Please refer to discussion on leaders and for the underlying reasons why Muslims arguably show an outward preference for leaders such as Bin Laden even as the majority do not accept his methods.
\item \textsuperscript{203} Qur’an 5:54.
\item \textsuperscript{204} Qur’an 8:61.
\item \textsuperscript{205} Please refer to discussion in chapter 6.
\item \textsuperscript{206} See text accompanying n 218, 143.
\item \textsuperscript{207} Michael Cook, \textit{Forbidding Wrong in Islam} (2003), 55.
\item \textsuperscript{208} The degree of religious freedom afforded to the (adult) immigrant Muslims must be deemed sufficient, as migration to a place of oppression is \textit{ipsa facta} forbidden. One must be cognisant, however, that in Islam oppression is not always viewed as an
\end{itemize}
\end{footnotesize}
lastly that the Muslims were strong enough not to be humiliated, thus prima facie legitimising the use of force.

It is not likely to be contested that military actions by Muslim non-State actors against the Coalition have so far resulted in their military humiliation due to their relative military weakness but on the other hand, prima facie indicates that \textit{djihad} other than for \textit{ribat} is unlikely to be considered mandatory on Muslims for their relative weakness. This relative weakness, however, raises a further question, which is: can Muslims lawfully, say for necessity, use non-traditional means of warfare such as \textit{kamikaze} action, to help equalise the asymmetry?

\textbf{Kamikaze, Self-Martyrdom or Suicide Bombings}

The starting point for an 'Islamic examination' of the legality of \textit{kamikaze} action is that suicide and self-harm are categorically prohibited.\textsuperscript{209} Death in battle, \textit{djihad} or otherwise, although probable or at least possible, is not inevitable. Therefore, the possibility or even probability of death in battle, cannot, without more, reasonably be equated with suicide, even for one who voluntarily goes into battle. However, the virtual certainty of death, other than for failure of the detonation of the explosives or being apprehended before the mission, means that the issue of \textit{kamikaze} action cannot so easily be equated with participating in a battle as a soldier, in the ordinary sense of the term. For safety, and while nothing turns on this point, this area of SHL must be developed in parallel with the \textit{shari'a} position on euthanasia.

The historical precedent, yardstick, inspiration and martyrdom of imam Hussain, a greatly respected scholar, Companion and a grandson of the Prophet is sometimes cited in this context. Imam Hussain went to battle against caliph Yazid, which with the benefit of hindsight turned out to be a

\textsuperscript{209} external factor. A Muslim may oppress him/herself: Qur'an 65:1, that one who transgresses the limits of God oppresses one's own soul. The greater \textit{djihad}, and not the lesser \textit{djihad} is the remedy prescribed for this genre of the 'oppression of self'. Qur'an 4:29; Qur'an 2:195; For a Shi'i view on the prohibition of the practice of \textit{tatbir} (self-flagellation for example during the anniversary of the 'massacre' and martyrdom of the Prophet's grandson Hussain and Shi'i imam at Kerbala, Iraq) based on the Qur'anic prohibition on self-harm see A. R Norton, \textit{Hezbollah: A Short History} (2007), 54; Izzeddin Ibrahim and Denys Johnson-Davies, \textit{Forty Hadith Qudsi} (1991), 112. For the \textit{shari'a} paradox that a lifetime is predetermined yet that taking of life is criminalised see: n 198, 230.
certain death at Karbala (Iraq). Hussain fought to highlight the injustices and excesses of Yazid, characteristics of Yazid’s rule not generally disputed. Depriving the imam and his family of access to drinking water is also a characteristic of Yazid’s war which is now almost universally condemned by Muslims by prohibiting all cruelty in war. However, on the other hand Hussain and his entourage were expecting promised reinforcements, but his Muslim supporters, probably suspecting the outcome, decided to abandon the imam, thus avoiding a kamikaze death. The ‘cannon fodder’ type of foot soldier referred above, can easily be distinguished from the situation in Karbala, where the Muslims abandoned the rightful and just imam and then obliged him to fight to the death leaving him and his entourage in the lurch. The imam did so in preference to capitulating to oppression and humiliation, thus establishing a precedent for succeeding generations of Muslims who would look to his example.

Therefore, while imam Hussain’s martyrdom is cited with approval as an example of self-sacrifice and courage, and while not disputing these attributes in the least, it is suggested that the real principle of Karbala, therefore, is not so much that it is permissible to go to a certain death but that Muslims should, having made a sacred commitment, honour their promises and not desert their rightful imam for fear of death. The Karbala precedent however cannot stand for the proposition that kamikaze acts are permitted, as the acts of the Muslims at Karabala show the opposite, ie those who could have voluntarily become kamikaze failed to appear and those who were abandoned are instrumentally characterised as kamikaze martyrs. While poetic, this masks the guilt of the Muslims and is hardly a reasonable interpretation of the facts as widely accepted.

In the context of the religious duty of ‘forbidding wrong’, which is a specie of djihad, Cook notes that ‘getting oneself killed [in forbidding wrong] is tantamount to suicide is known both to Sunnis and Shi’ites.’ Further, and in line with this analysis and cognisant of the absence of a living imam among Muslims to authorise djihad, Shi’i scholars note that ‘[the actions of] one who flirts with death by reproving those in power is

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tantamount to suicide',\textsuperscript{211} and further that there is no reward for one killed in confronting an unjust leader.\textsuperscript{212} Thus making a rash decision, which one may even subjectively believe to be a ‘d\textit{jihad}', prima facie is distinguishable from martyrdom. The use of the word ‘tantamount’ to qualify ‘suicide’ and further, the ‘absence of a reward’ for such acts means, at least, that the unqualified use of the word ‘martyr’ to describe kamikaze bombers, appears inappropriate. While the foregoing analysis uses Shi‘i law, it is this School that, in The Lebanon, first permitted the use of kamikaze attacks by Muslims in the present period. This law, it is posited, is also the most appropriate legal basis for analysis, as even the Sunni schools did not independently seek to legitimise their acceptance of kamikaze action till much later and well after kamikaze attacks had become relatively common practice in the Israeli Occupied Territories, the Muslim population of which is almost exclusively Sunni.

The leaders of Hezbullah, Hamas, al-Qa‘eda and other Muslim groups have also used the language of martyrdom to rally their fighters. Islamically, the leaders who authorise kamikaze attacks must share the onus of establishing the lawfulness of their decisions.\textsuperscript{213} Further, the Qur’an reminds Muslims that ‘it is only God who knows His true soldiers’.\textsuperscript{214} Therefore, a mere assertion by Muslim leaders of the ‘martyrdom-creating’ character of their operations should, without more, clearly be insufficient evidence to the fighters that they were in fact really ‘fighting for Islam’, hence giving them a chance of obtaining martyrdom.

The subjective knowledge of the individual kamikaze should ideally be taken into account here, particularly if they have turned their minds,

\textsuperscript{211} Ibid, 77. (Emphasis added)
\textsuperscript{212} Ibid. Death occurring in such circumstances is distinguished from suicide. Further, the actual death is caused by the unjust leader and not the individual who pursued to what in their mind was a (subjectively) lawful course of action. Indeed imam Djafar’s statement that ‘there is no’ reward makes the use of the term ‘martyr’ problematic in these cases.
\textsuperscript{213} It is proposed that these requirements ‘to legitimise’ their actions should not fail for retrospectivity as the crime of homicide or manslaughter is known to all legal cultures, including the shari‘a. Further, according to Muhammad Al-Mughirah al-Bukhari, \textit{The Translations of the Meaning of Sahih al-Bukhari vol 7} (1976), 338. and abstracted and generalised here states that all acts associated with or leading only to a prohibited act are also prohibited.
\textsuperscript{214} Qur’an 74:31.
even if flawed and imperfect, to the consequences of their actions, through the process of 'ittiba'. In other cases the degree to which this subjective intent was formed is important because the pressure placed on some individual young people by their 'handlers', 'sheiks' or parents is so great that it must be considered a relevant factor, even if the quantum of the pressure applied is not likely to amount to duress as between strangers. If the bombers survive a 'kamikaze attack', for the failure of the device to detonate or because of apprehension by authorities before the attack, evidence of their own subjective intent could firstly help to mitigate their own culpability and secondly to help to incriminate their handlers, parents or recruiters, an issue discussed below.

For the purposes of this analysis, kamikaze attacks are divided into two independent and distinct types of warfare. These are, type 1 kamikaze and type 2 kamikaze attacks, which are now discussed. It is conceded that there may be other equally valid means of 'where' a line can be drawn between the two or even more types of kamikaze attacks discussed here. However, the distinction made here aims to highlight the differences between the major type 1 kamikaze missions of which the Beirut bombing of US marines and the bombing of the USS Cole in Aden are examples, as compared with the majority of type 2 kamikaze bombings carried out against 'soft' targets, including places of worship, market places, public transport, family celebrations and funerals. The latter appear to be

215 For the meaning of 'handlers' as used in this thesis see: Culpability of 'Handlers', 249.
216 See Type 2 kamikaze (t2k), 243.
217 See Type 2 kamikaze (t2k), 243.
218 According to Michael Burleigh, Blood and Rage: A Cultural History of Terrorism (2008), 348. the bombers drove a five-ton Mercedes packed with 12,000 lbs of Hexogen high explosives which when exploded literally lifted the building, the so called 'Beirut Hilton' 20 feet into the air'. According to Jamal Sankari, Fadlallah: The Making of a Radical Shi’ite Leader (2005), 206: [in] the early hours of 23 October 1983, a truck driver drove his TNT-laden vehicle into the marine compound, adjacent to the international airport. The explosion devastated the reinforced multistorey structure leaving 241 Marines dead and 75 wounded. It was the highest death toll suffered by the Marines in a single day since World War II. The factual issues leading up to the attacks are discussed (ibid) and was instrumental in removing US and French troops from on Lebanese soil. Note that Fadlallah himself was (ibid. 207) 'initially [...] ambivalent' to the attacks. What is done here however, is to apply his test as a general test to some large scale kamikaze attacks. See also text accompanying n 166, 224.
arbitrary, as they target mainly people of the protected classes and do not appear to be legitimate military targets. One of the key differences between the two types of attacks appears to be the relevance of a target and the type of bomber selected for the *kamikaze* attacks.

**Type 1 *kamikaze***

The P5 have developed sophisticated weapons, weapons guidance and intelligence systems which can deliver intercontinental ballistic missiles (ICBMs), nuclear warheads or 5,000 or 10,000 pound bombs from over a 1,000 miles away to within 50 feet or less of its intended target. Possessing the technical ability accurately to guide a weapon to its (military) target, and the satellite and human intelligence infrastructure on which the targeting is premised, is vital in the interest of precision targeting, while minimising collateral casualties. This is not to excuse Western forces for the killing of civilians. The Brookings Institution is cited as stating that US drones in Pakistan are killing ten civilians for every ‘militant’ it targets, although it is reiterated that there is a distinction. The US’s ‘aim’ is *not* to *target* civilians, and while an issue clearly worthy of study the examination of it is outside the scope of this paper.

Muslims for most part, and certainly Islamist rebels, do not have access to such technology. Their means of delivering a missile with any degree of accuracy is to use *kamikaze* soldiers to ‘guide’ weapons to within the range of a specific military target. The underlying theory arguably, as with the technologically sophisticated, is that they can avoid unnecessary collateral deaths within the traditional meaning of the *shari’a*.

While the aim of reducing collateral deaths is no doubt Islamically laudable, the means by which this is achieved is still intrinsically problematic under the *shari’a*. It is re-iterated however, notwithstanding the ensuing analysis, that suicide has always been and will always be a problematic theological and legal issue under the *shari’a*, and must be separately and independently addressed by jurists.

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220 See text accompanying n 209, 232.

221 Qur’an 4:29.
In a contemporary legal examination of this issue, Ayatollah Fadlallah said that 'if the self-martyr [had a] political impact on the enemy that is impossible to fight by conventional means, then his [ie the self-martyr’s] sacrifice can be part of a jihad (Fadlallah test). This provides a strict test and a threshold for legitimising kamikaze attacks for ‘impossible’ situations and are called type 1 kamikaze attacks, against strictly military targets in this analysis. The Fadlallah test as quoted here, however, is retrospective. Prospective application of the Fadlallah test arguably requires re-wording it to ask: ‘Is there a very reasonable likelihood that […]’?

Alternatively, since ‘impossibility’ is difficult to establish, the Fadlallah test arguably can be linked (for the purposes of this exercise only) to the Qur’anic test of an ‘overwhelming military superiority’ of the enemy. In a practical application of this test the Hizbollah’s secretary-general in the Lebanon is quoted as stating ‘It is impossible for us to fight the Israelis through traditional and classical methods […]’, thereby prima facie legitimising the use of kamikaze attacks against the IDF. If this analysis is correct, then by analogy, attacks satisfying the Fadlallah test may be permissible if established on a case-by-case basis against a militarily much superior enemy, subject still to the condition that the attackers eliminate or at least minimise collateral non-combatant injury inter alia.

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Note however that the term ‘self-martyr’ is novel to this century and time. ‘Self-martyr’, a term not known to the Qur’an or the hadith, is clearly an euphemism for a kamikaze bomber.


The taking of one’s own life remains absolutely prohibited and that is a separate barrier with which an individual soldier must contend. This however, as mentioned, not entirely akin to a soldier deciding to go to war or to become part of a very dangerous mission where death is inevitable but is left as a separate subjective threshold that a soldier individually and deliberately must surmount. The majority of the jurists appear to be reluctant to engage with this question of ‘suicide’. Jurists such as Fadlallah and Ibn Rushd’s views have been mentioned and will further be discussed in this paper.

See n 156, 66.

Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 91.
through careful planning and reliable intelligence, noting however that this concept is yet a long way from being accepted by consensus.

Type 1 kamikaze fighters are generally older, well-informed individuals who undertake their mission with a sense of strategic purpose, the mindset, training and determination of a soldier who is almost certain of death but subjectively seeks to die ‘honourably’ and is cognisant not to take life (or at least to minimise the taking of life) that he is certain, ‘but for’ the ‘impossibility’ of the situation, is not normally permitted. These more sophisticated kamikaze attacks require extensive planning concentrating on very specific military targets. They require self-motivated, skilled and intelligent kamikaze with a high degree of initiative and discipline and yet who are committed enough to follow a leader who is leading them over the abyss. These kamikaze appear to be reasonably well versed in the Qur’an, have a deeper understanding of their missions and the societies into which they will penetrate. The 9/11 kamikaze leader Mohamed Atta, had a PhD in German town planning, had too much invested, in his education and his own family simply to ‘throw away’ his life based on a ‘handler’s’ mere promise of paradise, reasoning that can perhaps be extended to others in these types of complex missions.

None of the bombers in these attacks so far however, was a shari’a lawyer or a lawyer in another tradition generally, and while not excusing, perhaps explaining to some degree their incomplete subjective legal analysis. They must be presumed to know of the Qur’anic punishment for unlawful killing and its eternal consequences in Muslim theology and law and therefore, most likely, independently have arrived at a decision to participate in a kamikaze mission perhaps after a great deal of thought, prayer and uncertainty. While this analysis may not be palatable to many, particularly in the West, such kamikaze fighters have actively, carefully and strategically selected their targets which are in their view lawful military targets (at least under IHL, although perhaps not yet under SHL,) a law which in any event and as mentioned, does not appear formally to have

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227 For example as with the WTC attacks picking a time which will minimise the loss of life, such as before people normally get to work. Or as in the Base of the US and French Bases in Beirut, attacking only purely military targets.
been studied as a discipline by any of the type 1 (and certainly type 2) kamikaze.

Some examples of type 1 kamikaze attacks are considered now. Such attacks include Hizbollah's 1983 US Marine base attack in Beirut, the USS Cole in Aden in 2000 and the Pentagon on 9/11. All are clearly military and therefore arguably type 1 targets, as are perhaps even the WTC attacks, which by Dinstein’s criteria, are ‘military’. The USS Cole was attacked at sea, eliminating the possibility of civilian collateral. The WTC and the Pentagon were attacked in the early morning using the first planes out of Logan, when the number of civilian casualties in the WTC would be at a minimum, but while maximising the economic damage. While both the WTC and Pentagon include a civilian workforce, on the Dinstein criteria, they are nonetheless legitimate military targets under IHL.

The 9/11 attacks were aimed at causing economic damage to the military industrial complex but were attacks which did not directly target soldiers. Nonetheless, it resulted in the death of several protected persons and its inclusion as a ‘type 1’ attack can reasonably be criticised, as the WTC is unlikely to be considered a legitimate military target under SHL.

Type 1 attacks referred to above are kamikaze attacks where the Fadlallah test might have been satisfied and are now considered individually. If the Fadlallah test is applied to the Hizbollah’s 1983 Beirut attacks against US and French marines, the facts appear to satisfy the criteria of fighting the military of an enemy possessing an overwhelming military superiority and the success of which is likely to bring potential political results (here removing these foreign forces from the Lebanon).
and which in retrospect was ‘successful’). Other (arguably, operationally more difficult or sophisticated) kamikaze attacks such as the attacks on Moscow’s FSB (Secret Service) metro station in 2010, although not strictly ‘military infrastructure’, might also meet the Fadlallah test. The attacks on Madrid and London transport would not however pass the Fadlallah test because of the ‘soft’ nature of the targets, with the certainty of killing or injuring civilians. If the Fadlallah test ever become a standard objective test ‘as is’, or perhaps better still in a more refined form to include more nuanced considerations and factors (such as by incorporating a subjective test, say in the form of the ibn Rushd test mentioned below and discussed in chapter 5), the Fadlallah test could provide a useful starting point for ascertaining the legitimacy of a particular attack.

An objective test will envisage the inevitability of the death of some soldiers in armed combat. For an individual Muslim, however, the ‘choice’ intentionally of taking one’s own life, by auto-triggering the detonating device, with the degree of certainty that is present in kamikaze missions, must remain subjectively problematic, for Islam’s prohibition on suicide. While this is not part of the analysis of kamikaze attacks, for the Muslim, the issue of suicide alone (and which is temporally non-justiciable), separated from the broader mission, must always remain individually problematic.

As discussed in chapter 5 the ‘ibn Rushd test’ is a subjective test, but one that requires subjective ‘certainty’ on the part of the individual that an act is lawful. It is an exacting test. Subjective intent must, if necessary, be proven by the kamikaze’s handlers in retrospect. Videos and taped messages of statements and aims and can help to convey intent. Some of the latter-day tapes however, now have degenerated to be no more than posthumous gloating, providing little more than slogans in support of their horrific acts, and should be adduced as evidence both with respect to establishing the

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233 The attacks were reputedly carried out by the Black Widows, the widows of Chechnyan fighters. Russian reaction was that they would act with ‘even more cruel and harsh methods’: Arsen Mollayev, In Russia, Medvedev promises "crueler" measures (2010) <http://www.salon.com/news/2010/04/01/eu_russia_bombings_1> at 6 April 2010. Which does not bode well for peace in that region.
234 See n 300, 253.
culpability and credibility issues of ‘handlers’ if they are ever tried under the *shari’a*.

Type 1 *kamikaze* attacks that ‘miss their targets’ for technical reasons, say analogous with the accidental US bombing of the Chinese Embassy in Belgrade, could be treated in a similar manner but with compensation being payable to the victims and their families.

**Financial impact of 9/11 Attacks: Proportionality and Reciprocity.**

Al-Qa’eda may have inspired and morally or even financially supported the 9/11 attacks or, as viewed by the USA, carried out the 9/11 attacks. Bin Laden characterised the 9/11 attacks as ‘great events by any measure’. In a financial analysis of the cost effectiveness of the terror attacks, he estimated US financial losses including, stock losses, loss of American jobs, loss of infrastructure as over US$1 trillion, for an outlay of US$200,000. He also claims that other intangible American losses are even more significant and said that in doing this analysis he sought to expose the falsity of the U.S.’s claim of defending freedom.

If bin Laden’s claims on the relative costs and loss are accurate, then al-Qa’eda’s military action on 11 September (9/11) is arguably not proportionate as compared with USA’s pre-9/11 military action and damage against the Taliban and al-Qa’eda interests which in turn were undertaken by the USA in response to al-Qa’eda’s 1998 bombings in Dâr

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235 The test is referred to here as the ‘Ibn_Rushd_Test’.  
237 *Ibid.* While not endorsing the accuracy or otherwise of bin Laden’s projected costs to the US economy, the resulting cost of the Iraq war (although perhaps not a reasonably foreseeable consequence of the 9/11 attacks), has been estimated at US$3 trillion: *Joseph E. Stiglitz and Linda J. Bilmes, The Three Trillion Dollar War: The True Cost of the Iraq Conflict* (2008). The monetary figure of a ‘trillion’ refers to a million, million and in the context of the term as employed in the USA rather than in Australia or Britain.  
240 *Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden* (2005), 112. In any event, bin Laden’s message was broadcast by several news outlets. While there may have been an attempt at censorship, this fact disproves bin Laden’s criticism of actual censorship.
es-Selam and Nairobi bombings, setting up a vicious circle of retribution. Therefore, as the economic damage to the Taliban is not even close to that of the U.S.'s losses as claimed by al-Qa'eda (and confirmed by Nobel Prize winning American economist), then the 9/11 attacks must arguably fail the shari'a tests for the lack of proportionality and reciprocity in defence.

On the other hand it must be recognised that as a non-State entity, that al-Qa'eda does not have the legal infrastructure and resources to make the fine legal arguments. Their capacity to make accurate estimates for proportionality calculations may have been lacking or faulty. However, as a self-declared Islamist group, fighting for Islam and wanting to hold Muslims to shari'a standards, it must certainly be required to adhere to the basic minimum legal shari'a standards. Al-Qa'eda and other Islamist groups are not alone in this omission as Muslim jurists generally are in this sense responsible for their abdication of their positive duty to develop, clarify and promulgate the relevant shari'a standards, a burden that militant Islamists cannot reasonably be expected to bear alone. For this reason, as a related issue therefore, compensation that becomes payable to victims consequently should be able to be legitimately recovered as a lawful debt from all those who self-identify as Muslims. Tax authorities in non-Muslims States could legislate to help recover these 'diya debts' from Muslim charities operating in their jurisdictions.

Carefully distinguished kamikaze actions against military targets of an invincible enemy is one thing, but wanton kamikaze attacks against non-combatants and on 'soft' non-military ('type 2') targets are an entirely separate issue. However, the protagonists, the media and thus the public treat these type 2 attacks as belonging to the same specie as type 1 kamikaze attacks, and is a convenient political tool that assists both sides of the war. They should nonetheless never be treated as equivalent forms of combat under SHL.

242 See n 238 above.
Type 2 kamikaze (t2k)

A second ‘use’ of the concept of kamikaze attacks are distinguished from the Type 1 attacks by their failure to satisfy the Fadlallah test. Type 2 kamikaze attacks are usually carried out by very young, inexperienced, poor, often uneducated Muslims (t2k Muslims) who are ‘encouraged’ or coerced, sometimes by their sheiks, mosque ‘imams’ or financially strapped parents into performing kamikaze attacks. Young men and sometimes women are drawn or coerced through promises by ‘leaders’ to their impoverished parents, of martyrdom for their children and paradise for themselves and thus a guarantee of ‘pleasing God’. Such rhetoric arguably eases the inevitable pain of parents, steeped in a culture of the sanctity of God given life and an inherent distaste for suicide, of knowing that they have in effect killed their children (and other innocent people), particularly when the parents do not believe the rhetoric themselves and perhaps for a degree of economic deprivation and desperation — that most Westerners will find difficult to comprehend — ‘sell’ their children for tangible financial incentives and benefits, to further ease the pain.

Applying the ‘slippery slope’ theory to this scenario, it appears that many Islamists who initially only adopted type 1, but then later degenerated and have expanded the scope of kamikaze attacks. Therefore, for t2k Muslims in Afghanistan, Pakistan, Iraq or Somalia, struggling against crushing oppression and dehumanising persecution with little prospect for liberation or economic uplift for their families, an escape through martyrdom with its lavish promise of the hereafter, together with some very tangible financial benefits for one’s family on earth, and a hero’s treatment during the pre-attack period, are very powerful metaphors and incentives indeed. The phenomenon of kamikaze attacks is now so

243 In many cases these ‘imams’ are poorly educated, very poorly paid individuals who basically lead prayers at mosques and help maintain the buildings.

244 For example Palestinian (often young) suicide bombers’ families were looked after and given what in their circumstances is a large amount of money that would help their families some respite in conditions of grinding poverty: Ken Layne, ‘Saddam Pays 25K for Palestinian Bombers’ in Fox News 26 March 2002.

245 See n 250, below.


commonplace in places such as in Iraq, Afghanistan and Pakistan, and the
targets most commonly attacked are mosques or ‘Muslim shrines’
frequented by immigrants’,\textsuperscript{248} that the term ‘armed \textit{djhihad}’ has completely
lost its traditional meaning.

It is posited that there is a very high likelihood of an implicit
understanding on the part of the t2k Muslim (and for the young, poor,
uneducated and inexperienced bombers\textsuperscript{249} not unreasonably so), that
because \textit{kamikaze} acts, are ‘recommended’ as deeply religious acts, they are
therefore, ipso facto legitimate. The ‘reasoning’ behind the actions of these
young impressionable people is often ‘based’ on very superficial
‘knowledge’, emotive appeals by parents and imams and generally the
unprincipled exploitation of poverty and ignorance, manipulated by
Islamist leaders to fit in with the rudimentary ‘knowledge’ of Islam
possessed by many young enthusiastic but uninformed t2k Muslims. In
most cases this is not likely even be ‘knowledge’ as such, but a mélange of
culture and prejudice. This t2k Muslim is simply ‘cannon fodder’,
purchased from their family or encouraged by promises that their poverty-
ridden families will be ‘looked after’.\textsuperscript{250} These temporal aspects of the
promises that appear generally to be honoured sometimes using monies
donated by other innocent well-meaning people.

Generally it is the t2k Muslims who are dying in their hundreds,
and killing in the thousands, attacking Qur'anically unambiguously
prohibited targets such as mosques (Pakistan, Iraq), synagogues (Morocco,
Argentina, Iraq) and churches (Indonesia, Pakistan, Iraq), killing Muslims,
non-Muslims, rabbis, priests and imams, men, women and children. Except
by sheer co-incidence or ‘luck’, not a military person or installation within
miles has been harmed, for the tough security measures employed by all

\begin{footnotesize}
\begin{enumerate}
\item Azaz Mohmand, Mosque bombing in Pakistan's NW kills at least 40 Reuters 5
November 2010.
\item James Murray, 'Suicide Bomber, 12, at UK School' (2008) \textit{Daily Express}; Kim
Sengupta and Jerome Starkey, "12-year-old Afghan suicide bomber kills three
marines' (2008) \textit{The Independent}.
\item This is also a clever circumvention by al-Qa'eda and others of Muslims' hesitancy
directly to fund terrorist attacks. Looking after poor families on the other hand is a
meritorious act and it is not likely that the families will be destitute particularly as
it is sometimes and allegedly al-Qa'eda's sister organisations that distributes the
charity collected from among the wealthy Muslims in the many parts of the world.
\end{enumerate}
\end{footnotesize}
armed parties. In places like Pakistan and Iraq, these suicide bombings against civilians, sectarian enemies (mainly Shi'i victims by extremist Sunni groups) and political or business rivals are reported now as a ‘daily occurrence’.251

An important element of the t2k attacks is the unquestioning and unthinking obedience that appears to be required of these young bombers. Demanding taqlid252 of one’s followers or students is an extreme form of arrogance.253 On the other hand, taqlid may appear to justify kamikaze operations because for ‘ordinary people’ it calls for absolute obedience to a leader, and hence contemporary Muslim unease for the instrumental exploitation of taqlid by unprincipled leaders. For these and other reasons, Kamali contends that prevailing contemporary Muslim thinking is decidedly anti-taqlid.254

This however raises the practical question of how some Muslims are led into kamikaze action, by means prima facie contrary to the Qur’an and sunna, particularly by leaders who do not themselves participate in such activities. It raises the legitimacy of the ‘psychological’ conditioning of bombers as opposed to the ‘spiritual’ preparation of jihadists to answer for their acts before God and is an issue that must urgently be examined by jurists. It is posited here that ‘psychological’ conditioning to blind obedience is prima facie unlawful as it not sanctioned by the Qur’an and sunna and further because it is used to trump the ‘spiritual’ preparation for death that is recommended for all Muslims in the primary sources.255

252 Recall that taqlid is obedience based on the concept of the presumption of continuity (pr binding precedent) of the shar’i’a. See also discussion on taqlid in Appendix 1.
253 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 92.
254 Mohammad Hashim Kamali, Equity and Fairness in Islam (2005), 121.
255 While nothing turns on this point, the UK and the USA can put substantial pressure on the Saudi Government, their closest Arab ally in the Middle East, to stop their propagation of a harsh Wahhabism and further to use the sermons during the hajj pilgrimage to fast track the value of education among Muslims generally and in this context proper understanding of religious texts (which as noted is not the current Saudi version).
A related question is whether *taqlid* provides a defence or is a mitigating factor against a serious shari'a criminal charge. A plea of superior orders, which has some equivalence to *taqlid*, is a mitigating factor although not a defence under ICL. There is in addition under the shari'a, potentially, the possibility of a subjective belief in a *muqallid* Muslim that an act (including of fighting) has become binding. However, unlike superior orders, *taqlid* is *not* in itself a mitigating factor in SHL. This is because, in the resort to violence undertaken at the behest of the leadership, in Sunni Islam, *taqlid* itself is adopted voluntarily, with all its attendant consequences. Therefore, the question of whether the means used or prescribed by a School in fighting are legitimate must therefore be answered individually, independently and separately. That is, *taqlid* should be examined in the light of the duty of *ittiba*. In the case of Shi'i Muslims, where *taqlid* to a *marja'* is an established mandatory religious principle, a *marja'* could, where appropriate, also be joined in the action, say for conspiracy.

In putting this contemporary carnage in a theological context, the Prophet forewarned against this sort of indiscriminate killing among the umma, absolutely denying the t2k attacker or his handlers the epithet of a martyr:

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256 See n 252, above.
257 Article 33 Rome Statute of the International Criminal Court, Came into force on 1 July 2002 (with the ratification of 60 States), U.N. Doc. A/CONF.183/9, (as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999), 2187 UNTS 3; Article 7(4) Statute of the International Criminal Tribunal for the Former Yugoslavia, ADOPTED 25 MAY 1993 by Resolution 827,; Article 6(4) Statute of the International Tribunal For Rwanda, 8 November 1994,
258 That is, a Muslim who adheres to *taqlid* as a matter of faith. See n 256, above.
259 There are clearly factual issues of subtle coercion, religious pressure, family, peer and community pressure etc on fighters who often are quite young were issues discussed below.
260 The Prophet said: 
If one does not know then the only remedy is to inquire *(innama shifa'u bi' al su'-aal)*.


Abu'l Hussain Muslim, *Al Jami'us Sahih* vol 3 (1972), 1029. The full text of the translation the *hadith* is:

The Messenger of God (peace be upon him) said: One who defects from obedience (to the Amir) and separates from the main body of the Muslims—if he dies in that state—will die the death of one belonging to the days of Jahiliyyah (ie would not die as a Muslim). One who fights
Whoever attacks my umma, indiscriminately killing the righteous and the wicked of them, sparing not (even) those staunch in faith, and not fulfilling his promise made with those who have been given a pledge of a security,\textsuperscript{262} he has nothing to do with me and I have nothing to do with him.

The indiscriminate killing in the meaning of this hadith is an issue not addressed in al-Qa‘eda’s fatwas. Kamikaze operations, undertaken within the umma explicitly against proscribed targets, appear to fall well within what the Prophet characterised as ‘(indiscriminately) killing righteous and wicked alike’ and appear to violate specific and explicit Qur’anic injunctions that Muslims must not kill Muslims, People of the Book or those under Muslim protection that Muslims should not destroy themselves, and also wilfully, or arguably even recklessly, kill protected persons and those who are not fighting against Muslims.

A possible implication of al-Qa‘eda’s silence on the issue is that it does not consider such attacks as ‘indiscriminate’ but as targeted or deliberate. Either way Muslims and others, particularly the families of victims are entitled to better legally sustainable justifications for the attacks and if they fail to do so to the satisfaction of the jurists, then prosecution for what must be considered unlawful killing must ensue. Alternatively, if the deaths were caused accidentally, then explicitly seeking the victims’ forgiveness and paying fair financial compensation as required under the shari‘a is needed.

The umma have never endorsed type 2 kamikaze attacks and even some even very ‘conservative’ Islamists are now condemning such under the banner of a people who are blind (to the cause for which they are fighting, ie do not know whether their cause is just or otherwise), who is puffed up with family pride, calls (people) to fight for their family honour, and supports his kith and kin (ie fights not for the cause of God but for the sake of his family or tribe)—if he is killed (in this fight), he dies as one belonging to the days of jahiliyyah (ignorance). Whoever attacks my umma, indiscriminately killing the righteous and the wicked of them, sparing not (even) those staunch in faith, and not fulfilling his promise made with those who have been given a pledge of a security—he has nothing to do with me and I have nothing to do with him.

\textsuperscript{262} While not directly considered in this thesis for space, undertakings given to non-Muslims in Muslim lands make them must‘amin, (those who have been given a pledge of security by Muslim leaders). While Muslim leaders are liable and answerable for making such commitments, Muslims would generally be expected to honour these undertakings given by their leaders adding an extra level of complexity into the equation.
action, and the extension of kamikaze operations by al-Qa‘eda and its affiliates to non-combatants and other Muslims, clearly does not have majority Muslim approval or consensus. Some Muslims disown the levels of violence used, by subscribing to or endorsing, so-called conspiracy theories, often by blaming or attributing the planning of the attacks on others such as Western governments or their intelligence agencies. On the other hand, Muslims (or indeed others) ‘comfortable’ in the West tend to condemn all armed resistance and support a purely pacifist position on the part of Muslims while approving or remaining silent on the disproportionate Western use of violence. The better and fairer position probably lies somewhere between these extremes.

It is this type 2 use of kamikaze attacks that is of particular importance with respect to prosecution. Prosecution of the handlers and leaders of such groups as co-conspirators is also crucial as they are in a sense the ‘real’ criminals who create and are responsible for mindless indiscriminate carnage among civilians and achieve no legitimate military advantage, but seek only to terrorise, promoting sectarianism, crime and fitna. Prosecuting ‘successful’ kamikaze ipso facto however, is not an option but securing justice for victims in these cases is crucial and is now examined.

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263 ‘Deoband first: A fatwa against terror’, Times of India (New Delhi), 1 June 2008.
265 Greg Fealy and Virginia Hooker, ‘Interactions: Global and Local Islam; Muslims and Non-Muslims’ in G Fealy and V Hooker (eds), Voices of Islam in Southeast Asia, (2006) 411, 468. where the authors translate material from the Indonesian Bina Wawasan press that explains the Bali bombings analysing the statements by Western leaders and press to conclude that: So the tragic event of 12 October 2002 may have been an operation drafted by Intelligence agencies like the CIA, Mosad and MI-6, while its implementation may have been carried out by a group of people in Indonesia who had long been infiltrated and taken advantage by those intelligence agencies.

Muslims claims have also been supported by Western reports: Norm Dixon, ‘How the CIA created Osama bin Laden’, Green Left Weekly (Melbourne), 19 September 2001. One interpretation for the generation of these several ‘alternate theories’ to explain terror attacks is that, the means used (or attributed to Muslims) are so utterly unacceptable under Islam that, those who perpetrated these acts must have been non-Muslim.
Culpability of ‘Handlers’

The term ‘handlers’ as used in this thesis describes those who are involved in recruiting, grooming, training and coercing kamikaze, often young impressionable and inexperienced youth. They are clearly co-conspirators in the attacks and thus prima facie liable to prosecution. In a spiritual sense, while leaders may promise martyrdom, their Muslim followers should not, and in good conscience, reasonably could not, uncritically accept what could clearly amount to empty promises, particularly when given by a person with absolutely no shari’a authority to make such a promise. In Islam, all relevant ‘negotiations’ and ‘differences of opinion’ between the bomber and the handlers must be settled ‘here’ on earth. This is because in the Qur’anic view (to which the ‘Islamist’ bombers ipso facto claim to adhere diligently,) no person will be able entirely to attribute or shift blame to another in the hereafter. In this context the Qur’an alludes to the dispute between those who were led astray and those who led others astray. Those who were ‘led astray’ will complain to God. In this context, the ‘handler’ will respond:

‘Our Lord! I did not make him transgress but he was (himself) far astray.’

As discussed, the moral of the martyrdom of imam Hussain at Karbala therefore is not one of sending desperate or foolish young men and women to their certain deaths and carnage for the many victims. T2k Muslims are coerced into acts based on empty promises of a reward, presumably a reward not sufficiently attractive for cowardly handlers who pragmatically or cynically stay behind to carry out further attacks and for whom presumably the life of earth is more attractive than ‘life with the [purported] 70 virgins’. In these instances only (ie of type 2 kamikaze) a

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266 The term ‘handler’ is a non technical term that is used in ordinary language with respect to reporting terrorist attacks by the press: ‘26/11 terrorists were stressed, handlers motivated them’, Hindustan Times (Mumbai), 4 November 2009.

267 See also the plight under Islamic theology for false ‘martyrs’ in Appendix 2.

268 See n 261, 246.

269 In cases however where the bomber is yet to reach the age of discernment (see n 249, 244) the handlers or parents, vicariously must bear some legal responsibility for kamikaze acts.

270 Qur’an 50:27-29.

271 According to Sara A. Carter, Taliban Hire Kids As Suicide Bombers Washington Times 2 July. Children are sold by their parents to the Taliban who then use them as suicide-bombers to help settle business scores.
subjective test should apply to (any surviving) kamikaze, as notwithstanding the Qur’anic verse just quoted, the survivors too are victims of sorts. If these t2k Muslims are willing to assist the prosecution of handlers, they should be co-opted to assist the prosecution.

Application of Article 8 of the Rome Statute
From the foregoing discussion it is clear that there are many acts of violence and cruelty that are prohibited during war, although not yet criminalised as positive law, under SHL. As with other criminal statutes, ‘similar crimes’ may be criminalised variously depending upon intention, recklessness or negligence. The following brief and summary comparison, by ‘pulling together’ the principles of the shari’ā discussed above with the substantive and operative provisions of Article 8 of the Rome Statute will show,272 it is posited, that criminalising egregious acts under the shari’ā should not in principle be problematic. Whether a breach is ‘grave’273 or ‘serious’274 is a threshold question which is likely to go to the jurisdictional aspects of the crime. Recall that an intervening international border is, of itself, not a substantive issue under the shari’ā. Crimes from the Rome Statute are now briefly compared with the shari’ā with the intention of identifying the ‘equivalent acts’ that may then be criminalised.

The ‘wilful killing’ of non-combatants is clearly prohibited under the shari’ā.275 Torture, inhuman treatment or biological experimentation,276 or intentionally causing great suffering,277 to any sentient creature is prohibited.278 The prohibition under the shari’ā of the wanton destruction of property for other than military necessity has been established, although the scope of what is permitted under IHL before the act becomes criminal,

272 For a slightly broader examination of the methodology please refer to the comparison of the ICL crime of genocide under SHL in Appendix 3.
273 Article 8(2)(a) of the Rome Statute.
274 Article 8(2)(b), (c) or (e) of the Rome Statute.
275 Article 8(2)(a)(i) of the Rome Statute. See text accompanying n 50, 106.
276 Article 8(2)(a)(ii) of the Rome Statute. See Operative Shari’ā Criterion: Prohibition against Causing pain to Sentient Beings, 210
277 Article 8(2)(a)(iii) of the Rome Statute. See Operative Shari’ā Criterion: Prohibition against Causing pain to Sentient Beings, 210
appears to be greater. Depriving a person of their substantive rights to fair and just treatment is also prohibited under the shari'a, as it is for a non-Muslim to be co-opted into the Muslim army. Deportation, unlawful transfer and hostage-taking are also prima facie prohibited as is expelling people from their homes.

Attacking non-combatants or non-military objects generally is not lawful under the shari'a. While 'humanitarian workers' are not explicitly covered in these terms in either the classical or traditional formulations of the shari'a, their protection is clearly encompassed by the more general prohibition on attacking non-combatants, and Muslim States party to IHL instruments, are bound under this more contemporary expression of the idea.

The taking of life collateral is not permitted under classical SHL (a restriction that is quite problematic in contemporary conflicts), as is destroying defenceless places, felling palm (and therefore other) trees, the killing livestock other than for food (and by analogy a fortiori other wildlife which may not be used for food), wanton destruction of other infrastructure not directly assisting the enemy in its war effort, or attacking those hors de combat including soldiers after they have laid down their arms. Ignoring of flags of truce is prohibited indirectly under the shari'a for treachery. The issues of deportation, protection of religious and cultural places, the prohibition against mutilation, the prohibition

279 Article 8(2)(a)(iv) of the Rome Statute; See text accompanying n 50, 106.
281 Article 8(2)(a)(vi) of the Rome Statute. Recall that djihad (as opposed to ribat) is mandatory on some Muslim males only.
283 Article 8(2)(b)(i) of the Rome Statute. See discussion on dhimmis in Appendix 1.
285 See Protected Categories in Appendix 1.
286 Article 8(2)(b)(iii) of the Rome Statute.
287 Article 8(2)(b)(iv) of the Rome Statute.
288 Article 8(2)(b)(v) of the Rome Statute. See text accompanying n 50, 106.
289 Article 8(2)(b)(vi) of the Rome Statute. See n 74, 110.
290 Article 8(2)(b)(vii) of the Rome Statute. See n 50, 106.
291 Article 8(2)(b)(viii) of the Rome Statute. See 4 'Those who expel people from their homes', 120.
against treachery, mercilessness, wanton destruction of property, co-opting
people and pillaging are according to this analysis also generally
prohibited under the shari’a.294 Intentionally killing by fire and other means
that cause pain to sentient beings,295 humiliating or dishonouring the
dignity of a human person, sexual misconduct296 or depriving ordinary
people of food or water297 are all prohibited298 in theory under SHL but not
often honoured by Muslims in practice.

The prohibitions of Articles 8(2)(c), 8(2)(d), and 8(2)(e), dealing with
non-international conflicts are encompassed by the shari’a as discussed
above with the caveat that the shari’a does not distinguish between
international and non-international conflicts and therefore does not require
separate criminalisation. As noted the Rome Statute, prohibitions appear in
cases to be narrower than their shari’a equivalents. Initially the broader IHL
interpretations could apply in preference to the shari’a interpretation in
order not to disadvantage Muslim defendants. Muslims should however be
given the option of electing to follow the stricter shari’a interpretation, as
many Islamists purport to hold shari’a values supreme and should not
therefore be denied that opportunity to adhere to their subjective faith
positions.

Conclusion: Martyrdom and self-annihilation in armed conflict
It is reasonable that the public in U.S./Coalition States may not appreciate
important shari’a distinctions. What is less reasonable is that the U.S. and
Coalition military, strategic policy and intelligence authorities should not
make and understand the import of these distinctions or properly analyse
the key issues particularly with the huge resources available. Failing to
recognise the difference between sophisticated attacks that require a great
deal planning and consideration and concentrating on significant military
targets (as compared with kamikaze ‘cannon fodder’ that opportunistically

293 Article 8(2)(b)(x) of the Rome Statute. See n 102, 211.
294 Article 8(2)(b)(xi) to Article 8(2)(b)(xvi) of the Rome Statute.
295 Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-
Bukhari vol 1 (1976), 398; Muhammad Al-Mughirah al-Bukhari, The Translations of
the Meaning of Sahih al-Bukhari vol 3 (1976), 323.
296 Qur’an 4:15 and Qur’an 24:4
297 See Karbala example at text accompanying ‘of access to drinking water ’,233
298 Article 8(2)(b)(xvii) to Article 8(2)(b)(xxvi) of the Rome Statute.
perpetrate type 2 kamikaze attacks the softest civilian targets,²⁹⁹ sometimes purely for political or economic gain or even surprise attacks in London or Madrid,³⁰⁰) is according to this analysis, a significant contributing factor in the continued high levels of violence. In fact, in the past decade the levels of violence have increased and the number of U.S. military deaths in Iraq alone have surpassed the total number of ‘terror’-related deaths on 9/11, the event that precipitated the war on terror. Recall that in al-Qa’eda’s view it is not freedom or American lives that the US Government pursues but the financial interests of the rich and powerful military-industrial complex (hence the targeting of the WTC). As in the fable of Hamelin, in the first instance it is not so much the Pied Piper, but the one who pays the Pied Piper who calls the tune. A result of the West’s strategic errors is that in spite of its brutality, al-Qa’eda is still viewed by Muslims (and even other poor oppressed people in lesser developed countries) as a very imperfect ‘David’ fighting for survival against a bungling, corrupt, decadent and inept, yet mysteriously and incredibly powerful, ‘Goliath’.

Emerging Muslim consensus around most kamikaze operations, although not yet unanimous,³⁰¹ is largely negative.³⁰² On the other hand

²⁹⁹ All kamikaze attacks are characterised simply as suicide attacks with little effort to distinguish the attacks on synagogues, churches, mosques or other places of worship, market places or schools as compared with attacks on military targets in the so called ‘Green Zone’ in Baghdad or against the Pakistani military. This blurring creates a lack of clarity among Muslims as well as the Western public, with the arguably intended effect of each side assuming that ‘their’ side acted morally/lawfully (or at least not immorally/unlawfully) and that the outcome of a particular attack was, although unfortunate, perhaps one that was the best that one could expect in the circumstances. While, the Western public is, it appears more trusting of its military and executive ‘spin’, because the Western institutions have followed up the actions of politicians much more closely than have al-Qa’eda’s actions have been examined by Muslim (and other) institutions. Therefore, paradoxically, Muslims appear to remain suspicious of al-Qa’eda’s actions and motives.

³⁰⁰ As noted however, these attacks are likely to be legitimate under IHL, as both Madrid and London can be compared analogously with the example of the attacks on Beirut referred to by Dinstein, and as being much more militarily integrated ‘as a city’. While Dinstein did not distinguish specific targets such as highways, power facilities etc all of which have ‘dual use’ purposes and the British and Spanish rail networks are analogous in that they are also used by the military. See n 283,162.


against kamikaze attacks, and particularly against attacks on predominantly civilian targets, including Qur’anically-prohibited targets, are widespread in the Muslim world and there is an emerging consensus against such attacks. This crystallising consensus must mean that deliberate self-annihilation coupled with the use of fire to cause one’s own death, is also problematic at best but unlawful in the vast majority of cases. At this stage generally, irrespective of whether or not other lives are placed in jeopardy, taking one’s own life appears to be viewed as unlawful, thus making kamikaze operations prima facie, ultra vires.\textsuperscript{303} The blanket and unqualified shari’a prohibition on suicide means that the onus of proof rests with those who assert otherwise.

There appears to be an emerging consensus therefore that type 2 kamikaze attacks are definitely unlawful, although the absence of a formal distinction in a clearly articulated form of words makes formally separating the elements of type 1 kamikaze attacks difficult for many people. On the other hand, type 2 kamikaze attacks are reported in the Western press and cited by Western leaders for most part in a very responsible and in a principled manner, identifying only the small minority as ‘terrorists’ and with a careful emphasis that the terrorists are not representative of Muslims in general and that terrorism is not sanctioned by Islam.

The question whether kamikaze operations against military forces which are disproportionately superior is ‘lawful for necessity’ remains unsettled but the door appears open. The proposition that a leader can order a soldier to go into battle that is most likely to result in his death is un-contentious under the shari’a as it is under IHL. This is still probably the case under the shari’a even where the soldier’s death is certain. The specific

\textsuperscript{303} In contrast to the probable legality of attacks on purely military targets, for example the kamikaze attacks on 23 October 1983 by two Shi’i Muslims, aimed at purely (the French/the US) military facilities in West Beirut in the Lebanon: Jamal Sankari, Fadlallah: The Making of a Radical Shi’ite Leader (2005), 205. Moreover, the drivers of the vehicles involved in the attack were ‘blessed’ by Ayatollah Fadlallah prior to the attack: Bernard K Freamon, ‘Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History’ (2003) 27 Fordham International Law Journal 299, 355. and justified the attacks based on \textit{ra’y}’s (reason and not on a textual basis, (at 361) but is only valid if directed towards military adversaries (at 364). Ayatollah Fadlallah’s view is that armed aggression against civilians in peacetime or at least not formal hostilities/war, is forbidden: Jamal Sankari, Fadlallah: The Making of a Radical Shi’ite Leader (2005), 273.
question is whether the imam has the legal authority to order the self-sacrifice the life of a soldier, which s/he is expect to obey. Alternatively, the question is whether militarily disadvantaged Muslims will be forced to commit the greater wrong of taking innocent lives with inaccurate but nonetheless devastating weapons, in defending themselves. For these reasons therefore, can in its stead, for dire necessity, the imam order a soldier (but perhaps not a volunteer for the still-open issue of suicide) to carry out the 'less harmful' means of using type 1 kamikaze attack against a specific military target of a much superior army, in order inter alia to eliminate or minimise non-military injury?304

On the other hand, there is no consensus yet that type 1 kamikaze attacks are lawful, but here is some consensus crystallising, although a rule cannot be expressed with any degree of clarity. What is presented in this thesis with respect to distinguishing types 1 and 2 kamikaze attacks is a first-cut attempt, mainly based on the Fadlallah test (perhaps amended to include a subjective element as per the Ibn Rushd test) but still subject to refinement. Even if this is not correct, then there is likely to be at least some tolerance in extenuating circumstances for use by Muslims of type 1 kamikaze attacks against the military targets of a very strong adversary, a definition very narrowly construed.

Conflating the two types of kamikaze attack is clearly done for pragmatic reasons. Nonetheless this lack of precision with respect to the analysis of kamikaze attacks has helped the protagonists. The symbiotic relationship has enabled al-Qa'eda to silence (and to depict) critical Muslims as Western collaborators, while the West simultaneously is able to label genuine freedom fighters as terrorists.

The shari'a sometimes puts Muslims at a military disadvantage with respect to offence because of its moral constraints, but note that this is the intent of the shari'a! That is, that Muslims will not undertake such missions

304 Muslims fighting at night who accidentally kill a woman or a child (who is a non-combatant) or even if he kills a Muslim (on his own side) is not culpable, if there was not intent to disobey God: Abu'l Hussain Muslim, _Al Jami'us Sahih_ vol 3 (1972), 946. While the Prophetic hadith may establish a narrow principle that one is not culpable for accidental killing, the question is whether this principle, and barring dire necessity, can be extended to cover for example, the dropping of large bombs on targets which one is almost certain will result in non-combatant casualties?
lightly and if they do, to do so with as little cost as possible to human life generally. The reason why *djihad* (as opposed to *ribat*, defence) ceases to become individually binding on a Muslim male when the army reaches half the opponent's army is clearly to make the Muslims think very carefully about fighting and to exhaust all other possibilities before they embark on a mission that will spill sacred blood. The *fundamental* difference between the use of force under the *shari'a* and under IHL is that in SHL human blood is deemed sacred by an Almighty Creator.

At a more mundane level however, as a starting point, and in fairness to Muslims, all contemporary means of fighting that are not prohibited under IHL should also be available to Muslims. The *quid pro quo* is that these prohibitions must apply to Islamists in the eyes of Muslims, and no derogation is ordinarily permitted. Muslims can make a broader practical contribution to the development of IHL. First however, Muslims can begin by curbing their own excesses, of those who would kill with non-Muslim weapons, under non-Muslim norms, and under non-Muslim law, still have the *chutzpah* to call themselves 'Islamist', to do so with the collusion of both Muslims and non-Muslims in power, but do so at the cost of many innocent lives they are being allowed to get away with this blatant lie.

What Muslim political leaders particularly, should learn in general (with pressure applied by the international community if necessary to spur on progress), is that subjecting their people to conditions resulting in high levels of desperation through oppressive and dictatorial rule is counterproductive for their own societies, 'pushing' the susceptible

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towards extremism with its attendant consequences. Providing Muslims with an education that incorporates a traditional Islamic component focusing on acquiring the knowledge of ‘doing good to humanity’ is a strong tool against extremism of all forms, be it cruel and vicious use of force on one hand or mindless consumerism on the other. A current example is how Indonesia has used aid monies from Australia (and with Australian blessings) to help build pesentaran or religious schools for the poor in that country, a strategically insightful programme that is reducing violence in Indonesia, promoting peace, increasing individual freedom and a precedent that other aid donor nations would do well to emulate.

**General Conclusion on armed *djihad***

An armed *djihad* is the only lawful use of force permitted under the *shari’a*. The *shari’a* further limits the means that may be used and the class of people that may legitimately be slain during an armed conflict. Protected classes are quite explicit. The means of permitted force are also explicit. However, Islamic law has not kept pace with contemporary weapons as they have been developed and therefore has lagged behind. Limiting weapons that may be employed only to those that are clearly lawful under the *shari’a* will leave Muslims greatly disadvantaged in a military sense. This is because ‘new’ weapons (developed in secrecy by nation States, and unless they fall into a category of weapon previously banned by treaty or custom), are generally presumed to lawful. SHL however, in its strict sense requires a weapon to be declared lawful before it may be used in attack.

Some difficult issues discussed have included identifying legal mechanisms that will help lawfully to broaden SHL-permitted weapons and means of fighting while simultaneously lawfully ‘limiting of the scope’ of the notion of ‘protected persons’ to allow for the inevitable collateral

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306 After the deposition of pro-Western Tunisian dictator, Ben Ali, in January 2011, the following graffiti appeared on an Arabic website ‘Every Arab government is watching Tunis in fear and every Arab is watching Tunis in hope’.

307 According to Javad Nurbakhsh, *Traditions of the Prophet* (1981), 87: The Prophet said ‘the best people are those who are most useful to others’.
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dearth caused by modern weaponry. This expansion is achieveable through the application of legal necessity, proportionality or reciprocity, but, given the gravity of the consequences for civilians, should be done very cautiously.

From a political perspective, what al-Qa'eda appears to have done in practice is to mirror the worst military practices. Islamists have also conflated permissive means of warfare with a broad interpretation of what constitutes armed *d* āh *j* āh *d* āh and have attempted to elevate armed *d* āh *j* āh itself to a 'religious position' unprecedented in Islamic history. Al-Qa'eda have also understood the imperatives of Western press cycles and exploited them in a manner that appears to have given the organisation a position of importance in global consciousness not commensurate with its true power. It has also largely escaped legal scrutiny under the *shari'a*, or has silenced its critics, mainly through its use of the Western media but also cleverly including the Arab press when it suits. Al-Qa'eda appears to have hit upon a political strategy for gaining recognition, and one that it has executed in a manner that has led it to these stratospheric levels of 'success', well beyond what one would reasonably expect for a group with its resources and support.

From a legal perspective however, on one hand the Qur'anic permission for the use of force is clearly reactive and defensive. On the other hand, SHL goes further to require Muslims to come to the aid of a group that is wronged and subsequently requests Muslim help as against an oppressor. In this narrow aspect, SHL is similar to the aspirational aim of collective security under the Charter (or for Muslims under the Qur'an), through a prohibition on the first use of force but countered with the threat of collective action against an aggressor.

At the other extreme, some contemporary Muslims, particularly those living in the West, instrumentally portray *d* āh *j* āh as purely defensive and while, no doubt, this 'narrow' definition falls within the broad spectrum of views on *d* āh *j* āh in the jurisprudence, it is not an accurate reflection of its true scope. This disingenuously limited definition however,

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also conveniently falls within what the contemporary international community 'wants to hear' of Muslims and what some Muslims would like to portray as *djihad* in order to avoid having to challenge or explain the genuine grievances and claims of Islamists. The foregoing analysis however does not support the pragmatic position of the armed *jihad* as limited to being purely 'defensive'.

This analysis of armed *djihad* could reasonably be classified as concentrating on a meaning closer to a 'pacific' approach, in that it favours a legal approach to solving longstanding conflicts by creating opportunities for 'dialogue' in a legal forum, albeit, unfortunately, sometimes in the post-conflict situation. Once a body of law is established and accepted by the majority, the need for violence is likely to be reduced for the availability of alternative remedies in the jurisprudence. It is proposed that this is not an unreasonable position as the underlying problems leading to the use of force in the Muslim world are, in the main, related to a search for justice.

There is also the phenomenon of the 'rebel without a cause', spoiling for a fight — young men attracted to war and adventure who appropriate the injustice of the some to satisfy their desire for a fight and whose presence in the equation makes for violence. The availability of legal options is also therefore likely to dissuade and prevent such young people from joining the fray. On the other hand, rich Muslim nations have failed dismally in this aspect by 'exporting' their 'young' to create trouble in other peoples' lands, a process that must be curbed and reversed.

The better solution with respect to SHL as argued here is not that Muslims simply accept IHL standards, thus legitimising their own bloodshed or blood spilt in their name, but in addition to prosecuting Islamists as proposed in chapter 7, to ensure broad equity by also agitating

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309 For those who are sceptical of the *shari'a*’s power to resolve conflict a clear contemporary example is that of the present conflict between *Shi’ite* Muslims around Basra (Iraq). While the American backed regime pursues the ‘military solution’ which has failed thus far with loss of a large number of lives, Moktada al-Sadr, the leader of the Mahdi Army, has suggested that the two parties put their case to Grand Ayatollah Sistani, an eminent jurist and scholar, and to accept his decision as binding:
for the prosecution of Coalition leaders involved in the war and who have prima facie breached IHL or ICL provisions. For political reasons, the leaders of the P5 should be not pursued in the first instance, and for now Muslims should settle for the less important leaders such as those of middle powers, who could be tried where there is sufficient admissible evidence.

A broader intent of this thesis is to promote and encourage the development of less permissive norms overall and one way of doing this is to expand the scope of the sources of IHL. Muslims can rightly be condemned for their ignorance of ‘their own laws’. The practicality however is that illiteracy is very high in many Muslim societies and the little information they glean is arguably from the Western electronic media, which as discussed portrays bin Laden and al-Qa’eda as Islamist and fighting a dhijahad, words that have particularly positive connotations, despite Muslim’s deep misgivings as to the lawfulness of Islamist actions. If people like Terry Jones in Florida and Geert Wilders in The Netherlands, members of two very literate, generous, tolerant and open societies can find minority support for their own often prejudiced Islamophobic views, support at levels perhaps not dissimilar to that which al-Qa’eda enjoys in the Muslim world, then it is clearly time to examine better alternate strategies to help combat the hate on all sides. Education and the application of the rule of law (under a secular system or the shari’ā, depending on popular preference) will in the view of this thesis be a medium to long-term solution to the problem of Islamist violence.

On the weapons front, the nature and potency of weapons of warfare have evolved markedly. Muslim jurists must urgently develop the laws of war to balance the competing military interests against the needs of the broader community (the oppressed and the Islamists, among others), while remaining faithful to the object and purpose of armed dhijahad within the classical and traditional meanings of the terms, as far as practical and fair. The West should not fear this trend as Islam draws its criminal law

from the Ten Commandments and what is sometimes described as the
Judeo-Christian but perhaps more accurately the Abrahamic tradition
which binds Muslims. The west not doing so risks alienating norms a large
part of the Muslim community, who may rightly or wrongly feel
themselves subjected to a form of legal hegemony by laws based on other
than Muslim sources, notwithstanding the fact that their inability to apply
their own laws stems from their own failures.

Such a expansion of law however, may reasonably be viewed with
some concern by the Chinese, with a different take on the ‘rule of law’,\textsuperscript{310} or
the Japanese, Indian and other living traditions of law such as the Native
American and Native Australian legal traditions, which will likely feel even
more alienated in an international legal framework with is emphasis on
values solely derived from the Abrahamic traditions. This is a perception
that must be handled with some sensitivity and with due regard to the
intrinsic value of these civilisations, which should be accommodated some
day, but nonetheless is a matter outside the scope of this work.

The antagonists of Islam sometimes give the impression of
deliberately misquoting, or it may be that they simply misunderstand, the
basic concepts of the religion, including issues of law and leadership. The
task of confronting these criticisms is often left to individuals. It would be
preferable if \textit{shari'a} scholars were to take up this challenge, not only within
the narrow confines of their own religious culture, but, of greater value, by
capturing the \textit{morés} of the wider Muslim community using the
opportunities provided by the institutional and political framework
existing in contemporary Western secular democracies.

The present Muslim \textit{umma} is quite unlikely to accept, and in the
majority have rejected, the leadership of self-styled \textit{Salafi} Islamists.
Muslims are hesitant to recognise an imam, absent the outstanding
Qur'anic qualities they expect in a leader, and even if they do, arguably it
will be well near impossible to get non-Muslims to recognise a Muslim

\textsuperscript{310} A discussion of Confucianism and its deference to age and authority are outside
the scope of this paper. However, the Chinese commitment to filial piety and
personal relationships over an ‘objective law’ is arguably reflected in the Chinese
Proverb that states with respect to justice that : Heaven is to high and Beijing too
far away’
leader (who will fearlessly, but fairly, honourably and legitimately fight
injustice everywhere and does so with genuine power and authority)
unless such a Muslim leader also possesses such overwhelming power,
authority and military capacity that makes it impossible for the rest of the
world not to do so.311 This is the long awaited Mahdi.312

It is the aspiration of many of the Islamist leadership to be
recognised as, if not quite the Mahdi, then as ‘pious’ individuals in the
meaning of the shari’a, as is indicated by their universal appeals and
references to an umma, the shari’a, to Islamic values and concepts,313 but
often doing so in ways formulated to suit their instrumental needs rather
than the constraints of law and methodology. In this respect and
notwithstanding, his own ‘elegant piety’314 the cruel company he keeps, the
cruelty he refuses to condemn and with his political capital all but spent,
bin Laden is prevented from being recognised as the long-awaited global
leader by the majority of Muslims. Many leaders, Muslim and non-Muslim
alike, have rhetorically invoked higher ideals to mask their base motives.
Their cruel violence, however, belies the emotional appeals.

On the other hand the level of Muslim ‘rage’ is unlikely to abate
while the systemic injustices remain. Muslim ‘rage’ is exploited by Muslim
States, Islamists and the West, each for its own instrumental purposes, and
in cases in an unprincipled, if not unlawful manner. For Muslims on the
other hand, it is time perhaps to ask if the fault lies not in their stars but in
themselves: That it is they who must lift up their own societies out of
poverty and ignorance.

311 In reality a just Imam would in effect act in a manner not greatly different to that
what the US currently says is its real aim with respect to geopolitics and that is to
promote freedom. The key theoretical difference between the USA and with the
aforesaid Muslim leader is that the USA aims to create an environment of
‘freedom’ while the Muslim leader aims to create an environment where an
individual can exercise his or her freewill.
313 Yaroslav Trofimov, The Siege of Mecca: The Forgotten Uprising in Islam’s Holiest
314 Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden
(2005), xvii; See also Sally Neighbour, In the Shadow of Swords: On the Trail of
Terrorism from Afghanistan to Australia (2004), 49.
There is a view however, that is the USA ‘who helped set up bin Laden in the path he follows today’. The US has paid a price for its lack of strategic foresight, although in fairness to the USA, it was difficult reasonably to foresee the merger of al-Qaeda with brutal Egyptian Islamists, until after they murdered Abdullah Azam. A tentative step towards rectifying these strategic errors will be for the West to combine its diplomatic support, together with diplomatic pressure on States, to expose and critique the oppressive conduct which spawns this violence, violent leaders and mindlessly ‘pious’ followers. It is posited that the better long-term strategy is to promote ‘rule-of-law’ regimes, while not being prescriptive as to what constitutes ‘law’.

While the London bombing was tragic with a loss of 52 bystanders the equivalent of one or more ‘London’ type bombings occur in Muslim States quite regularly, with none of the economic, psychological or emotional support provided to victims or their families. Yet the occupying forces in the many Muslim lands bear ultimate responsibility for the events that transpire in the territory under their occupation. However, as the colonial powers left the third world in a mess behind them, this new occupation can be expected to do the same when the occupiers eventually tire of their charges. ‘Islamist leaders’ are preparing to take over as the West inevitably leaves these lands. From a shari'a standpoint, many of these Islamists are utterly unfit to govern and the importance of shari'a education, which will help Muslims sort out the wheat from the chaff and which can be achieved through the existing infrastructure, is therefore quite urgent.

315 Douglas H. Fischer, ‘Human Shields, Homicides, And House Fires: How A Domestic Law Analogy Can Guide International Law Regarding Human Shield Tactics In Armed Conflict’ (2007) 57 American University Law Review 479. Further the West continued to support the mujahideen in Afghanistan against the Soviets even though the fighters were encouraged by speeches such as ‘terrorism is a gift’ : Brynjar Lia, Architect of Global Jihad: The Life of al-Qaida Strategist Abu Mus’ab al-Suri (2007), 82.

316 While al-Qaeda under bin Laden’s predecessor, Abdullah Azam (d.24 November 1989) leader of Maktab al-Khidamat (as it was then known) was a formidable fighting force there was never use of suicide bombers or intentional targeting of civilians. While bin Laden was close to Azam and his hard fighting but ‘military’ only type targeting, and certainly not targeting civilians or Muslims. Bin Laden was unable to control al-Qaeda’s move to a bloodier path, it is alleged supported by the CIA and the West: Abdul Bari Atwan, The Secret History of al-Qaeda (2006), 73.
and vital, particularly in order to reduce current problems and prevent them from projecting their violence into the future.

The Qur'an foresees these vicissitudes and urges Muslims to acquire great human capacity but mandates that military (and other) power must be used fairly, justly and wisely. The acquisition of both technological and military superiority requires a phenomenal degree of human effort and commitment which, for a multitude of reasons, is lacking in Muslim-majority societies but perhaps less so among Muslim minorities. In helping these societies overcome their ‘backwardness’, their societies must be equipped with both educational institutions and freedom of enquiry to allow individuals to flourish, preconditions that are at present arguably largely absent in most of the Muslim world, mainly for the stiflingly oppressive and brutal regimes who kowtow to the West, do their dirty work such as torture when required and thus buy the West’s acquiescence. This is an area that is need of desperate attention.

Freedom of enquiry, however, is arguably also a necessary a precondition for both the development of the law and for rule-of-law societies. Muslims in Western nations enjoy these freedoms and could utilise their positions to promote rule of law in the lands of their co-religionists as well. On the other hand, the shari‘a strictly prohibits perfidy and treachery and minority Muslims must be vigilant against exploitation by Islamist groups of the positions of trust they enjoy within their communities. These are some of the broad-brush prerequisites for the development of the shari‘a within the maqasid or the spirit of the Qur’an. This is the methodology of how Islam was introduced into both Meccan and Medinan societies by the Prophet and can be summed up for the leaders as ‘practice what you preach’, particularly with respect to justice and freedom from oppression.

Fighting generally, at a higher level of abstraction, is premised on the ability of leaders to convince soldiers, often the poor, to fight an ‘enemy’, however characterised, and to lay down his life for his cause, however characterised. These are hurdles that every leader whether it is Obama or Hu, Che Guevara or bin Laden must successfully negotiate; the
rhetoric, ideology and weapons at their disposal may differ, but the basic aim is the same: to convince a person to kill and be killed in the name of 'something'. This 'something' is sold to the potential soldier as the 'greater good', however characterised, and that 'success', the elusive, illusory 'prize', will follow. Success from the perspective of the leader rallying his troops however, is ultimately the largely the undeliverable goals of glory, wealth, paradise or nirvana.

In Islam, a Muslim is told repeatedly that it is not the leader but God alone who grants success. On the other hand, in the Muslim view, the gullible soldier, the unjust and the cruel leader will all nonetheless pay the ultimate price of God’s displeasure and damnation. This is the subjective choice that confronts the Muslim and this motivating force is a key to reducing the present carnage. It must therefore be highlighted in the interest of international peace and security which is perhaps better viewed as human security for all.
CHAPTER 5

ESTABLISHING THE TYRANNY OF A PIous PRINCE: ARMED CONFLICT OTHER THAN DIIHAD

The Prophet said 'many will spill blood in this umma, all of them seeking the pleasure of God, and none of them finds it.'

Types of Armed Conflict Recognised in the Shari’a
In addition to armed djiihad, the shari’a also recognises but does not legitimise some other types of conflict (which may involve the use, or threat of the use, of armed force) discussed in this chapter. Having defined the scope of djiihad in some detail and with a degree of precision in the previous chapter, it is now useful to identify armed action which prima facie does not constitute djiihad. IHL does not make a ‘just war’ distinction, only whether a conflict is lawful or otherwise. Further, under IHL the lawful use of force is generally reserved for States only. Under the shari’a, if a ‘war’ cannot be characterised as an armed djiihad (and therefore ipso facto lawful and just) a ‘war’ is presumed to be unlawful and unjust.

On the other hand those suffering oppression must not be prevented from using armed force that helps them to preserve their faith and dignity, even if the use of force itself was classed ‘unlawful’, as long as the means used in armed conflict are legitimate. However, when Muslims

1 “Justice without religion (Islam) is better for the order of the universe than the tyranny of a pious prince”: David Pendlebury, ‘The Baharistan of Jami — The Abode of Spring’ (1980) 185, 199.
2 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 46.
3 It appears that, in the main, much of this oppression is within Muslim majority States: Taha Jabir al-Alwani, Ijihad (1993), 29.
4 Although the Western public’s sensibilities are not any more an objective or informed guide as compared with any other public, once atrocities have surfaced as they did with torture issues, Guantánamo Bay and mal-treatment of people at Abu Ghraib, Bagram and other prisons, the Western public has been able to exert political pressure and thus engender some political change. On the other hand, the free Western press in the main – and arguably for commercial purposes rather than
are seeking legitimisation under the *shari'a*, what they must demonstrate is
that the legal reasoning used to legitimise their actions was rigorous and
fell within *shari'a* methodology.

Armed conflict under the *shari'a* is generally distinguished by the
religious status of the combatants.\(^5\) For example — and while none of these
categories is definitive or invariable — in addition to (and therefore prima
facie not) armed *djihad*, the *shari'a* broadly recognises armed action that
may constitute (1) war (*harb*), (2) aggression ('*udawvan*), (3) anarchy or chaos
(*fitna*), (4) rebellion (*baghi*), and (5) banditry (*hiraha*). These categories are
now briefly examined in turn.

**1 War**

The word *harb* (حرب) appears four times in the Qur'an.\(^6\) Three of these
references deal with situations of war in the meaning of armed conflict and
in general refers to a war situation in which fighting is in train.\(^7\) Once, in a
different context, it refers to people dealing in usury, or rapacious interest,
which was levied on capital.\(^8\)

There is a general prohibition on war in Islamic law.\(^9\) The exception
to the prohibition against ‘war’ is armed *djihad*.\(^10\) The *shari'a* prohibitions on
war also, generally extend to wars between or among Muslims.\(^11\) On the
other hand, and against these prohibitions, history attests to the fact that
there have been several internecine armed conflicts, often called *djihad* by


\(^6\) Qur'an 2:279; Qur'an 5:64; Qur'an 8:57; Qur'an 47:4.

\(^7\) Qur'an 5:64 [God will extinguish the fires of war]; Qur'an 8:57 [Strength that will deter war]; Qur'an 47:4 [Smiting the necks of the disbelievers in war].

\(^8\) Qur'an 2:279. According to Muhammad Asad, *The Message of the Qur'an: Translated and Explained* (1984), 120. ‘God and the Prophet declare war on those refusing to give up demands for interest on their capital (riba').’


\(^11\) The exception as mentioned previously is when Muslims transgress 'beyond all bounds': Khaled Abou El-Fadl, *Rebellion & Violence in Islamic Law* (2001), 37.
the protagonists to gain legitimacy, from the very early Islamic period. Recognising this reality, jurists named armed conflict against non-Muslims as *harb al-kuffar*, and armed conflict between Muslims as *harb al-bugha*, and both types are distinguished from the command for *djihad*. Characterising an armed conflict as a ‘war’ (or rebellion), and importantly, without depriving fighters of legitimacy or IHL rights under international law, would preclude the exploitation of religious epithets such as martyrdom under the *shari’a*, thus avoiding some of the problems associated with such characterisation.

2 Aggression

The word ‘*aduw* (عدو) means (enemy) aggression (*uduwan* عدوان). The word aggression in its various grammatical constructs occurs several times in the Qur'an. However, the Qur'an not only prohibits aggression, but also prevents Muslims from co-operating with any form of aggression, even if the issue at stake is as fundamental as access to the *Ka'aba* during

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12 Imam Ali ibn Abu Talib, *Nahjul Balagha: Peak of Eloquence* (1986), 53. refers to the 'Battle of the Camel' one of the earliest rebellions involving the fourth orthodox caliph fighting against A'isha bint Abu Bakr, a widow of the Prophet.


15 The subject of the verb occurs in the Qur'an as the aggressor (معرِض) Qur'an 50:25: Qur'an 68:12: Qur'an 83:12. The aggressor [the word as the subject] i.e. the actor *marfuú* (مَفْريع) *mu'athdaan* appears in Qur'an 9:10. The word occurs in the accusative (the object) in the form *mu'tadeen* Qur'an 2:190: Qur'an 5:87: Qur'an 6:119: Qur'an 7:55: Qur'an 10:74. The meaning 'aggression' occurs twenty five times as (satan as an enemy) in the form ‘*aduw* (عدو). The word occurs once as God acting aggressively towards those who cover the truth (or act with aggression towards the Archangels Gabriel and Michael) for example Qur'an 2:98 in the form ‘*aduwun* (عدو).

16 Qur'an 2:190 (emphasis added):

Fight in the cause of God those who fight you but do not transgress

limits, for God loveth not transgressors;

and Qur'an 2:193:

And fight them on until there is no more tumult or oppression and
there prevail justice and faith in God; but if they cease let there be no
hostility except to those who practice oppression.

17 Qur'an 2:215. *Ka'aba* or *Ca'aba* (الكعبة cube) is the central, cubic, stone structure, covered by a black cloth, within the Great Mosque in Mecca, Saudi Arabia. The sacred nature of the site predates Islam: tradition says that the *Ka'aba* was built by Adam and rebuilt by Abraham and the descendants of Noah. Also known as the House of God, it is the centre of the circumambulations performed during the hajj. Muslims face the *Ka'aba* in their prayers. The *Ka'aba*, also known as the (البيت الحرام) 'The Sacred House', is located inside the mosque known as al-Masjid al-Haram in Mecca. The mosque was built around the original *Ka'aba*. The *Ka'aba* is the holiest
the pilgrimage season. A *fortiori* Muslims should never cooperate with aggression (or oppression) or the aggressor (or the oppressor).

A *hadith qudsi* states ‘O My servants, I have forbidden oppression for Myself and have made it forbidden amongst you, so do not oppress one another.’ The Prophet said further (alluding to the severe punishment in the Hereafter for a crime that prevents a human being from exercising free-will, and the Muslim’s duty to save another from this fate): Help your brother, whether he is an oppressor or he is an oppressed one. People asked, ‘O God’s Apostle! It is all right to help him if he is oppressed, but how should we help him if he is an oppressor?’ The Prophet said, ‘By preventing him from oppressing others.’

Further, in answer to a series of specific questions relating to how an excellent Muslim should behave towards another, the Prophet said ‘One who safeguards a Muslim against (the aggression of) his tongue, and hand.’ The theological and legal basis for the obligation to prevent oppression is that one cannot (exclusively) ‘serve two masters’. The Muslim Covenant requires a Muslim to serve God alone. There was no distinction made by the Prophet between the application of this principle to an individual, a group or the ruler (read here as ‘the State’ in its contemporary context). As oppression goes to the heart of a person’s ability to exercise...
free-will, it is argued here that the broadest interpretation of preventing ‘oppression’ or ‘aggression’ is both valid and justifiable under the shari‘a.

Aggression is also prohibited under international law. Further, it appears settled that aggression, by both States and non-State actors, is prohibited. The purposes of the UN provide that, once the Security Council (UNSC) determines the existence of an act of aggression (the content of which is discussed below), requires suppressing such aggression, and to this end Chapter VII of the Charter authorises the UNSC to take necessary action. This action can involve the use of force, military forces which States shall make available and shall provide when required. The determination by the UNSC of the existence of an act of aggression is assisted by the General Assembly’s (UNGA) adoption of a definition of aggression (‘UNGA definition’), which arguably provides some normative guidance as to the meaning and scope of aggression in international law. Sloane observes that UNGA resolutions may satisfy States’ subjective element (opinio juris) of customary law. Further, Harris approves Sloan’s view that the binding status of UNGA Resolutions in international law is ‘unresolved’. Therefore, and although perhaps in theory UNGA Resolutions are non-binding, in the Nicaragua case the ICJ acknowledged the customary nature of aspects of the UNGA definition of

25 Article 2(4) UN Charter; Article 39 UN Charter; Article 51 UN Charter; Article 1 Definition of Aggression, United Nations General Assembly, 14 December 1974, and Article 2(a) where first use of force shall constitute prima facie evidence of aggression. In 2010, the Review Conference recommended the adoption of the crime of aggression but is yet to come into force.
27 Article 39 UN Charter.
28 Article 1 UN Charter.
29 Article 42 UN Charter.
30 Article 43 UN Charter.
31 Article 25 UN Charter.
32 Definition of Aggression, United Nations General Assembly, 14 December 1974,
34 J D Harris, Cases and Materials on International Law (5th ed, 1998), 58. It is noted however, that J D Harris, Cases and Materials on International Law (6th ed, 2004), appears to be silent on this issue.
aggression. On the international plane, the ICC has jurisdiction over the crime of aggression. While it is yet to exercise this jurisdiction, a definition broadly similar to the UNGA definition is likely to be adopted as Article 5(2) of the Statute of the ICC but is not yet in force.

Sloane cites various sources generally to show that UNGA Resolutions tend to anticipate the 'hard' law of tomorrow. This may well be the position with respect to the crime of aggression over the next decade. However, the criminalisation of acts of the vast majority of States' even 'questionable' acts is not very likely in the contemporary regime, unless they become party to a binding instrument that criminalises that behaviour. Dinstein importantly notes in this regard that 'not every act of aggression constitutes a crime against peace, only a war of aggression does'. Armed djihad however by its nature and by definition is not compatible with aggression. Properly characterised therefore, a definition which recognises the 'non-aggressive' nature of armed djihad will help and provide an incentive for Muslims to force Islamists away from (for most part) their current path of mindless violence.

However, notwithstanding the broad tolerance of the use of 'defensive' force by States under IHL, and perhaps because even these 'generous' limits are overstepped from time to time (particularly, but not exclusively, by the powerful States) the use of such force by States — while arguably not likely to be declared criminal, fortunately — still is nonetheless not uncontroversial. The examination of the use of such force by States remains outside the scope of this paper but is clearly one of great importance. Even States not party to the Rome Statute arguably are bound

37 Article 5(1)(d) Statute of the ICC.
38 Article 5(2) Statute of the ICC.
40 Blaine Sloan, ‘General Assembly Resolutions Revisited (Forty Years Later)’ (1988) 58 British Yearbook of International Law 37, 108.
41 Santiago Villalpando, L'emergence de la communaute internationale dans la responsabilité des Etats (2005), 190.
43 See 2 Aggression, 269.
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by Common Article 3 to the Geneva Conventions, under customary law, with respect to their conduct in 'the case of armed conflict not of an international character occurring in the[ir] territory'. It appears that the use of 'aggressive' force by States within their borders against 'minorities' however characterised, can give rise to counter claims of fighting for 'liberation' or against occupation, apartheid or neo-colonialism, as the case may be, by non-State actors.

Further, it should be made more difficult for States to use law to regulate the behaviour of non-State actors, if States are not themselves constrained to act within the scope of the law. Such instrumental use of law by States arguably sustains a sense of cynicism 'that law favours the strong', particularly among marginalised peoples, in this context thereby predisposing the Muslims to support local resistance groups whether the pacifist Hizb al-Tahrir group globally or armed local groups such as the Taliban in Afghanistan, Hizbullah in the Lebanon, Hamas in the Occupied Territories, al-Shabab in Somalia or the Muqtada al-Sadr group in Iraq, and in some cases for a small group of radicalised youth to go even further and support internationalised armed groups like al-Qa'eda or the WIF.

The prosecution of serious aggression by individuals in domestic jurisdictions finds expression in the criminal laws of States, for example in Australia, as aggravated assault.44 Under the shari'a the prohibition against aggression extends to the acts of each Muslim45 and therefore the shari'a prima facie provides a legal basis for the direct prosecution of individuals for the crime of aggression, including a fortiori, against leaders,46 who order acts of aggression.47 Prosecution of Muslims under the shari'a is not intrinsically limited by (territorial) jurisdictional issues.

The broader problem of formulating a legal definition of aggression with clear fault elements, however, remains unsettled under the shari'a.

45 Qur'an 5:2.
46 See n 21, 270 above.
47 While nothing turns on this for the time being, prosecution of the crime of aggression, when it comes into force, is likely to be limited to leaders, on the international plane. It should not be difficult to prosecute leaders under the shari'a only, as long as it is explicitly stated that the scope of the crime itself remains unaltered under the shari'a.
Nonetheless, what can be asserted with some confidence is that aggression is unlikely ever to be shown to be necessary under the *shari'a* and that those involved in armed attacks on the US embassy in Nairobi or Dar es-Salam (or JI's attacks in Jakarta) prima facie are likely to be characterised as acts of aggression, but where the defendant is given a fair chance of defending. However, as with the ICC Statute, only serious acts of aggression will warrant prosecution at an international level and the proposed *actus rei* of such crimes are quite explicit.48

48 The Kampala Conference agreed by consensus that the following text is inserted after article 8 of the Rome Statute, [emphasis added]:

**Article 8 bis**

**Crime of aggression**

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

2. For the purpose of paragraph 1, "act of aggression" means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

   (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;

   (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

   (c) The blockade of the ports or coasts of a State by the armed forces of another State;

   (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

   (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

   (f) The action of a State in allowing its territory, which it has placed at the
Thus, the basic understanding of an aggressive act by leaders between the ‘secular’ and shari’a systems are not entirely dissimilar,\(^4^9\) and

- disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The *sending by or on behalf of a State* of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

**Crime of aggression**

**Introduction**

1. It is understood that any of the acts referred to in article 8 bis, paragraph 2, qualify as an act of aggression.
2. There is no requirement to prove that the perpetrator has made a legal evaluation as to whether the use of armed force was inconsistent with the Charter of the United Nations.
3. The term “manifest” is an objective qualification.
4. There is no requirement to prove that the perpetrator has made a legal evaluation as to the “manifest” nature of the violation of the Charter of the United Nations.

**Elements**

1. The perpetrator planned, prepared, initiated or executed an act of aggression.
2. The perpetrator was a person [or several persons] in a position effectively to exercise control over or to direct the political or military action of the State which committed the act of aggression.
3. The act of aggression – the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations – was committed.
4. The perpetrator was aware of the factual circumstances that established such a use of armed force was inconsistent with the Charter of the United Nations.
5. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations.
6. The perpetrator was aware of the factual circumstances that established such a manifest violation of the Charter of the United Nations.


Article 1(2) *Definition of Aggression, United Nations General Assembly, 14 December 1974,* ; According to Dinstein, Yoram Dinstein, *War, aggression, and Self-defence* (4th
therefore, the Rome Statute formulation can form a basis to help define an equivalent *shari’a* crime. As it stands, the scope of prohibition against aggression under the *shari’a* appears to be broader than the scope of the prohibition under the UN Charter or customary law, but about the same, as a whole, when domestic laws are included. On the other hand the final definition of aggression in the Rome Statute (when ratified and in force) will in practice only be used to prosecute the most serious, internationally significant cases. A similar regime is also likely to be the case for any prosecutions brought under the *shari’a*, therefore, the finer differences between the two systems are unlikely to be tested or to have a practical effect for prosecutions brought on the international plane.

On the other hand, *Caroline* pre-emption is also permitted under the *shari’a*. Thus, pre-emption by parties against Muslims cannot automatically be equated with *shari’a* aggression. For example, a Muslim litigant seeking to characterise a ‘pre-emptive strike’ against a Muslim party as ‘aggression’, say for the absence of UNSC authority under Chapter VII for such a strike, must separately establish the elements of ‘aggression’ under the *shari’a*, cognisant of the lawfulness under the *shari’a* of reasonable pre-emption.

What must Muslims do when aggression was initiated by Muslims? The Qur’an and *sunna* specify that Muslims should fight the Muslim...
aggressor.\textsuperscript{56} Al-Qa'eda may contest a view that it is the aggressor, pointing to the US occupations in the Middle-East which al-Qa'eda has said is humiliating to Arabs and Muslims, thus legitimising its war against the occupying forces of the USA and the Coalition. This does not appear to be an unreasonable view on principle. The situation however, is essentially an issue of law and fact that must be established. What is recommended in this paper is that the better forum for solving these controversies is legal as opposed to a battlefield.

What must appear clear to Muslims, however, is that despite their entreaties to the Almighty,\textsuperscript{57} the Just God has apparently not restrained the fury of their enemies, presumably because Muslims must share the blame for their present predicament.\textsuperscript{58} On the other hand, the Qur'an reminds Muslims that numerical and military superiority will not be determinative\textsuperscript{59} and warns Muslims against submitting and ‘faint hearted[ly] crying for peace’\textsuperscript{60} against those ‘hindering people from God’s path’.\textsuperscript{61} Muslims therefore have a general duty to restrain aggression by some Muslims, though clearly not when oppressed or fighting a despotic or oppressive regime (but certainly when their means of fighting are ‘indiscriminately killing the righteous and the wicked’ alike, as is the case with al-Qa’eda in many of its operations).\textsuperscript{62} Muslims are also obliged to fight those assisting the oppressive ruler in his oppression, perhaps including the Western States, when they support the oppressor.
However, treatment of the issues by jurists will most likely provide a clearer picture of the relative merits and faults of the contending parties, objectively clarifying the legal position, making it easier for Muslims to identify the wrongdoing party and to assist and support the ‘right’ party as they are obliged. Such clarity will also then in turn help the achievement of the strategic UN goal of an enduring peace with security by isolating the errant party and starving them of the support they need to sustain their wrongdoing. A greater degree of clarity in the law is likely to bringing peace and security, but importantly with dignity and freedom, to their countries.

3.0 Anarchy
*Fitna* (فيتنأ, sometimes translated as tumult and oppression) also means anarchy, killing, torture, confusion, a trial, affliction, hardship, temptation or a good human quality put to test or trial.\(^{63}\) The word *fitna* and its morphological constructs\(^{64}\) occur over thirty times in the Qur’an. *Fitna* is not conducive to free thought and thus to voluntary submission to God’s will, which in Islam is the ‘true’ *raison d’être* of a human being;\(^{65}\) and therefore *fitna must* be eliminated, even at the expense of fighting. The concept of *fitna* represents all that is bad for humanity although God may at times put humanity to trial through *fitna*.\(^{66}\) It is a broad term and as with

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64 For example Qur’an 57:14:
   you caused yourselves to fall into trial.
66 For example, Qur’an 8:28:
   And know that your possessions and your children are a test [...]’

There is also a story mentioned in Qur’an 2:102 where the two angels came to Babylon and taught those who wished to learn an evil magic (*sihr* سیهر) that would create by *fitna*, a means to sow discord between man and wife. However, in teaching the magic, the angels would forewarn the people that the means to this end were indeed a *fitna* and those using this ‘magic’ would be deprived of good in the hereafter, and further that there was no guarantee that the magic would work in every case.

Why would one agree to be deprived of all good in the hereafter (note: a Muslim must believe in the hereafter as a matter of faith), in exchange for coming between a husband and wife, particularly when there is no guarantee (given by the angels) that the ‘magic’ would work anyway? The answer appears to be that these are people with ‘evil intent’, happy to use any chance of causing misery to those whom they do not like. They really do not believe in the hereafter (an important article of faith) therefore, with ‘nothing to lose’ in their reckoning.
concepts such as ‘innovation’ (bid‘a) can sometimes be used instrumentally to ‘shut down’ debate among Muslims.

In a contemporary example of how the term fitna is used to stifle debate, El-Fadl concedes that his work may in some quarters be classed as fitna, (and it is posited reasonably so and that his aim of highlighting certain aspects of contemporary Muslim thinking could be interpreted as being divisive by some, notwithstanding that he categorically states that his intention is primarily to illuminate and which he clearly does). Fortunately works by native Arabic-speaking legal scholars makes such characterisation a bit more difficult for Islamists and supports the proposition that balanced debate by learned and respected contemporary jurists will facilitate, encourage and promote dialogue.

In examining the treatment of fitna in the past, in the early historical period, the fourth orthodox caliph Ali bin Abu Talib fought the sectarian khawarij for sowing fitna. The khawarij of the period tended to equate belief with an outward conformity with the law. They ‘repudiated the need for the caliphal office altogether (and held that) a Muslim who committed a grave sin (kabirah), political or other would cease to be a Muslim and if such an individual happened to be the caliph, he could then be deposed or killed legitimately as an infidel’. It is noted that the khawarij position is not unlike that of al-Qa’eda, which tends to declare contemporary leaders as disbelievers for what is perceived as their lack of (outward) compliance with the law. Ali’s actions against the khawarij give Muslim groups and States a useful precedent for fighting Muslims who are ‘errant’ and would impose their view on others through the use of force, not unlike the more radical groups of today and no doubt similarly in every other period of Islamic history. It is not however the intent of this paper to compare Ali, a learned, brave but gentle scholar, with contemporary leaders in the Muslim world who are for most part corrupt tyrants.

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69 Majid Fakhry, A History of Islamic Philosophy (1983), 38.
70 Ibid.
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On the other hand, corrupt Muslim leadership is arguably why al-Qa’eda/WIF perceive and project\(^{71}\) themselves as those elected by God to replace the leadership, particularly of Muslim States which voluntarily have submitted to the hegemony of disbelievers.\(^{72}\) What must be recalled, however, is that al-Qa’eda have not only slaughtered the innocent but that they have exacerbated the problems of global hegemony by allowing (or by being manipulated) into establishing a uni-polar power structure that disadvantages the weak and the powerless, including the majority of Muslims, of the world.

In summary, *fitna* anywhere, at least wherever there is oppression or the abusive and coercive use of power, which cannot be changed by peaceful means, is grounds for commencing and/or for continuing *djihad*.\(^{73}\) Paradoxically though, unjust fighting is itself characterised as *fitna*, thus resulting in the inescapable conclusion that *fitna* cannot be eradicated by those engaged in *fitna*, including by those using unjust and cruel means of achieving their ‘ends’. In this vein the exercise of power by the legitimate imam (or leader) under the *shari’a* is not conceptually different from the exercise of power by the UNSC to maintain peace and security,\(^{74}\) although; ‘political wars’ (i.e. wars fought over power, resources or for strategic advantage) are all wars of *fitna* and prohibited under the Qur’an and are unlikely ever to be shown to be necessary.\(^{75}\) Again, the characterising of an armed attack as *fitna* (or even as discussed below as banditry) will make such attacks illegitimate in the eyes of most Muslims and thus expose false characterisation of such attacks as ‘*djihad*’

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\(^{71}\) Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 123.


\(^{73}\) Qur’an 2:193.

\(^{74}\) Chapters VI and VII, UN Charter.

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4 Banditry or Armed or Highway Robbery

The word *hiraba* (حراية) derives from the same root or triliteral (so c) as war (حرب). It ordinarily means to stir up war.\(^{76}\) The Qur'an refers to, and creates the crime of *hiraba* (*hiraba* verse) as: \(^{77}\)

The punishment of those who wage war against God and His Apostle and strive with might and main to cause corruption on the Earth is: execution or crucifixion,\(^{78}\) or the cutting off of hands and feet from opposite sides or exile from the land: that is their disgrace in this world and a heavy punishment is theirs in the Hereafter.

There is a general view that the *asbab al-nuzuul* (circumstances accompanying revelation) surrounding this particular verse are 'contradictory'\(^{79}\) and that the early jurists could not agree upon the intended 'subject' of this verse.\(^{80}\)

It has been pointed out by el-Fadl that the wording in the *hiraba* verse could in theory encompass and therefore criminalise 'a wide range of

\(^{76}\) According to Lane: E W Lane, *Arabic English Lexicon* vol 1 (1984), 423., *hiraba* in its meaning of interest in this paper is closely connected with *harrabah* (حربة) which means a group of plunderers or *hirabah* (حربة) which means 'wealth or property which one is despoiled of'.

\(^{77}\) Qur'an 5:33; Khaled Abou El-Fadl, *Rebellion & Violence in Islamic Law* (2001), 47.; The most often quoted *asbab al-nuzuul* for this Qur'anic verse appears to be the incident of Bedouin Arabs, maiming, killing and then desecrating of the body of the slave boy Yassir: According to AbuAbdellah Mohammed al-Ansari al-Qurtubi, *Al Jami' li Ahkaam al Qur'an* vol 3 (pt 5 & pt 6) (1987), 147. The most often quoted *asbab al-nuzuul* for this Qur'anic verse appears to be the incident of Bedouin Arabs, maiming, killing and then desecrating of the body of the slave boy Yassir: According to AbuAbdellah Mohammed al-Ansari al-Qurtubi, *Al Jami' li Ahkaam al Qur'an* vol 3 (pt 5 & pt 6) (1987), 147. *Al-Qurtubi* Volumes 5-6], a renowned scholar on the Qur'an [mufassir (sing.) mufassireen (PL)], this verse was sent to ensure that this punishment was never to be repeated. At least one contemporary Qur'anic commentator: Muhammad Asad, *The Message of the Qur'an: Translated and Explained* (1984), 148. takes a similar (although not identical) view to that of al-Qurtubi. He makes the (very reasonable) argument that, because the *hiraba* verse speaks of a punishment very similar to that meted out by the Pharaoh of the Exodus, a person condemned in the Qur'an for his overweening arrogance: Qur'an 28:39, and cruelty: Qur'an 2:49, towards the children of Israel, and is the very punishment used against Moses' followers: Qur'an 7:124; Qur'an 20:71; Qur'an 26:69. It is unlikely, therefore, that a Merciful God would sanction the very same punishment, thus creating an interpretation that potentially contradicts the Qur'an. For this and other reasons of grammar, context, tense and etymology: Muhammad Asad, *The Message of the Qur'an: Translated and Explained* (1984), 148., opines that the provision is not a legal injunction. On the other hand, many contemporary commentators take the opposite view — that the *hiraba* verse is indeed a legal injunction — but do not appear to engage the crucial question regarding the cruelty of the Pharaoh in this context.


\(^{80}\) Ibid, 49.
activities from writing heretical poetry to raping and pillaging\textsuperscript{81} a situation exacerbated by Muslim rulers' practice favouring its expansive interpretation.\textsuperscript{82} The interpretation of some commentators is now examined.

Yusuf Ali interprets \textit{hiraba} in this verse to mean 'sedition and treason'\textsuperscript{83} and also to apply to armed criminals. Shafi‘i states that the subjects of the verse are ‘dissenters and highway robbers’ [and that] ‘jurists agree (that they) should be punished by the imam but disagree on the punishment’.\textsuperscript{84} El-Fadl observes that banditry (\textit{hiraba}) relies on terror,\textsuperscript{85} and so is a meaning that captures the contemporary meaning of terrorism.\textsuperscript{86} Maududi includes ‘criminals and murderers who cause disorder in the settled society, or by armed force attempt to overthrow the Islamic system and attempt to establish some corrupt un-Islamic system instead’.\textsuperscript{87} He goes on to state that ‘the real object is to show that any attempt by any person residing in the Islamic State to overthrow its government is high treason and a most heinous crime […]’, \textsuperscript{88} thus supporting Yusuf Ali’s view that \textit{hiraba} includes acts of treason. Zubaida states, on the other hand, that the concept of an ‘Islamic Society’ is a myth,\textsuperscript{89} a statement borne out in the contemporary Muslim context, thus making Maududi’s analysis somewhat theoretical. Asad’s and Qurtubi’s position on this question is that the ‘punishment’ does not form part of a legal injunction, because the verses correspond with the cruel punishments of the Pharaoh of the Exodus against the Children of Israel. Shafi‘i appears to agree that the ‘punishment’

\begin{itemize}
  \item \textsuperscript{81} Ibid, 48.
  \item Ibid.
  \item Yusuf Ali Abdullah, \textit{The Holy Qur’an Translation and Commentary} (1934), 252., though the relevant verse is incorrectly numbered 5:36.
  \item Majid Khadduri, \textit{War and Peace in the Law of Islam} (1955), 79 (emphasis added).
  \item Khaled Abou El-Fadl, \textit{Rebellion & Violence in Islamic Law} (2001), n 53.
  \item El Fadl reveals that he made a conscious decision not to include the word ‘terrorism’ within the meaning of \textit{hiraba} pointing out, Ibid, 6, that:
    \begin{itemize}
      \item Some scholars have invited me to adopt the word ‘terrorism’ as a faithful translation of the term \textit{hiraba}. I have declined to do so […].
      \item As I argue later, \textit{hiraba} does share many similarities with contemporary conceptions of terrorism […].
    \end{itemize}
  \item S Abul A'ala Maududi, \textit{The Meaning of the Qur’an} vol 1 (2002), 449.
  \item Ibid, 450.
  \item Sami Zubaida, \textit{Law and Power in the Islamic World} (2003), 114.
\end{itemize}
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is not prescriptive. This, arguably, is the better view. Note however that hiraba, which appears to include wanton destruction of lives and property, can be distinguished from rebellion against oppression, which is a political act.

However, and in summary, jurists and Qur'anic commentators have limited the meaning of hiraba as 'corruption on the earth' to encompass the acts of armed criminals, brigands and those who terrorise people and usurp property. Further, the key Qur'anic phrase which criminalises hiraba is 'those who strive to cause corruption on the earth' makes the subject of this verse general and thus applies to all, Muslim and non-Muslim, the ruler/Queen (and vicariously her servants), the government and the ruled alike. Some contemporary armed attacks, whether labelled 'terrorism' or 'shock and awe', the intended effect of which is to create trepidation among the civilian population, are likely in some cases to satisfy the elements of hiraba.

In this context, the fatwa issued by the World Islamic Front ('WIF') on 22 February 1998 'calls upon every Muslim [...] to abide by Allah's order by killing every American and stealing their money anywhere, anytime and whenever possible.' This call to 'steal' has no precedent in the practice of the Prophet or the orthodox caliphs and prima facie is ultra vires the shari'a but arguably reflects the practice of the Arabs in the 'time of ignorance,' in which raids of plunder were carried out in the 'land' of the

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90 See text accompanying n 84, 282.
91 Muhammad Asad, *The Message of the Qur'an: Translated and Explained* (1984), note 51 to verse Qur'an 5:33. quoted a hadith related by A'isha, the wife of the Prophet, who said that (emphasis added):

> The blood of a Muslim cannot be shed except for three reasons (1) for adultery (2) murder (3) and for those who apostatise and fight against Muslims (kharaja min al-Islami fa haraba) [...]

Hiraba is distinguished from bugha (rebellion). It is hiraba that can draw a death sentence, for example if a victim is killed in the armed robbery. See also n 77 above.

92 That is, Qur'an 5:33, *yas'auma fil ardifasadan* (يسمعون في الأرض فسادًا), spreading corruption in the land.


94 Ibid, 48.

95 The existence of the “World Islamic Front for Jihad against the Jews and the Crusaders” was announced on 22 February 1998 and was co-signed by Dr. Ayman al-Zawahiri (Al Qa’eda) and Egyptian, Pakistani and Bangladeshi Organisations: Peter Bergen, *Holy War, Inc.: Inside the Secret World of Osama bin Laden* (2001), 104. Ibid, 105.
other party. A further WIF fatwa was issued stating that ‘the judgment to kill and fight Americans and their allies, whether civilian or military, is an obligation for every Muslim who is able to do so in any country’. This version of the fatwa did not even exclude American Muslims, civilians, women, children and other protected persons, from the blanket command and is also therefore prima facie ultra vires the shari’a.

The collection of war booty (fay) in Islamic law, after legitimate armed action, is similar to the legitimate post war re-distribution of resources under IHL. However, the use of theft from individuals (a hadd crime in Islamic law) as a ‘tool of war’ by Islamists (as distinguished from fay) prima facie renders some of their armed action as banditry (hiraba). Hiraba is a hadd crime, prohibited under the Qur’an, with no wartime exceptions allowed and is highly unlikely ever to be shown to be ‘necessary’ under the shari’a. The characterisation of hiraba as sporadic acts of violence are also distinguishable from acts of armed liberation.

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97 The pre Islamic Arabs were referred to being living in jahiliyyah or the period of ignorance and is well documented. For raids of plunder please refer to ghazwa discussed: n 392 at the footnote starting: ‘Some armed confrontations are characterised [...]. It is alleged that Islamic ‘terror’ groups have encouraged criminal activity in order to fund armed conflict and the UN has taken steps to assist countries develop legislation to counter this trend: See for example, <http://www.un.org/terrorism/strategy-forthepress.html>. [Accessed December 2006].

98 Peter Bergen, Holy War, Inc. : Inside the Secret World of Osama bin Laden (2001), 105. (emphasis added).

99 The transfer of war booty is a legitimate means of transfer of a property right in Islam: Qur’an 8:1. The transfer of some of the vanquished’s property interests to the victor after conquest come under the categories of fay. The technical differences of these concepts are beyond the scope of this paper. The characterisation of war booty under international law is very similar to the contemporary Islamic concept: Yoram Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict (2004), 215.

100 That is, while extra-judicial taking of life is prohibited under the shari’a generally, there is a wartime exception (subject to certain limits) which permits the taking of life of a class of people fighting against Muslims. Hiraba however is prohibited unconditionally with no wartime exception being explicitly warranted or allowed. Looting and plunder are specifically prohibited: Abdullah Yusuf Ali, The Holy Qur’an: Translation and Commentary (1980), particularly n 4886 to Qur’an verse 48:15. The original Islamic concept of booty was broader than that discussed at n99 above, as it was under the ancient laws, where slaves were also a legitimate part of the war booty. This is no longer a contentious issue. The GIA used fay an excuse for stealing non-Muslim property: Center for Policing Terrorism, Groupe Islamique Armé (GIA) Dossier.
recognised in the meaning of Article 1(2) under APII. These are also matters of fact that should be determined objectively. Authoritative and detailed pronouncements by jurists and scholars would greatly assist Muslims to distinguish legitimate liberation or *djihad* from (*hiraba*) banditry and other acts of wanton violence.

5 Rebellion (*bagha* or *baghi*)

The word *bagha* (بغية) means 'he was occupied in corrupt, wrong or unjust conduct' or 'to treat [someone] unfairly or unjustly'. The word *baghi* however, now means: rebellion by Muslims against the Muslim authority, who the rebels subjectively believe are corrupt and unjust. In determining the validity of a claim by defendants to be classified as rebels, the key legal issue then is to identify the elements of rebellion (*baghi*). This is attempted below.

An important distinction between *baghi* and *djihad* is that the former involves conflict between Muslims and the latter can include conflict between Muslims and others. *Baghi* is prima facie not legitimate but nonetheless principled rebels are treated leniently. The main consequence of applying the rules of rebellion (*baghi*) is that when applied

101 Article 1(2) Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977: This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

102 The root of the word *baghi* is (بغي). There are about forty references to *baghi* in the Qur'an, see for example Qur'an 3:19; Qur'an 2:90; Qur'an 2:213; Qur'an 16:90. The Arabic words take the form (فَحْشَا وَمُنْكَرَةَ وَبَغِيَّة) which means (God) forbids all shameful deeds and injustice and rebellion.


105 The words used to describe 'the authority' vary, and include the ruling power, the government or the imam.

106 For the purposes of this paper, a key aim is to distinguish *baghi* from war (*harb*), banditry (*hiraba*), anarchy or chaos (*fitna*) and particularly from *djihad*.

107 See Discussion of the Elements of Rebellion below, 314.

108 The alleged activities of Islamists acting in breach of the Covenant (in consuming alcohol, frequenting nightclubs etc) would if true make for a (rebuttable) presumption that they were not principled rebels, a reasonable starting point: Brynjar Lia, *Architect of Global Jihad: The Life of al-Qaida Strategist Abu Mus'ab al-Suri* (2007), 173.
to contemporary militants, including say to some members of al-Qa'eda, they may become eligible for more lenient treatment under the shari'a.

The Qur'an does not legitimise or permit rebellion, but recognises that it is a possible occurrence in certain circumstances. Recall that there is also the absolute Qur'anic prohibition on Muslims intentionally taking life for extrajudicial reasons and other than in armed djihad. On the other hand, Peters states that ‘Islamic law allows revolt only in very rare circumstances, including when the ruler abandons his belief’. However, the law as it has evolved has permitted rebellion by Muslims against unjust Muslim rulers and in the case of the Zaydi School, Muslims are encouraged to rebel. This contradiction, against what appears to be a relatively clear Qur'anic prohibition against rebellion, was ‘developed’ principally and originally in order to accommodate the actions of some close Companions, who for theological reasons cannot be seen to be in hell; because they actively participated in rebellion against each other on their own subjective belief and is discussed below.

Permitting fighting between Muslims is prima facie problematic and is a recipe for anarchy, as ‘both’ parties often claim that they are the ‘believers’ and their opponents the ‘heretics’. Bin Laden has explicitly and

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110 Qur'an 4:92; However, for rebels killed in a rebellion, the dead rebels (baghi) are characterised as having received a hadd punishment for their act of rebellion.

111 This is an important reason for rebels declaring the rulers as non-believers: Rudolph Peters, Jihad in Classical and Modern Islam (1996), 7.

112 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 248.

113 See text associated with n 247, 308, discussing the Battle of the Camel. The leadership and the actions of the close Companions is generally not questioned and all the actions of all his close companions carry precedential value. This deference to the companions is based on the authority of the Prophet quoted by Javad Nurbakhsh, Traditions of the Prophet (1981), 42., who said:

My Companions are like stars, whichever one you follow, you will be guided. In the Islamic ethic therefore, those Companions who rebelled in a principled manner but based on their subjective beliefs were also then 'right'.
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publicly denied that he declares ‘Muslims’ as heretics.\textsuperscript{114} He has however declared the Saudi Government as heretical.\textsuperscript{115} The significance of this declaration is that in addition to the Qur’anic permission to fight other transgressing Muslims, according to bin Laden, Muslims may legitimately kill heretics\textsuperscript{116} although against this the Prophet has, forewarned his followers against unjustly creating schisms in the umma.\textsuperscript{117} The position of Muslim Nation States unsurprisingly, is to adopt the contemporary global norms with respect to State sovereignty as well as granting a pre-eminent position to ‘national security’ as it favours their regimes.\textsuperscript{118} A key justification for rebellion is the Qur’anic command to right wrongs which is now discussed followed by an examination of the elements of rebellion.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{114} Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 262.; Khaled Abou El-Fadl, The Great Theft: Wrestling Islam from the Extremists (2005), 48. This denial, without more, is not entirely helpful even from a Muslim perspective because Salafis have a restrictive view of who is a Muslim. For example, ‘al-Qa’eda in Iraq’ states that those who do not support armed action against the Coalition are not Muslims. It would therefore have been more helpful if Bin Laden had said that he did not declare as kafir/heretics those who were generally accepted as Muslim by the community although his specific wording was perhaps intentional. The end result, however, is that while both parties to the conflict may have transgressed, one of the parties would have transgressed ‘beyond bounds’.
\item \textsuperscript{115} Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 23;
\item \textsuperscript{117} Rudolph Peters, Jihad in Classical and Modern Islam (1996), 52.
\item \textsuperscript{118} Members of the OIC appear to go further in this respect by specifically extending the meaning of terrorism. Article 1(2) The OIC Convention For Combating International Terrorism, 30 June 2000, holds (emphasis added):
‘Terrorism’ means any act of violence or threat thereof notwithstanding its motives or intentions perpetrated to carry out an individual or collective criminal plan with the aim of terrorising people or threatening to harm them or imperilling their lives, honour, freedoms, security or rights or exposing the environment or any facility or public or private property to hazards or occupying or seizing them, or endangering a national resource, or international facilities, or threatening the stability, territorial integrity, political unity or sovereignty of independent States.

This definition, although not explicitly referring to bugha or because the scope of the definition is not qualified, must be considered as direct signalling by Muslim nations of a non-recognition of bugha as a shari’a right under any condition.
\end{enumerate}
\end{footnotesize}
5.1 Commanding Right and Forbidding Wrong

The Qur'an inter alia defines Muslims as those who 'command right and forbid wrong' (forbidding wrong) and is expressed as a duty for the 'best of people'. This command sometimes is used to help explain the phenomenon of armed combat in Islam as well as a justification for what spurs a not-insignificant minority of Muslims into fighting, to rebellion or simply engaging in 'correcting' others' faults, but in doing so as discussed below this Meccan command is not used in its proper original context. It is settled that 'forbidding wrong' applies only as between Muslims. The Schools, however, differ on the limits of the application of this duty. The methodology among the surviving (Sunni and Shi'i) Schools appears to be consistent on who, what and how far can one go, and the means that may be employed in forbidding wrong. To be

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Ye are the best of peoples evolved for mankind enjoining what is right forbidding what is wrong and believing in God.

120 The Qur'an 5:48 states that this teaching conforms with the teachings of the previous scriptures. In this vein, this Qur'anic concept is not dissimilar to the Biblical teachings of Leviticus 19:17 ('thou shalt reprove thy neighbour or thou shalt incur guilt thyself'). The Bible also commands that 'reproving' is to be done in private: Matthew 18:16. This Islamic duty is contrasted with the common law which does not compel strangers to go to the 'rescue' of persons: Jaensch v Coffey (1984) 155 CLR 549, 578 per Deane J; Sutherland Shire Council v Heyman (1985) 157 CLR 424, 474 per Brennan J. or to prevent a wrong.


122 See Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 45. for some the varying, specific conditions, that attach to the application of this formula under the several Schools.

considered a principled censor, the means used in forbidding wrong must not be ultra vires.

An important issue is: who can forbid wrong? This is a general command to all Muslims. Therefore, clearly all Muslims may, or prima facie appear to be, authorised by the Qur’an to correct what they subjectively see as being wrong. It is a fundamental question touching on the identity of a Muslim and also an important question linked to and touching on the issue of rebellion.

Some Schools, as discussed by Cook, appear to limit forbidding wrong, in the public arena anyway, to Muslim men only and this is the practice in contemporary Saudi Arabia and the Afghanistan of the Taliban. The Shafi’i scholar Ghazali (d. 505/1111) however, explicitly includes women in performance of the duty.124 The Qur’an does not limit the command to ‘male Muslims’ only, in fact it specifically commands women as well, ‘mu’min_nu na wal mu’mina_tu,’125 and interpreting the command as directed to both genders is arguably the better interpretation on the syntax of Qur’an 9:71. Further, the restriction of the general interpretation to Muslim males could conceivably mean that only the male (parent) may admonish and persuade the child to good and to discourage the bad, which is an indefensible interpretation both on the text and the intent of the Qur’an.

Further, the reason why jurists have limited the scope of the duty is arguably for pragmatic reasons, as Qur’an 9:71 refer to ‘believers’ which in addition to women can also include believers among the ‘people of the book’ — perhaps a step too far for Muslims who have constructed their own version of a ‘chosen people’. Therefore, jurists were arguably reluctant to extend this duty to non-Muslims. It is likely, therefore, that the jurists mean that if fighting becomes necessary in ‘commanding good and prohibiting evil’, then the obligation first falls on Muslim males able to fight, thus linking the duty to forbid wrong with armed *djihad*.

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124 Ibid, 332.
125 Qur’an 9:71.
In analysing the Qur'anic command to ‘forbid wrong’ this paper favours the work of Mankdim (d. 425/1034) of the mu'tazilite ‘theological school’, mainly because of its wide acceptance by scholars and jurists of the surviving Schools (both Sunni and Shi'i). Mankdim states that the key elements of the phrase are: command (amr), forbid (nahy), right (ma'ruf) and wrong (munkar). Mankdim, as summarised by Cook, posits that a ‘command’ must necessarily be given to one of a lower rank, while ‘forbidding’, is telling someone to desist from an action, while ‘right’ is when the agent knows or infers goodness (husn) while ‘wrong’ is when the agent knows or infers badness (qubh). The jurist Abu Ali (d. 303/916) requires that to act in ‘forbidding’, the agent must have actual knowledge of the wrong that was committed, and should be knowledge gleaned by lawful means, which is the better meaning. ‘Forbidding’ must therefore, not be done in a reckless manner, resulting in greater ‘harm’.

Acting on the command to forbid wrong presumes that the censor knows or can legitimately identify wrong and secondly, that this identification is correct in both substantive law and in the process of collecting admissible evidence to support the charge of wrongdoing. See the hadith of Omar I and the drunk, where the caliph was forced to not press charges against the drunken man, even though the clearly inebriated

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126 H A R Gibb and J H Kramers (eds), *Concise Encyclopaedia of Islam* (4th ed, 2001), 421. The term ‘Theological School’ is used to distinguish it from a Legal School. Cook notes that Mu'tazilite principles have been used in all the surviving legal Schools: Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (2001), 195. and the adoption here of which has some precedent.

127 Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (2001), 195. the use of mu'tazilite work can sometimes be contentious despite, ironically, ‘its wide acceptance as noted by Cook.

128 This ‘lower rank’ which can mean a lower social rank, must also include the understanding that the person doing the ‘correcting’ is of a superior spiritual rank. These commands of djihad and ‘forbidding wrong’ are prescribed to the mu'min (and mu'mina) who by definition have internalised the high moral qualities of taqwa and are ipso facto not likely to act in a brutal, unkind and improper manner. It is conceded however, that while the reality is at odds with this statement, a judicial body is not prevented from demanding the higher standard of a believer (mu'min or mu'mina) than from a mere Muslim. Thus a higher standard should really be expected from all those who are wont to correct the major or minor failings of others.

129 Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (2001), 205.

130 Ibid, 200.

131 See text accompanying n 156, below.
man could not deny the charge, because the evidence against the drunken man had not been obtained lawfully. Recall that drinking alcohol is a Qur’anic prohibition with a serious hadd punishment and must be considered a precedent on admissible evidence with respect to other serious shari’a offences. Generally, however, the common sense tests for who may forbid wrong, have crystallised over time. The first is that the censor is one who possesses knowledge, credibility and probity. Another test by Abu Hanifa specifies the five qualities that a censor must possess: knowledge, pure intent, gentle performance of the duty, one who practices what one preaches and perseverance.

The central issues with respect to the application of this duty against an unjust ruler are whether:

1. (a) Is the wrong that was done by the ruler in the category of acts normally considered ‘commendable’ acts or supererogatory acts only? or (1) (b) is the ‘wrong’ the neglect of an obligatory Muslim duty? and if so
2. (a) can one legitimately use force in forbidding this wrong and (2) (b) if the answer to (2)(a) is ‘yes’, under what circumstances and to what extent can force be used to correct the ‘wrong’?

These questions are examined below. In doing this, the analysis concentrates on the law according to the Sunni Hanbali School, as it is the guiding School of al-Qa’eda in Saudi Arabia.

Cook collates the jurists’ answers to the first question, (1)(a) and (1)(b), on whether ‘commanding right and forbidding wrong’ is mandatory or supererogatory, to summarise that the ‘commanding right’ aspect of the duty is obligatory for the obligatory aspects of the Covenant and that

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132 See text accompanying n 156, below.
133 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 43.
134 Ibid, 314.
135 Acts in Islam are characterised as follows (1) legitimate (halal); (2) commendable (manduub, mustahab); (3) indifferent (mustahabie melanually acts); (4) disliked (makruh); or (5) prohibited (haram): Peta Stephenson, Islam Dreaming: Indigenous Muslims in Australia (2010), 172.
commanding all other (supererogatory) acts is supererogatory.\textsuperscript{137} Forbidding wrong, however, is obligatory without distinction of the magnitude of the wrong.\textsuperscript{138} There appears to be no real dispute among the Schools about the binding nature of this relatively clear Qur'anic command of ‘forbidding wrong’. In practice, however, it not as simple or as definitive as is stated here because there is some consensus that forbidding wrong is not mandatory where one does not have the power (\textit{qadr}) to do so, or if it involves personal risk,\textsuperscript{139} say as against an armed official or a neighbour, with whom good relations are mandatory. Exceptions also appear to apply, including with respect to ‘forbidding wrong’ associated with the performance of mandatory Covenantal obligations but will not be considered here.

The \textit{shari'a} makes a distinction between \textit{intrinsic wrongs} such as oppression which \textit{must} be opposed and \textit{contingent wrongs} which may or may not be wrong contingent on the intention and ultimate aim of the act.\textsuperscript{140} This arguably is why al-Qa'eda consistently refers to intrinsic, oppressive wrongs and has attempted, but failed however, to show that \textit{djihad} has consequently been elevated to the status of the second most important individual compulsory Muslim obligation. Recall that other than \textit{ribat}, armed \textit{djihad} generally remains a collective and not an individual duty on some male Muslims.

The issue of the ‘content’ of the obligation is much more complex, as is the answer to the second question, (2)(a) above, of whether it is permissible to use force in forbidding wrong, cognisant that the mandating Qur'anic verse was revealed in Mecca prior to the authorisation for Muslims to use force in defence. The presumption must be that the use of force in forbidding wrong must at least be shown to be necessary, as and as is discussed below, there is no overarching authority for the use of force in ‘forbidding wrong’ in this context.

\textsuperscript{137} Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 200.
\textsuperscript{138} Ibid, 213.
\textsuperscript{139} Ibid, 134.
\textsuperscript{140} Ibid, 221.
The two questions (1)(a) & (1)(b) of forbidding wrong generally and second question (re the use of force) are treated extensively and comprehensively by Cook.\textsuperscript{141} For the purposes of this paper however, the consensus with respect to ‘forbidding wrong’ arguably constitutes:

(a) not permitting individuals or groups other than the legitimate ruler to usurp the States’ monopoly jurisdiction over certain crimes, justice and law enforcement;

(b) ensuring that matters over which ‘forbidding wrong’ is permitted, are within the jurisdiction of the censor; and

(c) ensuring that the substantive rules of the laws of evidence and other procedural matters with respect to forbidding wrong are strictly followed (ie narrowly construed) in favour of the individual accused,\textsuperscript{142} particularly, if ‘God’s rights’ only are infringed.

As mentioned, the ‘forbidding wrong’ verse was first revealed in Mecca before permission for armed \textit{djihad} was granted.\textsuperscript{143} There is also a clear decoupling between the obligations of forbidding wrong and the armed \textit{djihad}.\textsuperscript{144} The Zaidi School, however, held that it is equivalent in merit (but not in obligation) to \textit{djihad}.\textsuperscript{145} This longstanding view was confirmed by the distinguished Hanbali scholar Abu Butayyin (d.

\textsuperscript{141} Ibid.

\textsuperscript{142} Malik ibn-Anas, \textit{The Beaten Path Al-Muwatta’} (1979), 318. (emphasis added): Malik related to me from Yahya ibn Said from Said ibn al-Musayyab that a Syrian man called Ibn Khaybari found a man with his wife and killed him, or killed them both. Muawiya ibn Abu Sufyan found it difficult to make a decision and he wrote to Abu Musa al-Ash’ari to ask Ali ibn Abi Talib for him about that. So Abu Musa asked Ali ibn Abu Talib and Ali said to him, “Is this thing in my land? I adjure you, you must tell me.” Abu Musa explained to him how Muawiya ibn Abu Sufyan had written him to ask Ali about it. Ali said, “I am Abu Hasan. If he does not bring four witnesses, then let him be completely handed over” (to the relatives of the murdered man).

\textsuperscript{143} Qur’an 7:157. Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 52.

\textsuperscript{144} In the history of Islam there appears to be only one major jurist, Abu Bakr al-Qaffal (d. 365/976), who linked forbidding wrong with armed \textit{djihad} and did so on the basis of Qur’an 9:67: Ibid, 341. The key sticking point appears to be that forbidding wrong is an obligation between Muslims only. The position taken in this thesis is to conform with the near unanimous majority of the scholars of the present and the past in decoupling ‘forbidding wrong’ from armed \textit{djihad}. A consequence of this position however, is that it leaves the question of rebellion against Muslim authority as prima facie within the scope of the duty.

\textsuperscript{145} Ibid, 228.
1282/1865) who stated that forbidding wrong was not the same as *djihad* (arguably because of a duty to 'help' a Muslim by preventing wrong and therefore its eternal consequences146) but was more important than *djihad*.147

The Prophet's *hadith*, often quoted in conjunction with the means of forbidding wrong comprises the 'three-modes tradition', referring to the three modes of censure, (1) by the hand, (2) by the tongue and (3) in one's heart.148 Ibn Hanbal was of the view that one 'should neither use weapons nor confront them (i.e. the leaders)'149 and importantly also disapproved enlisting the ruler in forbidding wrong arguably for avoiding the use of the

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147 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 179.
148 The 'three-modes' Prophetic *hadith* appears to specify 'correcting' wrong in a reverse intuitive order. [Ibid, 32.]. The famous and oft-quoted *hadith*: Abu'l Hussain Muslim, *Al jami'al Sahih* vol 1 (1972), 33; Abu'l Hussain Muslim, *Al jami'al Sahih* vol 3 (1972), 1032.; Michael Cook, *Forbidding Wrong in Islam* (2003), 28. states: A Muslim should correct a wrong with his hand (or in some versions, sword), or else with his tongue or else at least be opposed to it in his heart (but this is the weakest faith).

There are other *hadith* however, that require a Muslim to give his advice to the wrongdoer in private in order to preserve the person's dignity and is discussed generally in much greater detail: Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (2001). Generally however, the Qur'an and the *hadith* appear to give the 'worst case' solution in the both the 'three modes' *hadith* and in the *baghi* verse. The worst punishment is stated first and then 'goes down' in the order of severity. This is purely an observation and it is not suggested that there is a general principle embedded in this observation. There is also an underlying assumption that the three modes tradition applies to wrongdoing that has already become manifest. Support for this position is from the Qur'anic abhorrence of suspicion and spying: see n 154 below, and the tradition of the Prophet that even 'Satan does not open closed doors' (*a fortiori* preventing a censor from 'opening' closed doors, ie by keeping what is 'covered', unexposed.): Muhammad Al-Mughirah al-Bukhari, *The Translations of the Meaning of Sahih al-Bukhari* vol 7 (1976), 362. See also Muhammad Al-Mughirah al-Bukhari, *The Translations of the Meaning of Sahih al-Bukhari* vol 8 (1976), 60. where the Prophet said:

All the sins of my followers will be forgiven except those of the *mujahirin* (those who commit a sin openly or disclose their sins to the people). An example of such disclosure is that a person commits a sin at night and though God screens it from the public, then he comes in the morning, and says, 'O so-and-so, I did such-and-such (evil) deed yesterday,' though he spent his night screened by his Lord (none knowing about his sin) and in the morning he removes God's screen from himself.

See also *hadith* on the behaviour of an excellent Muslim in this context: n 22, 270.

149 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 106.
criminal law. Thus the aim of forbidding wrong is to help a Muslim to overcome faults. It must be done in secret to avoid adversely affecting his/her honour, dignity and reputation and to avoid involving the authorities, who may act inappropriately. Recall in this context the Prophet's hadith that ‘the Muslim is one against whom others feel safe from (the aggression of) his tongue, and hand’. The best Muslim therefore is one who does this forbidding in secret or else minds his own business so that others do not fear his tongue or his hands.

Further, the Qur'an prohibits Muslims from spying on each other and urges them to avoid suspicion and therefore, it is inferred that a misdeed must be manifest. In support of this proposition Muslims often quote the hadith involving Caliph Omar I, who climbed over the wall of a house to reprimand its drunken owner, whence the drunk admitted to a single breach (i.e. consuming wine) but in turn accused the Caliph who had breached three prohibitions. Omar agreed and left the man in peace. The majority view seems to support the proposition that forbidding wrong by individuals is to avoid involving the criminal law and to act with discretion and kindness, so as not to expose an individual's misdeeds. Correcting wrongs in private also helps preserve the dignity of the

151 Abu'l Hussain Muslim, Al jami'us Sahih vol 1 (1972), 29; Javad Nurbakhsh, Traditions of the Prophet (1981), 78. cites a very similarly worded hadith carrying an identical meaning.
153 See n 175, 297.
154 Qur'an 49:12: O ye who believe! avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay ye would abhor it...but fear God: for God is Oft-Returning Most Merciful.
155 Michael Cook, Forbidding Wrong in Islam (2003), 129.
156 The three breaches committed by Omar were (1) suspicion (or in the first instance), supposition (zann) and spying (tajassus): Qur'an 49:12, (2) entering the house (of the drunken person) without (his) permission, and without offering salutations and a greeting of peace: Qur'an 24:27, and (3) that visitors should enter houses through their proper entrances: Qur'an 2:189.
157 Michael Cook, Forbidding Wrong in Islam (2003), 129.
158 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 80.
individual, and permits one discreetly to allow for ignorance and human frailty and to leave alone those who 'choose to remain ignorant'.

Involving the State in indiscretions that have not infringed the rights of a person unnecessarily escalates the problem, because the ruler may act outside the shari'a or in a manner that attempts to show the leader as an enthusiastic Muslim, ie by 'being tough on crime' or for other political purposes, and thus to go 'beyond' the appropriate legal sanction. Ibn Hanbal did not appear to criticise the Hanafi position of not rebelling even against an unjust ruler. Abu Hanifa 'counselling against rebellion' and the use of force unless the good produced outweighed the evil. Ibn Abbas even discouraged people from approaching the rulers, as a believer should never humiliate himself and warned that the ruler might 'put you in the way of temptation', which basically means 'try to buy you off'.

Even if the censor is subjectively 'certain' that a misdeed has been committed, and particularly while these misdeeds remain unknown to the public, misdeeds should not be exposed unless a greater harm will consequently be avoided. If the censor is justified in acting, however, there is a 'general consensus among jurists' that a death incurred in forbidding wrong is rewarded by God although some countervailing factors include (from the Hanafi School) that 'one must not throw one's blood away', 'ask to be killed', or 'one must not be an accomplice in one's own death'. This last phrase indicates, at least that Hanafis distinguished being 'an accomplice in one's own death' from a suicide and, not to put too fine a point on the issue, touches on the issue of kamikaze actions.

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159 Qur’an 7:199.
160 Qur’an 7:200.
161 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 311.
162 Ibid, 8.
163 Ibid, 55.
164 See text accompanying n 237, 307.
166 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 311.
167 Ibid, 8.
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Speaking against an unjust leader (as opposed to armed action) is however considered obligatory by contemporary Hanbalis even if one's life could be placed in danger. On the other hand ibn Hanbal did not approve of scholars approaching the Sultan. In any event the contemporary Hanbali position is that a person killed in forbidding wrong is a martyr and underlies al-Qa'eda’s position. On the other hand the contemporary Djafari view is that strong action, and particularly wounding and killing in forbidding wrong, requires the imam/sultan/leader's permission, and was similar to Ibn Hanbal’s own position. Al-Qa'eda’s position however, has moved substantially from the quietist position of the eponym to one of actively confronting the ruler.

The Qur'an and the shari'a in its broadest sense are meant to lead to personal salvation (the ‘personal salvation verse’). To this end, it does not benefit a Muslim to not mind his own business and to seek out the faults of others, particularly if the wrong causes no harm to another. On the other hand, one cannot be wilfully blind to wrong when it becomes manifest, particularly if other than God's rights are affected. Further, this view of personal salvation as only looking to one's own interest to the exclusion of the interests of others is permissible in its broadest sense only when society is so utterly corrupt that any admonition is futile.

168 Ibid, 135.
170 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 128.
172 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 106.
173 See n 172, above.
174 Qur'an 5:105:

O ye who believe! guard your own souls: if you follow (right) guidance no hurt can come to you from those who stray.

In the view of some jurists this verse has been abrogated.
175 Qur'an 4:28. According to Javad Nurbakhsh, Traditions of the Prophet (1981), 88: The Prophet said: “A good Muslim is one who minds his own business and does not interfere which that which does not concern him”.
176 Qur'an 5:105.
177 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 41.
Therefore, 'good behaviour' lies somewhere between these two extremes. However, jurists also conclude that if the outcome of the admonition is likely to be ineffectivel (such as after an act is completed and therefore, cannot be avoided)\textsuperscript{178} then it is only necessary to tell the offender once,\textsuperscript{179} or in other cases to avoid admonition, for example, in the case of a neighbour, where other rights take precedence, may intervene and where good relations are prescribed.\textsuperscript{180}

Nonetheless there are examples of individuals taking it upon themselves to forbid wrong sometimes by force and being punished by the authorities for their efforts.\textsuperscript{181} There are also examples of people being punished not so much for forbidding wrong by force but for what they actually said, which was construed as slander, a characterisation which while problematic, may not have been entirely untrue given the nature their zealotry and the manner in which they abused the rulers, purposely 'seeking martyrdom'.\textsuperscript{182}

\textbf{5.2 The Hanbali Position}

The Egyptian activist and scholar Said Qutb, who had a significant impact on contemporary Islamic thought,\textsuperscript{183} was of the view that establishing Islamic government locally was more important than correcting individual transgressions. Significantly, in Cook's opinion, Qutb's views are not 'standard fundamentalist doctrine'.\textsuperscript{184} Jurists such as Ghazali hold that the permission of the ruler (or government) is not required for forbidding wrong,\textsuperscript{185} but is arguably more akin to the gentle, secret reminding referred to above,\textsuperscript{186} but further, he creates a principle of escalation, with the result that weapons may be used in forbidding wrong subject to the proviso that

\begin{itemize}
  \item \textsuperscript{178} Ibid, 133.
  \item \textsuperscript{179} Ibid, 50.
  \item \textsuperscript{180} Ibid.
  \item \textsuperscript{181} Michael Cook, \textit{Forbidding Wrong in Islam} (2003), 104.
  \item \textsuperscript{182} Michael Cook, \textit{Commanding Right and Forbidding Wrong in Islamic Thought} (2001), 57.
  \item \textsuperscript{183} John L. Esposito (ed) \textit{Voices of Resurgent Islam} (1983), 67.
  \item \textsuperscript{184} Michael Cook, \textit{Forbidding Wrong in Islam} (2003), 121.
  \item \textsuperscript{185} Ibid, 123.
  \item \textsuperscript{186} See text accompanying n 180, 298.
\end{itemize}
the action does not cause fitna. Bin Laden claims to have acted on this principle, but both this claim and the issue of whether his fighting has caused fitna are questions of some complexity under the shari'a and should be determined objectively.

Even when government authority to 'forbid wrong' is present, as is the case with the Saudi religious police (mutawe'en) or the Iranian equivalent, the basij, who inter alia address moral infractions, this 'policing' activity is itself a religious 'innovation', which did not exist at the time of the Prophet and the original salaf. The cruelty of such 'policing' is highlighted in the example of fifteen young women who perished in Saudi Arabia when they were prevented by the mutawe'en from leaving a burning building, where a witness said he saw the religious police 'beating young girls to prevent them from leaving because they were not wearing the abaya'. The abaya is a cultural, not religious requirement, and in any event, for necessity, is not mandatory in this extreme case.

Zealots and zealotry are not uncommon in Islamic history. There are documented instances of sustained campaigns of Hanbalites plundering shops, attacking Shafi'ites, harassing Shi'ite pilgrims to Karbala and forbidding the mourning for imam Husayn, to 'fanatical terrorism' by Hanbalis such as Barbahari (d.329/941) and others. It is noted that the founders of all three other surviving Sunni schools had Alid

189 Michael Cook, _Commanding Right and Forbidding Wrong in Islamic Thought_ (2001), 101.
190 There is an historical reference to a woman named Samra bint Nahik who had met the Prophet and who later took to using a whip against 'transgressors' in the market place and can also be distinguished from the specific appointment by the Second Caliph Omar bin Al-Khattab who appointed a woman by the name of Shifa al-Adawiyah to regulate some aspects of the market: Ibid, (82., but these are more specific cases of preventing sellers using short weights and does not provide a precedent for the mutawe'en or basij.
192 Michael Cook, _Commanding Right and Forbidding Wrong in Islamic Thought_ (2001), 117.
193 Ibid, 120.
(Shi‘i) sympathies and may explain the greater antagonism of the Hanbali for Shi‘i Muslims, one that is violently played out by al-Qa‘eda and its sympathisers in Iraq, Pakistan, Chechnya, Afghanistan and generally other places where Wahhabis fund Islamic movements.

The original Hanbali ‘quietist’ position, which here means not being in the employ of the State or not challenging even unjust rulers, was held until about the 8th AH/14th CE, when Ibn Taymiyyah (d. 728/1328) a Damascene Hanbalite developed a more utilitarian view of forbidding wrong. The reversal in policy appears to have started around the time of Abu Ya‘la ibn al-Farra (d. 458/1066) who stated that if the ‘costs’ (mafasid) of exceed the benefits (masalih) then obligation to perform that (forbidding wrong) action is voided, and ibn Taymiyyah developed this doctrine so that in his view it was possible to enter into the service of the State without getting blood on one’s hands, and articulated it in a manner that has not been challenged within that School. Thus the Hanbali position, as re-stated by ibn Taymiyyah, replaced ibn Hanbal’s reluctance for power.

The drift from forbidding wrong based on principle to one based on utilitarian effect was also evident when ibn Taymiyyah ‘restrained’ against reproving the (Muslim) Mongols from drinking alcohol because ‘the Muslims stood to lose more if the Mongols renounced liquor’.

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196 In Australia it appears that a significant portion of the funding for Islamic activity is from Wahhabi sources and although it is linked to radicalism, it is unclear whether the ‘extremist’ individuals who have been prosecuted for terrorism-related charges were directly funded by these sources.
198 See text accompanying n 169, above.
199 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 51. or alternately as stated by the Hanbali jurist Abu Ya‘la ibn al-Farra (d. 458/1066) the actions forbidding wrong and in the circumstances must not in themselves lead to a greater evil: Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 133.
200 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 156.
initially espoused by ibn Hanbal was completed when the political forces of Ibn Saud co-opted the religious forces of the imam, Abd al-Wahhab. This has resulted (in the contemporary Saudi State) where the State has almost totally co-opted the scholars of the School (and vice versa). Further, non-Wahhabi Muslims are sometimes branded disbelievers so that ‘forbidding wrong’ (which, it may be recalled, is generally only to be practised between Muslims) is now ‘extended to fighting infidels’ and Qur’an 9:5 is arguably now interpreted expansively by the Wahhabi to permit them to kill non-Wahhabis.

Note however that when Wahhabi ideology was globalised and funded (by the US and UK’s allies from the Arabian Peninsula), this version of Islam has not gained popularity among the Muslim masses in Muslim-majority States and has only the barest toehold in many Muslim societies. On the other hand, Saudi influence is quite strong in the West, for, Saudi funding pays for many imams in Western mosques and Islamic Centres. This dynamic explains some of the extremism that is present in Western Muslim communities.

‘Forbidding wrong’ includes eradicating ‘innovations leading to polytheism’ (*bid’a*), although this ‘purification process’, very conveniently does not forbid and openly even permits self-serving practices such as government through monarchy, ‘eulogies of kings’, and sycophantic praise of ‘kings’, openly practised by contemporary Hanbalis. The unrestrained use of force by Abdul Wahhab, sanctioned by the various tribes in the 17th–20th centuries CE, has created a culture in which violence against Muslims and other protected persons is condoned. Extremely violent groups such as al-Qa’eda in Iraq have been fostered, continuing the hatred against Shi’i Muslims by including them as targets along with the occupying forces, while it appears to be largely the Sunnis themselves who were co-opted by the Coalition, resulting in the

202 Ibid, 155.
204 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 172.
205 Ibid.
already strong Iranian influence being further strengthened among the religious Shi'i.

Forbidding wrong has deep legal and historical roots in jurisprudence. While the rebellion of the Companions against the caliph was justified by the jurists, the Schools had initially attempted to restrict ‘forbidding wrong’ to mean not employing force or coercion. The ‘three modes tradition’ made it difficult for Schools to completely shut down the armed option and the Hanbali School post ibn Taymiyyah has revived the tradition of taking up arms against a Muslim ruler who, in its subjective view, is somehow deficient in upholding Islam.

Further and in practice, the armed conflicts between some Companions have led to the parallel development of principles, a body of law and jurisprudence on rebellion. Weeramantry interprets the Qur'an 16:90 as creating ‘an individual right to correct the ruler and attack his decision if he commits an error’. In the context of Islamic history this appears to be a supportable interpretation of the verse. That is, if a sufficient, albeit indeterminate, number of Muslims reject the imam or government on principle, for example, for the ruler abandoning his faith or for being unjust, and then take up arms against the establishment, their struggle may be categorised as rebellion so that the rebels are treated leniently even when they kill people and/or destroy property during the conflict. These interpretations are unlikely to ‘sit comfortably’ with contemporary notions of stability. While Muslims must not be required to abandon valid jurisprudence for convenience, it is posited that the broad Islamic legal education will make it much more difficult for those who express violent views easily to recruit supporters outside their narrow

206 See n 148, 294.
207 See below: 5.3(a) Development of a corpus of Law on Rebellion, 303
208 Qur'an 16:90:

God commands justice the doing of good and liberality to kith and kin and He forbids all shameful deeds and injustice and rebellion:

He instructs you that ye may receive admonition.

210 Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 10. for example, declares Saudi and other Arab rulers for the various reasons to be apostates.
211 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 179.
Schools, for the preponderance of Qur’anic verses and sunna against the spilling of sacred human blood. In support of this proposition, it is noted that even in contemporary times, when Islamic legal studies either are ignored or conducted in their most elementary, rudimentary form, groups like al-Qa’eda are still only able to recruit a miniscule percentage of the Muslim population, who in spite of their rudimentary knowledge appear to sense a mismatch between Islam and al-Qa’eda’s ideology or means. This is an area, when developed, that will help to reduce violence.

5.3(a) Development of a corpus of Law on Rebellion

The Qur’an specifically refers to rebellion in the ‘baghi verse’:212

\[
\text{If two parties among the Believers fall into a quarrel (بَغْحَة)}:213
\]

make ye peace between them: but if one of them transgresses (باغت) beyond bounds against the other then fight ye (all) against the one that transgresses until it complies with the command of God;214 but if it complies then make peace between them with justice and be fair: for God loves those who are fair (and just). The believers are but a single Brotherhood: So make peace and reconciliation between your two (contending) brothers: [...]

The original Arabic sources of the ‘reasons surrounding revelation’ (اَيْشَابَ الْنُّزُول) appear to shed little light on the meaning of this verse with respect to rebellion in the armed sense215 and both Shi’i and Sunni scholars have conceded the ‘tenuous’ relationship between the baghi verse and the Islamic law of rebellion.216 El-Fadl further notes that there is no elaboration in (the Prophet’s sunna) on the nature of this transgression and particularly that ‘it does not seem to address the situation in which a person revolts against a superior or in which one rebels against an established government’.217

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212 Qur’an 49:9–10.
213 This verb is conjugated in the faa’ala (فَعَّالِ) construct, which normally means that the verb expresses reciprocity of action, so that in this case there would be an element of fault on both sides of the quarrel.
214 And if the non-transgressing party, which a Muslim subjectively determines for him/herself as seen in the battle of the Camel, seeks assistance, then the Muslim (if he is able to do so) is obliged to provide help: Qur’an 8:72.
215 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 38. According to Maulana Muhammad Ali, The Holy Qur’an: Arabic Text English Translation and Commentary (1917), 978. the asbab al nuzul (reason) for this verse was the quarrel between the two Medinan Muslim tribes of Aus and Khazraj.
217 Ibid, 38.
El-Fadl observes that significantly the word ‘rebellion’ appears in the so-called ‘Constitution of Medina’\(^\text{218}\) where Muslims were required to act against those who transgress or commit injustice.\(^\text{219}\) A further important point for this thesis is that armed action taken against heterodox Muslim groups is only permitted if they took to arms first.\(^\text{220}\) El-Fadl also refers to the *sunna* to give some examples of how the *baghi* verse can be misapplied\(^\text{221}\) and particularly the softening of the absolute prohibition on extra-judicial killing. He quotes the following *hadith* that militates against this murderous trend:\(^\text{222}\)

An unidentified man asks al-Ash'ari about the wars taking place between the Companions. The man asks "What if I take my sword, and seeking the pleasure of God, strike with it whom ever I wish?" al-Ashari responds, "You have a right to do so (laka dhalik)." Ibn Mas'ud, who overhears this conversation cautions al-Ashari, "Be careful with what you say, many will rebel in this *umma*, all of them seeking the pleasure of God, and none of them finds it."

Incidentally, this is an example of the quiet manner in which an important Companion ‘forbade wrong’. Ibn Mas'ud’s view broadly accords with the *hadith* from the Prophet who said that:\(^\text{223}\)

"‘When two Muslims fight (meet) each other with their swords, both the murderer as well as the murdered will go to the Hell-fire.’ Abu Bakrah\(^\text{224}\) said, ‘O God’s Apostle! It is all right for the murderer but..."


\(^{222}\) Ibid, 46 (footnotes omitted).


\(^{224}\) Abu Bakrah, a relatively late convert to Islam, was punished for slander (*qudf*) by the second orthodox caliph Omar bin al Khattab: Khaled Abou El-Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (2001), 111. Abu Bakrah was a witness in an unsuccessful charge of fornication (*zina*) against both a man and a woman. Thus, the use of Abu Bakrah’s testimony may be problematic, particularly in the light of the Qur'an 24:4 (emphasis added) whereby:

> And those who launch a charge against chaste women and produce not four witnesses (to support their allegation) flog them with eighty stripes: and reject their evidence ever after, for such men are wicked transgressors.

According to Malik ibn-Anas, *The Beaten Path Al-Muwatta*’ (1979), 314 [hadith number 1398], the eponym of the Maliki School, the testimony of such a person is acceptable ‘if his repentance is evident from his actions’. See also Fatima Mernissi, *The Veil and the Male Elite* (1991), 61.
what about the murdered one?' God’s Apostle replied, "He surely had the intention to kill his companion."

Extra-judicially taking life (َّالحسبة) prima facie is criminal. In the criminal context, however, ‘intention’ (or َّالقصد الـِجَنِيّال which is arguably synonymous with mens rea) is a clear fault element of the crime of killing under the شريعة. Intention will determine how the taking of life as part of an armed دعوة or rebellion ultimately is characterised, qualified and distinguished from criminal, unlawful, negligent, reckless or accidental killing. The Prophetic hadith quoted directly above arguably may be distinguished from the preceding hadith because, while fighting in a rebellion, the intent to kill a specific person has not been formed. This hadith can be distinguished as it appears to be a ‘peacetime’ reference. At any rate, as discussed, ﬁتن can in cases be worse than killing under the شريعة, and the notion of terrorism can in cases be better equated with ﬁتن as it intends to engender a sense of uncertainty, fear and tumult.

Further, Ibn Mas‘ud, who must have been aware of the competence of the narrator (of the second hadith referred above, Abu Bakrah as a شريعة witness) does not go as ‘far’ as the hadith related by Abu Bakrah in stating that both the killer and killed will go to hell but limits approbation to ‘not finding God’s pleasure’. Ibn Mas‘ud is one of the most prominent, closest and knowledgeable of the Companions of the Prophet, and without further historical information on the incident, Muslims generally are most likely to prefer his view over that of Abu Bakrah.

In the ‘old’ common law in Australia, such an act where there is only a ‘general’ intent, was classified as ‘recklessness’ although the law in Australia was developed to consider even such an intent ‘to cause grievous bodily harm’ to any person as sufficient to satisfy the mental element for a charge of murder. While the magnitude of the crimes

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226 Qur’an 2:216:

Fighting [quital /killing (قاتل)] 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.

227 See n 224, above.
228 R v Crabbe (1985) 156 CLR 464.
committed by those charged on the international plane are so egregious and their culpability and blameworthiness so manifest, the fine distinctions required in domestic laws with respect to the prosecution of a single homicide (in most cases) are not really necessary. That the shari'a as practiced today does not appear to make the distinction between basic intent and specific intent is perhaps also a symptom of the neglect of

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229 Barwick C.J. said in *Ryan v The Queen* (1967) 121 CLR 205, 213 that - [...] there has not been any frequent need to express with technically expressed precision the difference between that element of mens rea which relates the will to act to the deed in question and that element which relates to it the general intent with which that will was exercised.

Barwick C.J. then noted in *R v O'Connor* (1980) 146 CLR 64, 76:

Mens rea ordinarily requires a general or basic intent at least to do the physical act involved in the crime charged.

And the Court in *He Kaw Teh v The Queen* (1985) 157 CLR 523 subsequently said that:

Nonetheless, voluntariness and general intent are distinct mental states. General intent and specific intent are also distinct mental states. General or basic intent relates to the doing of the act involved in an offence; special or specific intent relates to the results caused by the act done.

The Court in *He Kaw Teh v The Queen* (1985) 157 CLR 523 [7], further stated that:

Voluntariness, general intent and specific intent are three categories of mens rea that may be (but are not always) mental elements applicable to the external elements of an offence. Voluntariness and general intent are generally implied in a statute creating an offence as mental elements applicable to the act involved in the offence; specific intent is not implied. When a specific intent is expressed to be an element, it is ordinarily expressed to apply only to results. The definition of circumstances attendant upon but not an integral part of the act involved in the offence may (but does not always) imply another mental element: knowledge or the absence of an honest and reasonable but mistaken belief as to the existence of those circumstances. The distinction between the act and the circumstances which attend its occurrence is frequently of no moment, because for all practical purposes the same mental element — knowledge — is the requisite mental element ordinarily applicable both to the act and the circumstances. But if there be a legislative intention to apply a mental element to the circumstances different from the mental element applicable to the act involved in the offence, it is necessary to decide what circumstances are defined to be an integral part of the act (to which intent and therefore knowledge will ordinarily apply) and what circumstances are defined to be merely attendant (to which no mental element may be intended to apply or to which a mental element less than knowledge may be intended to apply). One of the intractable difficulties in the process of identifying the particular category of mens rea that applies to the respective external elements of an offence is the identification of the prohibited act on the one hand and the circumstances attendant on the doing of that act on the other.
criminal law in the domestic jurisdiction but is not discussed any further here as it is tangential to this analysis.

The early authorities rejected rebellion as a legitimate means of rectifying wrongs, and urged admonition only, as a means to effect change on ‘wrongdoers’. The underlying reason was arguably for the Qur'anic injunction there is ‘no compulsion in religion’ and therefore, that no one had the right to impose his religious interpretation on another. This view favouring admonition is also supported by the Prophet who said that the best *djihad* was the speaking of a word of truth (*kalimat al-haq*) to the unjust leader. Further, some scholars have reserved the matter of rectifying wrongs (censorship or *hisba*) to the ruler (or arguably in the present environment, the State) only. Rebels on the other hand have invoked the ‘forbidding wrong’ verses in support of their actions and have done so from the time of the ‘Kharijites, the Ibadis and the Zaydis’, to the more contemporary situation in Oman, but where the Sultan was able to placate the rebels with gifts.

It appears that ‘commanding right’ verses were the catch-cry of the ‘puritanical’ against individual wrongdoers, including in some instances the caliph, although there is doctrinal or legal basis for limiting its application. However, the scholars warned against using the verses for ‘bloodshed and plunder’, a characterisation that could equally apply to the many instances of al-Qa’eda’s armed action, revenge attacks, kidnappings and extortion. On the other hand, the Prophet also stated that

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231 Ibid, 91.
232 Qur’an 2:256.
234 Ibid. 80.
236 Ibid, 94.
238 Ibid, 87.
there will come times when there is an ‘utter corruption of values’,\textsuperscript{240} when one is best served by minding one’s business and looking to personal salvation’.\textsuperscript{241} There is no consensus on whether this time has been reached.

Peters states that ‘it has been established on the authority of the Koran, the Sunna, and the Consensus of the Community, that those who depart from the law of Islam must be fought,\textit{even if they pronounce the two professions of faith’}.\textsuperscript{242} After the death of the Prophet, some Muslims outside the Hejaz wanted to secede on the grounds that the tithe (zakat) was no longer payable to the Muslim treasury and for this reason caliph Abu Bakr fought them till they relented and paid the tithe.\textsuperscript{243} Further, since the earliest times or at least since the wars between the Prophet’s Companions, particularly ‘The Battle of Siffin’\textsuperscript{244} and ‘The Battle of the Camel’,\textsuperscript{245} jurists have been at pains to justify or at least not to condemn rebellion. Ibn Rushd,\textsuperscript{246} an eminent jurist and scholar, sums up the Sunni position on the ‘Battle of the Camel’:\textsuperscript{247}

\begin{quote}
A’isha (sometimes written Ayse by Turkish Australians, the wife of the Prophet) meant to ascribe fault to the Companions who refused to become involved in the wars that took place between them and who abstained and \textit{who refused to be with one side against the other.} A’isha believed that it was their duty to attempt to reconcile between the contending parties, and if they were unable to effect a reconciliation, then they should have joined the forces of the party
\end{quote}

\begin{itemize}
  \item \textsuperscript{240} Ibid, 86.
  \item \textsuperscript{241} Qur’\textsuperscript{an} 5:105: \textit{O ye who believe! guard your own souls: if you follow (right) guidance no hurt can come to you from those who stray. Some jurists have expressed the opinion that this verse has been abrogated. }
  \item \textsuperscript{242} Rudolph Peters, \textit{jihad in Classical and Modern Islam} (1996), 52 (emphasis added).
  \item \textsuperscript{243} Philip K Hitti, \textit{The Arabs: A Short History} (4th. ed, 1960), 48.
  \item \textsuperscript{244} This conflict was between the fourth righteous orthodox Sunni caliph/ first Shi‘i imam, Ali ibn Abu Talib, who was an acknowledged scholar and considered a righteous person by all Muslims, and the Umayyad Muawiyya bin Abu Suffiyan [657 A.D]: Christian Decorbet, \textit{Le Prophète et Le Combattant: L’Institution de l’Islam} (1991), 12.
  \item \textsuperscript{245} The armed conflict in this case was between Caliph Ali and ‘Ayse, a widow of the Prophet: Imam Ali ibn Abu Talib, \textit{Nahjul Balagha : Peak of Eloquence} (1986), 53. The personal relationship between the two, although strained from an earlier incident in which ‘Ayse was accused of improper behaviour, and although the allegation was not made by Ali, did not blind the protagonists to the virtues of the other. ‘Ayse said of Ali that he was the most knowledgeable of the sunna: Taha Jabir al-Alwani, \textit{Source Methodology in Islamic Jurisprudence} (2003), 18.
  \item \textsuperscript{246} As discussed however, the Wahhabis consider Ibn Rushd a heretic and it seems ironic that they may have to depend on his authority for them to be declared as baghi.
  \item \textsuperscript{247} Khaled Abou El-Fadl, \textit{Rebellion & Violence in Islamic Law} (2001), 45 (footnotes omitted emphasis added).\
\end{itemize}
they believed to be in the right, as the [bāghî] verse requires them to do. [However], it should be noted that those who refused to join either side, did so to stay on the side of safety and certainty because they could not ascertain who was right and who was wrong. Hence it was incumbent upon them to abstain from becoming involved because it is not permitted for a Muslim to kill another while acting on speculative belief rather than certainty. Likewise, it was incumbent upon those who did fight to do so because they believed that to be right, pursuant to their own idjtißad on the matter. Consequently, each of them is praiseworthy for what they have done. The killer and the killed are in heaven, and this is what every Muslim should believe as to the conflict that befell the Companions.

The test that emerges is that ‘it is not permitted for a Muslim to kill another while acting on speculative belief rather than certainty (the Ibn Rushd test)’ and accords with the analysis of the Qur’anic view on ‘suspicion’. This sometimes questionable ‘certainty’ is not unknown in Equity’s legal culture which notes as part of this language that ‘theologians are often in error but seldom in doubt’. However, the reality is that in addition to the rebellion among the Companions, history has witnessed the overthrow of the Ummiyads (who ruled for 100 years) by the Abassids (who ruled for 500 years), who were in turn successively replaced by a succession of other rulers up to the 20th century Ottomans (who ruled for 400 years), the European colonialists and the development of independence as nation States today. The rulers gained legitimacy over (and in cases a significant period of) time and this shows that in practice rulers generally lost power when they were unable to hold on to the reins and not because they relinquished power for reasons mandated by the shari’ a. Jurists and rulers have not adequately addressed the issue of peaceful transfer of power under the shari’ a and it is posited with respect, and while nothing turns on this, that Muslims can perhaps learn, and appropriately and

248 Emphasis added to signify that this test derives from Ibn Rushd’s subjective opinion and is not part of the Prophet’s reasoning as per the hadith reported by Ibn Mas’ud in the hadith referred above n 223. This test itself however, has stood for a 1,000 years but nonetheless suits the contemporary political and judicial environments and is therefore arguably a reasonable presumption. As a Sunni formulation it can prima facie apply to al-Qa’eda cadres.

249 This conclusion is diametrically opposite to that adopted by the Prophet in Ibn Mas’ud’s versions, see above n 222, but nonetheless falls within the meaning of the second hadith, “My companions are like stars, whichever one you follow you will be guided” : Javad Nurbakhsh, Traditions of the Prophet (1981), 42.

250 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 45.

251 See above n 154, 295.
lawfully adapt peaceful power transfer mechanisms, such as through periodic elections, as practiced by some contemporary Western States.

5.3(b) Some Relevant International Law on the Use of Armed Force by Non-State Actors

International law recognises that fighting against illegal, oppressive regimes such as apartheid regimes and colonial hegemons is in cases not illegitimate.252 The use of force by people in occupied territories to resist domination and oppression may however be punishable by the occupying power but a Court must be made cognisant that a resistance fighter 'is not bound to it [the occupying power] by any duty of allegiance'253 and that any sentence is pronounced after the matter is heard by the 'competent courts of the Occupying Power [...] after a regular trial'.254 That is, while international law does not condone rebellion as such, it does not arguably differ markedly in principle from the shari'a treatment of the issue in recognising that oppression might in cases force people to take up arms.255

Notwithstanding an anomalous position expressed by the Australian, and until recently the US government, Common Article 3 of the Geneva Conventions (‘CA3’) is a customary legal baseline for armed

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253 Article 68 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War., 12 August 1949, 75 UNTS 287.
254 Article 71. Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War., 12 August 1949, 75 UNTS 287
256 Subsequently, following Hamdan and Others v Rumsfeld, Secretary of Defense, et al. (2006) 126 SCt 2749 (2006). [decided on 29 June 2006] the US Government stated that 'detainees held in US military custody around the world are entitled to protections under the Geneva Conventions': Tony Snow, Detainees protected under Geneva Conventions: White House (2006) <www.cbc.ca/world/story/2006/07/11/geneva-convention.html> at 12:39 PM ET. Thus, it is claimed that the US Department of Defence ban on torture does not extend to captives held in CIA custody: Deb Reichmann, 'Democrats Criticize Bush's CIA-Bill Veto', USA Today 8 March 2008. The Australian Government accepted as legitimate the US military's characterisation of those detained at Guantánamo Bay as 'enemy combatants' as distinguished from a POW. While a POW was entitled to, in the US and Australia’s view, the rights enshrined in the Geneva Conventions, this protection did not extend to the class of 'enemy combatants' held during the war on terror.
conflicts not of an international character. As a matter of international law, CA3 applies *erga omnes*. This view of the universal application of CA3 was arguably confirmed in the Additional Protocol II (APII) which extends and supplements CA3, although clearly APII in its entirety is binding on States party only.

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257 The ICJ referred to the legal obligations under Common Article 3 as a ‘minimum yardstick’ in IHL: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, (judgment of 27 June) (1986) 14 ICJ Rep 1, 449.*

Common Article 3 of the Geneva Conventions provide in part that:

Art. 3. 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.

258 Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977,

259 Article 1 Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977

260 According to Article 75 of the Protocol (Fundamental guarantees):

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) violence to the life, health, or physical or mental well-being of persons, in particular:

(i) murder;

(ii) torture of all kinds, whether physical or mental;

(iii) corporal punishment; and

(iv) mutilation;

(b) outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) the taking of hostages;

(d) collective punishments; and

(e) threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
Thus in practice, the European parliament recognises the existence of oppression in Chechnya, but at the same time characterises the 'fighters' as terrorists for their methods of warfare. This is a reasonable position and provides support that this shari'a distinction enjoys support in

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
(c) no one shall be accused or convicted of a criminal offence on account or any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
(d) anyone charged with an offence is presumed innocent until proved guilty according to law;
(e) anyone charged with an offence shall have the right to be tried in his presence;
(f) no one shall be compelled to testify against himself or to confess guilt;
(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;
(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and
(j) a convicted person shall be advised on conviction or his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:
(a) persons who are accused or such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and
(b) any such persons who do not benefit from more favourable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article, whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favourable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1

This seems to suggest that certain detainees are not covered by Geneva Conventions III and IV. The better view is that the Conventions are of general application as a matter of customary international law: Brian D Tittermore, 'Belligerents in Blue Helmets: Applying International Humanitarian Law to the United Nations Peace Operations' (1997) 33 Stanford J Int'l Law 61, 99.


Ibid, 17.
the broader legal area. A similar situation existed with respect to the fighters in the conflict in Kosovo/Kosova, which was also an area with a Muslim majority population, although Kosovo/Kosova is now an independent State as recognised by Australia263 and other Western States.264 Accepting that ‘just causes’ can be fought for in an unprincipled manner is well known on the international plane. What international law condones and the shari‘a will not, however, is that even ‘terrorists’, truly characterised as such, tend to have their previous transgressions ignored when they accede to power. The shari‘a as a system does not have the authority to ‘forgive’, and therefore cannot usurp the right of the victims, their families or God to exercise such forgiveness.

While general international law may not explicitly recognise a ‘right to rebellion’ as such,265 in practice, many once ‘national liberation’266 movements, including ‘terrorists’, are now in government. This phenomenon attests to the fact that a successful rebellion brings with it at least de facto but often (in time) de jure recognition.267 However, until Islamists including al-Qa’eda attain to this level of political power or are somehow able to get to the negotiating table with the other key stakeholders in the debate on international peace and security, it is not likely to be treated with any degree of respect by the international community. Therefore, while not a substantial ‘right’ under international law as such, there is at least ex post facto recognition of successful rebellions.

Any such use of force by Muslims who claim to abide by the shari‘a, however, must nonetheless be intra vires the shari‘a limits. Rebellion under

According to the authors, Noam Chomsky and Gilbert Achcar, Perilous Power: The Middle East and US Foreign Policy (2007), 64:
What makes [a State] legitimate? The way the international system is set up, States have certain rights; that has nothing to do with their legitimacy
the shari'a falls into this category of resistance against a nominally Muslim regime kept in power through oppression or by foreign forces and is now examined.

5.4 Elements of the Law of Rebellion
There are six key elements in the 'baghi verse' and from subsequent practice which are now examined. This examination not meant to be an exhaustive of the available law but an attempt to identify whether the basic law exists to formulate positive law in order to establish a prima facie case against those involved in fighting and to declare them legitimately as rebels or otherwise in the meaning of the shari'a.

5.4.1 The contending parties must be Believers (or at least Muslim)
The baghi verse requires that there are two (or more) Muslim parties to the conflict or quarrel.

Al-Qa'eda and Islamist groups generally claim to be Muslims and to be fighting under the banner of Islam. On the other hand, some sub-groups or affiliates of al-Qa'eda declare its adversaries, including the Saudis as 'heretic' or (say in Iraq) where the government is dominated by Shi'i Muslims, to be apostate (by the process of takfir). This characterisation, if accurate, means that since its adversary is non-Muslim the law of rebellion cannot apply and the conflict must be viewed as either a war against the disbeliever (harb al-kuffar) or as a jihad.

However, as discussed in Appendix 1, the characterisation of one party by the other as 'kafir' (disbelieving) or heretic is common and therefore should not prevent the application of the laws of rebellion if there is a general consensus among Muslims that the two parties are Muslims. The majority population of Iraq is Shi'i Muslim and the democratically elected government reflects this sectarian representation. The present Afghan government is also notionally democratically elected. Saudi Arabia

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268 See n 212, 303, for the text of the baghi verse (on rebellion).
269 See Appendix 1.
on the other hand is an absolute monarchy\textsuperscript{270} but all three States by consensus are Muslim States.

The degree of involvement of non-Muslims in Muslim conflicts is difficult to ascertain with any degree of accuracy or certainty. Indeed in the interdependent world of today such involvement is likely to be unavoidable, as witnessed in the makeup of the Coalition that used military means to free Kuwait from Iraqi occupation. Further, in Iraq and Afghanistan, al-Qa'eda is fighting both the local (Muslim) government as well as other Coalition partners, both Muslim and non-Muslim, and therefore aspects of the conflict may be characterised variously as war, \textit{djihad}, rebellion (or insurgency as it is sometimes classified in Afghanistan and in Iraq), war against non-Muslims (\textit{harb al-kuffar}) or in other cases plain banditry (\textit{hiraba}). Although Muslims are not meant to take non-Muslims as protectors in preference to other Muslims,\textsuperscript{271} there is an exception in Qur'an 3:28 (emphasis added):

\begin{quote}
Let not the believers take disbelievers for their friends in preference to believers. Whoso doeth that hath no connection with God unless (it be) that ye but guard yourselves against them, taking (as it were) security. [...] 
\end{quote}

In light of the present realities, which include the power of the UN Security Council to authorise States to protect others, it is necessary to interpret the Qur'an in its contemporary setting, in which Muslim States are the underdog. Muslim States must not therefore be considered 'heretic' or 'infidel' purely because they sought the protection of non-Muslim States, as there is legal authority to seek such help in cases.

Further, some of the Islamists' acts, such as \textit{kamikaze} attacks and the slaying of women and children, are likely to be characterised \textit{bid'a}. The oppressive acts of the Muslim States (which by their horrible behaviour may render both the Islamists and key personnel in the nation States, and very broadly speaking, 'not-quite-Muslims' in the eyes of some Muslims) are likely to be characterised similarly. Nonetheless, the majority by consensus are likely to accept both al-Qa'eda cadres and States'.


\textsuperscript{271} Qur'an 8:72–73; Qur'an 5:57; Qur'an 60:1.
functionaries as ‘Muslim’, for the very low threshold that is required and as discussed in Appendix 1.

In conclusion, the majority of Muslims arguably recognise both al-Qa’eda and the ‘Muslim’ governments party to the conflicts in question as Muslim.272 The question of whether they are ‘believers’ is not a question for a temporal court.

5.4.2 There must be a conflict between these parties.
The nature of the conflict between Muslims is not defined but the existence of a conflict is a question of fact which can be established by admissible evidence.

Even those who speak of ‘an umma’, such as Bin Laden, whose call for change is universal, limits himself principally to Saudi Arabia on the topic of the distribution of Saudi Arabia’s oil wealth.273 Bin Laden has explicitly declared war in [Saudi] Arabia.274 Al-Qa’eda variously characterises its struggle as for liberation275 (تحریر as well as a djihad.276 The specific terminology is not important with respect to ascertaining the existence of a conflict. Both these terms appear to be prima facie inappropriate descriptors of the conflict, the first because a ‘war of liberation’ is not terminology with an accepted meaning under the shari’a and secondly because one cannot generally engage in armed djihad against Muslims (notwithstanding al-Qa’eda’s characterisation of the Saudi government as heretical),277 although the struggle against foreign forces

272 See for example the Organisation of Islamic Conference where countries and peoples recognised as ‘Muslim’ acknowledge each other. <http://www.oic-oci.org/french/conf/makka-meeting/list.htm>. [Accessed on 20 December 2006]. Further while al-Qa’eda’s methods elicit some, sometimes strong, criticism or even condemnation as examined through this thesis, its character on the other hand, as ‘Muslim’ is seldom challenged by other Muslims.


274 Ibid, 23.

275 Ibid, 27.

276 Ibid, 23.

may prima facie constitute legitimate armed *dijihad*. On the other hand, while the word liberation does not appear in the Qur'an in its contemporary context, it arguably covers the meaning of the concept of deliverance from oppression, which in this context could possibly be sanctioned and supported by the *shari'a* (but which nonetheless needs the attention of the jurists before the matter is settled).

There is an underlying question of whether changing or seeking to change ones (local or State) government conceptually is problematic because a single *umma* precludes the existence of multiple governments. The existence of multiple 'States' within the *umma*, however, is a question of fact acknowledged by the existence of organisations such as the OIC. Further, the break-up of the *umma* into multiple sovereign States, including the recognition by Muslims of these separate States universally, in the meaning of the UN Charter, is a matter of fact and one that has been accommodated by Muslim jurists. On the other hand, al-Qa'eda could claim that a 'regional government' such as Saudi Arabia, not sanctioned by the legitimate imam is ipso facto not legitimate. Note however that the *baghi* verse does not require the conflict, or the parties to the conflict, themselves to be legitimate.

The existence of a conflict between al-Qa'eda and the respective governments of Saudi Arabia, Afghanistan or Iraq, where the governments and their allies and al-Qa'eda and its allies are engaged in armed combat, is clearly satisfied.

5.4.3 There must be transgression
One of the parties to the conflict must have ‘transgressed’.

Failure by individual Muslims (including Muslim leaders) to perform prayer, to pay the poor rate (*zakat*), to fast in Ramadan or to become involved in oppressing others, are all transgressions. The existence of transgression, however, is essentially a question of fact. Oppression is a clear transgression of the *shari'a*. Most Muslims are likely to consider the

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278 Recall that Bin Laden declared the Saudi Government heretic, not as *kafir*. See n 226, 287.
situations in the countries in which al-Qa'eda is most active as generally oppressive, although how blame is apportioned between the States and al-Qa'eda is not a settled question. This element is likely to be satisfied in the current conflict.

5.4.4 Transgression must be 'beyond bounds'
The Qur'an sets up a threshold test that '[the transgression referred to in #5.4.3 above] must be beyond bounds'\(^{279}\) and clearly not every transgression will satisfy this threshold.

Commentators refer to the acts of the Pharaoh (of Moses and the Exodus) as one whose actions transgressed beyond bounds as he ordered the worship of the Pharaoh, blatant cruel maltreatment and oppression of the Children of Israel (the Jewish people) including torture and murder. On the other hand, as mentioned above, fitna, oppression and the denial of religious freedoms are transgressions by governments which appear to give rebels a prima facie justification for fighting.

To use some old English terminology however, the 'cure' for the mischief must not however be worse than the 'disease' itself. Muslim must therefore act on certainty and not on speculative belief that the requisite threshold has indeed been reached (the ibn Rushd test\(^ {280}\)). Further, bin Laden elevates the Saudi theatre of conflict above all others, presumably because of the presence of the two holy cities, and calls for 'reform' based on Qur'an 11:88\(^ {281}\) and does not appear to be an unreasonable emphasis for a person from the Arabian Peninsula.

Bin Laden characterises al-Qa'eda’s struggle against, and the removal from power of, the Saudi Arabian and other (Persian Gulf) Arab

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\(^{279}\) Qur’an 49:9. The word bagha (فَغَتَ) is translated by Yusuf Ali as 'transgression beyond bounds'. The Qur'anic phrase is: قال: فَغَتَ إِبَدًا مَنْ أَخَذَ الصَّابِرَةَ وَفَغَتَ إِبَدًا مَنْ أَخَذَ الصَّابِرَةَ and 'transgression beyond bounds' is the most quoted translation. The issue of a more precise and broadly acceptable meaning of the baghi verse is an issue that must be settled by contemporary Muslim jurists. For example el-Fadl translates 'transgress against the other'; taking the phrase to signify when two parties of Muslims 'each transgress against the other'. In his view therefore baghi means transgression or injustice and specifically rejects Yusuf Ali’s translation: Khaled Abou El-Fadl, *Rebellion & Violence in Islamic Law* (2001), 37.

\(^{280}\) See text accompanying n 250, 309.
governments as a *djihad* in self-defence. More problematically he states that this *djihad* is individually binding on all Muslims, while the consensus is that armed *djihad* generally is a collective duty. He notes on the other hand, perhaps rightly, that it was the failure of peaceful means of achieving change that 'pushed' him into armed action. Some evidence that al-Qa'eda brings against 'Muslim' governments, is that:

(a) they are oppressive and thus unjust and

(b) they do not apply the *shari'a in toto*.

These governments also appear unwilling or unable to protect (and in other cases actively or by omission aid and abet driving Muslims from their homes) people who do not have freedom of worship and are sometimes subject to torture. Al-Qa'eda also refer generally to the ill treatment of Muslims by Coalition members including the 'sale' by the Northern Alliance of free Muslims some of whom were transferred to Guantánamo Bay. On the other hand, *Guantánamo* detainees were quite instrumentally described as the 'worst of the worst', some possessing such vital 'ticking time bomb'-type information that in cases even justified


284 See Appendix 1.

285 Rosalind Gwynne, *Al-Qa'ida and al-Qur'an: The "Tafsir" of Usamah bin Ladin* (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004., 15. According to the First Orthodox Caliph Abu Bakr, the selection of a leader (Caliph) is a matter for people according to what is in their best interests: Khaled Abou El-Fadl, 'Constitutionalism and the Islamic Sunni Legacy' (2002) 1 UCLA Journal of Islamic and Near Eastern Law 67, 79. a key aspect of political succession not practised in Saudi Arabia or the other Persian Gulf Arab States. The principle of escalation developed by the Jurist Ghazali, see n 187 above, requires that Muslims must try peaceful means to achieve change and failing this may escalate the means. Bin Laden appears to have relied upon the *shari'a* escalation process.

286 Many Muslim and non-Muslim States allow the application of Muslim personal law and inheritance law. Few, if any, countries apply the *shari'a* in a more comprehensive way. For example, no country distributes its wealth among the poorest in the *umma* or prohibits the dealing in interest among Muslims.


288 Ibid, xxii.
the use of torture. As has transpired however, Guantánamo captives have included taxi drivers, shepherds (including one 90 year old), together with the now public information on the infamous mistreatment of ‘prisoners’ at Bagram, Abu Ghraib and at other ‘undisclosed locations’ where some were tortured. There is evidence of UK Muslims, at the instigation of the UK authorities, being given falaqa in Dubai, Manama and Pakistan, coupled with the use of ‘waterboarding’ and other ‘enhanced’ questioning techniques (by the US authorities).

Bin Laden on the other hand promotes the view that there is an obligation to kill Americans, whether civilians or military personnel, binding every Muslim individual, a command the breadth of which appears to be utterly novel, ultra vires the shari’a and to well go beyond reasonable bounds. Bin Laden also appears to ignore the part that al-Qaeda plays in the carnage. A further example of transgression beyond bounds is the wilful blindness on his part, which he appears to condone, or at minimum is silent, as to the plight of Afghan girls being deprived of

289 Joseph Marguilies, Guantánamo and The Abuse of Presidential Power (2006), 10; Alan Dershowitz, Why Terrorism Works: understanding the threat, responding to the challenge (2003), 162.


291 Moazzam Begg (with) Victoria Brittan, Enemy Combatant: A Muslim’s Journey to Guantánamo and Back (2006). Begg quotes a Pakistani official who said: ‘This [treatment] is nothing to do with us [Pakistani Officials]. It is your [i.e. UK] government that is doing this’.

Begg, a Briton of Pakistani descent, highlights the better treatment he received at the hands of Pakistani officials as compared to the treatment he received from all other authorities. This probably reflects a general view that foreigners were ill treated by all relevant countries. Begg also claims that the UK authorities stole money £300 from his shop: Moazzam Begg (with) Victoria Brittan, Enemy Combatant: A Muslim’s Journey to Guantánamo and Back (2006), 89.

292 falaqa is the Arab torture of beating the victim on the soles of the feet: Moazzam Begg (with) Victoria Brittan, Enemy Combatant: A Muslim’s Journey to Guantánamo and Back (2006), 79.

293 Ibid, 88.

294 Jennifer Loven, ‘Obama says waterboarding was torture’, The Huffington Post (New York), 29 April 2009.

even a basic education (against the mandatory shari'a requirement for the
pursuit of knowledge\textsuperscript{296}), while two of his wives have PhDs. This double
standard is a form of Arab supremacist behaviour not unknown in the
Arab world and which is every bit as obnoxious as White other similar
supremacists movements.

Further, Islamists make broadly-stated and unsubstantiated
charges against large groups of Muslims by labelling them as heretics or
disbelievers and prompting ‘true believers’ to kill ‘heretics’, which also
amounts to a transgression beyond bounds. But for the West’s own
excesses Muslims would be obliged to unite against the Islamists. On the
other hand, Muslim States, including those adhering to the Wahhabi
ideology, that originally supported al-Qa’eda when it suited, now accuse
al-Qa’eda of ‘terrorism’.\textsuperscript{297} Terrorism does not yet have specific legal
meaning under the shari’a although much of the attacks resembling Type 2
kamikaze attacks arguably constitutes a class of banditry.\textsuperscript{298}

However, there is sufficient evidence of wanton, random or reckless
indifference to causing grievous injury or death, extra judicial killing and
the destruction of property among Muslim populations caused by al-
Qa’eda to support a charge against al-Qa’eda operatives and leadership of
‘transgression beyond bounds’. On balance, at least some of the current
transgression by al-Qa’eda and its allies reasonably is likely to be
considered ‘beyond bounds’.

That al-Qa’eda goes ‘beyond bounds’ appears to be an almost
universal view among Muslims. The question for Muslims is: Which side
will they opt to support in a conflict? And this raises a scenario not unlike
the times of the wars between the Companions. The only consensus
appears to be that whichever side a believing Muslim elects to support,

\textsuperscript{296} Javad Nurbakhsh, \textit{Traditions of the Prophet} (1981), 49.
\textsuperscript{297} Asad Abukhalil, \textit{The Battle for Saudi Arabia} (2004), 36.; Anthony M Cordesman,
Saudi Arabia: Guarding the Desert Kingdom (1997), 41.
\textsuperscript{298} See 4 Banditry or Armed or Highway Robbery, 281. Compare also, al-Qa’eda’s
behaviour against say that of the rebels at Mecca: Yaroslav Trofimov, \textit{The Siege of
they must do so with ‘certain’ conviction\(^{299}\) and more importantly ensure that ‘their’ own side abides by \textit{shari'a} limits.

5.4.5 \textbf{Principled belief in the righteousness of the cause}

A Muslim’s decision to participate in rebellion must be based on principled or sincerely-held beliefs. Further, historical precedent, originally based on incidents at the battles of Sifin and the Camel, established the requirement that the rebels are principled \textit{(muta'aawila)}.\(^{300}\) This element is based on a subjectively-held belief of ‘certainty’ and thus must be subjected to a ‘due diligence’, ibn Rushd test to ascertain whether their individual belief is sincere, derives from a reasonable theological basis, is credible and is honestly and firmly held.\(^{301}\)

\textit{Shi‘i} Muslims responding to a carefully considered case for rebellion,\(^{302}\) by a recognised imam arguably satisfy this element as they are subject to \textit{taqlid}.\(^{303}\) On the other hand, many contemporary (\textit{Sunni}) scholars, including \textit{Wahhabis}, do not accept \textit{taqlid} as valid,\(^{304}\) and will therefore, individually and independently be required to satisfy the ibn Rushd test. Failure to do this may nullify the necessary mental element of the necessary principled belief in the rightness of the cause. Broadly speaking, ‘rebels or dissidents’ under a responsible command, who fall within the meaning of Article 1(1) of APII\(^{305}\) are not dissimilar to rebels under the \textit{shari'a} and the

\footnotesize
\begin{itemize}
\item \(^{299}\) See 5.4.5 Principled belief in the righteousness of the cause, 322.
\item \(^{300}\) Khaled Abou El-Fadl, \textit{Rebellion & Violence in Islamic Law} (2001), 125.
\item \(^{301}\) See text accompanying n 250, 309.
\item \(^{302}\) The imam, as commander, is therefore responsible for acts that were covered by his/her authorisation. Clearly, the individual soldier is liable for his/her own \textit{ultra vires} acts.
\item \(^{303}\) See Appendix2.
\item \(^{304}\) Khaled Abou El-Fadl, \textit{Speaking in God's Name: Islamic Law, Authority and Women} (2001), 84.
\item \(^{305}\) Article 1 Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.
\end{itemize}
concepts of the laws of *bugha* should not be difficult to adapt, particularly for Muslim States party to API.\textsuperscript{306}

\textsuperscript{306} OIC Members are listed in the table set out below: Table 1 and the Muslim States who have ratified or acceded to the Protocols are set out as shown. (Status as at 18-Jun-2009)]

Table 1 — Muslim States’ party to APII

<table>
<thead>
<tr>
<th>OIC Member</th>
<th>AP I</th>
<th>AP II 1977</th>
<th>OIC Member</th>
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<th>AP II 1977</th>
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<td>07.06.1978</td>
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<td>16.08.1989</td>
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<td>03.09.1991</td>
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<td></td>
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<td>08.09.1980</td>
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<td>08.06.1979</td>
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<td>Uzbekistan</td>
<td>08.10.1993</td>
<td>08.10.1993</td>
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</table>

The preponderance of Islamic writings appears to show that rebellion against the imam is not permitted. On the other hand there is no general doctrinal or legal basis for a decision prohibiting ‘rebellion’ by Muslims.\(^{307}\)

\(^{307}\) There was an uprising by Muslims during the Caliphate of Abu Bakr, refusing to pay zakat (as mandated in the Qur’an), but the issue was not the injustice of the
provides not so much a ‘right’ to rebel against injustice as such, but provides that a principled rebel (muta‘awwila) cannot be treated harshly or punished under the shari‘a. It is conceded that as a matter of policy this leniency is problematic under the contemporary international legal regime. On the other hand, the majority of Muslims, even many of the majority who disagree with their methods, are likely to accept that some of the followers of al-Qa‘eda act according to their understanding of Islam and a legal question that arises is whether an individual can be classified as a principled rebel (muta‘awwila)? A possible test here is to examine the question of whether the rebel strayed beyond of the permitted means of combat.

5.4.6 Just Settlement of Disputes
Finally, peace arrangements for the cessation of hostilities between the warring parties must be just, fair and ensure that oppression, fitna and other serious transgressions that precipitated the conflict are eliminated. Rebels killed during the fighting are deemed to have been executed by hudud and their families/successors therefore not entitled to any compensation. Rebel survivors (who satisfy the muta‘awwila criteria) are however, not liable for punishment. Victims must be compensated however, although the law is not entirely clear in this area and needs to be developed to provide a suitable remedy in conjunction with a successful prosecution. It is also possible that, for protagonists not satisfying the elements of rebellion, their acts may be treated as banditry, or (for those who have taken life) as murderers. Soldiers in States’ military forces including but not limited to intelligence agents and torturers should also be

ruler. While the rebels were fought there was no consensus that the rebels did not have a right to fight against what they thought was taxation.

Khaled Abou El-Fadl, Speaking in God's Name: Islamic Law, Authority and Women (2001), 162.


This characterisation is important from a shari‘a perspective. It means that a rebel has ‘paid’ for his crime and is thus no longer liable for punishment from God. The survivor is expected to seek pardon through prayer and a change of behaviour.

treated according to the same objective criteria with respect to prosecution, with only ‘principled’ soldiers being excused from prosecution. It is conceded that this would require a very significant compromise by States under the current international regime.

Conclusion on Rebellion

The notion of a ‘call to arms’ during a very serious political, economic or social crisis is not novel. In some contemporary situations therefore, it is a distinct possibility that a section of the population could become involved in armed revolution against their rulers. On the other hand, the distinction between a political or economic war as opposed to a principled rebellion for the purpose of creating the right conditions for the free expression of a person’s free will, is central to the application of the shari’a. This important dichotomy creates a potential problem for both governments and al-Qa’eda, as purely political or economic wars would classify both protagonists as heretics as opposed to legitimate governments or principled rebels.312 Armed combat that cannot be classified as rebellion (and the criteria should include the means employed) can be considered criminal, or, if the elements are satisfied, as banditry or the other ‘equivalent crimes’, however named, created under the shari’a to parallel the Rome Statute.

It may in some cases be possible to characterise conflicts between al-Qa’eda and the various Muslim States as rebellion. The analysis of rebellion may also extend to and apply to the actions of other Islamist groups. The conclusion is that although some members of al-Qa’eda are likely to be found to be ‘legitimate’ rebels in some Muslim majority States. In other cases, some of their methods, tactics, targets and unnecessary and disproportionate means of fighting are likely to be found ultra vires. If charges are brought against individuals where transgression is ‘beyond bounds’, in the first instance these transgressors should be fought by all Muslims, and those who are brought to trial therefore be liable for punishment, if the charges are sustained. On the other hand, where the State is the greater transgressor, Muslims should endeavour to change this repressive regime and replace it with one that is more likely to allow

312 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 63.
people to practice their Covenants and to express their free will in a free and open manner.

There is a tension in the shari'a between social stability and a ‘right’ to act based on genuinely subjective belief that reaches the threshold of ‘certainty’. Conduct that infringes the rights and lives of others but is inspired by no more than speculative, subjective, individualistic faith must be considered culpable, prosecuted and punished where appropriate. The law on rebellion as it stands and as applies to al-Qa’eda now is summarised below.

The shari'a laws of rebellion appear to give both Muslims (such as those in al-Qa’eda and Islamists generally) and governments a legal basis for confrontation, with force if necessary against those who transgress ‘beyond bounds’. The shari'a creates a dichotomy where political or economic wars are fitna and remain illegal while a theologically-based rebellion against rulers transgressing beyond bounds (inter alia by acting oppressively) is deemed praiseworthy. The Qur'anic command to forbid evil leads to a degree of vigilance by believers who are expected to possess much higher standards of behaviour and taqwa and to expect their leaders to posses these same attributes.

The key question is, however, whether current armed action — including kamikaze, ‘terrorist’ or other armed activity by non-State Islamist groups against Muslim States and vice versa — falls within the scope of the laws of rebellion. On the analysis above there appears to be at least a rebuttable presumption that some members of the WIF/al-Qa’eda are rebels with a principled cause. However, the means used by the majority in their armed actions and the targets selected, particularly in Iraq, but increasingly in Afghanistan, Pakistan and Somalia and in other theatres of war, appear to be ultra vires.

The OIC can play a positive role in ensuring, or at least acting as a watchdog to ensure, that personal religious freedoms are respected so that the potential for fitna and the levels of oppression that can trigger rebellion are minimised and that regimes ‘transgressing bounds’ are ‘fought against’

313 Ibid.
by all Muslims as required under the Qur’an and the shari’a. International vigilance and supervision will to some extent help to restrain the activities of both States and rebels within their territories. As for the final legal element of the law of rebellion, any resulting peace agreements between the parties must also be ‘just’ in the meaning of the shari’a, which in a pragmatic sense reduces the future need for rebellion. Culpable rebels should be liable for punishment and financial penalties.

Chapter Conclusion

Muslim jurists determine the meaning of the Qur’an and the sunna. Therefore, they should turn their minds to determining the meaning of Islamic and Qur’anic terms including that of djihad, rebellion and other genres of armed conflict from a strategic perspective in a contemporary sense.

Contrary to Western reports on him, people like bin Laden and others from the Arabian Peninsula initially tried to use peaceful means of effecting change within their societies and moderated the more confrontational approach of those such as al-Zawahiri. Escalation of the struggle resulted when regimes, often backed by the West, failed to respond to requests for the simplest reforms and led to the escalation of the conflict, including the use of force.

The use of armed force can in cases be properly characterised as djihad and is legitimate, or in the case of rebellion at least tolerated, under the shari’a. While armed djihad may at times become incumbent upon the Muslim, the greater djihad is the more relevant and applicable form of djihad for the better part of their lives. Disproportionately and inappropriately emphasising armed djihad is a disservice to the majority of Muslims and also to the majority of non-Muslims who suffer the insecurity that this armed action entails. Establishing armed djihad’s legal parameters is thus a matter of some urgency. Strict enforcement by the international

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community will arguably reduce wanton damage of the misuse of Islamic epithets by Islamists.

What is unfortunate is that a major force driving this mutual violence is an exaggerated perception of the ‘evil’ of the other side. The West’s anti-Muslim biases and phobias and their support for corrupt and despotic but subservient Muslim regimes is well documented and publicised. What is much less well publicised is not the simple assertion of a few ideological writers in the West who portray a simple message that ‘Muslims hate the West and our democracy’, but the fact that this minority view is sold to Muslims as the prevailing view in the West. Muslims are exploited by the Islamists to promote the existing misapprehensions about the West in the Arab/Muslim ‘street’. Under the shari’a, however, Muslims cannot blame others for their own gullibility and prejudices, particularly as they do not trust al-Qa’eda or their ruling regimes and should therefore apply the relevant Qur’anic test to the information they receive.315

As they say however, there is no smoke without fire. A view that appears to resonate in the Muslim ‘street’ are the words of an ex-Guantánamo Bay Afghan detainee, Aziz Khan, a then 45 year old father of ten and who was released after about two years in detention, which is that the ‘Americans are very cruel. They want to rule the world.’316 This perception of oppression by many in both the Muslim and non-Muslim world, while arguably true, and while not condoning such barbaric activity by the West, is nonetheless greatly exaggerated and exploited by Islamists. Such imagery is used to justify the ‘need’ for armed jihad or rebellion. The reality however, is that like the Islamophobia in the West, the Western haters in the Muslim world are an influential minority using the media and half-truths to promote their own hateful response to (the ignorance of the majority and) the minority in the West that promotes Islamophobia.

315 Qur’an 49:6:
O ye who believe! if a wicked person comes to you with any news ascertain the truth lest ye harm people unwittingly and afterwards become full of repentance for what ye have done.

The proposal here is to allow Muslims to see the criminals among them tried by their own law, in a free and fair process. Given the Muslims’ reasonable mistrust of the many governments with their flawed and corrupt legal processes and systems and the poor infrastructure, prosecution on the domestic plane will not be viewed with the requisite degree of confidence. The torture of Muslims from Western States in Muslim-majority countries and the ‘biased’ anti-terrorism laws of the West make prosecution of important Islamists in the West problematic and unsatisfactory. For these reasons, it is extremely unlikely that rebels will receive a fair trial in many Muslim States. They should be tried in an impartial tribunal, preferably on the international plane. This matter, after a discussion in chapter 6 of mechanisms to develop the law, will be discussed in chapter 7.
CHAPTER 6

THE NEED FOR A 'NEW' PARADIGM

Do not wait till you want to 'go' before you build your toilet – Malay Proverb.
You cannot fatten your pig on market day – English Proverb.
If you keep doing what you are doing you will keep getting what you are getting. — American Proverb.

Introduction
Nothing is as clichéd or tired as the calling for 'new' ideas. It is tired because in the field of human relations, it is very unlikely that we are so wise as to glean what has eluded our wise predecessors. What would be novel in practice, however, is that we did not ignore the better precedents of our forebears, paid heed to history and respected and learnt from the collective wisdom of our elders or ancestors.

The foregoing discussion indicates that there is a viable shari'a legal framework of principles and a sufficient body of Islamic law and jurisprudence in the areas of humanitarian and criminal law ('SHL') that is broadly similar to and compatible with IHL/ICL. This is not to set IHL up as an ideal standard to be emulated in all cases. IHL is far from perfect, a law well behind its times, designed and formulated for use in a different century. To adapt Windeyer J.'s simile, humanitarian law as compared with the surge of the 'defence' business is well and truly 'in the rear and limping a little'.

Although in some need of development, SHL is nonetheless not so far from a stage necessary for its codification as positive law. This law can serve then as a suitable legal framework for prosecution on the

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1 Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383, 395 per Windeyer J.
2 It is not suggested that positive law is necessary for non-common law judges, only that it is preferable. International (non-common law) judges are capable of and willing to find the content of law in the jurisprudence, in customary international
international plane. IHL can legitimately explicitly be incorporated into the shari'a inter alia on the legal basis of adapting and adopting existing 'just' custom. On what was discussed in previous chapters this, it is posited, is proper use of custom under the shari'a. Developed within its 'spirit', it is also likely to curb some the excesses of the Executive in Muslim States but that is more an aspiration than a short-term goal.

The criticisms of many in the less-developed world against the privileging of Western law are well known. A parallel problematic perception that could also emerge is why Muslims’ law should now be privileged. Recall, however, that the argument in the paper is not for privileging any law (including secular laws) but is one of advocating legal pluralism and thereby to give effect to the UN as representing the civilisations and legal traditions of all peoples in the broadest sense.3 In the distant future perhaps, ‘international law’ could then include not just the laws derived from the major civilisations but also include the suitably-adapted laws of the many indigenous civilisations.

The other side of the coin is that the international community should not be seen to be rewarding terrorism and therefore wrongly privileging the immoral, if not unlawful, use of force. This, however, is a matter of characterisation. Many Islamist fighters are genuinely fighting oppression and see their deliverance in an armed struggle. Further, while Muslims engaged in armed struggle sometimes frame their aims and aspirations in shari'a terms, what they really seek is arguably a just, rule-of-law community. Gratuitous violence on the other hand must be punished

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3 This view of using the shari'a in a fair and transparent manner to resolve problems and to promote trade is advocated by the Australian Government. Senator Nick Sherry, Australia’s Assistant Treasurer (2010), said in an interview: Scott Alle, 'Australia to overhaul tax laws to assist Islamic finance growth' in Asia Pacific ABC Radio National, 2010, that: (The use of the shari’a law in banking services is not about special treatment) it is a commitment to creating a level playing field. While this example is clearly about making money for Australian banks and not about the reduction of violence, an issue that apart from Bali, has not really touched Australia in other than an oblique or indirect way. The Australian government however can be clearly be unemotionally be seen to be expressing a reasonable and fair view free of the emotion that comes with matters related to business and trade.
to the full extent of the law. In the case of Islamists (and it an argument of this paper) for best and enduring effect it must mean prosecution under the shari'a.

The creation of a shari'a-based system does not allow such criminals to escape justice. On the contrary, they will be punished much more severely than under secular law, if the secular authorities will permit the implementation of capital shari'a punishments for crimes such as hiraba and unlawful killing. It is re-iterated here, however, that this paper does not advocate the implementation of shari'a punishments for practicality, although it would serve as a deterrent for Islamists if applied legitimately and after a fair trial. To be punished under the very law they would impose upon others would be a form of poetic justice. It must be part of the human condition however that the effect of deterrence does not appear to last very long. If one of the indicia for preventing recidivism or deterrence is the notion of the chances of getting caught, then the shari'a is a constant reminder to the Muslim that an Omnipotent God watches his or her actions. While many 'Muslims' do not appear to believe in this notion other than at a very superficial level, or simply pay lip service to such a notion, the concept when articulated is nonetheless a constant reminder to Muslims, who for cultural reasons appear to proffer such platitudes as part of their daily cultural exchanges. Thus an enduring, living law that is constantly debated may have a more enduring 'chilling' effect on this violence by making exploitation of the shari'a more difficult and for the continuing interest of its adherents to protect its legitimacy and validity.

Some people, both in the West and in Muslim States, appear to fear the introduction of the shari'a, based however on what appear to be a fairly uninformed views of the broader law and on a narrow subset of some penal provisions of the criminal law. People in the West also sometimes appear not to recognise or acknowledge that the widespread oppression in the Muslim world is under laid by secular law and not the shari'a.

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4 According to R W Cooper, *The Nuremberg Trial* (1947), 271, the hopes of those immediately after the Second World War was expressed as:

[...] in the awesome serenity of the law Nuremberg passed into history bearing the still breathless hopes of mankind that a decisive step forward had been taken making the world secure from war.
Notwithstanding these omissions, the *shariʿa*, as with other systems of law, can and has been used and abused and it is this instrumental use of law — *shariʿa* or otherwise - that must be prevented, in a move towards rule-of-law societies.

The aim here is to examine whether it is possible legitimately and without violence to the *shariʿa*, to identify a process necessary ultimately to formulate a *shariʿa* Statute encompassing the serious crimes of genocide, war crimes and (although not specifically discussed for space) crimes against humanity and therefore one that parallels the Rome Statute. Criminalisation of what is broadly described as terrorism, and absent a specific definition on the international plane, but as defined in chapter 5 as broadly equivalent to the *shariʿa* crime of *hiraba*, is also recommended. The evolution of law must be gradual and allow for the time that crystallisation and genuine consensus formation can take, cognisant on the other hand of the problems associated with stagnation of the law.

In recognition of the many practical obstacles and problems however, a four-stage process is suggested for addressing the phenomenon of the unlawful use of force. A criminal Tribunal adjudicating on SHL is recommended for the long term (discussed under Stage 4 in chapter 7). Recommendations for the intermediate term are discussed in Stages 1 to 3 below.5

**Methodology for the Development of the law in a Contemporary Context**

Those who seek to derogate from the majority view always bear the onus of establishing an alternative norm. As what is proposed here may reasonably be viewed as attempting to establish a new norm, the methodology for doing so is proposed. It is noted in passing however, that what is proposed here is not a new mechanism but an attempt to revive an ancient methodology that served Muslims well for 800 years before instrumental politics took control of the law.

Creating a specific statute based on Islamic *shariʿa* legal theory, law, process, methodology and rules, some of which are discussed in previous

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5 See discussion commencing at page 337.
chapters, is likely to be a useful practical ‘end result’ of a process of development suggested in stages 1-3. Codifying the *shari’a*, while not entirely in the spirit of Islam (for its character as a jurists’ law) nonetheless has a precedent in the *Mejelle*. It is noted, however, that a legal instrument containing positive law does not *ipso facto* negate its own legitimacy, say if there is a body of jurists that can continuously monitor the statute’s operation for fairness, fidelity and justice and who are sensitive to the consensus of the people — issues broadly discussed in this chapter — just as under common law. In fact the proposed four-stage process itself falls within this broader *shari’a* methodology and is the reason why the suggested steps are formulated in this way.

Once drafted by jurists, publicising and opening up these legal instruments to debate and criticism will make the final adoption of a relevant Statute as ‘law’ and enjoy much greater Muslim ‘ownership’, making the ultimate aim of reducing or managing violence more likely. A secondary issue is whether publishing or promulgating a ‘positive law’, on which there is not yet a consensus, would be problematic under the *shari’a*. While this is an arguably legitimate criticism, the reality is that the *shari’a* has always been developed in stages and in a series of never-ending iterations and this proposed staged process is in principle no different as long as it does not claim somehow exclusively to be ‘the ultimate *shari’a*’ but merely a process of formulating consensus on SHL that is itself open to further development.

There are particularly offensive ‘laws’ ‘nested’ within these existing IHL instruments. Although not IHL instruments (and to demonstrate the point take for example formulations of the anti-terrorism legislation in Australia and other countries) jurists and Muslims must, and undoubtedly

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6 'End result' is used here in the context of a first stable form of the law. The *shari’a* however by nature is always susceptible to the critique of jurists and others and the term 'codification' is used here only as a term of convenience and not one of art.
8 See text accompanying the discussion related to the notion that these jurists can then create 'positive' 'legislation' that can bind or, that it is a necessary prerequisite to binding Muslims, is perhaps problematic.
9 The means for doing this perhaps created as an *ad hoc* tribunal such as the ICTY/R under Chapter VII of the UN Charter is discussed below.
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will, object publicly (as they have done\textsuperscript{10}). The consensus formation process is clearly and unambiguously impeded, signalling that the offending provisions need re-examination in much greater detail by both jurists and the Muslim public. The question of the existence of mechanisms to do so is a separate issue.

An important question touching on the issue of international peace and security is, whether, a judicial body legally based on the shari’a is a suitable forum to try persons who identify as Muslims, against whom there is a prima facie case for breach of serious criminal provisions and who would normally fall say within the current jurisdiction say of the ICC, the ICTY, the ICTR\textsuperscript{11} or other ad hoc or special purpose criminal tribunal created under international law (‘an eligible defendant’)?

The ‘stage 4’ discussion in chapter 7 answers this question in the affirmative and thus ultimately proposes the creation of such a specialist shari’a tribunal (‘the Tribunal’),\textsuperscript{12} using a lex specialis, broadly described and referred to as SHL or siyar law, continuously improved and refined by the input of the many interested parties. Further, for inter alia reasons discussed below, it is vital that the Tribunal employs recognised international jurists and (reports and) publishes its decisions in an open and transparent manner. It must serve as an institution that is publicly engaged with the broader Muslim as well as the international legal communities and act as an institution for testing and developing SHL.

\textsuperscript{10} ALRC, 'Review of Secrecy Laws' (2009) \textit{Discussion Paper}. Several Muslim groups provided input into these and other reviews of the legislation.

\textsuperscript{11} Mark Drumbl examines the limitations of the ICTY/ICTR model cognisant of the need to balance the ‘need to punish egregious breaches [and the] need to deter future breaches […].Mark A Drumbl, 'Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Global Order.' (2002) 81 \textit{North Carolina Law Review} 1, 15.

\textsuperscript{12} This is not an unrealistic idea and Western scholars have made similar recommendations inter alia for the same or similar reasons as proffered here. See generally: Frank E Vogel, 'The Trial of Terrorists under Classical Islamic Law' (2002) 43 \textit{Harvard International Law Journal} 53, 53. The necessary limitations of the very brief proposal made by Professor Vogel are not specifically discussed. For a more detailed article with some useful insights and recommendations on the use of a more ‘truly cosmopolitan international tribunal’ see: Mark A Drumbl, 'Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Global Order.' (2002) 81 \textit{North Carolina Law Review} 1, 14.
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Broad engagement and the recognition that is likely to flow to the Tribunal would place it in an ideal position to deliver justice that is recognised as fair and, in the longer term, expose those who would disingenuously exploit Western and Muslim ignorance or prejudice of the shari’a. It is conceded that convincing a sceptical Muslim community of the impartiality and fairness of a ‘Western’-based Tribunal is an obstacle to cooperation in the medium term. Scepticism of a Tribunal can however be mitigated through effective communication and constructive engagement with reasonable criticism, by producing good law and jurisprudence, fair decisions, and promoting the rule of law, openness and transparency. This chapter now examines the three stages proposed to help develop law to address, ameliorate and manage Islamist violence.

Stage 1 - ‘Opening up’ Contemporary IHL & ICL ‘Instruments’ for signature, accession and comment by Muslims

A first necessary step is to identify existing SHL, SHL compatible IHL/ICL and the ‘gaps’ between IHL/ICL and SHL as perceived by the broader Muslim community. The suggested starting point here is that Muslim States, non-State actors, groups, NGOs, civil society and individuals formally and explicitly be invited to accede to ‘copies’ of relevant ICL and IHL instruments, in a slightly modified form, that is, in a form that allows shari’a-based ‘reservations’ to these ‘instruments’ mutatis mutandis. Allowing Muslim States or others to make shari’a-based ‘reservations’ to settled law is a likely point of serious contention. This process of deliberate accession, as discussed below, can nonetheless be useful even when these rules are already an established part of customary international law. It ideally, formally requires the indulgence of the international community but failing that can be carried out independently anyway.

‘Uncontentious provisions’, that is, provisions for which there is an overwhelming support measured as a progressive total\(^\text{13}\) or with minor if any substantive critique, can, in a relatively short timeframe, be collated as

\(^{13}\) What is meant by an overwhelming majority of a ‘progressive total’, is the proportion of support to opposition after a minimum period of about 12 months of
shari'a instruments and opened for signature or accession by States, non-State groups or interested organisations or even individuals. It is proposed that a (shari'a-based) Weapons Charter, ('Weapons Charter'), the detail of which is discussed in Stage 3 below, is a high priority and should be created soon as practical as a specific, separate and important part of this proposed suite of instruments. The entire process can be managed as a transparent process, perhaps under the aegis of the OIC, honouring its aspiration to develop law in Muslim nations\textsuperscript{14} because the shari'a is a jurists' law and accepted as such by Muslims, including by the broader Muslim civil society.

For the contentious provisions, that is, provisions for which there is not an overwhelming consensus or where there are fundamental or serious 'reservations', shari'a scholars can then begin the process of discussing, arguing and critiquing, but generally addressing, the legal issues that are raised in these 'reservations'. This will help the process of clarifying the law, re-drafting the laws where this is possible. Fundamental issues, such as the original prohibition on the first use of fire or a reduced tolerance for causing a large numbers of collateral non-military deaths (and which, if effected, places Muslims at a military disadvantaged) may not find an immediate solution. In such cases, perhaps Muslim groups such as al-Qa'eda and others should be urged to accept the IHL standards, as accepted by Muslim States, and initially to agree to be bound for a limited time of, for example a renewable commitment (say every 5 years or so) until more practical and satisfactory shari'a standards evolve or can be formulated.

Note, however, that while Muslims will be bound by these broader limits as a matter of law, they are not required to exercise or use these broader limits if not absolutely necessary. Thus moral pressure should be exerted to keep Islamists well within the aspirational shari'a limits, except in situations of dire necessity. This process will aid, albeit imperfectly, a

consensus-forming process on SHL. The next step is then to help identify and publicise the new instruments, to keep developing the law, to continue the processes of identifying the remaining gaps between IHL/ICL and SHL and to encourage jurists to undertake the task of addressing these deficiencies in the shari'a, as an ongoing, iterative endeavour by providing them the opportunities and facilities.

'Reservations'
A reason for seeking this unorthodox indulgence of permitting 'reservations' against established IHL rules is because of the breakdown in trust between the Muslim/Arab street and its predominantly unelected and unrepresentative leadership — the loss of trust extending to the obligations entered into by their leaders on the international plane. The mistrust of their own corrupt or co-opted leaders is compounded by the misuse of law and power by the US and to a lesser extent by other Coalition States.

Refusal to engage means that the parties do not recognise the shari'a processes and therefore in any event remain bound by IHL. Further, political use of the ICC, such as arguably is the case with the indictment of President of the Sudan, is a tragic outcome from the perspective of the rule of law in the Muslim world and highlights the limits of the law in a 'power hungry' world. Such opportunistic and political prosecutions, even in cases when the legal basis of the charges is not unfounded (or even clearly founded) but is nonetheless arguably perceived by Muslims as unfair because of its political selectivity. Such perceptions, even when not entirely founded, are foolish because they pander to the strong. The Sudanese example is tragic not because President Bashir is innocent — he must be presumed innocent until proven otherwise — but because it highlights the well-known axiom in the Muslim world that the sharp end of the law is primarily reserved for the poor and dispossessed (in this case the 'victim' is a poor nation) while prosecution of the patently visible crimes of

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15 'Reservations' in this context is to be read broadly not differentiating for example interpretative declarations, an aspect not explicitly considered.

16 UN Security Council Resolution 1593, through which the situation in Darfur was referred to the ICC.
the rich and powerful and their allies is frustrated or denied *ab initio* by P5 power. It however strengthens the argument in this paper however that it is not so much the ‘sort’ of law, but that it is the instrumental use of that law, in this case secular law, that is problematic.

The main proviso is that all ‘reservations’ must be detailed, explicit, specific, legally based on the *shari'a* and ideally submitted independently. Such a pre-requisite will force a careful examination of IHL/ICL provisions by Muslim jurists and populace. Careful examination and reflection of *shari'a* criteria will in most cases show that their oppressive governments have not negatively influenced the formation of the IHL rules in any great way and that the protections they afford, however imperfect, benefit humanity generally. Further, requiring detailed ‘reservations’ may deter but probably not prevent Muslim States and Islamists from the option of refusing to accede, based on broad ‘motherhood-type reservations’, such as simply by stating that a provision is ‘un-Islamic’ or that it ‘does not conform with the *shari'a*’ as is the case with many contemporary reservations by Muslim States.17 To be taken seriously however, States and Islamists (and anyone else) would then have to show in some detail why and how a provision in question is ultra vires the *shari'a*. The benefit of such a requirement is that even when they make a ‘reservation’ to an IHL provision, they automatically may be forced to accede to a higher *shari'a* traditional or classical standard such as with respect to the prohibition on the first use of fire. An obvious drawback to this process is that if it progresses no further, it could erode IHL. To pre-empt such an eventuality, all ‘reservations’ must have a sunset clause, if the subsequent instruments do not come into effect in a reasonable, pre-determined, period of time, say ten years.

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A Justification for an International shari'a-based system for developing law

From the perspective of international peace and security, an important reason for a reliable process of law creation is a practical need for non-military avenues inter alia in combating terrorism. It appears unlikely that the Coalition will win militarily.\textsuperscript{18} If this (US) military analysis is correct, the likely result is a military stalemate, or worse, the premature unscheduled withdrawal of Coalition troops from 'Muslim' lands with the problems left unresolved. In Afghanistan and Iraq the present situation is still significantly worse than when ‘intervention’ first occurred, creating not only issues of ‘terrorism’ but also with respect to increased production, consumption and export of narcotics, refugees and white slaves. As in the past, this power vacuum is likely to provide a return to the political conditions in which base, reactionary and primitive forms of what is purported to be ‘the shari'a’ — one that is misogynistic, feudal and extremely anti-Semitic — takes root.\textsuperscript{19} Further, and when capture of their leaders has become increasingly difficult, extra judicially ‘taking out’ a few

\textsuperscript{18} There have been many references to this inability to win the war on terror militarily. Some of the opinions published have been attributed to high ranking US military personnel. For example see Scott Burchill, 'Military force will not win the Afghan war', The Age (Melbourne), 18 January 2008. Brigadier Mark Carleton-Smith, commander of 16 Air Assault Brigade, said it was necessary to "lower our expectations". He added that the challenge was about reducing the conflict to a manageable level of insurgency that is not a strategic threat and can be managed by the Afghan army. Nicholas Christian, 'Afghan war unwinnable, says UK commander', Scotland on Sunday (Edinborough), 5 October 2008. Defeating the insurgents in Afghanistan include defeating both the Taliban and al-Qa’eda. According to Fran Kelly, 'Abbott and Rudd battle over troops' in Breakfast Show ABC Radio National, 26 April 2010. According to Philip Dorling, 'No Knowledge, no victory', Canberra Times (Canberra), Saturday 12 June 27, General David Petraeus, the head of US Central Command, was quoted as saying that: (training the Afghan Security forces who were to do the ‘heavy lifting’ in fighting the insurgents, with the resources allocated and high level of desertions) ‘was like trying to build the biggest aircraft in flight while being shot at’.

\textsuperscript{19} For example, the Prophet made the seeking of knowledge (or education in contemporary language) compulsory for every Muslim male and female: Javad Nurbakhsh, Traditions of the Prophet (1981), 49. The Taliban regime was however able to close girls schools under its 'shari'a'. It had very strong support from the only three countries that recognised, and supported, its regime (Saudi Arabia, The United Arab Emirates and Pakistan: QAAH OF 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1448 1448 para. 26 per Dowsett J.), all these three nations close allies of the West and with an uncritical acceptance in the West of the Taliban's acts such as the closing of girls schools 'as Islamic', and by implication legitimate under the shari'a, thus completely 'reversing' a position, and selling it as 'true' through clever 'spin'.
terrorists (i.e. through extra-judicial ‘targeted assassinations’ through the use of unmanned ‘drones’) where possible,\textsuperscript{20} in addition to being problematic and contrary to ‘Australian values’,\textsuperscript{21} a much-bandied phrase, appears to do nothing more than stir up a proverbial ‘hornet’s nest’ delivering ever more young men and now increasingly young women\textsuperscript{22} into the armed conflict against the Coalition. Extra-judicial killings by the West to eliminate Islamists, often with significant collateral damage, in turn justifies Islamist attacks, and in cases reasonably allows such attacks to be characterised as a means of self-defence. The misuse of secular Western law against Muslim suspects has also been largely counterproductive and in many instances arguably quite damaging to the cause of improving international peace and security and is now discussed.

Disillusionment with Secular justice: Why Muslims are moving towards the shari‘a

Many Muslims have little idea of the depth of the legal content of the shari‘a. If this analysis is correct, then the call by Muslims for the application of ‘the shari‘a’ is really a cry in the wilderness. The question then is why they can not settle for the use of rule-of-law principles generally? In this context, an impetus for shari‘a-based justice also comes from a general disillusionment, not with the concept of ever receiving justice \textit{per se}, but with the current flawed application of ‘Western’ secular justice which has disadvantaged Muslim citizens of mainly, but not exclusively, the poor nations. Further, the imposition of a ‘foreign law’,

\begin{itemize}
\item \textsuperscript{20} Eben Kaplan, Targeted Killings (2006) <http://www.cfr.org/publication/9627/> at 1 July 2007. Kaplan (ibid.) states that: During peacetime this might be a more contentious issue, but former Assistant Secretary of Defense Lawrence Korb explains that in this case, “the congressional authorization of force gave [the president] the power to do this.”
\item \textsuperscript{21} One can equally substitute another adjective, English, French, Islamic, Buddhist etc, here, one often used by politicians to create a sense of ‘exceptionalism’ among otherwise ordinary groups of people some of which share these higher human values in common with all of humanity.
\item \textsuperscript{22} According to Alissa J. Rubin, ‘Iraqi suicide bomber kills 10’, International Herald Tribune (New York), 9 October 2008. : A suicide bomber blew herself up in the provincial capital of Diyala Province on Wednesday, killing 10 people on a street that has already been attacked by suicide bombers at least 16 times in the last five years, including three times this year by women, according to the police in the province.
\end{itemize}
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gives Islamists too easy a way to avoid their obligations, to dismiss this law out of hand and thus ‘escape’ culpability for their atrocities in the eyes of the Muslims or at least prevent them from receiving the benefit of their doubt.

Many already alienated, misinformed, poverty-ridden and oppressed Muslims are confused by the complex issues associated with terrorism. They do not have the time or the resources to delve to the depth required to deconstruct these problems or do not trust the sources of the information they receive, either from the major Western news agencies, their own ‘news’ networks or Islamist propaganda. However, as with the success in the West of the simple ‘good us’ v ‘bad them’ formula, even as against a well-educated Western population, Islamists have used the same strategy, with some, but paradoxically less success among Muslims. There was and is however, sufficient scepticism among Muslims about the fairness of Western legal processes for foreigners, for them to accept the validity of the Taliban’s refusal to hand over bin Laden or to accept ‘Western justice’ for Muslims generally.

Notwithstanding this, many in the West, including Muslim nationals, are raised reasonably to believe that ‘our system’ guarantees certainty and the ‘blind’ delivery of justice, that is justice that is neither delayed nor denied. This expectation has developed and is part of English law in modern times. Muslims have not had the opportunity or time to gain this level of trust with the operation of their States’ judicial systems, secular or religious, even in economically better off Muslim States.23

A relevant issue with respect to ‘justice’ in ‘the war on terror’ is really a question about whether, say the US military justice system (set up in the main to try Muslims24) is an appropriate and valid legal base for prosecutions as a ‘court’ of first instance. As at March 2011 the US was not party to the Rome Statute and therefore, will not25 rely on the ICC’s

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25 For example through Article 98 Agreements Statute of The International Court of Justice, and inter alia for this reason it would be difficult for the USA to view the ICC as a proper forum for prosecution of alleged Muslim terrorists.
jurisdiction to bring alleged ‘guilty’ members of al-Qa’eda or other Islamist groups to justice. In its stead it has used military tribunals and this was the case until President Obama’s election in 2008.

Prior to this, for Muslims captured outside the US, the legal basis for the US’s prosecution of alien militants, Islamists or others, was the criminal jurisdiction created by Presidential fiat, based on ‘the laws of war and other applicable laws by military tribunals’ because ‘it may not be practical to use principles of law and rules of evidence generally recognised in [the US’s] domestic criminal cases’. The view of Michael Ratner, President of the [US] Centre for Constitutional Rights, and a view endorsed by Stephen Kenny, then Australian Guantánamo Bay detainee David Hick’s Australian lawyer, is that the military tribunals were ‘an obviously unfair system of kangaroo courts that try only Muslims’. This view is not entirely dissimilar to that of Dr Robert Gates, US Defence Secretary, who in less colourful language said in testimony to Congress that the military trial for David Hicks at Guantánamo Bay ‘lacked legitimacy in the eyes of the world’.

29 Ibid.
30 An organisation that represented both Guantánamo Bay Australians in the case that filed a writ of habeas corpus in the District Court for the District of Columbia, appealed the decision of the lower federal court at the Appeals Court for the District of Columbia Circuit and having lost then appealed to the Supreme Court: Michael Ratner, Ellen Ray and Stephen Kenny, Guantánamo : What the World Should Know (2004), 80.
31 Steven Kenny was relieved by Hicks’ team in February 2005 apparently over differences over tactics: Leigh Sales, Detainee 002: The Case of David Hicks (2007), 193.
33 Paul Hattaway, China’s Christian Martyrs. 1300 Years of Christians in China Who Have Died for Their Faith (2007). Dr Gate’s view is consistent with previous US Government policy of condemning such military tribunals for both US and non-US citizens. For example, in the past the US has condemned the use of such a commission or tribunal against Lori Berenson in Peru [and also when used against] Ken Saro-Wiwa in Nigeria": Michael Ratner, Ellen Ray and Stephen Kenny, Guantánamo : What the World Should Know (2004), 79.
Even in this military judicial environment which appears to favour the prosecution, only two of the so-called ‘worst of the worst’ terrorists, David Hicks and Moazzam Begg, were initially marked for trial. Mr Begg was released without charge by the US. While there are [unproven] allegations of political interference in the ‘legal process’, there was a plea bargain subsequent to which Mr Hicks received a nine month sentence, partly served in an Australian gaol, on the lesser charge of ‘materially aiding a terrorist group’. President Obama ordered the closure of Guantánamo and Mr Hicks subsequently indicated that he would seek to clear his name.

Even in the *prima facie* neutral forum of the Lockerbie terror trials, the perception of the politicisation of Islam appears to interfere with the administration of justice. Black Q.C raised questions about the fairness of the process, and the subsequent review of the ‘injustice’ done to the


There are two competing views at the two extremes of the spectrum. The first view holds that Mr Hicks was a terrorist, among the worst of the worst, who plea bargained a significantly lesser sentence. The alternate view was that he agreed to a lesser charge in order to get out of Guantánamo Bay where he had been detained for about 5 years.


Jean Berkley whose son Alistair was one of the 270 victims of the Lockerbie bombing questioned the evidence produced and also how it was possible for a single bomber to bring down the aircraft. She noted that with the abandoning of the appeals case by Mr al-Meghari that the victim’s families would not find closure and called for a full enquiry and investigation: International Editor Michel Panayotov, ‘Mother of Lockerbie victim reacts to bomber’s release’ in The Breakfast Programme ABC Radio National, 21 August 2009.

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Libyan Mohamed Al-Meghari (who alone was convicted of bombing PAN AM flight 103) and later released, removed the necessity for an inquiry into Black Q.C’s allegations.42

Further, trials in domestic French Courts ‘retrospectively’ prosecuting and sentencing the French Guantánamo detainees on broad charges, brought down decisions which included custodial sentences, which were then ‘considered as served at Guantánamo Bay’ during their detention. This was an unfortunate attempt retrospectively to legitimise their arguably unlawful detention at Guantánamo Bay, and engenders a sense of distrust in the impartiality and fairness of the French judicial process as a whole.43 Australian terrorism prosecutions also appear to be flawed.44 The better view is that the Australian trials are a procedurally fair system applying flawed or bad ‘political’ formulations of Security Council Resolutions,45 and while the examination of this particular issue is outside the scope of this paper, it is likely that the US, and to a lesser extent perhaps the French legal systems no doubt also fall within this category.

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42 Keri Phillips, ‘Politics and justice: the Lockerbie trial’ in RearVision ABC-RN, 9 & 27 September 2007. The matter was to be appealed however Mr al-Meghari was released on 21 August 2009 by the Scottish authorities on compassionate grounds as he was suffering terminal cancer: see above n32.


I am satisfied that (ASIO Officers) B15 and B16 committed the criminal offences of false imprisonment and kidnapping at common law and also an offence under s86 of the Crimes Act 1900.

45 Security Council Resolution 1373, 28 September 2001 S/RES/1373 (2001), which decided that all States must take certain measures to suppress terrorism and the financing of terrorism. These SC Resolutions are binding on States under the UN Charter: Article 25.

The court process themselves are fair and have been acknowledge inter alia by Muslims as fair: Damien Carrick, ‘The Benbrika terror trial’ in The Law Report ABC Radio National, 23 September 2008. The unfortunate breadth of terrorism legislation is highlighted in Britain (whose the breadth of whose legislation Australia’s Federal law emulates to some extent) was able to convict the Icelandic Central Bank, which by any yardstick is hardly an ‘al-Qa’eda’.
If the 'worst' of the offenders are unable to be fully prosecuted, even with very questionable processes and the standard of the evidence adduced, bin Laden's view regarding the persecution of Muslims by the Coalition becomes harder to dismiss out of hand. Once again, it is the instrumental use of Western law by Western States as against Muslims that has irked Muslims, who see in it the failure of secular law in the West as well as secular law in their own countries. As a result they arguably prefer to try their 'own law' cognisant of its shortcomings for having lain dormant and undeveloped for some considerable period of time. It is unclear, however, why they would expect corrupt Muslim leaders not to use the shari'a as instrumentally as they do secular law. In overcoming this problem of domestic corruption, it is a recommendation of this paper that the shari'a first be used in its SHL form, on the international plane under international supervision and therefore less susceptible to corruption by any one State.

There are however, many important hurdles to the proposed course of action, some of which are now examined.

Promoting the Formation of Muslim Consensus on SHL
Non-Muslim and secular Muslim States will find this process of promoting a 'religious law' or legitimating 'reservations' based on natural law considerations particularly difficult and should have the option of abstaining from the entire process with no adverse implications attaching. However, civil society groups in these States (or any other State for that matter) must not be impeded in critiquing the laws and processes if they so choose and, to the contrary, should be given every facility and assistance actively to engage with the process. The rationale here is that the consensus of Muslim individuals, Muslim religious lawyers (and in the case of Shi'i marja', that their followers are legally bound to follow through taqlid) validates the emerging law. Recall that in Shafi'i's view, and one that is not counter-argued by the other eponyms, the consensus of (ordinary) Muslims

46 For alleged reservations by prosecution lawyers Captain John Carr, Major Rob Preston and Air Force lawyer Carrie Woolfe see Leigh Sales, Detainee 002: The Case of David Hicks (2007), 156.
47 Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 329.
is better than that of jurists (and arguably political leaders), the reason being that the former are less susceptible to corruption or coercion. This view may, however, be considered problematic in our State-centred model of international relations, where State coercion on individuals and mass media propaganda are not uncommon, although the status quo Shafi’i position on consensus should be considered valid, at least until an alternate consensus emerges.

The Problem of ‘Reservations’
In addition to the general problem of permitting ‘reservations’ to obligations otherwise *erga omnes*, a further intrinsic hurdle to this process is broad reservations. Some ‘*shari’a*-based reservations to international instruments fall within this category. In practice however, even when they were permitted (that is, before the emergence of the Geneva Conventions’ ‘rights’ as customary norms) the denunciation clauses in the Geneva Conventions were never invoked, including by Muslim nations, even on the pretext of incompatibility with the *shari’a*. This is very likely to also be the case with the ‘reservations’ discussed here. Such broad ‘reservations’, including ‘*shari’a*-based reservations’, must be discouraged or taken as a statement of the inability of ‘parties’ effectively to respond, for say scant legal resources, a distinct possibility with the poorer States, or States not particularly interested in the *shari’a*, but nonetheless forced to pay lip service for public pressure. The consensus-forming process will show up the deficiencies of such broad or vague ‘reservations’, which while not ideal are perhaps best left alone without too much comment or attention. If such a ‘reservation’ were to come into dispute and be brought before a Tribunal, it is likely to be struck down for uncertainty or read down. This is because, as discussed, there is already broad general agreement between IHL/ICL and SHL at a higher level of abstraction, so that in any event only very specific ‘reservations’ are likely to make any legal sense in this context.

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48 See n 17, 340.
49 Jean-Marie Henckaerts, ‘The Grave Breaches Regime as Customary International Law’ (2009) 7 *Journal of International Criminal Justice* 683, 687., referring to Art 1, GC I, Art 62, GC II, Art. 142, GC III and Art. 158 GC IV (‘Each of the High Contracting Parties shall be at liberty to denounce the present Convention’).
On the other hand, the promotion of dedicated conferences to discuss development of the shari'a, further and together with broad internet-based communications should help to draw informed comment on these 'reservations'. If the 'reservations' and concerns _prima facie_ appear genuine, they must be considered and addressed by the jurists and other interested parties and allow consensus solutions to evolve, even when they diverge from IHL/ICL.

Another potential hurdle is: why would Islamist non-State actors accede to IHL/ICL treaties when they explicitly do not recognise the legality of such instruments or because their acts are clearly criminal under these instruments? Note that the Prophet's precedent, and therefore the shari'a position, is that the applicable and valid laws of 'non-Muslims' are binding, if just. A central issue of importance here is that the real issue is never about who formulated a treaty or agreement but _always_ about whether such an instrument is just. That is, the only relevant question then is whether contemporary IHL is, in the circumstances, just?

The role then of sceptics/Islamists/ Muslim States/ Islamic States/civil society/law societies is to highlight or limit the application of the unjust elements of IHL/ICL through substantive 'reservations'. They are obliged to do so by virtue of their claim to be Muslims, or others who are committed to justice or pluralism, and thus to the promotion of justice by the best or most effective available means. As highlighted so far, IHL's permissive tolerance of collateral killing in mixed areas is problematic under the shari'a, particular since there is a bias in favour of the citizens of the P5, their allies and client states (i.e. the powerful or those close to power).

The default position for this exercise could be that, notwithstanding the non-recognition by the Vienna Convention and customary international law, of treaties (or here 'reservations') that derogate from pre-emptory

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50 According to Adil Salahi, _Muhammad: Man and the Prophet_ (2002), 40. the Prophet honoured the _al-fudul_ treaty, a just treaty, protecting the rights and interests of non-Meccans visiting Mecca and as against Meccans.
norms. Muslims, including non-State actors, could be given a very limited but practically meaningful opportunity, and if necessary legal assistance, for expressing a considered and detailed view in the form of a ‘reservation’. While there is a problem of principle here with respect to ‘reservations’ inter alia that may fall within the classes of reservations that are disallowed in the meaning of Article 19 of the Vienna Convention or against *ius cogens* norms, in practice it very unlikely that there will be a problem with the actual ‘reservations’ that are correctly framed, as it is very unlikely that the content of any correctly formed reservation is unlikely to contravene a *ius cogens* norm. If a ‘reservation’ really does derogate from a ‘*ius cogens*’ norm when formulated in good faith and conscience, then *shari’a* jurists must give serious consideration to this reservation and suggest a way out of the impasse. While this statement or possibility is canvassed from the view of not pre-empting what may be possible, it is posited that it is extremely unlikely that such an eventuality will come to pass.

On the other hand, much of the intent of IHL in the many cases finds accord with SHL as was seen in the preceding chapters. Many general ‘reservations’ thus would simply not ‘ring true’. On the whole, however, if IHL in their subjective view is not ‘sufficiently just’, whatever this might mean, it would be best for such non-State actors, individuals or groups to articulate their subjective views of these perceived deficiencies as best they can with their available resources and establish a claim to being a persistent objector, so that interested jurists and lawyers can set to work on clarifying the scope and if possible (and if necessary) rectifying or suggesting mechanisms and processes to narrow these gaps or else critiquing the offending ‘reservations’.

Notwithstanding this, if this process is problematic under international law, the initial/foundational process of SHL harmonisation and adaption of identifying the substantive gaps the process could be conducted in parallel, perhaps under the aegis of the OIC or civil society

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52 Ibid.
53 *Anglo-Norwegian Fisheries Case* (1951) ICJ Reports 161.
sharing a similar longer term aim of combating politically or religiously motivated violence. Such a project could be conducted ‘off line’ and ‘brought back’ to the international community when the offending resolutions have been addressed to the general satisfaction of the majority. All ‘reservations’ are however subject to the broader shari’a legal principle that while an individual may have a subjective opinion on a matter, she or he is still nonetheless bound by the consensus of the overwhelming majority.

As Muslim consensus emerges, the effect of any broad non-specific reservations will in any event greatly be diluted to the point of nothingness. The P5 will also be able to influence the process through their allies and proxies in Muslim-majority States. Such interference, while generally undesirable, is perhaps inevitable and best therefore perhaps catered for in an explicit manner and thus properly managed.

Conclusion
The Nicaragua Case considered separate ‘systems’, both recognised by the ICJ and serves as a useful precedent for the subject of this thesis. In its articulation of the principle that a rule can have different sources and yet have the similar legal content, it said:54

Thus, if that rule parallels a rule of customary international law, two rules of the same content are subject to separate treatment as regards the organs competent to verify their implementation, depending on whether they are customary rules or treaty rules.

Notwithstanding the ICJ’s openness, not all differences between IHL/ICL and SHL can reasonably be accommodated, nor should they, given the sometimes distinct values underlying the two legal traditions.

The presumption should be that defendants are bound by the IHL standard unless they explicitly choose to be bound by a higher relevant shari’a standard and in this case to provide a formulation that they believe best expresses their legal position. This is not an empty choice, as for Islamists who do not recognise law other than ‘the shari’a’, this is their only chance to participate in a subjectively legitimate (and therefore fair perhaps) legal process.

54 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, (Judgment of 27 June) (1986) 14 ICJ Rep 1, para. 178.
In cases where the IHL standard is stricter than the shari'a standard then the IHL standard should nonetheless apply, for the shari'a presumption. This is not to relegate ‘the shari’a’ to a subsidiary position but to state only that higher standards that bound previously should not be eroded, a principle in accordance with the sunna, that just laws of non-Muslims can continue to apply. Gratuitous ‘reservations’ that intrinsically favour Muslims (or any other group) and ipso facto creates privilege should be re-examined for fairness and justice at the earliest opportunity. This is a proposition for which Muslim jurists have a strong legal basis. Note that the Islamic concept of justice and obligation to ‘do’ justice is not contingent, as it is with almost every other legal tradition, on others’ acceptance of the Islamic norms, but are unilaterally binding on a Muslim by virtue of their claim to be Muslim. All relevant historical shari’a standards should be re-examined with a view to, if theologically and legally permissible and on a basis other than necessity, permanently to adapt the higher IHL standards and make these higher standards a part of the shari’a on the customary legal basis under the Qur’an and sunna.

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55 An example of this is the Prophet fasting on the Day of Achoura, the day of the Exodus, along with the Jewish community although such fasting was not prescribed in the Qur’an, but is now a part of the shari’a when Muslims thank God for the deliverance of the Jews (or in Muslim terms, the Muslims who followed Moses out of Egypt) and from the oppression of the Pharaoh.

56 Qur’an 4:135:
O ye who believe! stand out firmly for justice as witnesses to God even as against yourselves or your parents or your kin and whether it be (against) rich or poor: for God can best protect both. Follow not the lusts (of your hearts) lest ye swerve and if ye distort (justice) or decline to do justice verily God is well-acquainted with all that ye do.

57 Desmond Manderson, ‘Governor Arthur’s Proclamation: Aboriginal People and the Deferral of the Rule of Law’ (2008) 29 Arena 1, 6. analyses the image of the English depicting the rule of law as having equal application on the First nations in Australia, in spite of the atrocities being conducted against these populations simultaneously. His analysis hypothesises that the image really conveys the message that ‘if you want justice, then you must first become like us’. The Qur’an critiques this version of ‘justice’ as belonging to the ‘morality’ of those among the worst of humanity. The Qur’an also reminds Muslims that the powerful among the People of the Book will not be content until Muslims emulate them in every way: Qur’an 2:120.

58 Qur’an 4:135.
Stage 2: Create an Islamic International Legal Commission (IILC)

Introduction
It was argued that the reluctance of Muslim jurists to develop SHL, for example to accommodate new weapons and methods of warfare, has led to pragmatic or instrumental use of (or alternately the neglect or abandonment of) SHL among Muslim rulers, while simultaneously and for political reasons, continuing to pay lip service to the notion of the shari'a as a complete law. The effect in this century of such neglect is to allow Islamists to employ the weapons and means of non-Muslims — people so despised by some Islamists — but nonetheless, absent even their restraints a situation that can be reversed by re-introducing shari'a restraints. The absence of positive shari'a rules has, however, not worked entirely in favour of Islamists because it focuses the Muslims' minds on the period of the Prophet, a time which had strict prohibitions, but nonetheless which Muslims understand cannot be applied in toto in contemporary society. The absence of explicit legal shari'a restraints has nevertheless helped Islamists to gain some benefit through their duplicity and Western media support for the message that Islamists are 'fighting for Islam', a message that reaches most Muslim homes and therefore appears to keep the majority of Muslims from criticising the Islamists for their disregard of shari'a limits.

Public statements of high-ranking officers of the US and its allies show that they have unilaterally accepted al-Qa'eda's self-characterisation of its war as a djihad. Following the Soviet occupation of Afghanistan, the Coalition's 'acceptance' is based largely on political expediency, rather than on sound shari'a legal analysis of specific claims.

59 Nuclear Test Cases (Australia v France and New Zealand v France) Merits (1974) ICJ Rep 253, at para. 43. stands for the proposition that unilateral statements by high ranking officers can bind the party involved.


61 On the instrumental use of armed conflict and the attacks of 11 September, characterised as djihad by non-Muslims, Michelle Grattan, the political editor of 'The Age' newspaper, was of the view that the use of this attack and the West's response to al-Qa'eda's djihad helped the re-election of the Conservative Federal Government in Australia: Michelle Grattan, ABC Radio National Breakfast Show (2007) at 7 February 2007.
which one would reasonably expect, given the significance of *djihad* in Islam. Fear of al-Qa'eda has also cynically and opportunistically been exploited by many, including by segments of the Australian polity.\(^6\) Part of the expedient use of this fear is the denigration of the *shari'a* and dismissing it out of hand.\(^6\) The message that appears to get through to Muslims is Western recognition of al-Qa'eda's war as *djihad*. The fact that this *djihad* is also characterised as 'hostile and illegal' would be seen as a natural view held by the antagonistic party, thereby increasing al-Qa'eda's visibility. The disproportionate level of publicity gained by al-Qa'eda has also greatly enhanced its visibility, although perhaps not its legitimacy, within the Muslim world.

The West is however, only partly to blame. Kamali also rightly and reasonably notes and confirms this gap between Islamic theory and practice.\(^6\) Nyazee persuasively points out that what is often attributed to Islamic law as practised by Muslim States today is really secular in nature,\(^6\) a message unfortunately that does not 'make it' on the BBCs, ABCs, 'Le Monde's and CNNs of this world in this explicit form. An-Na' im further addresses this issue of the *attribution* of 'inadequacy and injustice to the *shari'a*',\(^6\) which appears to help Islamists to operate in a legal vacuum. This legal vacuum is problematic and dangerous and has so far delivered a bitter harvest.

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63 For an extreme case refer to the Electorate of Lindsay (NSW) where some members of the (Australian) Liberal party sought to capitalise on mainstream fear of Muslims: 'Leaflet scandal 'demonised' Islamic community: Bowen', The Age (Melbourne), 23 March 2008. The intended effect of the leaflet is summarised here (apparently) by respected commentator Margot Kingston: Margo Kingston, Liberal fraud: race card with Labor logo (2008) <http://webdiary.com.au/cms/?q=node/2202> at 25 March 2008: 'Let me translate for you the psychological message that the Liberals have been spreading to save a marginal seat. "Be afraid of the Muslims. They support terrorism. Labor supports the Muslim supporters of terrorism. To protect yourself, vote Liberal".
64 Abdullahi Ahmed An-Na'im, Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law (1990), xiii.
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It is worth recalling the words of Justice Weeramantry, who describes the shari‘a as ‘remarkably modern and relevant to our time’, and has been shown to be an accurate reflection of Islamic concepts including collective security, reducing cruelty and eliminating injustice and treachery, as issues of broad principle at a level of abstraction that remains ‘timeless’.

The question is then: how does one achieve practical regulation through the shari‘a today? The underlying principles for at least the Western and shari‘a legal traditions, broadly speaking, are the Ten Commandments. There are nonetheless significant, non-trivial, differences between Islamic and international legal norms when considering their detailed application. These significant differences have developed over time as the two systems have evolved in different historical, cultural and social circumstances. These resulting differences will necessarily require careful and skilful navigation.

The proposal here to help overcome this particular problem is the establishment of a specialised international body of shari‘a jurists. Here, it is referred to as the Islamic International Law Commission (IILC). It is named to indicate a function parallel to that of the ILC, with an appropriate secretariat and specifically tasked with developing SHL under a shari‘a methodology, with an emphasis on the ‘gaps’ identified in Stage 1 above. An immediate aim of this institution is to produce shari‘a-compatible instruments, documents parallel to the Haig Conventions and the Rome Statute, describing in sufficient detail the permitted legal means of ‘warfare’ and the means and circumstances under which the use of such means is considered lawful under the shari‘a. Identifying the shortcomings of the law as it presently is, and ensuring that the precautions Muslims must take in their own use of force and weapons are explicitly stated, is

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69 For example along with other Legal Bodies responsible for the Codification and Progressive Development of International Law (serviced by the Codification Division of the Office of Legal Affairs), http://www.un.org/law/index.htm [Accessed
also part of this programme. The scope of the permitted use of identified weapons, prohibited weapons, and presumptions with respect to ‘new weapons’ and technology are to be included as part of the suite of instruments that is hereinafter referred to as (and that will make up part of) the ‘Weapons Charter’ which is discussed in Stage 3 below.

The IILC can take submissions from the broader Muslim community, States, non-State actors, armed groups and individuals as part of its engagement with stakeholders and consider these submissions prima facie as relevant when determining the SHL or the scope of SHL. The IILC could also consider the validity of a range of shari’a-based ‘reservations’ to international IHL/ICL ‘instruments’ from Stage 1 above, as relevant to their determination of SHL. The legal issues that are raised in these ‘reservations’ can also be addressed in a broad manner with the aim of constantly examining the evolution of the Weapons Charter, which is then likely to enjoy broad Muslim consensus.

The Case for Creating an IILC
The UN aims to promote international peace and security and justice. From the international peace and security aspect, strictly speaking, the shari’a is unlikely to permit Muslims to defer to the Security Council as required by the UN Charter, unless the request is just. Neither the Security Council’s or the Coalition’s, wars in the Middle East or Central Asia have brought peace and security and appear unlikely to achieve this end. The Security Council’s (silent) support for the Coalition and the overwhelming support the Coalition has received from the greater majority of Muslim States is some proof that the consensus of the Muslim States is acceptance of the binding nature of Article 25 of the Charter, requiring

April 2010]. Centres could be based in say Melbourne (Australia), Chicago, Marseille and Dakar (Senegal) for example.

Weapons Charter Defined.

Article 2(3) UN Charter.

Qur’an 5:57.

Article 25 UN Charter.
States to comply with mandatory UNSC resolutions. Thus an institution created by the UNSC would be legitimate by Muslim States’ consensus.74

Comprehensive peace and security however, are unlikely to be improved until all possible solutions are explored, including means other than through the use of force. The strategy in this thesis is to employ law that al-Qa’eda cannot ignore without exposing hypocrisy on its part. The law will help to reduce violence or at least the intensity and random nature of the victims among non-combatants, thus in the longer term helping to reduce foreign troops fighting in many Muslim States whose mere presence appears to be a destabilising force. The use of law for this purpose, however, presupposes the existence of mechanisms for formulating and executing the law.

While jurists can, and always have, developed the shari’a, the reasons why criminal law and the siyar (shari’a public international law) were neglected has been discussed. Therefore, creating an international institution that is authorised to propose law (and as with the ILC, to examine and study the existing jurisprudence and custom) and propose a formulation of positive law is possible and also necessary. Such positive law is more convenient for litigation and prosecution than a non-codified ‘common law’ such as the shari’a. The UN undertook in its collective security ‘contract’ with the States to deliver justice.75 Since Muslims, who represent approximately a fifth of the planet’s population, appear to be seeking justice sometimes through their armed struggles, one option for the UN is to allow the trial of a body that may be able to deliver the law that underlies the hope of such justice and, as argued here, can enhance international peace and justice.76

There appear, however, to be serious reservations among the public (both Muslim and non-Muslim) with respect to good governance in the

74 This point is noted for Step 4 and the suggestion that a Tribunal is created by the UNSC. For this chapter, the creation of an institution for developing law is discussed in Step 2: n 99, 364.
75 Article 2(3) UN Charter.
76 Article 2(3) UN Charter.
A majority of Muslim States, the general absence of rule-of-law regimes, endemic corruption and the absence of academic freedom in educational, research and other institutions of higher learning. This denial of such opportunities for the exercise of free will inter alia impedes the optimal development of law as a whole, or skews its development to the oppressive end of the spectrum. That is, while institutions based in Muslim States can promote and assist in the development of the shari'a, the level of confidence Muslims have with respect to legal institutions in the majority of Muslim States appears to be, not unreasonably, quite low. This lack of confidence in the domestic sphere is unlikely entirely to be dissipated when the same 'leaders' of the same oppressive regimes are operating in an international frame. Thus independence, transparency and confidence in the IILC jurists is implicit for the potential success of an IILC, and while these requirements are clearly self-evident they are rare commodities in much of the Muslim world.

On the other hand, and notwithstanding the hurdles they face, there are many courageous individuals in Muslim States who fearlessly adhere to principled debate and continue with their writings in spite of the dangers. Such individuals must be helped and encouraged by those outside these oppressive States and also by the broader international institutions and civil society, to present the fruits of their works and thoughts, to provide them assistance independent of the specific positions they may take on any particular legal issue. However, given the necessary although non-exhaustive preconditions, discussed above, it is nonetheless not inconceivable that principled development of law by individuals can take place in Muslim States. Thus, while unlikely in the contemporary environment, there is nothing to stop these 'freer' nation States

independently developing centres of shari'a excellence. However, what is posited here is that the international community must not hang its hopes on this distant eventuality organically coming into fruition anytime in the near future but that it act affirmatively in creating an IILC in a more deliberate and urgent manner for the many lives that are being lost or destroyed on a daily basis.

That is, the levels of general corruption and the absence of freedom in Muslim States arguably means that international institutions that promote the rule of law inter alia under the shari'a are best based in the West. Considering the vital importance of French to many Muslim communities together with the importance of Anglophone democracies as places of sanctuary for Muslims, which enjoy greater individual religious and academic freedom and can also provide the necessary technical and other infrastructure, appear to be the best locations for an IILC. As a compromise however, an IILC could be based in a French-speaking city with a large Muslim population, such as Marseilles or Dakar (Sénégal) or even perhaps a bilingual city such as Montréal or Geneva, but with important research arms in Anglophone cities such as Melbourne and Chicago. This is not entirely to exclude free Muslim States such as Indonesia, Bosnia or Senegal, just to mention a State on each relevant Continent, although the non-availability of reliable first world technical infrastructure may at times become an issue. Geography however is less

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79 See: The National Centre of Excellence for Islamic Studies (NCEIS) in Australia jointly hosted by The University of Melbourne, Griffith University and the University of Western Sydney and is funded by the Australian Government. The National Centre of Excellence for Islamic Studies (NCEIS) is funded by the Australian Government to provide outstanding higher education level programmes in Islamic studies. The University of Melbourne is collaborating with Griffith University and the University of Western Sydney to deliver a world-class, multi-disciplinary program from 2008. <http://www.nceis.unimelb.edu.au/>. [Accessed November 2008]

80 For example some European States (and as at April 2010, France and Belgium) are examining the banning of the niqāb for women, the full veil /le voile intégral/, and it is often seen by Muslims as an unnecessary irritant over a few yards of cloth touching on the smallest of minorities and yet used as an ideological provocation: The strangest part of this debate is the banning of the most individualistic of Muslims (there is no consensus among Muslims on the religious as opposed to the cultural requirement to cover the face) by the supporters of individual freedom and the emancipation of women. Arguably, from a shari'a perspective, this 'banning' is a very positive move as it redirects the debate to more substantive legal issues.
important than the availability of freedom of intellectual pursuit and the legal and technical infrastructure and resources necessary for developing the shari’ā.

An international institution such as the IILC may incidentally also help promote Muslim civil society, perhaps to act as a further antidote to widespread corruption, oppression and exploitation, sometimes leading to violence, in many Muslim States. Muslim civil society also appears to be calling for the introduction of the shari’ā.81

The important issue that is glossed over is the content of the shari’ā. However, it is clearly in the interests of every thinking person to avoid the ‘Talibanisation’ of Muslim societies, a process that has spread in Afghanistan, parts of Pakistan, Somalia, Algeria, the Sudan, the Yemen, Iraq and to a lesser extent even in places such as Malaysia and Nigeria, just to mention a few States. The call for the shari’ā however, is almost always synonymous with a cry for justice, equality and freedom, and this is an important hook upon which to engage the Muslim world in an equal partnership.

The examination of areas covering what would normally be considered domestic expressions of the criminal law is outside the scope of this paper. It is posited that this development and legal articulation of Islamic norms on the international plane nonetheless makes it difficult for Islamists, the Taliban, the Wahhabi, fundamentalists, modernists, Salafis or any other single group — who have and sometimes fairly, been denigrated, but at any rate have at times tried to acquire exclusive ‘ownership’ of the shari’ā — to portray their own subjective view of the shari’ā as the only ‘true’ expression of the law.82 The development of plurality and diversity in the expression of the shari’ā will bring critical examination of the

82 See note and text accompanying n 12. The shari’ā can however be developed in isolation or worse allowed to become ‘Talibanised’ and ‘turned on its head’, in cases arguably by confusing their culture and custom and arrogating for themselves the only true understanding of the ‘real’ shari’ā, purely on the basis that they consider themselves ‘good Muslims’ and therefore, what the do, including same sex paedophilia, must ipso facto be ‘good Islam’.
activities of Islamists worldwide and provide more open and nuanced critiques of their activities when it involves the use of force.

A discussion in a sociological context\textsuperscript{83} of the application of the shari’a is beyond the scope of this paper and therefore this briefest of examinations is likely to appear shallow. In very broad terms however, it is noted that human nature and behaviour have remained virtually unchanged in several thousands of years. Therefore, a law (and moral code) of general application such as the shari’a, which primarily aims to regulate human behaviour, in general terms will continue, in principle, largely to remain relevant, particularly with continuous, appropriate and renewed interpretation and adaptation.\textsuperscript{84}

The question for the development of consensus (\textit{idjma’}) here is how, for serious \textit{ta’zir} crimes (defined by an Islamic ICL), one ascertains the existence of consensus on the validity of these laws. The answer is that in the shorter term, consensus is unlikely to provide a timely answer. While not overstating the problem, it is acknowledged that there is always the potential for creating some legal uncertainty while crystallisation occurs, and the process of review and consensus does not encourage rapid crystallisation of law. Conversely however — and arguably more importantly — a rejection of any of the laws with respect to the serious crimes by a significant number of Muslims must lead to a proper re-examination of the validity of those laws.

\textsuperscript{83} For a sociological discussion for example see generally Ibn Khaldun ‘s seminal work Ibn Khaldun, \textit{The Muqaddimah: An Introduction to History} (8th ed, 1989), to which Professor Boissard refers to as “Islam’s sociological doctrine: Marcel A. Boissard, \textit{jihad: A Commitment to Universal Peace} (2005), 25. See also Khaled Abou El-Fadl, \textit{Islam and the Challenge of Democratic Commitment’} (2003) 27 \textit{Fordham International Law Journal} 4, 5. where he quotes Ibn Khaldun’s reasons for constructing the Caliphate as a superior model for governance because it adheres to the notion of the rule of law (in principle if not in name).

\textsuperscript{84} Although in the West, Grotius (c. 1625) is credited with ‘systematising’ international law: Lucio. M. Quintana, \textit{Le Droit International en Fonction Nationale} (1967), 11. Further, Weeramantry J. correctly acknowledges the significant earlier contribution of great jurists such as Shaybani (b. 750 AD) to this field: C G Weeramantry, \textit{Islamic Jurisprudence: An International Perspective} (1988), 131.; See also generally with respect non-western law: Lori Fisler Damrosch, \textit{The "American" and the "International" in the American Journal of International Law’} (2006) \textit{American Journal of International Law} 2., on the possible role of non-Western laws on the international plane.
An IILC as proposed is likely to satisfy the Islamic requirement for consultation and puts the formation of law beyond the manipulative monopoly of both the leaders of Muslim States and Muslim non-State groups. Further, an Islamic ILC working closely with lawyers, NGOs and other interested parties will provide a platform for oppressed Muslims to air their legitimate concerns such as ultra vires means and weapons used by States. This will therefore arguably reduce that impetus or need for violence by ‘combating’ Muslim possessors and users of such weapons through the law. Weeramantry’s view which is strongly endorsed in this paper, is that the better, more competent scholars will then become recognised (by a broad cross section of the community) by the quality of their work.85

Legal Basis For Creating an IILC

The creation of an IILC would, if this analysis is correct, help promote peaceful resolution of some intractable disputes, a purpose clearly intra vires the UN Charter. The UN Charter generally prohibits the first use of force except when authorised under Chapter VII. The *shari’a* as discussed clearly accords with the primary prohibition86 but perhaps not directly with the exception. Notwithstanding this, Article 2(3) of the Charter states the purposes inter alia of the UN as promoting peaceful means of dispute resolution as well as establishing justice, both aims — as argued — supported by the *shari’a*.87 On the other hand, constructive engagement to help break or end the cycle of violence between Islamists and the Coalition appears very difficult at the moment, for intransigent leaders on both sides do not appear to canvass nor do they appear to be pre-disposed to peaceful outcomes. Bin Laden’s empty and crass rhetoric on one hand is countered by politically sophisticated ‘spin’ but empty rhetoric nonetheless on the other.88 A change in the West’s leadership has changed this to some extent, but the intransigence and venom of those such as al-Zawahiri on the al-

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86 Qur’an 2:192.
87 Qur’an 8:61.
88 Sally Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* (2004), 310.
Qa’eda side appear to be undiminished, making it difficult for the West to respond other than by force. This thesis canvasses an alternative avenue.

Further, Article 13(1)(a) of the Charter stipulates that the UNGA will initiate studies and make recommendations for the development of international law and its codification and Article 33 of the Charter provides a non-exhaustive list for the promotion of pacific solutions. The use of law, and adjudication in its various forms, clearly falls within the meaning of Article 33. The question then becomes whether the shari’a as described, is or can form part of international law. Article 38(1) of the Statute of the ICJ, when read in a contemporary context for its object and purpose, can without violence to its language encompass the shari’a as a law, although the increased secularisation of the international community means that there will nonetheless be some, perhaps even considerable, opposition to such an adaptation of what is perceived as a ‘religious law’. Such parochial views however should be a secondary consideration, particularly as the model recommended in this paper is an ‘opt in’, promoting therefore the strong liberal value of individual choice.

Another perspective is that the work of the proposed IILC can reasonably be said to fall within the scope of the ILC which is to be composed of people representing ‘the chief forms of civilisation and the basic legal systems of the world’, who are assembled in this instance with a view to selecting topics for codification, and who can include shari’a jurists. While the current ILC can legitimately be tasked with developing

89 Statute of The International Court of Justice,
90 It is unclear, but appears quite unlikely, that the original framers of the Statute, given the composition of the UN at that time, would have contemplated the shari’a as part of the broader international law.
91 It is argued in this paper that although the shari’a finds its roots in the religious text as does the cannon in the 10 Commandments, it is nonetheless a ‘human law’, although the way Muslims characterise it leaves some Muslims and non-Muslims in doubt as to its true character.
92 See text accompanying reference to the ‘opt in’ option as discussed at page 436, below.
93 Preamble of the ILC Statute. It is noted however that is not binding but is an aide to interpretation: Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) (Advisory Opinion) ([1971]) 16 ICJ Rep.(Namibia Case)
94 Article 18(1) ILC Statute.
SHL under its current statute, as part of its ‘progressive development of international law’ and, while this is a preferable outcome, it is unlikely to eventuate. The legal basis under the \textit{shari'a} for the creation of an IILC is the notion as discussed in Appendix 1 of the \textit{shari'a} as a jurist’s law. While the English norm is that of the Parliament as the primary lawmaker and judiciary as the interpreter of law, the creation of law by judges is nonetheless an accepted and recognised phenomenon in the common law world. In itself, the nature of the \textit{shari'a} as a jurist’s law therefore should not prove problematic.

The Scope of the IILC
The \textit{shari'a}, or even the \textit{siyar} (international Islamic law) are broader than SHL and much of the \textit{shari'a} is more akin to domestic law or private law. The scope of the IILC could therefore be confined to the development primarily of SHL (a sort of \textit{lex specialis} of defence) and perhaps its broader public law aspects, with particular emphasis given to humanitarian law and the serious international crimes. As proposed, the IILC’s functions parallel that of the ILC and it therefore make sense to follow a parallel genesis and Statute. Thus the IILC could be created by resolution similar to one that the UN General Assembly (UNGA) used to create the ILC. Further, it is likely to receive sufficient support in the UNGA.

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95 Article 1(1) ILC Statute.
96 Article 15(1) ILC Statute, and in the meaning of Chapter II of the ILC Statute.
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Organisation of the IILC

The ILC restricts membership to one person per State party.\textsuperscript{100} As discussed, the repression or general lack of academic freedom and that of expression, coupled with the much better facilities for research and publication elsewhere, has resulted in an exodus of Muslim intellectuals and thinkers from Muslim States. There is therefore a disproportionate number of shari’ā scholars in the West and certainly greater than would occur organically among the Muslims or Arabic speakers in such States. Membership limits based on nationality would therefore, in this context, prove counterproductive and should be avoided.\textsuperscript{101} In most respects, the function of the IILC can broadly parallel that of the ILC.\textsuperscript{102} The UNGA published the ILC Statute in French and English although an IILC could, and even perhaps should, include Arabic as a working language in addition to these two languages. Reports and submissions should be accepted in languages spoken widely in Muslim nations but initially at least in Indonesian/Malay, Persian, Turkish, Kurdish, Bengali, Swahili and Urdu, in addition to the other UN languages. The IILC secretariat should continue to support Arabic and French as two central languages used by Muslims internationally, with language training facilities to help staff and researchers. Links with universities should be encouraged.

An International Framework for the Development of Islamic Law

An IILC as proposed is an institution for the development of SHL and is not an effort towards centralising Muslim ‘law’ in the West or elsewhere. While the IILC as proposed is a central institution, its work can be distributed in many suitable locations where its independent work of developing the shari’ā can flourish. The existence of the IILC neither precludes the development of further knowledge centres by other groups, institutions or States, nor does it impede their initiatives. In fact the

\begin{itemize}
\item \textsuperscript{100} Article 2(2) Statute of the International Law Commission, UNGA, 'UNGA Resolution 174(II) The Creation of an International Law Commission' (Paper presented at the, 17 November 1947). (hereafter, ILC Statute)
\item \textsuperscript{101} Take the USA for example. If only one jurist was chosen from the USA many other pre-eminent scholars would not be eligible. This is not a problem in the case of the ICJ but the very few pre-eminent shari’ā scholars of international repute, many living in ‘exile’ in the West would make this restriction counterproductive.
\item \textsuperscript{102} Chapter II of the ILC Statute.
\end{itemize}
emergence of several such centres where learning, research and publication flourish would be a positive development.

A practical drawback of a study of a legal system which has spanned such a long period in history, however, is that the quoted material in support of any perspective can appear to be selective and self-serving. This reasonable view is compounded by the historical use and abuse of *idjtihad* (the development of the *shari'a*) to serve political ends. In this thesis, care has been taken to reflect the period closest to the time of the Prophet, which is universally considered the most authentic. There are, nonetheless substantial gaps. Inter alia, for these reasons almost inevitably, many Muslims would at first be quite sceptical of a *shari'a* laws and institutions developed by 'the West'.

The Qur'an mandates that Muslims act justly towards all peoples, and oppose injustice with the use of force if necessary. The Qur'an further prescribes that Muslims conduct their affairs by mutual consultation, promoting dialogue. While not strictly 'democratic',

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103 Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muhammad 'Abduh and Rashid Rida* (1966), 209. notes:

In attributing a general spirit of permissiveness and adaptability to the Qur'an and *sunna*, modern Muslims have often been the victims of two alternative but concurrent tendencies. The first is to carry the argument to a point where Islam seems to stand for nothing in particular except permissiveness itself. The second is to overlook the substantial renunciation of independence in judgment that is implicit in depending upon the Qur'an and the *sunna* for authorizations of flexibility.


105 That is, while care has been taken to reflect 'truer' examples, it is conceded that in most cases it would no doubt be possible to find counter examples. See generally for example, Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969). Coulson in the main however, considers issues of personal law.

106 Qur'an 4:135.


109 Qur'an 42:37-39. *Shura* is an important Islamic legal concept. It is normally translated into English as 'mutual consultation' and the Qur'an describes this means of mutual dealing as a characteristic of a Muslim: (ibid. 42:38). The etymology of the word *shura* derives from 'extracting honey from a small hollow in a rock in which it was deposited by wild bees' or 'to gather it from hives or other places': E W Lane, *Arabic English Lexicon* vol 1 (1984), *شَرَعْ* is therefore, and shows that unlike the position in democratic theory, not every opinion is regarded as being of equal or similar value. Further *shura* requires consultation on every substantial issue as opposed to periodic elections. There is therefore no reason for
has the potential to mitigate against the excesses of the tyranny of the majority\textsuperscript{111}

In the Australian context Sir Ninian Stephen speaks of a potential ‘democratic deficit’\textsuperscript{112} with respect to an active Executive creating law (in the common law context) through the ‘importation of (International) laws’ by-passing the Parliament. Although not causally connected with Islamic law, this ‘democratic deficit’ is arguably generally much deeper in a


A discussion of whether shura can be developed into a more formal democratic process is outside the scope of this paper.

See generally: Sayed Khatab and Gary D Bouma, \textit{Democracy in Islam} (2007). See also Fatima Mernissi, \textit{Islam and Democracy: Fear of the Modern World} (1992). A polemical examination of what she describes as the Muslim fear of the strange/unknown (\textit{gharib}) and in this instance, the concept of democracy. See also generally Khaled Abou El-Fadl, ‘Islam and the Challenge of Democratic Commitment’ (2003) \textit{27 Fordham International Law Journal} 4., arguably a better article on the subject by a Muslim, although even here Professor el-Fadl (ibid.10) states (uncritically and without substantiation) that:

‘In my view, there are several reasons to commend democracy, and especially a constitutional democracy, as the system most capable of promoting the ethical and moral imperatives of Islam.

While it is absolutely clear from his many excellent, thoughtful and honest works that Professor el-Fadl is no apologist or rejectionist and more balanced than most contemporary Muslim commentators, in this instance however, he presents a very particular perspective of a successful immigrant in a migrant society ignoring the perspective and plight of the \textit{sans-papiers} and indigenous peoples brutalised by the very same Constitutions. He overlooks or fails to explain how the ‘best system for promoting the ethical and moral imperatives of Islam’ is underpinned by racist constitutions that in his adopted country deprived the humanity of its indigenous peoples and slaves and even today permits the legitimate detention of people not convicted of a crime or against whom no charges have been laid, in prisons and further in secret detention; and who are prevented from proving their innocence in a fair and open court using fair legal processes that appear at present and as of right to be available to ‘citizens’ only of the US. In Australia, the Constitution permitted or at least condoned the dispossession of its indigenous peoples and even today permits the passing of constitutionally valid legislation that permits the explicit discrimination of indigenous Australians. While in practice Muslim societies are arguably no more or less racist that other societies it is more difficult to attribute the condoning of such racist practices to either the Qur’an or the Prophet as the immigrant societies did with respect to their respective constitutions.

This statement is based on a premise that the Executive will act justly and impartially (or that there are other institutions in place to dissuade excess/oppression) which in a historical context was arguably only valid in relatively short intervals of Islamic history. The Prophet said (as noted \textit{infra}) that Muslims will not form a consensus on something that is incorrect.

majority of contemporary Muslim States than it is in contemporary Australia and other constitutional democracies. Under the shari’ā, the requirement for consensus can potentially prevent the incorporation of unjust laws through a significant minority voicing their opposition (thus preventing the crystallisation of consensus). The IILC is less likely to be tainted on account of a lack of legitimacy arising from the ‘democratic deficit’ not because it is democratic — it is not meant to be such — and its measure on its technical competence and not its popularity. However, as with the higher Western Courts, they draw in men and women of the highest legal and moral calibre. Although administratively complex and expensive, specific individual criticisms of the IILC, the law that it proposes and its processes, can all be publicly addressed by the jurists or their officials, thus enhancing communication and openness.

Obstacles to the Creation of an IILC
The ILC desires to harmonise existing law,113 which derives from different legal traditions and norms. The proposed IILC on the other hand, initially anyway, would suggest further diversification and expansion of the law and highlight the conflict of norms on the international plane for the need to harmonise and simplify the laws versus a broader representation of legal traditions. This diversification may arguably be justified nonetheless as a practical and necessary tool that both enhances peace and security and, as importantly, accurately represents the diversity of human legal cultures. Damrosch correctly points out that the influence of Islamic law on international law has received ‘less attention than it undoubtedly deserves114 and this paper seeks to encourage contributions to help redress this omission.

Conclusion
The shari’ā, if developed as a legal tradition properly speaking, and explicitly encouraged Muslims unilaterally to adhere to its norms can, it is proposed, help reduce the levels of endemic violence in Muslim

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113 Martti Koskenniemi, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, (2007).
communities. Such law might also be a catalyst for dissuading Islamists from serving as an inspiration for violent ‘Western’ Islamists by providing peaceful options to help address their peoples’ legitimate concerns and aspirations for justice and dignity. What is argued therefore is that the development of the law through an international body is much more likely to enjoy both the confidence of a largely sceptical Muslim majority as well as the sometimes fearful non-Muslim community. Given the levels of oppression in Muslim States, the need for an internationally sponsored institution, here a proposed IILC appears to satisfy these competing requirements based on the model of the ILC.

There are several credible contemporary Islamic scholars, some of whom have been referred to in this paper, whose reasonable voices on violence should be heard by the broader international public, in the context of opposing but on the other hand not entirely silencing, Talibanic and Wahhabic manifestations of Islam, but engaging with these perspectives particularly when they claim to provide the sole correct representation of the shari’a. The IILC will also provide an institution through which both interested Muslims and non-Muslims can contribute to the development of law by critically engaging in a principled manner in a neutral erudite forum.

The oversight of the IILC’s work by competent, internationally chosen, independent jurists, will aid Islamic law to develop similar in form to how it evolved in the past, and do so in a pluralistic manner and thus flourish, despite differences in Schools, traditions and sects. The quid-pro-quo for non-Muslims is that ‘mainstream’ Islam and Muslim jurisdictions will once again continue to move towards becoming rule-of-law entities. This will help to reduce the violence to which Islamists can subject their host communities with a stranglehold on what they claim to be the only ‘authentic’ Islam. Islamists are greatly helped in this by the world’s popular press. Agreed-upon shari’a legal limits on the use of force will make Islamists answerable and therefore potentially help bring down these unacceptable levels of violence and eventually perhaps lead to peace.
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In the current international context, contact, or at least communication between people, is not substantially impeded by State borders. It is not only State and legitimate non-State entities such as multinational corporations, capital flows, transnational NGOs, and the media, but the so-called global criminal enterprises who benefit from this greater permeability. Other beneficiaries of this openness are the ‘global’ Islamist groups who, in the one guise of humanitarian or charity organisations, energetically and tirelessly help the poor and weak enormously through innovative economic programmes, using funds from a diverse range of sources and particularly from wealthy overseas Muslim populations. This charitable work has in cases greatly increased their popularity and influence. The military wings of some of the same Islamist groups have in cases used or exploited the goodwill gained through social work to promote their military agenda. Resistance is by no means always unlawful, say for example for those who are fighting for self-determination or in some case those in occupied territories such as Iraq or Afghanistan. On the other hand, conflict with groups such as al-Qa’eda can take on a specific significance in the context of international peace and security. Even where armed action is not unlawful under international law, the shari’a requires Muslims to act morally and the Weapons Charter (discussed in Stage 3 below) will potentially provide a practical, open, transparent yardstick and thus introduce some form of accountability.

It is the conservative and sometimes reactionary governments in Muslim States and their P5 backers and not the non-Muslim or third world States that are usually the greatest obstacle in these attempts to create peace. They do so mainly for their own self-interest, which, while not

115 While for example the IRA (Catholic) / Loyalist (Protestant) link is not usually made, the terrorism and Islam link appears to be more prevalent. While not minimising the problem of media portrayal and its effect on the broader public opinion of Islam, a clear difference is that the IRA/Loyalist leadership does not claim to speak for their religious constituencies where as al-Qa’eda and their associated groups often explicitly claim to speak for Muslims or to speak authoritatively for Islam. The media portrayal of Muslims, while arguably an important social issue, is less important in a legal sense and the real issue is the verification of the claims of the Muslim groups/ the prosecution, on the available evidence.

116 See generally for example one such case at: Muhammad Yunus and Alan Jobs, Banker to the Poor (1998).
unlawful in this international environment, must be constrained if peace and justice are to take general root and not be the sole preserve of the rich and their allies. However, the basic causes of Islamist terrorism are arguably political and, while the greatest impediments to its minimisation are also likely to be political, the coercive power of Islamic law may be able to cut through the intransigence on all Muslim sides and provide a way around this impasse to a just and enduring peace.

**Stage 3: Formulate a Weapons Charter Modelled on The Conventional Weapons Conventions**

**Introduction**
The shari'a is a living juristic tradition albeit at present relatively stagnant in its broader practice in the criminal and international (siyar) jurisdictions. Cognisant of the tremendous political difficulties, the area of law dealing with the shari'a-based means that may be employed in fighting is in urgent need of principled development and the likely timeframe for this endeavour is most probably the longer term, even if carried out with some urgency.

To this end, and in the intermediate term, it is proposed that a suite of instruments be created, collectively called a ‘Weapons Charter’ here for convenience, based on shari'a limits, as alluded to in Step 1. The Weapons Charter inter alia will identify permitted and prohibited weapons under SHL. Referring to Step 2 the existing ‘gaps’ in SHL should be identified by the IILC and potential law proposed and compiled into instruments as part of the Weapons Charter. The Weapons Charter that emerges from this process will be published and opened for voluntary signature by ordinary Muslims, Islamists, NGOs and States through the agency of the OIC, the UN or through Muslim and non-Muslim NGOs committed to harm and violence minimisation and peaceful resolution of conflicts. The Weapons Charter will articulate the rules and underlying norms for limiting weapons (here read as conventional weapons). These limits will help to (a) regulate the use of some weapons, (b) entirely ban both the use or the

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117 For example, with the assistance of the Comité International de la Croissant-Rouge (CICR) — International Committee of the Red Crescent (ICRC) or if the association with the shari'a is likely to prove problematic for the ICRC, then other NGOs only.
production of other weapons and (c) regulate the development of new weapons. The Weapons Charter would carry the shari’a penalty or sanction for breach, for each weapon or class of weapons employed ultra vires.

The Need and Case for a ‘Weapons Charter’

The proposition that treaties can help to clarify the law and that reservations can further help to clarify the subjective positions of individual States or other stakeholders is axiomatic under international law. In explaining some of the broader reasons for the desire by States for treaties, and foreshadowing the proposal of a shari’a-based international tribunal, the ICJ noted that:

A State may accept a rule contained in a treaty not simply because it favours the application of the rule itself, but also because the treaty establishes what that State regards as desirable institutions or mechanisms to ensure implementation of the rule.

In reality it is individuals who make up ‘States’, who represent the ‘intention’ and ‘desire’ of States and who rule these States. The shari’a in effect treats nations or States similarly to how it treats groups of individuals, by sheeting home responsibility to individuals including the rulers. Such attribution makes sense particularly in the criminal jurisdiction where criminal acts include an ‘intention’ fault element. Thus, when the ICJ states that ‘States regard something as desirable’ it means individuals collectively exercising the powers of State desire this thing. To generalise a desire by Muslim citizens in these States, say for ‘independent judicial institutions or mechanisms’ to implement inter alia shari’a/SHL rules, is therefore not an unreasonable extension of the ICJ’s analysis.

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118 Article 36 Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, provides a useful starting point:

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

The provision could be broadened to include the shari’a.

119 In the first instances, the Charter could refer to shari’a and Qur’anic temporal and other penalties. These penalties should be highlighted in an aspirational, “moral culpability” framework rather than a legally enforceable framework, which is likely to be impractical.
Thus, while a State Party’s agreement is sufficient to bind its citizens on the international plane it is not without its limitations. For example, a State’s right to self-defence against a non-State actor with no proven nexus to a State is not guaranteed under international law, even though SHL imposes no such limitation. It is stated for completeness that there will be other such differences. However, popular consensus will emerge from among individual Muslims, Muslim groups (including Schools, sects and smaller collectives), NGOs, non-State actors and States. This consensus is likely, therefore, to demonstrate that the shari'a traditional (SHL) limits still enjoy widespread, if not overwhelming, support and will therefore not provide Islamists the succour that they theoretically enjoy under international law.

If Islamists then subsequently for necessity do elect not to be bound by shari'a limits in preference to the broader IHL tolerance of their means of combat, they will also then take their chances in secular Courts, but importantly will have to abandon their Islamic pretexts. It also appears that in many cases Islamists do not have State sponsors in the DRC v Uganda Case sense, and are likely to benefit from applying this test under international law. However, notwithstanding their putative ‘wins’ in secular courts, the support Islamists and their organisations receive from Muslims will then diminish correspondingly. With this loss of support, and perhaps less certainly, their levels of violence is also likely to diminish as their support and financing ‘dry up’. If some captured Islamist leaders are tried under the shari'a, and many are likely to have breached shari'a norms, this will make other Islamists more careful with respect to the wanton use of force and the destruction of innocent life, even when they only adhere to IHL limits or no limits.

A failure on the other hand to respond to Muslims’ call for help against oppression with peaceful measures then clearly makes the escalation of Islamists’ struggles less unreasonable. Here again a Weapons

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120 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, (judgment of 27 June) (1986) 14 ICJ Rep 1, para. 178.
121 This principle as discussed infra was established in the Nicaragua Case (a pre 11/9 case) and confirmed by the ICJ in the DRC v Uganda Case (a post 9/11 Case).
122 See n 121 above.
Charter, with a list of permissible weapons, will help control violence. Islamists would have to show that their enemy first used SHL-prohibited weapons (ie weapons not listed in the Weapons Charter) and that for reciprocity and necessity they resorted to the same, but the Charter will still not authorise even ‘worse’ weapons. Islamists who are in the main appropriating and in some cases usurping the right to represent the Muslim struggle, have been quick to include the use of force (albeit necessarily for Islamists, the use of which must be intra vires the shari’a Weapons Charter). Their breach of shari’a rules however, notwithstanding its non-binding character under International law, is in their own eyes still punishable under the shari’a.

For the international community the interest is to not only to effect a reduction in violence but also to prevent the ‘Talibanisation’ of the many Muslim States, thus pre-empting further problems. The al-Qa’eda ‘name’ or ‘brand’, as is described in some circles, is as or better known than ‘Pepsi’ or certainly ‘Coke’. Thus, it is arguably the inhibiting ‘pull’ of individual Muslims’ religious obligations, which recognise the unlawful nature of most but not all of al-Qa’eda’s violence under the shari’a and acts as a counterweight to prevent al-Qa’eda from fully converting their renown into overwhelming, direct and positive support from Muslims. If the majority of Muslims believed that al-Qa’eda was acting *intra vires*, this almost universal recognition of al-Qa’eda would translate into overwhelming support and not even the bloodiest dictators would be able to resist as has proven to be the case in Tunisia and Egypt in 2011. The French are purported to have promoted the GIA to this extreme to neutralise the Algerian Muslims. It is not inconceivable that the USA is doing the same with al-Qa’eda (as shown by bin Laden’s ability to still be so public and yet avoid capture by the world’s most sophisticated military) to help neutralise the emergence of more reasonable Islamic voices. This paper does not adopt this popular Muslim hypothesis. There is little doubt,

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123 Pepsico is the better known in many Muslim States. Generically, in place of ‘would you like a soft drink/juice?’, the analogous expression in many Arab and Muslim States is ‘Would you like a Bebsi?’ (‘P’ is sounded like a ‘b’ in Arabic speaking societies).
however, that these *extremely violent* Islamists pose little threat to their oppressive rulers.\(^{124}\)

Since the West has the better weapons it might become complacent. The US’s caution with respect to popular Islam is however understandable. Some cases show how internal hatreds have colluded to benefit the West, through no effort on its part. This ‘luck’ will not last forever, however. The effect of overwhelming public support for the clerics was seen in Iran in 1979, against the Shah who enjoyed the US’s unstinting support. For all the Shah power and brutality, there was little the US could do to help its close ally. That however, is the smaller of the *tsunamis*. Sectarian hatreds have prevented this Shi’i majority country\(^{125}\) from capitalising globally on their popular support. If the better part of the remaining 90% of the Muslims supported a military struggle, financially, morally and by providing fighters, they would become very difficult to resist. The Soviet Union discovered this in Afghanistan and also the US, which has conceded the unlikely chance of a military victory, in Iraq, Afghanistan, Somalia or the Yemen. We see also Israel’s inability to defeat Hizbullah, which used weapons such as IEDs that would not be legitimately placed on the Weapons Charter. Such weapons development has led to what is sometimes characterised as the defeat of Israel by Hizbullah and is also an example of gradual change in the balance of power.

A restrained and principled adversary such as Saladin, with complete deference to SHL, is much better for humanity than the many Genghis Khans now emerging in the guise of Islamism. While a Weapons Charter will not be a panacea, it will be a start towards coercing rebels to the principled end of the spectrum. Passing up an opportunity, for parochial political considerations, appears to acting in a manner that is penny wise.

It is true that it is not just weapons that have helped al-Qa’eda. As Western politicians once underestimated the ‘blowback’ from Afghanistan,

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it may once again pay a premium for both 'overplaying the importance of al-Qa'eda' and not strategically weakening its support structures, thus greatly helping to popularise jihadist movements generally among Muslims particularly by overstating their importance and efficacy. Al-Qa'eda also aids its own legitimacy by alternatively using the language of jihad, liberation and self-determination (yet continuing to acquire ever more sophisticated weapons and developing means of circumventing Western defences at airports and military bases) but also aiming at soft targets such as public transport. Al-Qa'eda has used both novel methods and also deadly explosives and weapons that are becoming more difficult to detect. Developing some restraints on weapons employed and employable by Muslims is in the overall interest of international peace and security.

Further, jihadist groups are sometimes accused of seeking to spread Islam by force. However, none of the UN proscribed jihadist groups, including al-Qa'eda, list the conversion of non-Muslims as a strategic aim, an aim that is at any rate contrary to the shari'a. This propaganda

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125 Shi'i Muslims while a Muslim majority in Iran nonetheless are a minority making up only about 10% of the total number of Muslims.
128 Duncan Gardham, 'Yemen cargo plane plot: ink bomb was virtually undetectable', Telegraph (London), 31 October 2010.
129 Daniel Pipes, Islam Was Spread by Force (2006) <http://www.danielpipes.org> at 8 January 2008. This view appears to have some traction among those in the West who are uninformed about Islam. Islam prohibits the forced conversion as discussed infra.
131 Muslims would not generally see this as a legitimate aim and al-Qa'eda focuses on gaining legitimacy (primarily if not solely) among Muslims and is unlikely therefore, to list forced conversion as an aim and to do this publicly.
132 See discussions on Qur'an 2:256.
arguably forms part of the political 'spin' aimed at alarming non-Muslims and no doubt has this intended effect. On the other hand, the down side of this strategy is that rather than diminishing the credibility or legitimacy of groups among Muslims, easily disprovable and dismissible allegations (such as forced conversion) gain very little traction with Muslims. They are characterised by Islamists as evidence of Western malice towards and disinformation about Islam thus successfully tainting Western information generally. The cruelty of the Western States' proxies, both Muslim and the poorer European States, against Muslims is also a significant factor.\footnote{Glenn Jones, 'Hicks case should be examined in war crimes trial', \textit{Canberra Times} (Canberra), Wednesday 16 June, 12.}

While prohibiting specific implements of torture in a Weapons Charter will not eliminate torture, mere possession however will bring with it certain disadvantages, and reversal of the onus-of-proof issues that will benefit torture victims.

On the other hand, Muslims as discussed, 'know' or more likely suspect, but without strong supporting evidence, that al-Qa'eda is acting ultra vires. Evidence with respect to both weapons and means employed will become easier to obtain with the existence of a Weapons Charter. At present, Muslims are faced with a large volume of both information and disinformation from all sides and lack reliable and objective \textit{shari'a} yardsticks for converting their suspicions of Islamists misbehaviour into legal certainty. This keeps Muslim opposition muted or pushes them towards neutrality when rightly they could be expected to oppose al-Qa'eda as a party that has transgressed beyond bounds. \textit{Shari'a} obligations are unilaterally binding on Muslims and are not contingent on non-Muslim morality, action or inaction. Thus, the yardsticks that can provide the legal certainty that Muslims need to then fight Islamists who act 'beyond bounds' (as they are obliged to do) are urgently required. A Weapons Charter will contain such criteria. The necessary norms and rules can also be articulated in the Weapons Charter. An erosion of positive support for violent Islamists is a predicted effect of a Weapons Charter. It will demonstrate the power of Islamic law to restrain, even in the face of provocation.
On the other hand, the inability of Western States to admit their strategic errors demonstrates a short-sightedness, cheered on by a weak, cowed and complicit international community. The situation is akin to the naked Emperor, who knows that his strategy has failed, but still 'keeps on doing what he is doing' foolishly expecting a different result.

That is, notwithstanding the fact that while the UNSC (read P5) is the organ primarily seized with responsibility for maintaining international peace and security, other organs of the UN, its members and other organisations nonetheless also have a secondary positive role to play in maintaining international peace and security. It is time they took their responsibilities seriously. In this context, the use of shari'a on the international plane to regulate the use of violence through law, and the promotion of such peaceful means by the General Assembly, member States, Civil Society, NGOs and individuals, can help play in helping to reduce endemic Islamist violence and thereby to contribute to international peace and security. Analysing and critiquing individual weapons as part of the maintaining of the Weapons Charter will promote monitoring overall. It is an idea whose time has well and truly arrived for the failure of the P5 to look beyond their own parochial interests.

Some Problems of a Weapons Charter and Reasons Against

The post-WWII international regime is predicated on preserving the privilege of the victors of that war. The IHL protection regime is patchy, incomplete or some may even say chaotic. This regime too seeks to entrench the post-WWII balance of power. The P5 have maintained supremacy in their weapons capability and production in a conventional weapons sense. On the nuclear technology front the P5 have largely maintained their monopoly, with the exceptions of India, Pakistan, South Africa, Israel and North Korea. These States, however, are either firmly committed to the present global political order or, as in the case of North Korea, is not in a position to effect change in any significant way in the

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134 Refer to the American Proverb, 331.
135 Article 27(1) UN Charter.
medium term. The numerous IHL-related conferences and negotiations could on one perspective be viewed as a mechanism to keep the rest of the world busy with what Sir Humphrey Appleby of the ‘Yes Prime Minister’ BBC TV series would call ‘creative inactivity’. This is because the resulting treaties do not disturb the status quo of P5 privilege.

Why then would the international community (read the P5) even dream of accepting the possibility of a shari‘a-based Weapons Charter? Firstly, it does not challenge the P5 privilege. Secondly it allows the P5 to regulate and oversee the development of the shari‘a, thus preventing the Talibanisation of a legal regime that can potentially destabilise large regions, although at present the shari‘a is unlikely to become a global threat in any way. It will help reduce regional conflicts and bloodshed without affecting the supremacy of the P5 or their broader strategic interests.

The disadvantage for the West is that such an instrument will place great pressure on the West’s strategic Muslim allies including Pakistan and Saudi Arabia, countries that have managed to avoid greater transparency, democracy and ‘rule-of-law’ regimes. These countries have largely compiled with Western requirements in terms of extradition of their Muslim citizens, use of questionable techniques in eliciting information in the war against terror or in neutralising countries such as Iran and to a lesser extent Syria, that have attempted to call the West to task. The West has been content to allow Pakistan to enhance its nuclear capability and even continue to produce land mines, an area of weaponry that has now been abandoned by most civilised societies. A Weapons Treaty will bring about internal pressure on the many Muslim States to alter their behaviour as they will not be able to hide behind the veil of the ‘shari‘a. This may adversely affect the US but not in a serious manner. On the positive side of its ledger is a reduction in US military spending on personnel, who are required to fight its losing wars, but to do so without necessarily reducing its arms production and purchases, an area that the defence lobby in the US is likely to protect very strongly.

The US, ‘strategic error’ in deposing President Saddam Hussein greatly strengthened Iran which was ‘kept in check’ by his brutal regime.
The US, which brought free elections to Iraq, succeeded in strengthening the Shi'i majority, which in a regional power balance sense also benefitted Iran. The US-Coalition and Iraq’s mainly Shi'i government are now fighting against a Sunni ‘al-Qa’eda in Iraq’, a group which it must be remembered was non-existent under Saddam Hussein’s government. The purported support for Iraq’s Shi’ites however further legitimises al-Qa’eda, promoting it as a champion of Sunni interests globally. Notwithstanding this critique of US policy, deposing Saddam was the ‘right’ thing to do. Will the US continue to do what is thought to be right by others, particularly at little cost to itself?

The Case for Codification of SHL
Producing a Weapons Charter is in effect codifying SHL. The ‘codification’ of the shari’a, arguably while a necessity for contemporary criminal justice processes is not entirely authentic in an Islamic sense as it appears to ‘bind for evermore’. This, as discussed, in the shari’a view of some, could be usurping God’s legislative prerogative.

That is, the notion that jurists can create ‘positive’ ‘legislation’ that can bind independent of an affiliation to a School is perhaps problematic and to some arguably is a step too far. While the shari’a parallels the common law in its mode of law creation, the notion that a group of jurists (or others for that matter) coming together to ‘codify’ such ‘common law’ is well established in the common law world, and while not unknown in the Muslim world is perhaps not on the other hand entirely established in consensus and needs more time to entrench this model. On the other hand, a notion of codification was acceptable for the last 200 years in the form of the Mejelle. Thus a methodology for creating a criminal code appears to be established as valid by consensus.

The chapeau of the constituent parts of a Weapons Charter should clearly signal the intent of the IILC to codify law and also that it envisages a law that is not final but one that is evolving. That is, the process of law

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137 See text accompanying n 6, 5.
139 See n 7, 335.
reform and development will continue, to ensure that the 'code' does not become static or archaic, but nonetheless to prevent a concept of 'binding forever' taking root. That is, the 'code' itself is subject to ongoing (development) *idjihad* and (consensus) *idjma*’, although perhaps in a more controlled and systematic manner than in the early Islamic period, avoiding the proliferation of new Muslim Schools of law. To avoid any doubt, instruments when finalised should again separately and independently be opened for signature to all Muslim groups, individuals or others and should allow for further reservations so that fine tuning can continue to occur and new consensus to crystallise.

Once a large number of Muslims have consented or acquiesced to its substantial content and form, and while not suggesting that this is a general proposition, the process of codification for at least some specific instruments dealing with a class, classes or even specific weapons — in the form of a Declaration or preferably as a Convention — can then proceed in earnest. Henckaerts cites the *Continental Shelf Case*\(^140\) to show that the ICJ has approved the process that ‘treaty law can provide a blueprint for future behaviour and lay the foundation of the development of customary rules’\(^141\) a statement equally valid for the development of the *shari'a*.

With the evolution of newer weapons and weapons systems, the scope for adding ‘newer’ weapons to the permitted/prohibited lists is useful and keeps the issue ‘alive’. While such a Weapons Charter will have no more than moral force under international law, it should nonetheless appear to Muslims (only) as binding law.

There is on the other hand no doubt that institutions such as the ICJ are both willing and able to adjudicate and when necessary use law that is not yet codified, was demonstrated in the *Nicaragua Case*.\(^142\) The ICJ’s use of customary international law in this contentious case gives a hint of how the difference between what is codified and what is customary can be negotiated. Common law judges are adept at this type of case based on case

\(^{140}\) The *Continental Shelf Case* (Libyan Arab Jamahiriya v Malta) (1985) ICJ 1, para. 27.
law, criminal codes being a latter day innovation. The links between the common law and shari’ah are mentioned in previous chapters and provide some support for the notion that both common law and shari’ah judges are clearly competent, and the Nicaragua Case shows the adaptability of civil law judges to deal with a level of uncertainty in the formulation of ‘the law’.

Nonetheless, there is still arguably some merit in codification, particularly to assist those who are not lawyers and to create some certainty for matters that can have criminal sanctions for individuals and thus to not run foul of the legal principle of nulla poena sine lege.

Another salient issue is that the sources of international law do not entirely coincide with the sources of Islamic law. For example ‘state practice’ would have held little meaning in the original Islamic sources given the single entity of an umma. It is possible to read the intent and the practice of the umma, or by analogy with Western history, take the ‘practice’ of princes and monarchs as state practice, for the purposes of the mental element of opinio juris. There are in practice, however, large gaps in both shari’ah law and procedure, although perhaps not in its principles, and the exercise of contemporising the shari’ah is important if the current carnage in the name of Islam is to be countered. The present international position of ignoring (by States, the ICRC and other ‘humanitarian organisations”) a shari’ah solution, to the escalating use of force by Islamists, in the view of this thesis is unconscionable, but is to be expected from an entrenched secular orthodoxy that is as conservative as, and little different from, any religious orthodoxy.

142 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, (Judgment of 27 June) (1986) 14 ICJ Rep 1, 4.
143 Article 38 Statute of The International Court of Justice.
144 See generally: Shaheen Sardar Ali and Javaid Rehman, ‘The Concept of Jihad in Islamic International Law’ (2005) 10 Journal of Conflict & Security Law 321, 324. (among others such as Majid Khadduri etc who) have created a bridge by discussing the concepts of the siyar (Islamic public international law) in a contemporary context.
Form of a Weapons Charter

There is a significant body of IHL which can form a low-water mark in many cases in drafting equivalent shari'a instruments. Some broad issues are considered here as an example of what may practically be achieved.

The Conventional Weapons Convention (CWC80),\(^\text{145}\) prohibits and restricts the use of specified landmines, incendiary weapons, booby traps and fragmentation weapons.\(^\text{146}\) The Mine Ban Treaty (MBT97)\(^\text{147}\) and the Convention on Cluster Munitions (CCM08)\(^\text{148}\) include in their preambles a reminder that these indiscriminate weapons kill and maim many, including non-combatants sometimes for many years after the cessation of hostilities. United Nations Security Council Resolution 1325 on women, peace and security\(^\text{149}\) and United Nations Security Council Resolution 1612 on children in armed conflict\(^\text{150}\) are also relevant with respect to protecting civilians, particularly women and children. While the principle of distinction and the principle of humanity are firmly established in international law, many guerrillas, non-Western rebels or Islamists do not adhere to dress codes or wear the uniforms of regular military forces in a Western sense. That is, what constitutes a uniform is in question, particularly with respect to Islamists, who prefer to dress in what is loosely classified as 'Islamic clothing', not generally recognised as uniforms. Such soldiers, and there is no doubt in the mind of Islamists that they are indeed soldiers for the cause, are often difficult to distinguish from their civilian counterparts, as to dress differently is seen as a sort of aloofness or arrogance and thus avoided. While this is not always the case, Islamic dress could also be a means of 'soldiers' unlawfully masquerading as civilians.


\(^{\text{147}}\) Convention On The Prohibition Of The Use, Stockpiling, Production And Transfer Of Anti-Personnel Mines And On Their Destruction, 18 September 1997

\(^{\text{148}}\) Convention on Cluster Munitions, 30 May 2008,


Weapons Charter must address this issue of ‘distinction’ from within the Islamic tradition.

International law permits collateral killing of civilians as long as this ‘incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would not be excessive in relation to the concrete and direct military advantage anticipated.’ This issue of intentionally causing collateral damage to human life is problematic under Islamic law (particularly for Cain culpability). Thus the permissibility of intentionally causing collateral damage to civilians is not explicitly permitted under the shari’a and for practicality a modified provision such as Article 51(2)(a)(iii) that allows some leeway must be adopted if possible. If such accommodation is not possible then the alternative must be articulated, with necessity permitting Islamists to adopt Article 51(2)(a)(iii) ‘as is’ in a worst case scenario.

The Weapons Charter, as envisaged here, should clearly include both individual as well as collective obligations as required by Islam. A concerted education campaign is then likely to get Muslims to consider the Weapons Charter as unilaterally binding by virtue of their claim to being Muslim.

Penalties that attach for breach, such as diyat payments to victims or their families and other sanctions, will create some moral pressure on those who breach the rules and thus draw the shari’a punishments, even in the absence of enforcement mechanisms. More importantly, it creates objective Muslim standards for victims to make a claim generally and hope that Muslim public pressure will force Islamists to ‘pay up’ or lose some of their support and credibility for acting contrary to and in defiance of clear shari’a provisions. It is likely that, even absent punitive legal sanctions

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151 Article 57(2)(a)(iii) Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977,

152 The notion of the payment of compensation for breach of regulations by a belligerent party is known to international law: Canadian Council on International Law / Conseil canadien de droit international and Markland Group (eds), Treaty Compliance: Some Concerns and Remedies (1998), 7.

153 Recall that in the Muslim view, ‘escaping’ punishment is not an option as legitimate punishment ‘avoided’ here on Earth will be administered much more forcefully in the Hereafter.
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against this, that Muslim charities will step in to cover such debts, thus providing a remedy to victims as is prescribed in the Qur'an.154

At this stage there will not be a forum for litigation but it is suggested that once broadly accepted, a Weapons Charter would provide further impetus for the creation of an international shari'a tribunal. The legal basis for the binding nature of the Weapons Charter will inhere in the shari'a but initially will not have any general legal standing as such. However, as developed here, the Weapons Charter is primarily based on international custom and it will not therefore be without significant international recognition by non-Muslims. It is likely that while Islamists may make ‘reservations’ based on necessity and reciprocity, even such broad ‘reservations’ can help the development of the shari'a and in bringing groups to accountability; public accountability that from the Islamists’ perspective is at present almost entirely absent.

Content of the SHL Instruments

In its initial form, SHL instruments including the Weapons Charter can prohibit weapons that contribute to cruel means of taking life or leading to the ‘serious SHL or siyar crimes’, defined here as the crimes of genocide, crimes against humanity, war crimes and when in force, the crime of aggression. The crimes should be framed in a form as close to ICL/IHL as the process in Stages 1 and 2 will allow and without doing violence to the shari'a.

The intention is that these crimes are formulated and cast as ta'zir crimes under a shari'a-compliant methodology.155 Hudud crimes carrying the most serious penalties in Islam, such as apostasy and adultery, fall

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154 Qur'an 9:60.

155 The Islamic religion has no clergy and consequently Islamic law is generally pluralistic and highly decentralised: Anne Elizabeth Mayer, 'Islam and the State' (1991) 12 Cardozo Law Review 1015, 1023. This phenomenon of separate evolution of laws in different jurisdictions is not unique to Islam. In the common law jurisdictions this divergent development to suit local conditions is illustrated by Professor Zines with respect to Australia which started with a decentralised federal system and developed into a centralised model while Canada, also a common law jurisdiction, moved in the other direction: Leslie Zines, Constitutional Change in the Commonwealth: the Commonwealth Lectures delivered at the University of Cambridge on 8, 15, and 22 November 1988 (1991), 89. On the other hand, and for consistency and equal application, the most serious IHL crimes must be codified under the shari'a. In this context, the Qur'an provides a precedent for codification of serious crimes such as hudud and some quisas crimes.
outside the scope of serious SHL/siyar crimes. Further, this exercise, which requires double criminality, means that apostasy and adultery will not be considered relevant crimes except in that they set the high-water mark with respect to punishments. In the longer term and as suggested in Step 4, Weapons Charter obligations could form the basis for development of a Statute and thus form a legal basis for prosecutions at a shari'a Tribunal, a concept discussed below.

Some Benefits of a Weapons Charter: Signature and Accession
The more cynical may sneer at this proposal, as did apartheid supporters when the African National Congress signed the Geneva Conventions.\textsuperscript{156} History arguably demonstrates that this engagement was beneficial in reducing unnecessary deaths and injury (or at least not more detrimental) to the slow and often bloody process that accompanied the de-legitimisation of apartheid. While not equating al-Qa'eda's bloody struggle to that of the legitimate armed struggle for self-determination\textsuperscript{157} against the crime of apartheid, it is suggested that, as with apartheid, it is the underlying injustice that provides some legitimacy to the struggle. Al-Qa'eda have appropriated a legitimate struggle against oppression, and have done so to satisfy what appears to be their own bloodlust.

Similarly, the Weapons Charter could also be opened for signature say via the internet, generally including ordinary Muslims who, in the overwhelming majority, are opposed to mindless Islamist violence but lack an effective means for demonstrating this opposition while not simultaneously dismissing or denying the legitimate claims of the oppressed. Their engagement will help both build and prove the existence of a consensus. Shafi'i, it is recalled, preferred the consensus of the Muslims over that of the scholars. Muslim civil society can also help promote the process of accession and consensus building.


\textsuperscript{157} UNGA, 'Res. 2625 (XXV) Declaration On Principles Of International Law Concerning Friendly Relations And Cooperation Among States In Accordance With The Charter Of The United Nations' (Paper presented at the UN General Assembly, New York, 24 October 1970). This right is enshrined in Article 1(4)
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The contemporary presumption that ‘new’ weapons are permitted until prohibited appears untenable under the shari’ā where it must be established that the weapon falls within the ‘permitted means’ before it is used. SHL could be used to encourage Muslim nations to adopt Article 36 of API and help to make this rule customary under international law.158

Finally, when a sufficient critical mass of support is reached among ‘ordinary Muslims’ it will make it more difficult for both Islamists and Muslim States to avoid either ratifying the SHL instruments or at least forced into making ‘reservations’ against what they may deem to be problematic or ambiguous provisions, even if only for their own instrumental and often legally unsubstantiated reasons, but in doing this, help to distinguish provisions from their own subjective legal perspectives. This process will improve the substantive legal content of the Weapons Charter, popularise and entrench the view that Islam limits the scope of, and strictly regulates the use of, violence to some relatively restricted circumstances, thereby promoting peace and security.

Conclusion

The broad development process for SHL can be summarised as follows:

(a) Jurists present the law in writing as they see it

(b) Statesmen settle on a compromise of what is practically feasible

(c) Muslims agree on law through consensus and repatriate what is not to begin the cycle anew.

The development of a Weapons Charter, by an institution such as the IILC, synthesises and summarises the better opinions, concerns and objections and addresses the SHL points thus raised, in a deliberate and open manner. It can serve as a focal point for further discussion among jurists, lawyers, interested institutions and individuals and hence be a great

158 Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Art 36. New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all
source of reliable SHL information for Muslims and non-Muslims alike. Initially however, and in order to gain this consensus, accession to the Weapons Charter can be promoted through multiple avenues including the OIC, the UN and also by Muslim and non-Muslim NGOs and individuals committed to harm and violence minimisation and who promote the peaceful resolution of conflicts. In the shorter term this Weapons Charter will assist in ‘holding’ Muslim protagonists to binding *shari’a* legal standards (during armed conflict), and although not enforceable in the ordinary sense, is likely to enable Muslim charities legitimately to step in and help the victims of Islamist violence. In the longer term, once the law is seen to be reasonably ‘settled’, Muslim nations and the international community can work towards formalising the Weapons Charter in the form of a Declaration or as with APII, and although not an exact analogy, better still a binding Convention, under both international and *shari’a* treaty law but broadly with the aim of drawing in non-State actors as well.

This mechanism can further serve to educate the ‘ordinary Muslim’ while at the same time making new minority opinions such as those of al-Qaeda easier to challenge objectively. While minority opinions are important and are the means by which the law will emerge and develop, they must not be allowed to purport to represent the majority position. Those seeking to develop the law, including those who use the law instrumentally, will bear the onus of convincing the majority of the merits of their opinions, as is rightly their privilege under the *shari’a*. It is reiterated that at present the Western mass media uncritically, and wrongly accept the minority *fatwas* of sometimes unqualified Islamists as ‘established law’. Muslims while uncomfortable with these characterisations do not have the means, yardsticks or institutions effectively to challenge either intra vires or ultra vires opinions and the Weapons Charter is a means for redressing this situation.

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159 For example, with the assistance of the Comité international de la Croissant-Rouge (CICR) — International Committee of the Red Crescent (ICRC) or if the association with the *shari’a* is likely to prove problematic for the ICRC, for its commitment to *secularity* / *laicité* and for its own political reasons, then other NGOs.
Further, specialised engagement with the *shari'a* will help promote expertise among international jurists and judges and perhaps potentially help relieve some of the workload, strains and bottleneck issues that can arise from a single general treaty body\textsuperscript{160} by distributing the workload of the ICC where appropriate,\textsuperscript{161} to bring to justice many more Islamists prima facie guilty of horrific and serious crimes, crimes which are magnified when viewed through the *shari'a* lens of Cain culpability. Scholars representing each School can help develop the *shari'a* and, with the infrastructure thus available, receive suggestions and critiques of contemporary IHL. They will in turn help to develop the classical, traditional and other SHL.


\textsuperscript{161} It is not suggested here however, that the ICC is itself inundated as there are 13 appointed judges. At July 2007 for example, there appeared to be only 4 cases in train. The issue of a lack of diversity in the laws however stands.
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On the other hand, war and conflict suit wealthy, powerful entrenched minorities on all sides, whether it is Islamists dealing in drugs on one side and the military/industrial complex with profits amounting to thousands of millions of dollars on the other. As the wise Thai proverb states, when the elephants fight it is the lowly grass that gets trampled underfoot, and in this case it is the grassroots, the underclass, the silent majority of the ordinary people who unjustly bear the burden of the fighting giants.
CHAPTER 7

JUSTICE WITHOUT RESERVATIONS: THE NEED FOR A SHARI’A TRIBUNAL

A Journey of a thousand miles begins with a single step – Confucius
Islam est un voix pour les sans voix: Graffiti in the Paris Métro

Stage 4: Establishing an International shari’a Tribunal (Tribunal)

Introduction

On the issue of Islamist ‘terror’, there does not at present even appear to be a common basis for negotiating an outcome not involving the use of force.\(^1\) There is no guarantee that the shari’a or even ICC trials of criminals on the international plane will help indirectly to reduce violence. While there is an absence of quantitative data on the issue of violence reduction, the underlying argument of this paper is that law, and the delivery of substantive justice through the use of law, must form a necessary element of an overall comprehensive, just and fair solution, particularly for injustices associated with oppression which either spawns violence or is a pretext for violence.

It is posited that it is reasonably likely that a functioning Tribunal, a forum likely to provide visible and transparent justice, in the longer term at least, will have a positive, cumulative impact on peace and security. A shari’a Tribunal, not unlike that of the ICC and the \textit{ad hoc} tribunals, which form part of a comprehensive solution, have brought a degree of stability and peace \textit{inter alia} in the Balkans, South Africa, Rwanda/Burundi and Cambodia. Analogously, such an approach is also more likely to be amenable to the majority of Muslims while simultaneously difficult for Islamists and their allies to reject out of hand, thus providing solutions to

\(^1\) While the rhetoric of ‘not negotiating with terrorists’ is often used as an excuse, it is submitted that this is an ambit political position that is altered when for example military action against rebels is not successful or when rebels gain a strategic upper hand as in the case for example of the African National Congress (ANC) in South Africa.
the underlying problems and creating opportunities for improving peace and security.

Delivering change to SHL through a Tribunal is also a less amorphous and arguably much less ambitious undertaking than the wholesale ‘reformation of the shari’a’ in a legal vacuum, particularly when it is unclear what this ‘reformation’ might mean in practice and how and under whose auspices such reformation would take place. On the other hand, a Tribunal will ipso facto ‘reform’ SHL and will do so in an open and transparent manner. It may even provide a forum for shari’a reform generally, thus taking the ‘sting’ out of its more extreme manifestations, the only form of the shari’a that appears to receive any substantial attention at present. Such characterisation of the shari’a is akin to taking the common law practice of the most oppressive dictatorships present in the world today as the true representation of the common law. Nonetheless, these broader policy considerations fall outside the scope of this paper which has concentrated on the development of a contemporary SHL.

However, even this wholesale ‘reformation’ is less impractical than the even more extreme desire by some to ‘reject the shari’a and eliminate the Koran as an obstacle’. This is an empty and unhelpful threat with little, if any, chance of ‘success’ and with little or no evidence being adduced for the proposition that the ‘Koran is the obstacle’. How blaming the Koran is even remotely likely to improve matters with respect to international peace and security is not an issue addressed by these more emotional critics. As mentioned, however, such views help validate al-Qa’eda’s claims as to the West’s hatred for Islam.

A Tribunal will provide an avenue for both Muslims and the victims of Islamist misdemeanours to help resolve justiciable disputes in a

3 Ibid.
4 Daniel Pipes, ‘Give Muslims time to find democratic feet’, Sydney Morning Herald (Sydney), 14 April 2008, 13. The suggestion of eliminating the shari’a or the Koran purely because there is not a ‘Church’ which can pass such an edict is impractical. Islam’s greatest apparent weakness is its inability to develop uniformly through an organised Church. This absence of a church however, also protects Islam from the utterly simplistic ideas of some and the manipulative construction of its law by others.
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temporal forum. Recall that Muslims are obliged to settle their disputes with people in a temporal forum under their Covenant. Such a forum will also allow Islamists' victims or their legal representatives/agents to confront and force Islamists to face up to the consequences of their actions, and further, to defend their actions from within and under the shari'a, as opposed to providing no more than untested, unchallenged shari'a rhetoric in their defence in a secular court.

It is a key conclusion of this thesis that at least some of the underlying problems which manifest as 'terrorism' are related to a complex mixture of issues ranging from oppression and an absence of justice to unadulterated crime pure and simple, with no more than a religio-political pretext. For the former, and the terrorism of concern in this paper, it would appear reasonable that that law is at least prima facie likely to be able to provide a solution and therefore that it would be unconscionable not to even try such an approach. First however, some reasons for creating a shari'a tribunal are examined followed by some hurdles to creating such a tribunal.

Need for a Tribunal

The contemporary international environment places a high value on international peace and security by placing primary responsibility for its enforcement in the hands of the Security Council. The UN Charter did not envisage international peace and security in isolation but created a direct link with justice.\(^5\) The UN created the ICJ as its principal judicial organ.\(^6\) However, the existence of the ICJ has not precluded the creation of other international courts and tribunals. The UN reflects the peoples of the world.\(^7\) The UN's institutions so far have mainly reflected the civilisation and legal norms of the largest religious community in the world. Having done so there is clearly scope for catering for the second most numerous religious community. The case for both the practicality and desirability of using the shari'a for promoting justice, and therefore international peace and security has been argued above.

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\(^5\) Article 2(3) UN Charter.

\(^6\) Article 1 Statute of the ICJ.

\(^7\) Preamble. The UN Charter.
There is little doubt that the best place to conduct trials is the jurisdiction in which the crimes were committed because of the access to evidence and witnesses. The absence of appropriate courts or tribunals goes against these obviously important practical considerations, usually is for of the existence of other pressing practical needs. A discussion in support of an international *shari'a* tribunal is made in this light, conceding that there is a lively debate as to whether international tribunals generally are necessary in the first instance, but endorses Condorelli and Boutrouche’s conclusion, and proceed on the basis, that such tribunals are only a ‘stopgap solution’.

The European Court of Human Rights (ECHR) is a useful example. The exclusion of Turkey from the European Union (EU) must not be seen purely through the lens of religion as this is too crude a measure as is shown by its involvement in the ECHR. Positive change such as the inclusion of Turkey and other European Muslim States such as Bosnia and Albania into the EU, must be given time to permeate, take root and become normative. It is not too early, however, to consider widening this experience of giving priority to the rule-of-law notion, at least among other compatible regional nation States such as the Arab League or the Organisation of the Islamic Conference (OIC). As a start, encouraging the development of the *shari'a* in the ‘open’ West gives the many ‘voices’ with ideas on how Islamist violence can be better regulated, the opportunity to be heard in a free and open environment and to allow their ideas to flourish and flower.

There is not at present a forum to try Islamists in a manner in which they will engage in a substantive and serious way. Islamists have treated secular courts with derision, sometimes using the trial purely as a political platform, inciting Muslims and further promoting the means of violent confrontation. Many Islamists probably feel that they cannot in good conscience engage positively with a non-*shari'a* legal system. The fear of

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9 Ibid, 444.

10 Qur’an 5:44.
death or imprisonment does not appear to deter these men or women and the torture to which some Islamists have been subjected only increases the venom and hardness of their reactions to what in cases they perhaps rightly see as 'show trials'.

What would help negate this use of the Courts as mere political platforms is the use of a legal forum that Islamists cannot treat with contempt while simultaneously providing a practical avenue for delivering substantive justice to both defendants and their victims.

It is true that the broad calls by Muslims for the 'imposition of the shari'a' are aimed generally at an emotional level and lack specificity - and often do no more than to point to the immense jurisprudence.

What is particularly important for international peace and security is that there is transparency in developing the shari'a. This is primarily because in invoking the role of Islam, one is by implication arguably purporting to act in the name of 'the Muslims' and although what results is a 'human law', for Muslims nonetheless (when there is overwhelming human consensus) it generally carries the imprimatur of God and the Prophet. The shari'a when used instrumentally can cause problems on the scale observed in contemporary conflicts.

On the other hand, governments' own, sometimes even disproportionate, use of violence appears ineffective in stopping further attacks or in eliminating Islamist groups as seen in Algeria, Saudi Arabia, Afghanistan and Iraq. Iraq's messy current situation although created by the Coalition's occupation has been exacerbated by the intervention of Arab 'volunteers' (sometimes allegedly financially supported by neighbouring

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11 See notes accompanying n 32, 344.
12 This phenomenon of referring to the vast jurisprudence is also somewhat strange as the other catch-call of the wahhabi movement appears to refer to the oft used expression that "Islam is easy": Mohammad Hashim Kamali, *Equity and Fairness in Islam* (2005), 25. and that it is inter alia the jurists who complicate matters related to the practice of Islam. This can lead to a simplistic view of practical Islam sometimes referred to as the Talibanisation of Islam: Yasmin Alibhai-Brown, 'The curse of Talibanised Islam is spreading', *The Independent* (London), Monday, 11 September 2006.
countries)\(^{14}\) who are hostile to the continued presence of U.S forces in the area.

Most Muslim States selectively condemn terrorist acts.\(^{15}\) Condemnation generally is based on the principles of international law although vague reference is sometimes made to the *shari’a*. However, it would clearly be of considerable benefit to the West as well as to Muslims, if analysis of, say, terrorist attacks were also based on *shari’a* principles and objectively assessed by credible jurists, with decisions and opinions made available to the Muslim public, giving Muslims a stake in the process. This can inter alia be achieved as discussed by conducting trials using SHL and administered by a Tribunal.\(^{16}\)

The American view of fighters in Afghanistan, and not unreasonably so, once was that the Taliban supported al-Qa’eda and both were at times indistinguishable from each other. It must be despair then that commentators in the US are now talking about it being time to ‘kiss and make up’ with the Taliban,\(^{17}\) a group that has not changed its approach to the use of force since the days when they were ‘terrorists’, and then ‘insurgents’, and after the consequent loss of so many lives. This is a form of futile defeatism which either shows up the lies of previous administrations who falsely accused Islamists of heinous crimes, or the moral bankruptcy of the present leadership as those willing to ignore the crimes of those with so much innocent blood on their hands.

Such defeatism accompanies a minority view among many ‘Muslim States’ and some in the West that all use of force, particularly by non-State actors opposed to their allies and satellites, no matter how repressive, equates to ‘terrorism’. Sometimes, however, even terrorists who fight against the West’s allies, such as South Africa, perhaps for convenience, are later ‘socially rehabilitated’ and called statesmen. Neither international law nor the *shari’a* suggests such a definitive and unqualified position on the

\(^{14}\) Robert Baer, *The Devil We Know: Dealing With the New Iranian Superpower* (2009), 79.


prohibition on the use of force, nor an unqualified ‘forgiveness’ for fighters who have committed grave crimes, no matter how just their original cause. It is conceded that this is a deontological position that might not fit in well with a consequentialist and utilitarian approach to power balance and international relations. The ‘might is right’ approach provides no incentive for a ‘fair fight’ but promotes a ethic of ‘victory at all costs’.

Another practical issue is the admissibility of evidence obtained under duress or even torture in the meaning of the CAT. While admissible in some US military judicial fora, a shari'a Tribunal, as would most independent civil courts, quite rightly refuse to admit such evidence. Using only properly obtained evidence for prosecution therefore is another key reason for having an international shari'a Tribunal. The US reservations with respect becoming a party to the Rome Statute highlights this point. Muslims are not such lesser people that their sensibilities should not be catered for in a manner befitting all peoples. An important aim of the Tribunal is to re-establish a level of trust and confidence in the international legal system, among Muslims particularly, after the recent abuses of law in the war against terror with respect to the prosecution of Islamists.

While all international Tribunals will use proper processes, the point made here is that Islamists are now not likely to co-operate and participate in a ‘positive manner’ with secular tribunals. Non-cooperation is justified as a matter of (or on the pretext of) ‘deep faith’, or as an escape from responsibility, but all these reasons lead to the same result vis-à-vis the international community with respect to peace and security. A non-Muslim American or Australian soldier would no doubt reasonably react in a similar manner, if tried under a shari'a Tribunal, or some other ‘unfamiliar’ legal system, here compounded by a perception of bias and injustice.

For the use of armed force by Muslim groups to be legitimate, i.e. justified to the umma, fighting must be characterised as jihad or failing that, at least as conflict undertaken for the common good of humanity, and

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17 Phillip Adams, ‘Settle or Surge in Afghanistan?’ in Late Night Live 12 May 2010.
not for base self-interest, or for the conquest or domination of others. On the international plane the definition and discussion of the term ‘collective security’ is limited to States. Against this, some armed action, particularly in recent times, by various groups of Palestinian, Iraqi or arguably Kashmiri groups, was considered under a corpus of law pertaining to occupied territories.

On the other hand, and notwithstanding Israeli, US or Indian civilian casualties caused by Islamists, their ‘novel’, including kamikaze means employed by occupied peoples, have been justified as acts of ‘self-determination’ or ‘legitimate resistance’, and consequently, generally have escaped condemnation by the Organisation of the Islamic Conference (OIC) and its member States. The OIC has rightly been criticised for hypocritically condemning similar armed struggles within their own borders as ‘terrorist’, while failing to condemn brutal attacks on non-Muslims. A shari’a Tribunal will bring clarity to these issues and interactions and will do so relatively free of the politics that besets and compounds these already complex problems involving the use of force.

Further, a practical reason for establishing a Tribunal is that it can help determine liability and the quantum of a payment, with respect to the

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18 This is conceptually not different to the use of force by states, which although accepted must - arguably for all states other than the permanent five in the Security Council - nonetheless must be justified under the UN Charter and the general international law.

19 According to W H T Gairdner, 'The Niche for Lights' in (1980) 57, 151. the great legal scholar Ghazali states [of some Muslims (under the Caliph) engaged in wars of conquest] that:

   “another class [of people] has thought that man’s Chief End is conquest and domination - the taking of prisoners, captives and life. Such is the idea of the Arabs, certain of the Kurds and withal very numerous fools. Their [souls are covered by] veils of pure darkness, the dark veil of the ferocious attributes, because these dominate them, so they deem the running down of their quarry the height of bliss. These, then, are content to occupy the levels of beasts of prey, ay, one more degraded still.”


21 These terms are not defined in the contemporary context in the shari’a. The question however, is not whether the labels are recognised but whether the reasons for participating in the armed conflict are intra ihres the shari’a. See generally: Preamble of the Convention of The Organisation of The Islamic Conference on Combating International Terrorism, Annex to Resolution 59/26-P,

award of compensation to collaterally killed or injured non-combatants, as was discussed in chapter 3. It would appear that a necessary pre-requisite to the awarding of compensation is to establish guilt or otherwise with respect to an act of killing or injury by a Muslim or group of Muslims.

The Emergence of a Relatively Homogeneous Contemporary Muslim Identity

Many Muslim States are quite oppressive with respect to individual freedoms – including religious freedoms, and this oppression creates a deep sense of scepticism among Muslim peoples about their governments and governance, which overwhelmingly are secular. On the other hand this oppression at home, together with Western media support for the notion of the existence of a uniform and homogeneous Muslim identity and community, has paradoxically strengthened and affirmed an Islamic identity, and in the recent past, in a way that appears to be both novel and very conservative. There is consequently now a greater and broader association and identification with Islam and an ‘Islamic identity’ inter alia, which in turn appears to have fuelled a desire, albeit framed in broad non-specific and non-legal terms, for the use of the shari'a to ‘clean-up’ these corrupt and unrepresentative governments.

The prominent role of Islamists such as Abdurrahman Wahid in Indonesia or Recep Erdogan in Turkey (both men close to the West), in

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24 Deina Abdelkader, Social Justice in Islam (2000), 44. Further, the term ‘Muslim’ is used in the popular media as if it was a single coherent ‘umma’, which paradoxically is to what Muslims in the main appear to aspire but do not even remotely achieve in practice.
25 The discussion of identity as a historical issue is not directly relevant to this paper and is therefore not discussed.
27 Michael E Salla, Islamic Radicalism and the West (1993), 6. draws on various sources to summarise that:
   Political exploitation of the Islamic vocabulary by governments that use it to reinforce their legitimacy and to strengthen their power, [has led to] a use of religion by a political opposition that is often left with no other means of expression.
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bringing a significant level of freedom and plurality to these Muslim countries under a pan-Islamic flag, creates a desire and fuels a push for similar reform in other Muslim States. As mentioned, a part of the basic problem is the perceived association of corruption with secular law, and again, as with the parallel case of the shari‘a, it appears to be a conclusion reached without any real legal analysis, an issue discussed below.30

This internationalisation of the Muslim identity has also helped to break down some cultural and tribal barriers. This is particularly so among the better educated Muslims who have benefitted and would like to continue to enjoy the benefits of the fruits of broader human learning and technology. It also appears that they want to do so from within their own cultural context, while maintaining their important core and a now internationalised Islamic identity, with its own attendant subjective benefits to individuals.

A further aspect of this broader internationalisation appears to be the assimilation by Muslims of broader contemporary legal notions of what constitutes ‘oppression’, ‘freedom’ or ‘human rights’ and faith in the ‘rule of law’, as demonstrated in a call for the use of the shari‘a and directly affects the development of SHL. The assimilation of ‘good’ contemporary values is clearly legitimate under the shari‘a, on the basis of adopting ‘just contemporary custom’. The process of crystallisation in SHL of these emerging norms is still ‘a work in progress’ and a long way away from being able to be classified as ‘settled’, with respect to their specific Islamic meanings. This is probably because of the absence of sound legal and political ‘Islamic’ institutions, which are competent to articulate the necessary process. Unfortunately for Muslims, such institutions are unlikely to emerge from the present Muslim world in the near to medium term. This is arguably a further justification for the establishment of an international Tribunal that will help harmonise international shari‘a values within an acceptable margin of appreciation vis-à-vis IHL.

A Tribunal will help give more precise shari‘a meanings to important contemporary values and thus help Muslims independently to

30 See Muslim States’ Judicial Systems, 402.
arrive at concepts under their own traditions and laws, not dissimilar to those of the ‘world’ community, albeit presently derived and defined in Judeo-Christian terms. Some might see this as a wasteful exercise, as ‘re-inventing the wheel’, but such an argument would appear disingenuous to Muslims, particularly to those living in ‘dualist’ jurisdictions such as Australia, which rightly, strongly defend their legal and legislative independence. Such legal development will then however place or reverse the onus on those such as the ideologues of the Taliban, al-Qa’eda and other similar groups, of showing that these global human concepts are antithetical to Islam.

At present some Islamists appear successfully to assert that concepts such as human rights or the rule of law are ‘Western’ notions and face little opposition to these views from within a traditional shari’a perspective. Importantly such clarification will also help Muslims simultaneously to help counter what appears to be an intractable problem of the excessive, misdirected and arbitrary use of force, sometimes in fighting against oppression but, and more problematically, at other times fighting for a more amorphous and vague notion of ‘Islamic rights’, exclusively appropriated by Islamists, as if these struggles for dignity and freedom from oppression were not somehow human values shared by all humanity, albeit demonstrating that base ‘jingoism’ is also a universal phenomenon. On the other hand ‘Islamists’ promoting the rule of law have delivered freer more pluralistic societies such as in Indonesia, Senegal and Turkey, whereas violent Islamists are yet to liberate a square inch of ‘Muslim territory’.

What might further assist Muslims to make a case for SHL is whether Muslims are a ‘people’ in the broader meaning of international law. Such a finding is a question of fact, but since in practice Muslims in

31 See text accompanying n 47, 406.
the main have been treated as if they were a distinguishable group, it would seem reasonable that they be considered as a people on this basis. That is, if Rwanda, Yugoslavia and other States or regions, justly have special criminal tribunals, then surely Muslims should not be denied this recognition. As one fifth of the world’s population, and among which much of the ‘most serious’ international crimes are being committed, surely Muslims not only deserve their own Tribunal. There is also an urgent need to bring the true ‘worst of the worst’ Islamists to trial where they are forced to face up to their crimes.33

On the plus side however, the internationalisation of the Muslim identity arguably means that the Tribunal is not likely to face the historical hurdles encountered in creating tribunals such as the ICC, because it is likely that contemporary Muslims will acknowledge the reality and the need for such international tribunals. The existence of outstanding legal scholars from a range of countries who are qualified and capable of promoting fidelity to the law, will aid this process. These are barriers that internationalisation and a globalised Islamisation have helped to breach, and are in contradistinction to the parochial mulla-driven, insular, narrow and harsh version of Islam of the Taliban and others of that ilk.

Perceived Injustices of Muslim States’ Judicial Systems
The often poor treatment in their secular ‘home jurisdiction justice systems’ and the resulting injustices suffered are often unjustly attributed to secularism rather than to corrupt enforcement. There are parallels to how the shari’a is popularly perceived in the West. Along with the legal processes attaching to the detention and prosecution of non-US citizens by the US in the war on terror, the treatment of defendants does not appear to meet international legal standards.34 Both the Bush administration (and its

33 Recall that the argument in this paper is not that International Tribunals are unfit to try Islamists, but that it helps Islamist to avoid moral responsibility for their crimes by declaring their fidelity to the shari’a. The shari’a Tribunal will show up their faulty legal analysis.

34 For example, the detention without trial of Muslims in Guantánamo Bay: Michael Ratner, Ellen Ray and Stephen Kenny, Guantánamo: What the World Should Know (2004). and other detention facilities such as Abu Ghraib: Karen J Greenberg and
allies) and al-Qa'eda have capitalised on the 'other's' mistakes, faux pas, misstatements and other parochial or ideological positions in this regard, to provide simple clichéd 'answers' to some very complex problems and processes.

They do this to their own incredulous constituencies and appear to have presented their own perspective with an unflinching and single-minded 'certainty' as to the righteousness of their own cause and position. While not attempting a psychological analysis of the Islamist leadership, it is posited that such overblown confidence of one's own moral and legal righteousness appears to fit into the so called Kruger-Dunning model, which provides that such inflated confidence is based on ignorance and is inversely related to one's own actual understanding of the others' situation.35

Further, to add insult to injury, the popular 'Western' views that reach the 'Muslim/Arab' street — societies with low literacy rates — are via Hollywood films, an industry, for which the terrorist attacks of 11 September, rightly describes by (Australian) ABC Radio National's film reporter Rigg as a godsend, has given the US film industry a new enemy to focus upon to replace the menace of the Soviet Union.36 These 'Hollywood' images arguably reinforce the unsubstantiated, largely inaccurate and ultimately unhelpful view that the West's 'war against terror' is a war against Islam and ipso facto therefore that Muslims will not receive justice in a Western-dominated system. A shari'a Tribunal practically will challenge the perception that the war against terror is a war against Islam, a slogan

35 Justin Kruger and David Dunning, Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments (2009) <http://www.scirp.org/journal/psych> at 12 May. In the Muslim world, this sort of misplaced confidence is reflected the fables of a fictitious Turkish wise man called Nasserudin Hoja, who used irony, satire and humour to instruct; and describes such Muslim leaders anyway, as those who have half read the shari'a but who understand it completely.

used by Islamists with little if any real evidence being adduced to prove this point, but unfortunately it is one that has traction because it plays to and reinforces Muslims’ own unjust prejudices against the West.

It is recognised that the internationalisation of the trial process comes with its attendant disadvantages such as cost, and other practical issues, which are common to all internationalised legal processes. Such a Tribunal is nonetheless necessary because the perception of the level of independence and transparency of the judiciary in their domestic jurisdictions has been brought into question, even in more economically developed Muslim countries such as Malaysia.

For balance, however, it is noted that while the independence of the judiciary is far less problematic in the West, and the problem much less acute, this issue of independence within the judicial process as a whole is nonetheless not entirely satisfactory. Further, there is, it appears, some allegations of collusion among the Police in the prosecution of cases involving indigenous Australians in Queensland. Even when judicial institutions are generally accepted as ‘sound’, the use of law that is not perceived as being impartial creates problems of confidence, in domestic Australian courts as with the al-Kateb Case. Thus, imposing Western law is perhaps not the solution to achieving a just (and if the underlying thesis in this thesis is correct) and less violent world.

The broader principle is that those in authority anywhere are not immune to the normal human frailties and transparent, open legal systems will help minimise a range of undesirable activities ranging from

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38 Antonio Cassese, 'The Role of Internationalized Criminal Courts and Tribunals in the Fight Against International Criminality' in Ibid, 1, 6.
39 Ibid, 8.
43 The decision was in broad effect one of authorising the Executive in Australia indefinitely to detain an 'stateless person', who had not been convicted of a crime carrying such a penalty: Al-Kateb v Godwin (2004) 219 CLR 562. (al-Kateb).
corruption to oppression and the resulting inequities that can flow. Notwithstanding its sound basis, Muslims initially are likely to be reluctant to engage with a ‘Western’ shari’a tribunal. In time however, the majority will be won over through the principled use of SHL.

The deep distrust between Muslims and the US, post 11/9, was further exacerbated by the then US President’s unfortunate words, characterising the conflict as a ‘Crusade’, with its attendant historical connotations for Muslims and Christians. The US has since sought to rectify this slip, for example through a direct address to the international Muslim community by a serving US president, from an important Arab/Muslim city such as Cairo. Notwithstanding these efforts however, it is only when the truly guilty (Muslim or otherwise) are found guilty in an open judicial process, trusted by Muslims inter alia because of its openness and transparency, that genuine trust will become re-established. Such trust will make it difficult for Islamists to portray Islam, rather than themselves or their criminal behaviour, as ‘a defendant’ on trial and the victim of Western aggression.

The notion that the ‘West’ is fighting Islam is as nonsensical a phrase as is the ‘war against terror’, but one that is lapped up eagerly by a morally bankrupt anti-Christian, anti-Western, anti-Semitic but vocal Muslim minority. It is conceded that justice and plurality alone, however, will not eliminate eradicate violence, war and brutality but is likely go some way, and perhaps even a significant way, in defusing tensions by bringing this vocal minority to account. The UN, the ICJ and the treaty framework and its use of Western law has largely resulted in peace in Europe and the Western States, and it might just be possible to replicate this experience in the Muslim world as well.

**Rule of Law**
The desire for the rule of law and the fruits of a rule-of-law society appears to be universal. The term ‘law’ is used here in a generic sense. While there is no intention to paint the ‘law’ of any civilisation as somehow inadequate

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or wanting, the quality and content of any particular ‘law’ is really a question of fact, to be determined on a case-by-case or law-by-law basis. The starting position is however, that each group or people may think of its own ‘system of law’ as somehow subjectively ‘better’ for its own ‘tribal’ purposes, as do say Huntington45 or bin Laden, sentiments not uncommon in all civilisations. In some ways this position is ‘self-fulfilling’ as people will develop their laws as best they can to suit their own cultural, historical and subjective situations, thereby making it better for their own purposes.

In this context the *shari’a* is a dynamic system of law that is amenable to development and one that Muslims appear to believe is able to deliver the justice denied to them by their secular systems and by their own often corrupt and oppressive leaders. On the other hand, while Islamisation is sometimes depicted as anti-Western (and it sometimes is) this is a disingenuous partisan and incomplete characterisation of the *shari’a*. Horowitz’s view, endorsed here as closer to the truth, is that ‘[the] institution building side to the Islamic revival is modernizing, State-centred and no means hostile to Western ideas’.46 This is clearly subject to the definition of what constitutes ‘Western ideas’, which by any reckoning is nonetheless a contemporary notion. What Muslim individuals desire is not debating a false dichotomy between Westernisation and the *shari’a* but to be subject to a legal regime that is imbued with positive human traits inter alia encompassing justice, charity, kindness and fairness which are exclusive to no ‘system’ but rather are universal values.47

The Muslim world encompasses nations ranging from the highest to the lowest *per capita* incomes and includes less developed States and OECD members, and the question is whether the *shari’a* is a suitable vehicle for rule of law to cater for defendants from a range of societies across the

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47 Of course many politicians (and others) of every ilk attempt to monopolise these positive traits as being unique to themselves and their race. The former Australian PM’s exclusive claim to ‘Australian mateship’ as a great Australian value, implies by its omissions that ‘mateship/friendship’ is only known to Australians to the exclusion of everyone else on the planet and somehow magically appeared on this Continent with the arrival of the English.
economic and social spectrum. However, this situation is in principle no different from the position of common or civil law, which straddles a similar spectrum of States at various levels of economic and social development. It lends weight to the notion that it is a commitment to the 'rule of law' as opposed to the specific 'system' or 'vehicle' for the carriage of the rule of law itself that generates the difference as to the level of legal transparency in a society. It is this commitment to the rule of law — law tempered by morality — that is the real issue in this context of prosecution of Islamists for the unlawful use of force.

Further, it is demonstrated that there is very unlikely to be serious conflict between the shari'a and international law on matters of fundamental principle. This view is further supported by the broad references to Islamic law in the separate opinions of some ICJ judges.\(^{48}\) The ICJ, ICC and other international judicial fora also grapple with this particular issue of reconciling the practical and procedural differences in legal traditions. There is perhaps no real answer other than to accept this diversity and to work with these differences as the judges from all traditions successfully have done to date. For the Islamic tradition, the Prophet described such difference of opinion, or in contemporary language plurality, as a boon to humanity.\(^{49}\)

A Tribunal's Role Developing the Law

It was noted that the shari'a is a jurist's law and a formal Tribunal can therefore by definition have a place in developing the law. Some Muslim legal opinions (fatwas), support the often indiscriminate and, if the analysis in this paper is correct, the prima facie unlawful use of force by Muslims, in the name of redressing (sometimes patently obvious) wrongs. It is a

combination of just causes and unjust means of combat that leads to both confusion and frustration among Muslims and others. A Tribunal is likely to help crystallise, sharpen, clarify, focus and 'make accurate' the 'fatwas' or Islamic opinions used to justify the use of force and affirm or deny their validity.\(^{50}\)

As is the case with the ICTY/R, the jurisprudential output of the Tribunals appears quite substantial. This is evident in the creation of a whole field of international criminal law, with practitioners and a whole infrastructure for reporting and critiquing decisions and by the inclusion of ICL as a course taught in many law schools. Circumscribing and articulating the lawful means and methods of fighting, by a Tribunal, is likely to replicate this effect.

The West has in the recent past enjoyed the important advantage of rule-of-law societies. On the other hand, even Western judges have not used the few opportunities that they have been presented constructively to engage with Muslim law, an issue that is now examined. This avoidance appears to strengthen the case for a Tribunal.

**Avoidance of shari'a Issues by Western Judges**

A Tribunal will also help to address what appears to be a reluctance or inability of non-Muslim jurists to engage with substantive aspects of the shari'a. For example, the Imperial Parliament in London, which clearly had jurisdiction over the matter, their Lordships were reluctant to engage in interpretations of the Qur'an, even in a case where the interpretations of the 'Muslim scholars' seemed to be clearly at odds with the apparent meaning\(^{51}\) of the Qur'an.\(^{52}\) Their Lordships' avoidance of the issues and their deference to 'the express ruling of commentators of such great antiquity and high authority'\(^{53}\) is understandable for its pragmatism but arguably not entirely reasonable in a judicial sense. This reluctance to


\(^{50}\) It is conceded that this aspect could be of concern for Western nations.

\(^{51}\) Qur'an 3:7. See also discussion of the comparison of the clear verses and the allegorical verses in Chapter 3.

\(^{52}\) Aga Mahomed v. Kolsom Bee Bee (1897) 24 Ind. App. 196.
engage with Islamic law is one that has apparently persisted.\textsuperscript{54} The reluctance of Western judges is also perhaps understandable for its historic struggle to separate judicial institutions from religious authorities. Islam has however had quite a different historical development,\textsuperscript{55} and a problem thus arises with inappropriate analogies between the Cannon and the \textit{shari’a}.

Significantly, it means it is unlikely that a superior Western, or for that matter, current international, court or judicial committee will found jurisdiction seriously to engage with the independent sources of the \textit{shari’a}, particularly with matters of Islamic criminal law. That is, what we have at present is a judiciary that is not culturally knowledgeable, able to try Islamists either fairly or to best effect. While this may not be an unreasonable position from the Western perspective, in effect, it leaves Islamists free to make up their own rules, not unlike the \textit{cadi} referred to by Dobie J.\textsuperscript{56}

**Legal Basis for and Creating a Tribunal**

Procedurally, a specialised ad hoc Tribunal could be created, initially on the ICTY/R model (ICT model), by Security Council Resolution under Chapter VII and in the longer term by treaty along a path similar to one leading to the development of the ICC.\textsuperscript{57} Countries with a non-Muslim

\textsuperscript{53} \textit{Aga Mahomed v Kolsom Bee Bee} (1897) 24 Ind App 196, 204 (Lord Davey for the Judicial Committee comprising their Lordships.

\textsuperscript{54} Against the deference of their Lordships, (see n 53, above), the American Court quoted in \textit{Beckwith v The Queen} (1976) 135 CLR 569, 11 per Frankfurter J. appear to go somewhat the other way, derisively describing Islamic judicial institutions as: This is a court of review, not a tribunal unbounded by rules. We do not sit like a \textit{kadi} under a tree dispensing justice according to considerations of individual expediency.

While the approaches of the justices of the two countries are different, the point stands that a superior Western court is unlikely actively to engage with Islamic law and particularly with the criminal law. The point of corrupt judges in domestic Muslim jurisdictions is not however, discounted. For the many honest Muslim jurists stood up to rulers, many others did not. Many more Muslim jurists were deferential to the rulers, although this deference is not unusual even today. See also n 56, below.

\textsuperscript{55} See n 100, 404.

\textsuperscript{56} \textit{Clark v Harleysville Mut. Casualty Co.}, (1941) 123 F2d 499, 502 per Dobie J:

We sit, after all, as an appellate court, administering justice under law, not as an ancient oriental \textit{cadi}, dispensing a rough and ready equity according to his own unfettered discretion.

\textsuperscript{57} The examination of the criticism of the Security Council as a Western dominated, political body in effect exercising Executive power is not addressed in this paper.
majority or constitutionally secular Muslim majority countries such as Turkey, which is constitutionally secular,\textsuperscript{58} or Bangladesh,\textsuperscript{59} notwithstanding the universality of shari’a jurisdiction, may refuse to accede to a treaty-based tribunal. These jurisdictional limitations are avoided by a Chapter VII tribunal created by the Security Council,\textsuperscript{60} which can give the Tribunal jurisdiction over all Islamists. The USA may nonetheless have reservations with this model, not dissimilar to those it encounters with the ICC, Statute in protecting its own citizens (including Muslims) from prosecution abroad.

This is not a revolutionary concept given the several special international UN tribunals, which have arguably served the international community very well, as indicated by their creation and largely successful use in various ad hoc situations. The creation of a shari’a Tribunal, but with an appropriately adapted Statute, might also help deflect criticism by Islamists such as bin Laden, who have criticised the UN and its agencies. The implicit intent of bin Laden’s criticism is that the West considers only itself and its judicial institutions as being truly ‘civilised’\textsuperscript{61} thus discounting the legal traditions of other important civilisations, which is not an unsupportable view on the facts.

Notwithstanding the huge obstacles, proceeding to the initial creation of a shari’a Tribunal is the better option and the one more likely to provide positive dividends in terms of international peace and security.

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\textsuperscript{58} Article 1 of the Turkish Constitution.

This is also theoretically a problem for secular states with large Muslims majorities. In practice France (or Australia as has been demonstrated) is unlikely to fight for its Muslim citizens who have been charged with a war crime. The example, the almost total absence of support of France and Australia vis-à-vis their Muslim nationals facing terrorism charges in the ‘court’ called the ‘black hole’ and the ‘kangaroo court’ of Guantánamo by Lord Steyn: Clare Dyer, ‘Guantanamo a ‘kangaroo court’ — British judge’, The Age (Melbourne), 27 November 2003. arguably lends some support for the proposition.

\textsuperscript{59} Preamble of the Constitution of Bangladesh (Bangladesh Shongbidhan).

\textsuperscript{60} That is a tribunal such as the International Criminal Tribunal for Yugoslavia (ICTY) or International Criminal Tribunal for Rwanda (ICTR).

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This Tribunal could also serve the function of the court envisaged by the OIC.62

The defendants will only be self-identifying Muslims.63 It is recommended however that non-Muslim and secular Muslim States should have an absolute right to appeal a decision by their Muslim citizens, who have freely elected to be tried at the Tribunal although, everything else being equal, preference should be given to the individual’s choice. On the other hand, parties (including non-Muslim State parties) should be able to refer their own Muslim nationals or those over whom a State has jurisdiction64 and against whom there is a prima facie case.

In summary, there are two broad means for providing justice in an Islamically legitimate form at an international level discussed here, one for the short term and the other a longer-term solution.65 Firstly, it is posited that initially a shari’a Tribunal with limited jurisdiction and secondly, a broader, treaty-based shari’a Tribunal, mirroring the ICC be created. It is likely that a provision such as that of the ICC’s complementary jurisdiction66 could be used to promote broad acceptance of the Tribunal by recognising its competence in shari’a-related matters.

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62 See text accompanying n 78, 414.

63 In the past non-Muslims have also accessed the Muslim judicial processes and from the Islamic perspective should always remain an option to non Muslims if they chose to do so. See Wael B Hallaq, The Origins and Evolution of Islamic Law (2005); Adil Salahi, Muhammad: Man and the Prophet (2002), 466. Muslims who opt for trial under general international criminal law should also be allowed to exercise that choice.

64 This presupposes a high degree of trust, particularly on the part on non-Muslim States that proper processes would be followed and that substantive justice would be meted out. It would be up to the tribunal itself to create this degree of confidence and trust in its operation and presupposes independent jurists, judges and operation and thus sufficient resourcing.

65 The actual processes such as whether a PrepCom (Preparatory Commission) such as that for the ICC would be a suitable mechanism for preparing an shari’a tribunal is not discussed as that appears to be too great a level of detail and prescription for a general recommendation as the one made in this paper. On the PrepCom see generally: Knut Dormann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (2004), 9.

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Shari'a Legitimacy of a Tribunal

The proposition that the shari'a provides for criminal courts is long and well established and does not need further authority. However, the proposition that a Tribunal created under what is a largely non-shari'a polity is a different question that is now addressed.

The Qur'an requires that Muslims obey only just commands\textsuperscript{67} of those in authority,\textsuperscript{68} giving at least \textit{prima facie} legitimacy among the masses to a just and equitable treaty acceded to by Muslim leaders. Binding UN Security Council Resolutions (SCR)\textsuperscript{69} are also binding under the shari'a's treaty rules.\textsuperscript{70} That is, the principle that agreements entered into by national leaders are binding on individual Muslims is settled in the shari'a\textsuperscript{71} as it is in general international law,\textsuperscript{72} although the shari'a explicitly requires that such treaties are just. Further, it is posited that Muslim consensus is a reliable legal mechanism for monitoring that SHL processes are just.

The 'treaties' in question include the UN Charter, therefore \textit{prima facie} legitimising a Chapter VII Tribunal and arguably also a treaty-based Tribunal for the longer term. The experience of the Chapter VII Tribunal can, as was the case with the ICTY/ICTR and other \textit{ad hoc} tribunals, be transferred to a longer-term permanent tribunal, as happened in the case of the ICC. Ideally the creation of the Tribunal through the co-operation between the Security Council and the OIC will also help to restore some dignity to Muslims while prosecuting Islamist crimes. Further, the quality of the draft laws provided by the Islamic ILC will clearly bear on the success of the overall programme and is therefore a crucial preliminary step.

\textsuperscript{67} There appears to be some consensus among Muslims that Muslims should obey their leaders only if they act justly and in according to the \textit{shari'a}: Ahmad Hassan, \textit{The Doctrine of ljma' in Islam: A Study of the Juridical Principle of Consensus} (2002), 31.
\textsuperscript{68} Qur'an 4:59.
\textsuperscript{69} If necessary, say through SC Resolutions under Article 25 of the UN Charter.
\textsuperscript{70} See Preamble of Organisation of Islamic Conference Resolution No. 65/27-P On The OIC Convention For Combating International Terrorism; The 27th Session of the Islamic Conference of Foreign Ministers (Session of Islam and Globalisation) held in Kuala Lumpur, Malaysia, from 27-30 June 2000.
\textsuperscript{71} Qur'an 9:7.
\textsuperscript{72} Article 26 Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, 27 January 1980,
A tribunal for the longer term created by treaty, and particularly if accession is done in consultation with independent scholars, is likely to enjoy wide acceptance among the Muslim populace. On the other hand, Muslim leaders who have abused the *shari'a* for instrumental reasons are likely to be reticent in supporting initiatives that promote justice and the rule of law and therefore their support for a *shari'a* Tribunal, as with the ICC, is likely to be more difficult to obtain, thus necessitating the medium-term Chapter VII Tribunal.\(^7\)

### Naming the Tribunal

The use of the term 'shari'a' generally appears to invite a negative reaction, both among non-Muslims, such as in the writing of the genre of Pipes\(^7\) as well as among Muslims who are sick of the abuse of their faith for criminal purposes. Calling the tribunal by a more descriptive and functional name such as an 'International Criminal Tribunal for 'Islamist' Combatants in the War Against Terror' (ICTICWAT), in preference to a 'shari'a tribunal' while quite a mouthful, is in practice also likely to lessen negative emotive reactions from non-Muslims, although Islamists are likely to say that this is 'picking on' them, which is true, and therefore, as self-identifying defendants, is not a perspective that has to be countered.

### Implications for International Peace and Security

The creation of judicial bodies such as the ICJ, ICC, ICTY/R and others that provide the infrastructure to settle disputes or to prosecute the most serious international crimes arguably shows that the international community, including two P5 states (the UK and France) have faith in their efficacy. Akande, for example argues persuasively as to the positive role played by the ICJ in promoting peace, many of its arguments able to be applied *mutatis mutandis* to a SHL Tribunal.\(^7\) While it is still too early to celebrate the success of the ICTY/ICTR/ICC, it is clear that the

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\(^7\) See Corruption in the Muslim World as an Impediment to the Creation of a Tribunal, 414.  
contemporary world perceives these institutions as being a reasonable means for diffusing residual, post-conflict tensions by contributing to justice, and thus post conflict peace building and thus security. A SHL Tribunal can also fall within this broader genre of international tribunals, as a tool to promote and enhance peace and security.

Corruption in the Muslim World as an Impediment to the Creation of a Tribunal

According to the various corruption indices of the world, Muslim-majority States are well represented at the ‘worse’ end of the scale. For the reasons discussed below, these leaders are likely, therefore, subtly to undermine international efforts to create a SHL Tribunal. While this much is intuitive, such a proposition must be supported with some evidence, evidence that is not directly available but which can perhaps be established indirectly.

While Muslim leaders may have private misgivings of the shari’a and its application, in public they support (or at least pay lip service) to the introduction of shari’a, transparency and the rule-of-law regimes. To this end, OIC member States have ‘agreed in principle’ to the creation of the ‘fourth arm of the OIC’ which is an International Islamic Court of Justice, although the resolution itself makes no direct reference to the use of shari’a law. As part of their own political ‘spin’, Muslim nations have expressed a ‘widespread desire’ for the use of the shari’a, including for the creation of a judicial body, although the contemporary will to do so, if

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76 See n 106, 421.
78 See OIC Resolution No. 49/25-P on The International Islamic Court Of Justice at the Twenty-fifth Session of the Islamic Conference of Foreign Ministers (Session for a better future for the Peoples of the Islamic Umma), held in Doha, State of Qatar. 15 -17 March 1998.
81 OIC Resolution No. 49/25-P on the International Islamic Court of Justice at the Twenty-fifth Session of the Islamic Conference of Foreign Ministers (Session for a better future for the Peoples of the Islamic Ummah), held in Doha, State of Qatar, from 17 to 19 Dhul Quida 1418H (15-17 March 1998).
judged by the results, appears lacking. Thus, this 'agreement in principle' should be taken at its face value in support of the creation of the Tribunal.

Nonetheless, as is now discussed, there are likely to be significant practical political hurdles to the use of Islamic law, particularly from Muslim States. Widespread institutional corruption in many Muslim States arguably means that in practice Muslim States are unlikely to be willing to support the Tribunal, because as in many cases the oppression experienced by Muslims is likely to be sheeted home to some in the Executive in Muslim States, allegations that are most likely to be supported by incriminating evidence that is publicly available. Further, the most vocal of Muslim States, such as Saudi Arabia, Iran and their respective allies, appear to hold a perceived monopoly on Sunni and Shi'i law respectively and are not likely to easily relinquish their positions of power and authority to a 'Western' shari'a tribunal, one over which they will have little control.

That is, reiterating the autocratic and corrupt nature of the leadership in some OIC member States, these leaders would reasonably conceive that they could also become candidates for trial for their own contribution to torture, violence, and bloodshed and this effectively means that many leaders are unlikely actively to support the Tribunal, in which they themselves may be forced to appear one day.\(^82\) This is particularly important given that it may not be politically or legally feasible for leaders to seek personal exemption from the application of shari'a, as the shari'a applies to all including the Prophet.\(^83\) Further sovereign immunity does not appear to be part of the Muslim legal tradition.\(^84\)

The following example provides some support for the proposition that Muslim States will attempt to sabotage or undermine a shari'a Tribunal.\(^85\) While not directly to point, it is posited that it supports the proposition. Israel caused significant damage in The Lebanon during its conflict with Hizbullah, a non-State entity, and one that does not appear to

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83 See Appendix 1, discussion of shari'a and the rule of law.
84 See Appendix 1, discussion of shari'a and the rule of law.
85 See also text at Corruption in the Muslim World, 414.
have the necessary proven connection with a State. Notwithstanding this, the Alston report on the conflict between Israel and Hizbullah, was accepted as balanced by the Lebanon, an Arab nation with primary interest in bringing the very significant damage caused to public light, but nonetheless was ‘sunk’ by a group of ‘Islamic Nations’. However, what is curious about this particular report and episode was that the greatest losers of its ‘sinking’ were Shi’ite Lebanese Arabs, despised by radical Sunni Islamists almost as much they despise Christians, Jews and Westerners. Nonetheless, and for practical pragmatic reasons, these Islamic States were supported by their Western allies, cognisant that groups such as Hizbullah and its ‘sister’ organisations in other Arab States are primarily aimed at changing their own corrupt ‘Arab’ or ‘Islamic’ governments and are therefore a greater threat to the existence of their regimes than is Israel.

Thus the loss to the people of South Lebanon, and the escape from justice of any war criminals belonging either or both to Hizbullah or Israel, are ‘covered up’ here with broad, sweeping, unsubstantiated claims against Alston et al of ‘bias’ in favour of Israel, when the practical result of their pious protestations is non-action that indirectly benefits Israel primarily but also Hizbullah, and hence have alleged Iran’s complicity. The right of individuals or nations to critique this or any other report is not questioned. What should have been demanded of the critique to the Alston report is detailed, reasoned and specific criticism of what was a detailed, very specific and balanced report.

Political interference is, however, not the sole prerogative of Arabs and Muslims. The Sudan’s President Bashir’s indictment by the ICC, which on one hand may be seen as a political use of the Court, has particularly been criticised in the ‘East’ and applauded in the ‘the West’ and has been

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86 See n 121, 373
88 Kanaga Raja, Criticisms of joint report on Lebanon situation Third World Network 5 October.
89 Philip Alston, ‘The Future of Human Rights at the UN’ (Speech delivered at the CIPL 20th Anniversary, ANU College of Law, Canberra 18 May 2010)
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predictably resisted by the Sudan.\textsuperscript{90} It is likely to make Muslim nations wary of a ‘Western Court’, particularly when the P5 and their allies appear immune from prosecution for even the gravest of their crimes.

Notwithstanding this ‘political use’ however, the ICC did not decline jurisdiction only on this basis, inter alia perhaps, for the fact that there is otherwise not a firm ground for the court to decline jurisdiction. Shari’a Tribunal judges, like their ICC colleagues, will be able to distinguish cases where a legal problem also contains strong political elements, and act accordingly,\textsuperscript{91} providing some insulation against overtly political interference perverting the course of justice.

Shari’a-based judicial institutions must meet or exceed the international standard of practice.\textsuperscript{92} This means that a shari’a Tribunal must (at least) meet the international standards of a ‘regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’\textsuperscript{93} and that litigation and prosecution result in fair


\textsuperscript{92} These international protections and standards are in the view of the majority of international lawyers part of customary law and therefore apply \textit{erga omnes}; see n 93 (below).

\textsuperscript{93} Common Article 3(1)(d) Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 51; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War., 12 August 1949, 75 UNTS 287. Note however, that Jean Pictet (ed) Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War (1952), 411. states that Article 84 requires ‘essential guarantees’ of proscribes the use of special tribunals to prosecute prisoners of war. It is therefore important that a shari’a tribunal as recommended in Chapter 6 must fall outside the meaning of such tribunals in the meaning of the Commentary. While Kennedy J. discusses the meaning of regularly constituted courts with respect to US domestic legislation \textit{Hamdan and Others v Rumsfeld, Secretary of Defense, et al.} (2006) 126 SCt 2749 per Kennedy J. the shari’a tribunal as will be discussed in Chapter 6 of this paper is best constituted purely with reference to international law (for example the type of institution referred in Article 9(4) of the International Covenant on Civil and Political Rights or Chapter 3 of the Statute of the International Court of Justice; the Statute of Rome.
trials with as sound protections as would be afforded to litigants, witnesses and others under ICL.94

However, while the proposal is that the shari'a can apply globally to self-identifying Muslims, shari'a standards that are higher than IHL standards should not, for fairness and consistency, mandatorily apply in the early periods of its operation.95 While the call for trying only a small number of serious crimes is bound to be criticised, there is no legal impediment to sovereign Muslim States,96 or any other grouping,97 from prosecuting the full range of ‘serious’ shari’a crimes that lie within their individual or collective jurisdictions, although some associated dangers are discussed in Appendix 1.

The call in this paper is for specific, detailed critique against the IILC, the proposed law or the tribunal. The right of States to respond is a natural right no matter how corrupt. The caveat here is that only specific detailed critique shall be engaged with and more importantly acted upon. Engagement however should not be limited to States but should also include a range of scholars, NGOs and ordinary Muslims who may not so easily be ‘bought off’.

However, in order to pre-empt some of these problems and to provide an incentive for current leaders to ‘sign up’ to a shari’a Tribunal, all prosecution should be prospective, thus excluding the prosecution of current and past leaders, giving them a strong incentive to support and accept immunity when they ratify the instruments, thus preventing a later regime from handing them over to the Tribunal for prosecution, no doubt to show their own fidelity to the law at the expense of others, a phenomenon quite evident in the Muslim world.

94 Articles 9–12 of the Universal Declaration of Human Rights; Article 130 Geneva Convention (III) Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Article 146 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

95 Some Muslims may however, request being held to higher shari’a standards for faith reasons and defendants should have the choice of ‘opting in’ on the higher shari’a standards.

96 Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (2008), 35. rightly posits that there are no definite criteria by which to define a ‘Muslim State’. For the purposes of this paper the term is used quite loosely to include countries with a Muslim majority.
States’ Opposition to a Tribunal

The feasibility of establishing a Tribunal is also contingent on the will and support of the Security Council, which inter alia includes permanent members such as the avowedly secular France with its own historically legitimate anti-religious views (but which are much less reasonable when imposed on others with a different historical experience); and also anti-religious China, both States with their own particular problems with restive Muslim minorities. In a world dominated by secular ideologies, sometimes even referred to as ‘secular theocracy’, there is arguably a general prima facie reasonable reluctance to engage in a religio-legal tradition perceived as originating from 1,400 years ago.

However, the fact that the development of a religious law goes against the tide of secularisation should not be a relevant consideration and should not in principle present an obstacle. Some may argue that protecting international peace and security is about protecting ‘P5 interests’. On the other hand, the function of a Tribunal is about delivering substantive justice while developing law honestly, without being deliberately provocative to the P5, resulting in an improvement in international peace and security. Certainly, Muslim law can reasonably be expected to contend ideologically with secularism as the dominant contemporary ideology. The phenomenon of secular Puritanism is also a reality in the contemporary world, and is as ‘one eyed’ as any other ‘fundamentalism’ and must also be checked. Fundamentalism of every ilk must give way to a greater pluralism, so non-Western peoples can also be ‘accommodated’ on the international legal plane, not just for the sake of

97 Say the Arab League or the Organisation of the Islamic Conference (OIC).
98 China has problems with its own substantial Muslim minorities and is unlikely to be overly supportive of a religious based system overseas when (and although it speaks of religious freedoms, in reality) it denies such rights at home: See generally: Blaine Kaltman, Under the Heel of the Dragon: Islam, Racism, Crime and the Uighur in China (2007).
plurality which may in itself be a worthy aim, but more importantly to reduce the levels of violence affecting contemporary communities.

'Fundamentalists' on 'both' sides are likely to object to this endeavour although Muslim puritans, perhaps even supported by the pragmatists in the Muslim ruling classes, who have their own vested interests in limiting the use of the shari’a, are more likely to be vocal in their opposition to a 'Western developed shari’a' and ergo a Tribunal, and perhaps even resulting in death threats, an apparent favourite intimidation ploy among some Islamists, against those who question and seek to revise the 'crusted-on post-colonial Muslim orthodoxy of the 20th Century'.

It is posited here, however, that the utility of a Tribunal as proposed would have also been suitable to try people such as bin Laden, whose extradition was requested of the Afghan Taliban Government by the US Government directly after the attacks of September 11. The US wanted to

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102 Ibid.
103 See discussion at Corruption in the Muslim World as an Impediment to the Creation of a Tribunal, 414. From a Western perspective, for practicality, a mixture of principle and pragmatic considerations may also take precedence over a purely principled position. For example one view is that the US did not ratify the Rome Statute for the 'danger that US military personnel could be brought before the ICC for political reasons': Anne-Marie Slaughter, 'Memorandum to the President' in A Frye (ed) Toward an International Criminal Court? Three Options, (1999) 1, 8. or because the 'ambiguity of the crimes over which the ICC would exercise jurisdiction, particularly the crime of aggression, [...] which would arguably implicate Israeli leaders for activities in the West Bank and the Gaza Strip.' (ibid.)
104 The debates on 'orthodoxy' are however not new to Islam. See for example Iysa. A. Bello, The Medieval Islamic Controversy between Philosophy and Orthodoxy: Ijma and Ta’wil in the Conflict between al-Ghazali and Ibn Rushd (1989), 16. The response to the proposal by Sir Rowan Williams, the respected head of the Anglican Communion and Archbishop of Canterbury, who proposed simply that the use of a limited amount of shari’a law be considered for private family matters for use in the UK: Sir Rowan Williams, 'Sir Rowan Williams, Archbishop of Canterbury's lecture in London: Civil and Religious Law in England: a religious perspective', The Guardian (London), 7 February 2008. Sir Rowan’s proposal brought about reactions from both the Attorney-General and the Leader of the Opposition in Australia. It is at odds with the freedom of speech that Sir Rowan could not even discuss the matter without being shouted down. Even the 'conservatives' who criticised Sir Rowan said, that it was not what he said was unreasonable, but criticised the 'stupidity of raising the subject' for debate: Damian Thompson, 'Holy Smoke', The Telegraph (London), 7 February 2008. The good news for this present paper that in attempts to create a similar debate, is that the vast majority did not attempt to silence Sir Rowan.
105 According to 'Bin Laden says he wasn't behind attacks' in CNN, 17 September 2001., Bin Laden initially while approving the attack, denied responsibility for the attack. Al-Jazeera quotes bin Laden saying: "I would like to assure the world that I did not plan the recent attacks, which seems to have been planned by people for personal reasons,” bin Laden's statement said.
extradite Bin Laden but according to the Afghan Taliban authorities, with no evidence being offered in support of their allegations.\textsuperscript{106} While the US may not have used a Tribunal as a forum of its own volition, there is some chance that, absent other alternatives not involving the use of force, the US may have better trusted a functioning, reputable international tribunal to adjudicate on the matter. A fair shari'a trial, at an international and transparent forum, could then potentially have helped determine the truth of the US's allegations. The result may have helped reduce the subsequent carnage and loss of life in the ensuing 'war on terror'.\textsuperscript{107} The world must not repeat this unfortunate error with its huge attendant detrimental consequences for the thousands, if not millions, of the most marginalised peoples. Western foot soldiers and other cannon fodder in the guise of 'local military partners,' have also lost their lives in not insignificant numbers. The other side of the coin is that in the absence of such a forum, al-Qa'eda and other Islamists have also escaped judicial accountability.

\textsuperscript{106} "I have been living in the Islamic emirate of Afghanistan and following its leaders' rules. The current leader does not allow me to exercise such operations," bin Laden said.

Later statements by other al-Qa'eda leaders seem to contradict this earlier specific denial. Read together could mean that bin Laden was personally not involved in the planning; Giles Tremlett, 'Al-Qaida leaders say nuclear power stations were original targets', The Guardian (Madrid), 9 September 2002.

The Taliban agreed to hand over some of the alleged bombers to a neutral court and asked for evidence of bin Laden's involvement. A shari'a tribunal meeting international standards such as the one proposed here would have prima facie been acceptable to almost all parties involved except perhaps the few at the White House who had declared guilt before making their intelligence information public. The Guardian reported that:

Returning to the White House after a weekend at Camp David, the president said the bombing would not stop, unless the ruling Taliban 'turn [bin Laden] over, turn his cohorts over, turn any hostages they hold over.' He added, 'There's no need to discuss innocence or guilt. We know he's guilty'. In Jalalabad, deputy prime minister Haji Abdul Kabir — the third most powerful figure in the ruling Taliban regime — told reporters that the Taliban would require evidence that Bin Laden was behind the September 11 terrorist attacks in the US, but added: 'we would be ready to hand him over to a third country'.


\textsuperscript{107} Note that there is an underlying assumption in this paper that reducing the number of civilian co-lateral deaths and even the deaths of fighters on all sides is a desirable end.
Islam is sometimes demonised, including by some Western politicians, for their own pragmatic reasons.\textsuperscript{108} It provides a further reason their own support for repressive governments in Muslim States, under the pretext of State sovereignty. Demonising the people helps to create the impression that poor governance is inherent to the cultural and religious morés of ‘those’ peoples. The use of the Islamic faith as a ‘shield’ by a relatively corrupt and largely unelected and unrepresentative ‘Muslim’ leadership in many Muslim majority States\textsuperscript{109} is at the root of many problems that lead to and sustain violence. Tacit Western support for oppressive regimes,\textsuperscript{110} against Islamist rebels, also simultaneously allows the ‘outsourcing’ of torture and imprisonment to these allies without due process checks.\textsuperscript{111} The mention of the \textit{shari’a} is sometimes a convenient

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109 The Organisation of Islamic Conference ["OIC"] has 57 member states \texttt{<http://www.oic-oci.org/index.asp>}. [28 May 2006]. The global Muslim population is however, not homogeneous either in language, culture, history or geography but share a common faith. Further the expression of this faith – while clearly having commonalities – is nonetheless arguably as varied as its constituent peoples. Muslim states cover a range of contemporary political ideologies and include secular states such as Turkey to Islamic Republics such as Iran, Pakistan, Afghanistan and Mauritania. Mayer states that Islamisation programmes have had ‘modest results’ inter alia for the reasons proffered here: Anne Elizabeth Mayer, ‘Islam and the State’ (1991) 12 \textit{Cardozo Law Review} 1015, at 1030. For countries (in various degrees) that use \textit{shari’a} law see Rudolph Peters, \textit{Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century} (2005), ix.
110 See generally, for a list of countries recognised generally as democratic, which includes few Muslim majority states although in the recent past, Muslim majority countries such as Indonesia have joined the ranks of the democratic states: \texttt{<http://www.state.gov/g/drl/44739.htm> [Accessed 17 July 2007]}
See generally:
\texttt{<http://www.transparency.org/policy_research/surveys_indices/cpi> [Accessed 17 July 2007].}
Source: The 2005 Transparency International Corruption Perceptions Index
The index defines corruption as the abuse of public office for private gain, and measures the degree to which corruption is perceived to exist among a country’s public officials and politicians. Only 159 [...] countries are included in the survey, due to an absence of reliable data [...].
\texttt{<http://www.infoplease.com/ipa/A0781359.html>.
See also generally The Charter of the Organization of the Islamic Conference. While the OIC Charter speaks of preserving ‘Islamic spiritual, ethical, social and economic values’, it does not mention Islamic law.
111 Karen J Greenberg and Joshua L Dratel (eds), \textit{The Torture Papers: The Road to Abu Ghraib} (2005); Moazzam Begg (with) Victoria Brittan, \textit{Enemy Combatant: A Muslim’s journey to Guantánamo and Back} (2006); Mamdouh Habib (with Julia Collingwood), \textit{My Story: the tale of a terrorist who wasn’t} (2008).
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'bogeyman' although problems in Muslim States are generally problems under a secular legal system.\textsuperscript{112}

The shari'a has rarely, if ever, been imposed on non-Muslims, and the application of religious requirements is ultra vires. Therefore, the strong and vocal non-Muslim opposition to shari'a Tribunals for Muslims appears to be based on an emotional ground rather than on some broader principle. That is, opposition to the use of the shari'a against Muslims — the system that is most likely to alter Islamist behaviour — is curious to say the least. The creation of the Tribunal, if left to Muslim States alone, will either fail or success would require a momentous paradigm shift in realpolitik terms, the term realpolitik used here in the sense of a law as it operates in practice.\textsuperscript{113}

The shari'a-secular divide is a false dichotomy. Corruption and oppression versus freedom and plurality, regardless of the polity under which these regimes are delivered, is the real divide. As ABC reporter Knight rightly observes, the tendency of young Iranians is to move away from Islam towards a more secular society while the reverse is occurring among the youth in Egypt.\textsuperscript{114} The problem in both States is not primarily the issue of Islam or secularity but oppression and the absence of freedom to express one's self openly and the often zealous, cruel and brutal imposition of a 'one right answer' thesis by the authorities.

On the other hand, the West is attempting to show that it is against Islamist terror but not anti-Islam per se, a view that is endorsed as the better view and one generally that reflects the Australian perspective. The support for a shari'a Tribunal would be a practical demonstration that this distinction is real, while simultaneously also likely to have other positive effects as discussed in this paper.

\textsuperscript{112} Shazeera Ahmad Zawawi, 'The Tragic Case of a Lunch Meal: Revisiting Corporal Punishment in Schools', \textit{LoyarBurok} (Miri), 17 November 2010; Sally Neighbour, 'Taliban funded by Drugs', \textit{The Australian} (Sydney), 21 May 2010.


Pressing Hard for Muslim Accountability

Groups such as al-Qa'eda assert but do not provide the necessary levels of valid legal authority for the proposition that they are authorised to declare an offensive war, use force in their customary manner and make declarations not even prima facie within the means permitted under the shari'a. They innovate and adapt the military means of non-Muslims and self-assert their own piety. What little evidence is provided is not tested for its legal validity and sufficiency against relevant SHL criteria. Some Muslims and Muslim jurists have critiqued the relevant fatwas, although they lack the power to challenge al-Qa'eda or other transnational Islamist group in any practically effective way.

On the other hand, al-Qa'eda leaders such as Al-Suri who, though strategic and farsighted with respect to their own ends, appear to lack sufficient shari'a legal knowledge and methodology to present a persuasive and methodologically sound legal argument in support of their legal position, and for most part re-state political rhetoric. It is simply not sufficient to cite the general obligation for djihad. However, because of al-Qa'eda's claim to represent an Islamic struggle, it can reasonably be presumed to act intra vires the shari'a, and therefore, its soldiers when captured and tried could reasonably be required to provide the relevant shari'a authorisation and justification when necessary, or when required to do so at trial.

As Lord Steyn observed, in law, context is everything. This statement is reflective not just of English law but, when applied appropriately, is a general statement that is universal. In a contemporary legal context, what is required for legitimacy is that fighting in a particular fact situation must be intra vires the permitted reasons for the use of armed force and that Muslims are able to adduce the evidence necessary to discharge their onus of proof. Unfortunately Western governments appear to leave al-Qa'eda's political assertions of the legitimacy of its djihad unchallenged in a legal sense. The West's purely military response to al-

116 R(Daly) v Secretary of State for the Home Department [2001] 2 AC 532, 548 [028].
Qa'eda is to the detriment of all peoples except for the few warmongers on all sides who sustain their campaigns based on this untested information concerning *dijihad* and appear to do so for their own private gain.

Further, and independently, but compounding the West’s strategic errors, the powerful free Western press uncritically disseminates al-Qa'eda’s untested assertions as ‘true’. This is despite of Muslims’ reasonable intuitive doubts as to the legitimacy of al-Qa’eda’s actions. This acceptance has in turn allowed or helped al-Qa’eda to benefit from the doubts created by this wide acceptance as ‘true’ of its mere assertions of the legitimacy of its war and means. Western governments do not control the media as such. It appears that ‘conservative’ interests, which are arguably allied and aligned to the ‘hawks’ in the defence industries, use their considerable influence to advance defence industry interests, which also unfortunately and co-incidentally favours al-Qa’eda’s strategic interests in maintaining a state of war. Strange bedfellows, but to mix metaphors it is a marriage of convenience, profitable in the widest sense to the protagonists.

**Using Internal Islamic Values Help to Prevent, Limit or Curb Islamist Violence**

A central proposition in this paper is that internal Islamic values appropriately and fairly harnessed are a useful defence against Islamist violence. As an example of the operation of this ‘internalised control’, attacks planned (overseas) for execution on Australian soil were said to have been aborted because of Jack Roach’s belief that Islam did not permit attacking civilian targets and he called ASIO to report his information. For reasons not directly relevant to this thesis, Roach was not contacted until after the Bali bombings. ‘New’ Muslim (converts), high in spirit

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117 Mr Roache was an English immigrant to Australia who converted to Islam in about 1993 and was alleged to be associated with JI in Indonesia and al-Qa’eda generally. He was tried and convicted in Australia on various charges related broadly what could be referred to as terrorism charges related to blowing up the Israeli Embassy in Canberra Australia: David Weber, ‘Trial of Jack Roche begins in Perth’ in ABC Radio National, 17 May 2004.

118 The Australian Security Intelligence Organisation (ASIO) is Australia’s internal security organisation and is very broadly speaking equivalent to the UK’s MI5, the FBI (Federal Bureau of Investigation) in the USA, France’s DCRI (*Direction centrale du renseignement intérieur*) or Shin Bet (*Sherut haBitachon haKlali*) in Israel.

119 Sally Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* (2004), 302.
belief and enthusiasm but in some cases still weak in substantive knowledge, and who are still learning the ethic and law, are in cases a relatively soft target for the machinations of those who would exploit these emotionally charged, well intentioned but vulnerable people.120 This path of relatively easy co-option must in these cases be targeted in order to make such recruitment much more difficult. The targeting of young, essentially Islamically ignorant Muslim males can be contrasted with the established mature mujahideen groups in Southern Thailand who, while committed to an armed struggle, rejected the targeting of civilian spots including tourist targets.121 This policy was only reversed when Muslim civilians were killed by the Thai military,122 which, without more, is not legitimate under the shari'a, but shows that reciprocity under international law is much more appealing even to those who call themselves mujahideen. The bombing of churches was also hotly debated among Islamists with sections of the Indonesian mujahideen who opposed such action,123 an act explicitly forbidden in the Qur’an,124 showing that it is harder to recruit Muslims who have been exposed to a level of Islamic learning and law. Neighbour also alleges that Bashir ordered the April 1999 bombing of the Istiqlal mosque in Jakarta and blamed the Christians for fomenting strife,125 although the evidence adduced is not likely to ‘stand up’ in a Court and must be tested to either convict a serious shari’a criminal or to rebut what must amount to a scurrilous allegation.

Bin Laden’s means of gradual escalation of the struggle has been mentioned above. While Islamists have used Islam, in the main, to rally fighters or ‘terrorists’, they have neglected to employ shari’a means and limits in attempting to attain to their sometimes even legitimate goals. On the other hand, those fighting the phenomenon have also neglected to use

120 The children of Muslim immigrants in the West are also in cases soft targets, as they in cases have a strong cultural and emotional attachment to Islam but with little if any substantive knowledge of the law.
121 Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 324.
122 Ibid, 325.
123 Ibid, 220.
124 Qur’an 22:40.
125 Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 280.
the countervailing Islamic legal provisions, perhaps through ignorance, an aversion to a faith-based law, or perhaps for a range of other reasons, which appear to be at the expense of the many lives lost, both Western and Muslim, in the various conflicts.

Double standards are not the sole provenance of one side. Islamists have their own means of placing others in a ‘no win’ situation. Islamists call for the exclusion of Muslims from places of vice or the closing down such of places in ‘Muslim areas’. On the other hand, a sense of humiliation also appears to result from such exclusion when enforced by owners of such premises, and appears to have played a part in the Bali bombings of the nightclubs in 2002. The sense of humiliation is clearly self-imposed, as the Muslim Covenant does not permit the consumption of alcohol, and therefore being excluded from say, nightclubs, is on this account not something about which Muslims should ordinarily complain and shows a degree of confusion in the thinking or the duplicity of some Islamist leaders. Nonetheless, the fact remains that some Bali bars such as the Sari Club did not serve Indonesians (note that this is not a purely religious issue in this context as non-Muslim Balinese are also, it appears, generally excluded). This arguably made it easier for the bombers to target foreigners, presumed non-Muslims and while this race-based reason is not a relevant shari'a criterion, Muklas noted that ‘none of these [targeted people] were our people’. JI thus chose a ‘Western-looking’ bomber for the Sari Club. The kamikaze bomber, Feri was a tall, blue eyed person, who was chosen for obvious reasons. Others such as the Paddy’s bar served wealthy Indonesians and for this reason the bombers used a smaller bomb here.

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126 This paper takes the view that Islam requires an individual to exercise his or her free will in each situation and the ‘removal’ of a State removing a person’s right to exercise their free will does not advance their spiritual development in the least because of the absence of the intention element.

127 Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 288.

128 Ibid, 291.

129 Ibid, 292.

130 Ibid.
Promoting Strategic Litigation

Strategic litigation that helps develop the law should also be encouraged by allowing Muslim charity groups, private organisations, institutions or even individuals to help fund such litigation. The creation of a broad-based group of scholars competent to advise and promote the development of the law is strongly supported. These scholars will interact with the Muslim community through conferences and web-based dissemination of ideas. The will submit *amicus* briefs, accept submissions on specific legal issues, provide *pro-bono* legal assistance to defendants, publish learned papers in peer-reviewed journals and otherwise actively assist strategic litigation. This will arguably be conducive to the development of the *shari'a* and assist the process of crystallisation of Muslim consensus on key contemporary legal issues.

The discussions of say Sheikh Yassin's *fatwa* on *kamikaze* acts and its applicability to contemporary situations should in right be judged by a competent Tribunal apprised of all the facts and law surrounding each separate attack. Whether a particular defendant's involvement in armed action in *djihad*/rebellion/pre-emption, satisfies the legal criterion of 'necessity' will emerge through such trials and perhaps with some expert guidance (maybe as *amicus briefs*) including from the IILC, other specialist interest groups, academic institutions or individuals will aid this process of crystallisation of SHL.

Intelligence Value of Suspects

An important practical impediment to trying terrorists openly is likely to be their intelligence value to authorities, which in the current environment will take precedence. From an intelligence perspective, a captive's likely value is arguably maximised where the captive does not have access to a public forum, where his colleagues and co-conspirators are still 'in the dark' with respect to his whereabouts or if they suspect his capture, unsure as to how much information he has divulged. Even while the immediate value of knowledge of operations in train has a limited 'shelf life', there is other information purportedly worth gleaning, such as knowledge of the captives' organisational structures, funding streams, local operatives and support networks and other related vital information required to disrupt
the cells. There must, however, come a reasonable point in time when the
detainee can be released, or charged and tried, and justice is seen to be
done. For example, Risen states that the 'CIA does not know what to do'
with people held at the secret CIA 'Bright Light' facility after their
intelligence value is exhausted. What would the US and other Coalition
Governments have to lose if these persons were tried at the Tribunal?

On the other hand, and while not condoning these practices, there
are also clearly issues associated with the admissibility of evidence
obtained 'illegally' by the US, under conditions of duress or torture,
without proper caution, information obtained prior to the defendant
having received independent legal advice, in the absence of competent and
independent interpreters and is a matter discussed below. Under the
shari'a, those who are unnecessarily, accidentally or wrongfully detained
should be eligible for compensation. Generally however, these issues are
arguably best considered on a case-by-case basis but clearly do not detract
from a need for open, transparent trials. The point here is that for

131 The shari'a recognises that sometimes in the heat of the moment that innocent
people can become caught in a security sweep and therefore perhaps detained
wrongly. The quid pro quo under the shari'a for this leeway is that if proved wrong
the detainee is then prima facie eligible for diyaat.

132 James Risen, State of War: The Secret History of the CIA and the Bush
Administration (2006), 30.;
Mark A Drumbl, 'Victimhood in our Neighborhood: Terrorist Crime, Taliban Guilt,
and the Asymmetries of the International Global Order.' (2002) 81 North Carolina
Law Review 1, 8. states:
[... ] senior U.S. government officials are on the record as stating that,
even if acquitted by a military commission some detainees will not be
released owing to national security interests.

133 It is conceded that there are those said to have been mistakenly captured and held
(Eg the Arar Case). Further Risen also notes the accidental capture of an African
man by the CIA, whom the authorities will not release even after the error was
discovered: James Risen, State of War: The Secret History of the CIA and the Bush
Administration (2006), 34. there are similar examples at Guantánamo cited infra. The
embarrassment likely to be caused to the Americans however is not a reasonable
justification for holding innocent people or denying others justice. The use has
publicly and openly admitted to 'waterboarding' and other tortures and has also
released (under duress) footage of US soldiers shooting at unarmed civilians and
journalists and taking some perverse joy as to these actions. The US may claim, and
arguably rightly so, that these are isolated incidents and that the US government
does not release footage of operational matters as a matter of course. Those on the
Arab/Muslim street however may prove more difficult to convince. An impartial
independent judicial body will build confidence on the international plane for
arguably the same reasons that they enjoy the respect of domestic jurisdictions.

134 See Tribunal’s Jurisdiction, 438.
135 See n 226, 450.
maximum benefits vis-à-vis peace and security the trials of Islamists should be conducted under shari'a law.

Misconceptions on Both Sides: An Impediment to Peace
Some ‘traditional’ contemporary Muslim writers and even jurists treat the ‘West’ as homogeneous and uniform. Treatment of Western law and civilisation in this base and unsophisticated manner results in what Weeramantry describes as ‘a sharpness and hostility that are ultimately antagonistic, self-defeating and create prejudice towards beneficial initiatives from the West’. Western society is somewhat less unsophisticated in its view of the Muslim world, although the still significant pockets of ignorance appear to create some unnecessary barriers.

An example of gross Western treatment at a ‘general public’ level is demonstrated when the regular host of a Breakfast Programme, who, albeit quite conservative, is generally well regarded and carries the imprimatur of a reputable and excellent radio service such as the ABC’s Radio National, can not only publicly say, but more importantly, to remain unchallenged, that ‘the dominant view in Australia is that Muslims are terrorists and that they oppress women’. The absence of a successful challenge resulting in a withdrawal or apology must mean that this view is substantially an

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137 The Western world is arguably much more open and has enjoyed freedoms of expression and thought that at an academic level have allowed great Muslims and non-Muslim Islamic legal scholars (many referred to in this work) that have been able to counter the more unsophisticated ‘orientalist’ works while simultaneously developing the shari’a. On the other hand the general public in both Islamic and Western civilisations appear more or less equally ignorant of “the other”, and it is an ignorance that is exploited by leaders on all sides.
138 ABC Radio National Breakfast with Fran Kelly, Council for Muslim women interview with Daisy Khan <http://www.abc.net.au/rn/breakfast/stories/2006/1794419.htm> [Accessed on 22 November 2006] On the other hand the view by those such as John Pilger that Muslims are also the greatest victims of terrorism is a view that was censored by the US Department of Defence according to the lawyer for some detainees at Guantánamo Bay: Clive Stafford Smith, Bad Men: Guantánamo Bay and the Secret Prisons (2007), 131. Bergen and Cruickshank also note that Muslims have, in the main, been the greatest victims of Islamist violence. [Peter Bergen and Paul Cruickshank, 'The Unraveling: Al-Qaeda’s Revolt against Bin Laden’ (2008) 238 The New Republic, 16.
accurate reflection of the opinion of at least ABC listeners,¹³⁹ and perhaps a significant proportion of Australians generally.¹⁴⁰

This view is less extreme than one that appears to portray Muslims as generally aggressive.¹⁴¹ These popular perceptions no doubt contribute to the relative ease with which governments can pass fairly restrictive domestic legislation which although non-discriminatory in form, appears arguably to be applied fairly selectively.¹⁴² Such actions have led Bronitt et al to refer to Muslims as a ‘historically oppressed minority [...] already] subject to a high level of policing’¹⁴³ and the operation of the suite of anti-terrorism laws as ‘leading to further levels of legal oppression’.¹⁴⁴ The view on Islam and its adherents held by the Western public will no doubt have some effect on decisions made by Western leaders about whether to support a shari’a tribunal on the international plane. At present this view appears to be negative.

¹³⁹ This is a general statement with clear exceptions. The Late Night Live Programme on Radio National often features personalities on various sides of the various religious divides. However, the host seldom – if at all – allows such sweeping statements about Muslims or other social, religious or political minority to go unchallenged.

¹⁴⁰ The ABC advertises that one in four Australians turn to ABC Radio, although perhaps not to Radio National specifically.


¹⁴² For example a non-Muslim Brisbane School teacher found with several bombs, detonators etc was not charged with terrorist offences: School reopens after bomb scare (2006) [http://www.abc.net.au/news/newsitems/200605/s1635321.htm] at [Accessed 17 July 2007]. On the other hand Dr Mohammed Haneef a Muslim foreign national [on the fairly weak evidence available; see transcript of police interview http://www.hindu.com/nic/0058/haneef.pdf (Accessed on 24 July 2007)] was detained [potentially indefinitely in immigration detention] through the cancellation of his work visa. Haneef was charged with recklessly lending a SIM card to terrorists, had his ‘457 visa’ revoked and was detained in an immigration detention centre pending the hearings or deportation. Phillip Coorey and Joel Gibson, ‘Haneef detained after bail win’, Sydney Morning Herald (Sydney), 16 July 2007.). As opposed to this treatment of Dr Haneef, the Australian Wheat Board [AWB] which paid $290 million in ‘kick backs’ to the Iraqi regime, which was at the time accused of terrorism, developing weapons of mass destruction, against whom the Coalition was preparing for war and ‘regime change’, and during which UN Security Council sanctions prohibited the payment of hard currency. The AWB was not only not prosecuted for funding terrorism but continues operating as a business trading on the Australian Stock Exchange (ASX). No politician or AWB official who was involved in the scandal has yet been prosecuted: See Caroline Overington, Kick Back: Inside the Australian Wheat Board Scandal (2007).


¹⁴⁴ Ibid, 959.
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On the other hand, not just al-Qa'eda, but Western Muslims have, sometimes privately and sometimes publicly, conveyed the most offensive and derogatory statements about women or of Jewish people in our society,\textsuperscript{145} descriptions we should not allow to stand against any group, including against Muslims themselves. Such behaviour by Western Muslims, however, will affect the decisions of Western leaders adversely, and the public can encourage them to make decisions in the greater cause of international peace and security.

\textbf{A Possible Form of the Tribunal.}

\textbf{Jurisdiction and Standing}

Under international law, the activities of non-State groups are sometimes sheeted home to States,\textsuperscript{146} because traditionally only States or their proxies have international legal personality and perhaps as indicated by the ICJ in the \textit{Uganda Case}.\textsuperscript{147} In the area of ICL/IHL however, since the trials at Nuremberg, the ICTY and the ICTR, the attribution of individual criminal guilt for acts committed on the international plane is uncontentious.

Under the \textit{shari'a}, every individual is a legal person\textsuperscript{148} and our lives are judged on the Day of Judgment.\textsuperscript{149} In a temporal court, however, criminal guilt must individually be proven in each separate case.\textsuperscript{150} An individual's association with a criminal group or organisation may be a relevant consideration. The question therefore arises as to whether non-natural persons (such as al-Qa'eda) are capable of possessing legal personality in Islam and therefore becoming legally liable for their criminal

\begin{footnotesize}
\begin{enumerate}
  \item \textsuperscript{146} Ian O Lesser et al (eds), \textit{Countering the New Terrorism} (1999), 9.
  \item \textsuperscript{147} See text accompanying n 121, 373.
  \item \textsuperscript{148} Qur'an 2:286.
  \item \textsuperscript{149} Note however that the Day of Judgment in Islam while in a sense, 'a tribunal' (consisting of God, the individual and witnesses), is substantially different because one is judged not only for breach of the Covenant but also examines an individual's life and works, ie in addition to breaches, one's good act are taken into account together with penalties already served/paid on earth and above all Grace that can forgive the greatest of crimes. The issue of why temporal penalties are important in Islam is discussed infra.
  \item \textsuperscript{150} Article 33 Statute of The International Court of Justice, ; Article 7(4) Statute of the International Criminal Tribunal for the Former Yugoslavia, ADOPTED 25 MAY
\end{enumerate}
\end{footnotesize}
The concept of non-natural persons is known to and has been accepted as part of Islamic law, and a non-natural legal person can accrue both interests and liabilities. A criminal act that requires intention however may clearly only be sheeted home to a human person or persons. All the serious criminal acts in question would no doubt require intention as a fault element.

Legal Personality and Universal Jurisdiction

Only Muslims are subject to the Covenant's religious obligations. The Qur'an subjects all Muslims to its jurisdiction and draws legitimacy through those believing, accepting and following its commands. Therefore, the concept of a single Muslim umma, which includes Muslims living as minorities, must also mean that 'universal jurisdiction' vis-à-vis the shari'a is the norm in Islam. This means that a distinction between a domestic jurisdiction and an international jurisdiction does not exist in

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151 This issue of the recognition of non-State entities is settled in general international law. Both States and international organisations have recognised non-State groups as possible stakeholders and possessing legal personality on the international plane. The international community has in the past recognised the non state groups such as the PLO (The Palestinian Liberation Organisation) or the ANC (The African National Congress). In a criminal law context, the ICJ recognised the existence of the non-State Bosnian-Serb paramilitary group the Scorpions (Skorpioni).

152 Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26 American Journal of Comparative Law 187, 191. For example, a deceased's estate is considered a separate legal entity.

153 Qur'an 2:256.

154 Treaties are binding in Islamic law: Muhammed ibn al-Hasan al-Shaybani, The Islamic Law of Nations Shaybani's Siyar (1966), 41; Sami Zubaida, Law and Power in the Islamic World (2003), 134. Zubaida refers to the hadith of the Prophet 'al muslimun 'ala shuruthihim, "Muslims are bound by/on their conditions" and must include treaties voluntarily entered into by the Muslim polity. Much is made of treaty law in Islam and particularly that it essentially complies or is generally equivalent to the obligations arising under the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, 27 January 1980. While the specific examination of the Islamic law of treaties or siyar is outside the scope of this work it is respectfully submitted that while there is broad agreement, a claim of general equivalence must be demonstrated more convincingly.

155 Covenant obligations are binding on Muslims everywhere, ie not just on Muslims living under the imam of the period. Although the views are not engaged with here, there is a very small minority that all Covenant obligations are only fully binding under the reign of the just imam. It is noted, on the other hand, that the treaties entered into by the Prophet were binding on Muslims living in Abyssinia (then under Christian rule): Adil Salahi, Muhammad: Man and the Prophet (2002), 127.
theory. This, however, does not mean that Muslim States, having adopted the Westphalian model, do not have domestic expressions of the shari'a — they do. However, for the purposes, of this thesis the plurality of Schools within the Muslim umma generally is reflected inter alia as different practice of Islam in the different States. The practice of each School also separately approximates to a domestic jurisdiction because many Muslim countries in theory predominantly tend to follow a particular School. While this not a perfect analogy it is arguably an accurate reflection of how States adapt Islamic law, as do secular States, with respect to domestic expression of international law, say in the common law States. Over all however, this distinction on jurisdiction should have little impact on the final determination of law under the shari'a and is discussed purely for completeness.

Under international law, Article 27 of the Vienna Convention\textsuperscript{156} holds that 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. The Vienna Convention is codified customary law and is therefore binding \textit{erga omnes}. It is nonetheless difficult to envisage members of the military forces of a P5 nation being prosecuted in an international criminal court for the breach of IHL or ICL, let alone at a shari'a Tribunal, even though many Muslims serve in say, the US military.

As a matter of principle international law is not self-effecting in common law States\textsuperscript{157} or, for reasons discussed, in strictly shari'a States. Further, practically speaking, the inability to bring the citizens of the powerful P5 nations and their allies to account as of right, is not a shari'a limitation but one of secular international law which highlights the problem of protecting citizens of the weaker nation States from oppressive laws and processes.

Standing
A believing Muslim should in principle be tried under the shari'a, whatever this might mean in practical terms of scope and content of the law. At minimum, a believing Muslim should at least ideally have the option of asking to be tried under the shari'a. This is a clear prerequisite and must be an available option before the Muslim community can compel him to feel responsible for shari'a wrongs he may have committed and his or her 'conscience' can be brought into play as a regulating force. The absence of a Tribunal is clearly no excuse for some of the atrocities committed by Islamists. On the other hand, a functioning Tribunal may in practice make a difference, particularly for an Islamist engaged in what may broadly be called wilful blindness. In our age, this 'choice' on the international plane must mean being called to account at a judicial forum that meets international standards, as opposed to a legal regime that allows the unjust treatment of detainees.

For reasons mentioned above, a person who declares that s/he is Muslim, prima facie has standing at the Tribunal. Standing at the Tribunal generally — if ever in contention — could be determined before a single Tribunal judge. The other side of this equation, and the one that this paper hopes will be precipitated by the creation of a Tribunal is, once rights and obligations are accepted as universal, that there is every possibility that individuals and groups will also seek both to enjoy and to enforce these rights in their domestic jurisdictions. This paper posits, on the negative side of the equation, that this is a key reason why Muslim leaders are reluctant to recognise the universality of the rights/obligations regime, particularly under the shari'a, because they cannot easily dismiss these rights as a creation of Western hegemony.

It is also proposed that eligible defendants are offered a voluntary but binding choice of forum (for example between a Tribunal and the ICC or other comparable international tribunal ('equivalent tribunal') where it is almost certain that, in the main, only Muslims will submit to the

158 Qur'an 5:45.
159 If the request is made earnestly and sincerely but his/her request is declined, then their religious obligation would generally end here.
jurisdiction of the Tribunal (that is, an ‘opt in’ system) and conversely, the Tribunal is only likely to found jurisdiction to try Muslims who openly and freely accept Islam.

A ‘balancing’ consideration recommended here, mainly to allay some of the fears among secular leaders and thus reduce the chance of them frustrating the process of justice, is to allow the leadership of a State, the Parliament, leader (or even dictator) of a nation State to which a defendant is connected in the broadest legal sense, to challenge a Muslim (citizen) defendant’s choice to ‘opt in’, and to do so as of right. Further, this leadership should as a matter of right have standing to request that the Tribunal decline jurisdiction over an individual or individuals. The Tribunal’s Statute should provide for judicial exercise of this discretion, inter alia to allow for considerations such as whether the defendant would otherwise be subject to an unfair trial or lengthy detention without trial. Recall that this exercise of power by the State against the defendant will not according to the Qur’an have adverse spiritual repercussions on the defendant, and therefore is likely not be of concern in a strictly theological or legal sense.

Non-Muslims who may wish to be tried by the Tribunal potentially present a problematic issue as, rightfully, under the shari’a, the Tribunal is obliged to apply ‘their laws’, that is, the ‘individual’s law’, whatever that might mean in each individual case, but which would ipso facto be outside this Tribunal’s jurisdiction. It is difficult to see such an eventuality arising because the obvious place for such a trial would be the ICC. However, if for some reason a non-Muslim is joined in an action (such as in a case in the future paralleling the atrocities committed in Bosnia-Herzegovina in the 1990’s) then for convenience the trial could be run together but applying for example the Rome Statute for the non-Muslim. For Muslim judges, this

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160 See text accompanying n 148, 432.
161 For example, defendants with multiple nationalities could have each country of nationality challenge his/her choice.
162 Qur’an 2:286.
mechanism does not run counter to the Qur'anic provision of judging by a law other than God's law.164

If a defendant converts to Islam immediately before exercising the choice to 'opt in' for trial, and if the conversion is 'sincere' — clearly a matter that is not justiciable in a temporal forum — theologically, the person's sins vis-à-vis God are forgiven.165 Generally, a person who converts to Islam begins with a 'fresh slate' of bad acts as recorded against him/her, i.e. they are in essence forgiven by God for all the sins they have committed against 'God's rights'. Theologically however, this forgiveness does not generally extend to crimes against individuals and as discussed in Appendix 1, must be settled in this life. Further, 'forgiving', without more, a person for crimes committed against victims, for mere declaration of the faith may result in injustice and is clearly open to abuse. Thus a mere declaration of 'faith' should not provide an automatic escape from justice. If the State's challenge to such a defendant's choice of forum is successful, then he may be tried under the Rome Statute. This is legitimate under the Qur'an and the sunna.

The authority for this proposition is that the Qur'an allows the status of something that happened before (in this case conversion to) Islam to persist, if a greater wrong would otherwise result.166

In principle however, it is possible that 'choice of law' or 'forum shopping' both between non-Muslims and Muslims and as between Muslims of various sects may become an issue at the Tribunal. Practically, however, this problem is not likely to be as significant as may first appear

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164 Qur'an 5:44:
If any do fail to judge by (the light of) what God hath revealed they are (no better than) unbelievers.
See also Qur'an 109:6.


166 Qur'an 4:23
and [prohibited in marriage are] two sisters in wedlock at one and the same time except for what is past; for God is Oft-Forgiving MostMerciful.
This Qur'anic verse is quite specific to the issue of the prohibition of the concurrent marriage by the one man to two sisters. The principle however, is that a 'lesser prohibition' may be tolerated if the rectification of this matter results in a greater injustice, here the divorce of one of the two sisters, which causes enmity between people who had entered into a contract for marriage in good faith.
as the Schools are not that significantly different in law. This is however an issue even with secular judicial fora. A useful precedent in this regard is the Islamic law of banking, where, while the different Schools prevail in the various Muslim States, they have through contemporary legal development agreed on practical means of resolving their sectarian and confessional differences, while non-Muslims have also in cases voluntarily or for commercial reasons adopted the stability of shari'a banking. Change has been steady and manageable. This broader issue of conflict of laws within Islamic law, however, is one that needs much deeper consideration as a discipline in its own right, as the financial imperatives in banking may have provided the necessary impetus for agreement, incentives not present for co-operation in the criminal law.

Tribunal’s Jurisdiction

A Tribunal’s jurisdiction should permit the trial of an individual who freely identifies as Muslim and against whom there is a prima facie case of a serious shari’a or siyar crime, which as mentioned parallels the most serious crimes and which include crimes against humanity, genocide and war crimes as described in the Rome Statute or as developed in the jurisprudence of the ICC (‘eligible defendants’) and normally who would be considered a candidate for trial under an equivalent international tribunal. The practicality of an ‘opt in’ system as proposed is yet to be tested, but is arguably necessary to assuage the doubts of the more extreme advocates of secularism, both Muslim and otherwise.

In general, shari’a jurisdiction encompasses both justice (‘adl) and equity (qist) although historically and unlike the common law, Islamic

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167 See text accompanying n 217, 447.
169 Qur'an 3:21; Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 27; Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 30; and see generally John A Makkidi, ‘Legal Logic and Equity in Islamic Law’ (1985) 33 American Journal of Comparative Law 63; According to Mohammad Hashim Kamali, Equity and Fairness in Islam (2005), ix. ‘istihsan is the nearest Islamic legal doctrine to the Western legal concept of equity’, though he went on to suggest (ibid. 20) that “the basic theme and philosophy of the Shar’iah (maqasid al-Shar’iah) is almost identical with that of istihsan [...]’.
170 Harris v Digital Pulse Pty Ltd (2003) 56 NSWLR 298, para. 89 per Mason P (with whom Spigelman CJ agreed); ‘Imposition of common law doctrines and principles
law did not create a separate jurisdiction for equity. The equitable jurisdiction as developed from the English Courts of Chancery does not appear to sanction penalty. The reason for acknowledging this difference is that the Qur'an mentions penalty with respect to criminal sanctions under equity, but is noted here for completeness only.

A two-tier system, a Tribunal (un cour de premier instance) together with an Appeals Body (un cour de cassation) is likely to be acceptable to the majority of Muslims (and certainly not any more unacceptable than the ICTY/R or ICC for Muslims generally) and falls within the general pattern of the international judicial framework. The decision of the Court of Appeal must generally however, be considered final, (i.e. with serious exceptions only for, say, fraud). The jurisdiction of the Tribunal could be by recognition by contracting parties, in a Statute parallel to the Rome Statute.

Circumscribing the Tribunal's Jurisdiction

Universal jurisdiction under Islam, as discussed, means that an eligible defendant could therefore, as a matter of shari'a law, be compelled to appear before such a Tribunal. Alternately, if an eligible defendant is able to exercise a faith-based choice, he or she could elect to appear before the Tribunal. To avoid this becoming a problem by say Islamists choosing to

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171 Ibid. The statement of Somers J in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 302 per Somers J (dis.), that "equity and penalty are strangers" was approved by the full bench of Federal Court of Australia: *Bailey v Namol Pty Ltd* (1994) 53 FCR 102, 112. In the early days of the Court of Chancery "the Court's jurisdiction was quite wide": Patrick Parkinson, *Tradition and Change in Australian Law* (1994), 79. At present its jurisdiction has been narrowed quite significantly. It is noted in passing that cases involving witchcraft were originally in the equitable jurisdiction, a crime which could carry capital punishment. See also: Law Commission (UK), *Aggravated Exemplary and Restitutionary Damages*, Report No 247 (1997) para. 5.54.

172 Qur'an 5:42 for example mentions the slander and misappropriation of property, both crimes under the shari'a, but crimes which the Qur'an commands are to be judged in equity (bil quist).


174 See reference to this discussion at n 155, 433.

175 Qur'an 5:45; Further, Qur'an 2:282. [...] The witnesses should not refuse when they are called on (for evidence). [...]
flood the system, the Tribunal’s jurisdiction under the shari’a should be curtailed by its Statute.

The theological issue then is whether a Tribunal can legitimately choose to limit the scope of its jurisdiction to only the serious crimes in question. The key issue is that the proposed limitations are on the Tribunal’s jurisdiction it is not about limiting the scope of the shari’a, which would appear ultra vires and should therefore not pose a problem as a matter of principle.

As discussed sovereign immunity is not part of the shari’a, although once again, the starting point for a Tribunal could be to accept the current international position of recognising sovereign immunity, until waived in accordance with the shari’a, through a treaty by each individual Muslim State.

Territorial Limits to Jurisdiction
The persons most likely to be brought to trial in the foreseeable future are eligible defendants currently belonging to UN-proscribed groups. In the case of Muslims these are mainly Sunni groups. The (Sunni) Shafi’i school’s view is that a Muslim is personally liable for a crime under the shari’a, irrespective of where a transgression is committed. This view on the territorial limits to jurisdiction does not appear to be unacceptable to other Schools. On the other hand, this broad scope will not be acceptable to the P5, some of whose Muslim citizens serve in their armed forces. The Tribunal’s jurisdiction can therefore be limited accordingly.

176 Courts of limited jurisdiction per se such as courts dealing with succession, marriage/divorce etc are not unknown to Islam and therefore, are in principle, not controversial. The problem arises here because what is proposed is a tribunal of criminal jurisdiction but is by design limited to examining the crimes of rebels and those out of the recognised power structures, while sidelining or ignoring the often far graver crimes that are carried out by or under the command of the Executive of a largely unrepresentative and whose legitimacy is questionable under the rules of the shari’a governance structures and law, and have greater impact on the lives of millions.

177 Article 98 of the Rome Statute.


179 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 177.
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Double Criminality

While most shari'a crimes appear to be in concert with international law, at least two shari'a crimes, apostasy and adultery/fornication, remain problematic with respect to prosecution on the international plane and are now discussed in turn.

In line with the Qur'an, the crime of apostasy is and will continue to remain a serious shari'a crime. For reasons already discussed, apostasy must remain outside the jurisdiction of a temporal court, including the Tribunal. Further, if some Muslims insist that apostasy remains justiciable, then due to the general problematic, political and controversial nature of this Qur'anic offence it is posited that apostasy should specifically be excluded from the Tribunal’s jurisdiction because (i) apostasy is not doubly criminal and (ii) on both policy and practical grounds, if only Muslims can opt in, ipso facto apostates are not eligible to be tried by the Tribunal.

The second serious shari'a crime that must remain outside the jurisdiction of the Tribunal is fornication, again inter alia for double criminality under international law. The exclusion of adultery however should not exclude the possibility of prosecuting rape and other sexual crimes against the person.

Exclusion from the Tribunal’s jurisdiction of the ‘crimes’ of apostasy and adultery favour the defendant. Erring on the ‘safe side’ is prescribed by the Prophet as is the presumption construing criminal provisions in favour of the defendant in common law. The double criminality requirement itself may be problematic in the sense that it appears to relegate the shari'a to a subsidiary position. This is unlikely to be acceptable to some Muslims, including Islamists. The alternative, however, is that their legal system is not recognised at all.

180 Qur'an 25:27 (and footnote); Qur'an 7:123 (Where the Pharaoh decreed death for those who left the Pharaoh's religion and to follow Moses, a which some Muslim jurists regards as preferable to the words of the Prophet).
182 And a parallel argument applies for zina to be excluded from the jurisdiction of the Tribunal.
184 Beckwith v The Queen (1976) 135 CLR 569.
Legal Representation

As with the ICC, ICTY and ICTR, defendants must be eligible for legal representation. Defendants must be able to appoint counsel of their choice and if there are other reasonable issues, such as security clearance for lawyers or an appreciable cost\textsuperscript{185} (above the cost of the court-appointed counsel) then the defendant must bear that cost. However, the source of extra funding for litigation should be kept confidential. Individuals, organisations, charities or governments contributing to the defence of an eligible defendant should not, within reason, be subject to ‘funding of terrorism’-type legislation in the donor’s home jurisdiction.

Selection and Appointment of Judges

While the Qur’an states that God is the ultimate judge,\textsuperscript{186} it provides authority for temporal judgment through human agency,\textsuperscript{187} albeit with limited jurisdiction. Islamic law has a strong tradition of, if not independent\textsuperscript{188} judges, then at least independent jurists,\textsuperscript{189} which must be encouraged and promoted in the interests of producing good law and transparent justice. Judges shall rule with justice,\textsuperscript{190} which raises the question of the meaning of justice in the shari’a context. Qur’anic justice incorporates its own notions of equity and fairness, and must accord with kindness,\textsuperscript{191} impartiality\textsuperscript{192} and cognisant of the fundamental importance of

\textsuperscript{185} For example Military Commissions Act, (MCA) §949c(b)(3)(D) : ‘Duties of trial counsel and defense counsel’ require the defence lawyer to be security cleared thus potentially creating a barrier to the choice of legal representation available to the defendant. While it is conceded that there will, from time to time, be sensitive material adduced, it is important that ‘catch all’ provisions such as this are not allowed to be abused by the prosecution.

\textsuperscript{186} Qur’an 95:8.

\textsuperscript{187} Qur’an 4:135; Qur’an 38:26.

\textsuperscript{188} Note ‘independent’ in Islam independence from being on the Government’s payroll and thus has a slightly different meaning to ‘independent’ in the Western sense. The intent however, that the judge is ‘independent’ from coercion or being subject to the whims of a ruler are similar.

\textsuperscript{189} Muslims pay a tithe/poor rate (\textit{zakat}) as a matter of obligation. A part of this \textit{zakat} paid directly into an independent and transparent institution could be used to fund the development of law and to pay jurists independent of Governments. There is precedent for conversion of religious obligations (such as payment of \textit{zakat}) into civil duties and it is unlikely that this will be problematic. The ‘clergy; in Iran during the reign of the Shah were an example of jurists’ independence from government.

\textsuperscript{190} Qur’an 4:58.

\textsuperscript{191} Qur’an 16:90.
human dignity. However, in keeping with shari’a traditions, this is not a purely objective justice but one in which a person’s subjective limitations can nonetheless be taken into account.

All judges must be lawyers with a good knowledge of the shari’a. The issue of a judge’s gender is not uncontentious, particularly in a contemporary, more misogynistic Muslim world. Historically, there is neither a theological nor legal impediment in the shari’a to women judges and jurists. Ayse, the wife of the Prophet, was a judge, military commander and prolific writer of legal opinions. While her religious opinions were at times were contentious they were critiqued or rejected not because of her gender, but because some resented her leadership of the armed rebellion against Ali (the 4th Orthodox Caliph). Again, although not uncontentious, the competence of women to lead, generally including as head of government, is also recognised. Historically, and particularly in today’s society, some Muslim States have an equal if not better representation of women in senior government positions, heads of State, MPs in parliament and in the judiciary, than in many non-Muslim

193 Ibid, 63.
194 This may seem like an obvious requirement. However, in response to the US Supreme Court decision in Hamdan and Others v Rumsfield, Secretary of Defense, et al. (2006) 126 SCt 2749 (2006). Congress passed the Military Commissions Act, (MCA), §948i(b) of which, dealing with the issue of who might serve on military commissions, refers to a requirement of ‘judicial temperament’ does not seem to demand formal legal training. While it is not crucial that defendants respect judges, the opinion of convicted terrorists appears to be that they respect those who understand the processes, imperatives, theology and law of jihad: Di Martin, ‘Tackling Indonesian terror’ in Background Briefing ABC, 23 September 2007.
196 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 111. examines the views of past jurists on issues such as women serving as judges and in leading men in prayer. See also Dr. Javad Nurbakhsh, Sufi Women (1983).
198 The merits or the wisdom of Ayse, the Prophet’s wife, leading an army, in the rebellion against the Fourth Orthodox Caliph Ali may be debated. The majority of this army consisted of men, some of who were close companions of the Prophet. Armies led by men also challenged the (other) Orthodox Caliphs. What is clear however is that the legal opinion of men in general is not discarded simply because some men chose to rebel against the Prophet or the Orthodox Caliphs. Therefore, rejecting Ayse’s legal opinions on this basis appears unjust and unreasonable.
199 See n 201, below.
majority countries. While analysis of this important phenomenon is outside the scope of this paper, it indicates some of the historical differences between the Judeo-Christian history of secularism and Islam. It appears however that present post-colonial Muslim society is more misogynistic than its ancestors.

There is no pre-requisite or explicit requirement in the Qur'\'an that judges or jurists be Muslim. This is not however the contemporary (20th and 21st century) position, which appears to hold that only 'Muslims' can be just. This is a parochial and self-serving position, which is clearly not in line with the text of the Qur\'an, which explicitly recognises that no faith has a monopoly on those with a just nature and trustworthiness.

It should be mentioned in this context that 'judicial independence' in an Islamic historical context signifies an independence free from susceptibility to pressure or deference to the Executive. The view in Australia is that while judges are on the government payroll, this fact alone is itself not problematic with respect to an independent judiciary and for the rule of law. In Australia and other democratic States governed by the

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201 Indonesia, Pakistan and Bangladesh, the three most populous Muslim States, have had women heads of Government. Iran and many other States have had women in the posts of Vice President, in Cabinet, in Parliament and in many instances have done better than Australia or the USA on this criterion. None of the four named States however, is an Arab State. It must also be noted however, that many – but not all – of these women were elected to Parliament, the leadership of their respective political party or countries, arguably because of their relationship to a famous male relative (such as a father of husband). On the other hand, some Persian Gulf Arab States still deny the vote to women, and in some cases deny the vote to both men and women, which shows that while there is a strong misogynistic streak in contemporary Islam, the underlying factor is not so much about gender but about power and control of in many instances a monopoly on power by the ruling classes. That is, the underlying problem is not however, primarily a matter of gender equity, but an absence of mechanisms of peaceful transition of power on merit, open government and the rule of law. Even in countries that enjoy periodic elections the general broader freedoms associated with free elections appear to be absent in many Muslim majority States.

202 Qur'an 3:75:

> Among the People of the Book are some who if entrusted with a hoard of gold will (readily) pay it back; others who if entrusted with a single silver coin will not repay it unless thou constantly stoodest demanding because they say "There is no call on us (to keep faith) with these ignorant (pagans)." But they tell a lie against Allah and (well) they know it.

Muslims are presumed to behave as the trustworthy among the People of the Book. This is aspirational and therefore, a useful presumption for Muslims, People of the Book and others but is clearly a rebuttable presumption.
rule of law and adhering to the principles of the separation of powers, there are of course constitutional protections and legal and political conventions with respect to the independence of the judiciary. The potential mischief here is with the Executive interfering with the judicial process for political reasons, sometimes masquerading as ‘national security’ reasons, and while arguably rare, is not unknown in the West.\textsuperscript{204} It is noted however, that judicial independence is not a ‘given’ in the many Muslim majority States and is now considered.

**Judicial Independence**

Transparent judicial institutions and processes in the contemporary Muslim world is perhaps a rare commodity.\textsuperscript{205} The public do not appear to have confidence in judges and the courts.\textsuperscript{206} This is arguably because most judges in the Muslim world, as in the West, are also on the Government’s payroll,\textsuperscript{207} although with consequences for judicial independence, which are not always apparent or understood in the West. Against this there is strong Qur’anic support for not so much an ‘independent’ judiciary but for the independence of jurists, who are, as discussed, ordered to deal justly even as against their own selves, family, tribal or parochial interests,\textsuperscript{208} and this is the judicial quality that must be normalised in the Muslim world, together with independent external checks.

**Nomination of Judges**

All States, whether or not States party to the Tribunal Statute, should be able to nominate judges. Election should be by a simple majority. The General Assembly and the Security Council should also be able to nominate judges, including past and present ICJ, ICC, ICTY, ICTR and other judges of international renown, judges with relevant shari’a


\textsuperscript{206} Ibid.


\textsuperscript{208} Qur’an 4:135.
expertise, both as Tribunal judges and as judges ad hoc. A transfer of skills through cross fertilisation will aid the development of a professional shari'a judiciary on the international plane. The decisions of the Tribunal are likely to be respected which in turn will help the further development of SHL. These requirements need to be examined more comprehensively. There emerges however a concomitant Qur'anic obligation on those who appoint judges to ensure the appointment of the best and most competent judges who are best able independently, impartially and wisely to 'do justice'.

Islamic Schools of Thought (Schools)
Islam has generally been pluralistic and accommodating not just of its own sectarian and confessional differences but also of other religious beliefs and systems. In the first three centuries of Islam there were over thirty legal schools and in spite of their differences, generally considered equally legitimate. This number had reduced to about ten Sunni schools and five Shi'i schools by the sixth century AH. The surviving schools are named after their eponyms. All 'mainstream' Schools for the purposes

209 These requirements need to be fleshed out but it would not be unreasonable to say that any ICC judge possessing the requirements of a judge on an international shari'a tribunal should be encouraged to serve on the bench as this would bring a greater degree of acceptance to its judgments in the Muslim world.

210 (madhhab (singular); madhaahib (plural) - School/Schools of Islamic thought or Schools of law.

211 Khaled Abou El-Fadl, The Great Theft: Wrestling Islam from the Extremists (2005), 32; Coulson refers to "[the first 150 years that were characterised by] an almost untrammelled freedom of juristic reasoning". Noel J Coulson, Conflicts and Tensions in Islamic Jurisprudence (1969), 4.

212 Khaled Abou El-Fadl, Speaking in God's Name: Islamic Law, Authority and Women (2001), 38.

213 For the contemporary distribution of Muslims by Country and School please refer to Table 1 Matthew Ross Lippman, Sean McConville and Mordechai Yerushalmi, Islamic Criminal Law and Procedure: An Introduction (1988), 27; There is also a small pocket of Muslims of the Ibadi sect living in Oman but this sect is not explicitly considered any further: Khaled Abou El-Fadl, The Great Theft: Wrestling Islam from the Extremists (2005), 147.

214 The four Sunni schools are named after Idris al-Shafi'i (d. 204/820, the eponym of the Shafi'i school), Ahmed ibn Hanbal (d. 241/855, the eponym of the Hanbali school), Malik ibn Anas (d. 179/795, the eponym of the Maliki school), Abu Hanifa (d. 150/767, the eponym of the Hanafi school). The three Shi'i schools: Zaid ibn Ali circa 740 AD (the eponym of the Zaidi school. Please note however generally to the process to which Cook refers as the 'Sunnisation of Zayidism': Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 247. Muhammed ibn Diyafer al-Sadiq (d. 148/765, the eponym of the Djafer or ithna ashar (or twelver) school), and the Sab'iya (or the seven' er school). When necessary reference is also made to some extinct schools such as those of al-Thawri (d. 161 / 771) and al-
of this paper are considered equally authoritative, although this view is not un-contentious. Therefore while a defendant is entitled subjectively to use opinions from his/her School for purposes of litigation, judges will weigh up this evidence in the light of the law and fact situation as a whole.

An important legal issue is that while there are not insignificant theological differences between the various schools, their laws are ‘remarkably similar both in terms of their methodologies and their positive determinations’. Further while some Sunni groups such as the Wahhabi persecute and consider Shi‘i Muslims as heretic, there appears little doubt that the eponym of their own Sunni School was as influenced by Jafer al-Sadiq, the eponym of the Shi‘i Jafari School, as were the other Sunni eponyms. Saudi Arabia, where the Wahhabi School is arguably the strongest nonetheless permits Iranian and other Shi‘i Muslims to perform the hajj, which theoretically only Muslims are permitted to perform. The significance of Saudi permission for Shi‘i Muslims to enter Mecca and

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Awza‘i (d. 157/773: Rudolph Peters, *Jihad in Classical and Modern Islam* (1996), 175. although no particular weight is given to the opinions of these extinct schools. Sometimes the lines between the schools are quite blurred with individual followers intermixing law and practices from the different schools. Sami Zubaida, *Law and Power in the Islamic World* (2003), 205. gives some examples of intermixing of Sunni and Shi‘i acts in Ottoman Turkey. Further, texts attributed to the eponym of a school may not have in fact been actually written by the founder but may have been written by a student attending the lectures of the eponym and who then reads the text back to the eponym for confirmation. For a discussion on the authorship of the Muwatta of Malik see Sami Zubaida, *Law and Power in the Islamic World* (2003), 20.

215 See above n 214, 446. The choice of the term ‘mainstream’ is justified on the basis that followers of these Schools are permitted entry into Mecca and Medina in Saudi Arabia. Saudi Arabia only allows Muslims access to these cities: Tim Niblock, *Saudi Arabia: Power, Legitimacy and Sunnival* (2006), 10.

216 The distribution of the surviving schools is approximately as follows. The largest group are the Hanafi, (Central Asia, Turkey, the Indian sub-continent, Russian and China), Shafi‘i (Egypt, East Africa, Southern Arabia, West Coast of India and Sri Lanka, Malaysia and Indonesia) Djafari (Iran Southern Lebanon, the Indian sub continent), Maliki (North Africa, West Africa, Upper Egypt, Nigeria), Hanbali (Saudi Arabia and the Arab states around the Persian Gulf) [C G Weeramantry, *Islamic Jurisprudence: An International Perspective* (1988), 49; John Duncan Martin Derrett, *An Introduction to Legal Systems* (1968), 64; and Zaydi (Yemen): Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought* (2001), 248.

217 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 154.


perform the \textit{hajj} is that notwithstanding the salaf\slash/Wahhabi position, that ipso facto the Saudi government acknowledges the \textit{Shi'i} as Muslim.

There is also some consensus that the \textit{Shi'i Djafari} approximates the \textit{Sunni Sha'fi'i} and that the \textit{Shi'i Zaydi} and the \textit{Sunni Hanafi} and are 'remarkably similar'.\footnote{Khaled Abou El-Fadl, \textit{Speaking in God's Name}: Islamic Law, Authority and Women (2001), 154.} The better view with respect to 'law' however, is that each individual School, \textit{Sunni} or \textit{Shi'i}, is not considered as a discrete separate 'system' but as a single broad system using alternative \textit{shari'a} methodologies with respect to specific legal issues, a view that has some support in the literature.\footnote{Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26 \textit{American Journal of Comparative Law} 187, 190.} The law that is to be applied at the Tribunal will continue to evolve over time as discussed in Steps 1-3 in chapter 6 and from that initially established by the Tribunal's Statute.

Notwithstanding this, judges (including Muslim judges) must decide a subjective matter according to the \textit{defendant's School} and not according their own particular School. In addition to the eligible defendants, witnesses and local religious leaders (\textit{hoja} or imam) of both defendants and witnesses should be made available (through subpoenas effected through the States' municipal courts if necessary) for cross-examination to if relevant and necessary ascertain a defendant's 'School', and inter alia to reduce 'forum shopping' or the misuse of subjective elements. An oath or 'Qur'anic' declaration analogous to a Statutory Declaration, sworn on the Qur'an, should suffice in this respect.

As noted in Appendix 2, \textit{Shi'i} Islam is 'ambiguous' on the use of \textit{idjma}\footnote{Sami Zubaida, \textit{Law and Power in the Islamic World} (2003), 14.} and 'accepts \textit{idjma}' only if the imam takes part in it',\footnote{Majid Khadduri, \textit{War and Peace in the Law of Islam} (1955), 41. This\textit{Shi'i} interpretation of \textit{idjma} (although more specific because of the coincidence of the opinion of the imam) in nonetheless still falls within the general definition of \textit{idjma}'.} as only the imam\footnote{The \textit{Shi'i} Muslims schools refer to the 12\textsuperscript{th} (hidden) imam's occultation (\textit{satr}) or disappearance (\textit{ghaiba}): H A R Gibb and J H Kramers (eds), \textit{Concise Encyclopaedia of Islam} (4th ed, 2001), 166. In this paper, this disappearance is taken here to mean that the religious opinion of a \textit{taqlid-e-marja} can possibly validly substitute for the hidden imam. It is noted that this matter is not settled.} has final legal authority. This is a particularly important
consideration in the prosecution of a Shi’i defendant but is also an issue for some traditional Sunni Schools that support taqlid. One way of satisfying this requirement would be to allow the marja’ (the Shi’i imam followed by the accused) the opportunity as of right to (i) provide amicus briefs and (ii) to identify any legal shortcomings in a tribunal judgment and to permit an appeal on a valid legal basis arising out of such advice.

**Shari’a Penalties**

The international community is unlikely to accept the death penalty as a legitimate punishment, even for a convicted mass murder. Therefore, even when the legal agents of victims seek capital punishment, as is their right under the shari’a, any such sentence that is awarded must be suspended. As many of these Islamists consider themselves better than everyone else, their lives by their own estimation must be significant, and thus the Tribunal can exact a significant ‘blood price’ for their spared execution. Such monies can therefore contribute towards settlement for their victims. Victims and their families must be made aware of these limits and given other options such as settling for compensation over the demand for the death penalty.

**Compensation**

The quantum of compensation payable for an injury wrongly suffered is arguably best left to the discretion of a Tribunal but subject to shari’a minimums. Compensation in this context is compensation in the meaning of the shari’a.

If Islamists insist on shari’a punishments in full, as they may do or if there is public interest and demand by Muslims in the trial process, then those shari’a sentences should be pronounced and execution suspended. Suspending shari’a punishments is not ultra vires and there is precedent in the time of Omar I for the suspension of shari’a punishments, even for hudud crimes, in certain circumstances.²²⁵

**Defendant’s Rights**

It is noted that an eligible defendant who was wrongfully convicted or unreasonably detained may be entitled to compensation as a substantial

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A right to compensation may also extend to eligible defendants who were falsely imprisoned, tortured or suffered physical injury in custody. The shari’a still needs development to cover psychological injury, an issue likely to be brought before a Tribunal. This process or avenue of redress is not likely to find favour with Coalition States, who may find themselves liable, but it is posited that compensation provides useful and just redress in cases where a miscarriage of justice or abuse of process is established.

Victims’ Rights

Eligible defendants, when convicted of a serious crime in question may become liable to pay compensation. The amount of compensation payable may vary according to the defendant’s School. One possible solution would be to apply the penalty on the defendant according to his/her School. The victim should however, receive the maximum compensation allowable under the shari’a as a substantial right. If there is a difference between the amount payable under the defendant’s School and the maximum amount payable to a Muslim victim, or if the defendant is unable to pay, the victim

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227 See above n 226.
228 The minimum quantum of diyat specified is the cost of 100 camels for a life or injury to the face: Malik ibn-Anas, The Beaten Path Al-Muwatta’ (1979), 337 (hadith number 1474). The exact definition of what constitutes a camel, i.e. its age, gender, pregnancy status etc of a ‘camel’ and thus its monetary value, varies with the Schools. There is also a view that at least 40 of the camels must be pregnant: Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000), 31. The average price for a camel in the UAE in 2006 was about €4,000. The Schools also allow for calculation of diyat on other standards such as payment in gold or silver: Malik ibn-Anas, The Beaten Path Al-Muwatta’ (1979), 337 (hadith number 1475). Calder states that ‘When non-deliberate killing occurred in Muslim communities, the established diya was 1,000 gold dinars or 10,000 silver dinars’: Norman Calder, Studies in Early Muslim Jurisprudence (1993), 203. and could serve as the basic average starting point for compensation. While there is no ‘upper limit’ set by the shari’a, this is an area that must be controlled carefully, to avoid unrealistic payments on the one hand and creating a financial deterrent on the other.

For a general discussion on translating currency to contemporary values see: Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000), 140. Co-lateral deaths could be eligible for the higher compensation payment based on the hadith (from the Maliki School) that “[...] while the killing is unintentional [...] the quisas is dropped and the heavier diyah is due”: Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000), 33. Collateral and/or intentional deaths of persons hors de combat caused by the rebels should – with respect to diyat – be treated in a similar manner to deaths caused by government forces and vicarious compensation may be sought.
should be eligible to draw down from a trust fund created and funded by Muslims including the governments of the OIC member States as well as Muslim charities. If the victim is a Muslim belonging to a School where the prescribed compensation payable (for some reason) is less than that of the payment mandated by the defendant’s School, then the difference could be paid back into the fund. In the longer term the Tribunal could attempt to standardise, through consensus, the amounts payable and receivable by defendants and victims. A drawback of this scheme is that P5 citizens will not be eligible for greater compensation as of right, even though the costs faced by these victims may be greater, and which may not therefore be acceptable to these States.

Al-Qaeda does not explicitly accept liability for intentional or accidental killing of non-combatants. There is no evidence that al-Qaeda’s victims have in the past been compensated or that al-Qaeda has explicitly sought forgiveness for the debt from the victims’ families. It would however be reasonable to expect al-Qaeda, a group fighting to establish Islam, to honour a fundamental legal principle of the shari’a, in this case the payment of diyat as a quisas liability, when a matter is proven.

The Tribunal’s Statute
The Tribunal Statute can reflect the substantive contents of the Statutes of equivalent tribunals, particularly in procedural matters. The operative law however is to be the shari’a in the meaning of the term as developed so far. While the shari’a is arguably a legitimate source of international law under the Statute of the ICJ, it would nonetheless be disingenuous to suggest that the framers of the Statute envisaged the use of a shari’a (or the creation of a shari’a) Tribunal. On the other hand, all law is expected to evolve to meet changing circumstances, and so must the ICJ’s Statute, which must be re-interpreted to include evolving exigencies. Reading the Statute of the ICJ as a ‘living document’ is not likely to prove unduly contentious.

229 While this point is not of direct relevance, the mandatory poor rate payable by a Muslim may be used to help relieve debts and is a steady source of funds to help compensate victims.

230 Art. 38(1)(c) Statute of The International Court of Justice,
The Tribunal Statute should take cognisance of the state of economic and social development in the majority of Muslim States and thus provide special processes and procedures to compensate for, or mitigate, the disadvantages that may arise from, for example, a defendant’s gender or lower levels of education and literacy. Some issues such as the distinctions and specific gender roles that appear to be part of Muslim societies, in particular to contemporary Islam, may not be acceptable to many non-Muslims and even many Muslims.

The Tribunal should ideally have the three official languages prevalent in the Islamic world: Arabic, French and English, with allowance made for the ad hoc use of the mother tongue of litigants and witnesses. Broad discretion should be written into the Statute to help this fledgling law evolve in the most efficient and appropriate manner, within the framework and parameters of its methodology.

Evidence
Islamic law has developed a corpus of law and procedure dealing with evidence which is not examined here in any detail. However, in discussing the verification of fact, it is convenient to note some general evidentiary matters related to Islamic law. The first issue is examining the centrality of having reliable and admissible evidence in Islamic law.

The Qur’an urges people to follow the Covenant because it is the Truth and the search for ‘Truth’, a complete multi-faceted goal, is a key objective in this life. The shari’a is a means to guiding to all Truths including in this context the truth or otherwise of an allegation against a person. If truth cannot be ascertained then the underlying presumption should stand and the matter fail. While a Muslim victim may take some comfort — that no ‘crime’ goes unpunished in the hereafter — this

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233 According to Javad Nurbakhsh, Traditions of the Prophet (1981). The Prophet said: There are as many ways to God as there are created souls.

234 Qur’an 39:71 and footnotes.

perspective is of much less comfort to victims with a secular frame and for this reason every effort must be made to deliver justice and establish the truth, particularly for those who do not share the Muslim concept of the inevitability of justice being done in a hereafter. To this end, any person possessing knowledge of a fact that can be adduced in evidence is commanded not to refuse to testify, the exception being matters going to ‘God’s rights alone’ when it is better to ‘not disclose’ that evidence, and to do so without any adverse spiritual connotation.

The Qur’an describes the Omnipotent God inter alia as Just and as loving those who are fair and just. However, even God who is Omniscient, Omnipotent, Irresistible and can do absolutely what He wills, nonetheless does not require humanity to accept God’s determination without ‘sufficient clear evidence’ and will adduce evidence for or against each individual to a standard of proof beyond all doubt. Further, and although unnecessary (given God’s infallible character) God nonetheless calls witnesses from amongst humanity to

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236 Qur’an 2:282.
237 Hashim bin Mehat, *Malaysian law & Islamic law on Sentencing* (1991), 37. notes that confession of crimes against God are discouraged.
238 The Prophet said: “Why do you uncover your sin/crime that God covered up in Mercy?”
239 If a confession is tendered as evidence (by the prosecution) in a (shari’a) criminal trial, the judge must give the defendant a chance to retract the confession. The procedure is that the judge must ask the defendant four (separate) times as to whether the defendant wishes to withdraw the confession. This process makes torture a redundant method for obtaining confessions although coercion of family members is still a possibility in obtaining confessions under duress and it is the judge’s duty to ensure that the likelihood of this is small. Uzoamaka N Okoye, ‘Women’s Rights under the Shari’a: A Flawed Application of the Doctrine of ‘Separate but Equal’” (2006) 27 *Women’s Rights Law Reporter* 103, 113. An individual’s confession when valid is evidence as against him/herself. Evidence against other parties to the crime must be obtained independently. Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), at 60 (footnotes omitted).
238 Qur’an 19:44.
239 Qur’an 49:9.
240 Qur’an 6:96.
241 Qur’an 54:55.
242 Qur’an 6:18.
243 Qur’an 39:38.
244 Qur’an 5:32; Qur’an 20:133; Qur’an 98:4.
245 Qur’an 85:9.
246 Qur’an 16:89. See also Qur’an 24:24: 
[...] your own limbs and bodies will testify for/against you.
prove every charge against an individual as against each other. Not an atom’s weight of evidence for or against the individual is omitted, and each person will experience ‘perfect’ justice.

Thus, the All-Powerful God who by definition cannot be held accountable nonetheless adduces evidence against an accused, is a Witness, and summons witnesses as required by justice, and is just in establishing individual guilt. A fortiori then it must follow that human prosecutors and judges must also do justice, using clear, admissible evidence. An evident principle is that one who asserts guilt bears the onus of proof and must adduce admissible evidence. Al-Sharakshi confirms the shari’a requirement to evaluate all available evidence on an issue. Circumstantial evidence and expert evidence are also admissible to aid the establishment of fact in certain circumstances.

However, a serious contention likely to arise with the shari’a is the issue of what constitutes admissible evidence for some serious crimes. In the criminal law, what constitutes admissible evidence for hudud crimes and strict limitation periods often makes prosecution of these shari’a crimes very difficult. The strategy in this thesis is not to try to negotiate these

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247 Qur'an 4:173.
248 Qur'an 17:16.
250 Qur'an 40:17.
251 Qur'an 43:19; Qur'an 36:12; Qur'an 75:14.
253 Qur'an 41:20-22 and footnotes.
254 al-adl (The Just) is one of God’s Qur’anic names and attributes, and the Qur’an states that for human beings that being just is next to piety (taqwa) Qur’an 5:8.
255 Qur’an 17:71; Qur’an 36:54.
limits through the application, for example, of legal necessity, but to leave the categories of crime 'as is'. Those wanting to prosecute *hudud* crimes can do so in a separate forum. The proposed Tribunal's jurisdiction is limited to *ta'zir* crimes in the main, with a very limited jurisdiction over some *quisas* crimes, and should not on this account encounter problems with the extremely strict standards of evidence.

Subjective and Objective Evidence under Islamic Law
The validity of legal elements that require either or both subjective and objective determinations were approved by the Australian High Court and is also part of international criminal law. The question of reasonable (i.e. objective) obedience to legal rules or to superior commands, and the evidence required to establish this in fact, raise important issues in law generally but are particularly important under Islamic law. At this point it is useful perhaps to distinguish the Islamic legal perspective of 'desirable actions' where Islam emphasises what is (Islamically) 'good', from, say Koskenniemi's perspectives of what is 'objectively right' in liberalism or Rawls' view that 'objective' '[principles of right] impose restrictions on what are reasonable conceptions of one’s good'. Although specific examination of this issue is outside the scope of this paper is unlikely that the two perspectives of Islam and liberalism would coincide in the majority of important cases.

However, neither is the notion of what is 'good' in Islamic law arbitrary. The independent sources shape the definition of what constitutes 'good' and do so in an objective, justiciable manner. Further,

262 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 154.
263 Rawls' reference to what is 'good' is in his example, equated with pleasure: John Rawls, *A Theory of Justice* (1972), 31. He goes on to explain: An individual who finds that he enjoys seeing others in a position of lesser liberty understands that he has no claim whatsoever to this enjoyment. The pleasure he takes in other’s deprivations is wrong in itself: it is a satisfaction which requires the violation of a principle to which he would agree in the original position.

264 In Islam this description of an individual's arbitrary actions would be characterised as 'hypocritical' whereas Islam urges a person who subjectively believes that something is 'good', nonetheless to examine this belief in the light of Qur'anic and sunnaic principles for 'Satan's deception'.
subjective belief under Islam is not identical with Rawls’ description of subjective belief.\textsuperscript{265} This is because the Qur’an pre-warns Muslims about the role of self-delusion,\textsuperscript{266} which results in a duty of ittiba’.\textsuperscript{267} The Qur’an warns Muslims that (i) a person’s actions can appear alluring to themselves so that evil actions appear subjectively good,\textsuperscript{268} and are thus pre-warmed of delusionary beliefs and (ii) reminds Muslims that Satan will (in cases) make evil to appear ‘fair seeming to humanity’,\textsuperscript{269} perspectives that fall outside the scope of a normal secular framework. Questioning, in oral examination of a witness, should be permitted along these lines and such probing should not be considered speculative. The need for subjective tests is however firmly established in both common law and in international criminal laws,\textsuperscript{270} and the shari’a use of subjective elements in its criminal law should therefore not prove problematic on this ground.

As Islamic jurisprudence spans a considerable period, an important issue that can also arise is the question of the meaning of objective justice under the shari’a. What was arguably reasonable in one century will not always transfer across time. For example, killing one’s attacker in self-defence would have seemed reasonable in 610AD Arabia as it will in 2010AD Australia. However, beating one’s slave/employee in 590AD Arabia would arguably not have been unreasonable but is unreasonable in

\begin{footnotesize}
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\item According to John Rawls, \textit{A Theory of Justice} (1972), 417: Thus the best plan for an individual is the one that he would adopt if he possessed full information. It is the objectively rational plan for him and determines his real good. As things are, of course, our knowledge of what will happen if we follow this or that plan is usually incomplete. Often we do not know what is the rational plan for us, the most we can have is reasonable belief [...]. He may later regret this plan if his beliefs later prove mistaken: ibid. 422.
\item For a contemporary discussion of this issue of the ‘psychology of being good’ and reality negation see generally Timothy D Wilson, \textit{Strangers to Ourselves: Discovering the Adaptive Unconscious} (2002). Self-delusion does not however, appear to find explicit treatment in secular legal traditions.
\item \textit{Ittiba’} is where a Muslim is obliged to consult another independent specialist (ie other than the one who produced the fatwa) in doubtful matters. Rudolph Peters, ‘Idjihad and Taqlid in 18th and 19th Century Islam’ (1980) 20 \textit{Die Welt des Islams, New Ser}, 131, at 140 [Footnotes omitted].
\item Qur’an 35:8.
\item Qur’an 15:39. For a contemporary discussion of this issue of the ‘psychology of being good’ and reality negation see generally Timothy D Wilson, \textit{Strangers to Ourselves: Discovering the Adaptive Unconscious} (2002).
\end{enumerate}
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Australia or the UK today, although arguably perhaps not so in some other countries even today. So, does this element of reasonability in Islam make the judge’s task impossible in determining the objective standard under Islamic law? The answer to this is arguably ‘no’, as the Qur’an recognises human limitations and only requires an ‘in good faith and best efforts’ examination of issues, as it clearly states that no soul is burdened beyond its capacity. One is obliged therefore only to determine as best as possible, what is ‘reasonable’ in their contemporary context according to prevailing social mores.

Therefore, a Muslim’s subjective belief must be viewed by the Tribunal in the light of these incumbent Qur’anic warnings. Generally however, objectivity in Islamic law allows for an individual’s immaturity, knowledge and other individual traits and circumstances and arguably is akin to the common law ordinary person test. For fairness to Muslims however, at the initial stages of a Tribunal, international standards must apply to a defendant unless the defendant opts for the shari’a standards, but only if ‘higher’.

Privileging Oral Evidence
The shari’a grants oral evidence a greater probity over documentary evidence thus making credibility issues and availability of witnesses for cross-examination crucial in a trial situation. Vigorous cross-examination therefore must also somehow allow for particular regional and cultural sensibilities. The validity of the subjective application of ijtihad can be

272 Qur’an 2:286.
273 See also in this context: Interpretation of the Qur’an in Chapter 3.
275 Sami Zubaida, Law and Power in the Islamic World (2003), 44.
276 The correct view of ‘subjective application’ [and (except for the statement marked with the asterisk (*) one generally supported in this thesis] is articulated by Khaled...
ascertained on cross-examination. While credibility tests can also go to determining the honesty and reliability of a witness, they have their own limitations, particularly with respect to defendants from pre-industrial societies. A degree of flexibility must therefore be built into the Statute, but its use must be monitored carefully for fairness by the judges and the public.

Scholars such as Vesey-Fitzgerald\textsuperscript{277} and Coulson\textsuperscript{278} severely criticise Islam’s methodology related to the acceptance of testimony and particularly the assumption that Muslims are presumed ‘trustworthy’. Scholars such as Al-Naim reasonably concede that there is some merit in these criticisms.\textsuperscript{279} The contention is that Muslims sometimes, but not universally, exclude the testimony of non-Muslims, presumably on the basis inter alia that non-Muslims are ‘not just’ (or lack ‘\textsc{adala}’).\textsuperscript{280} A pragmatic position adopted by some contemporary Muslims is that the testimony of non-Muslims should be accepted because of necessity.\textsuperscript{281} This is however a weak legal basis and can be rescinded if Muslims become a power, thus obviating the ‘necessity’\textsuperscript{282}.

\begin{footnotesize}
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\item Abou El-Fadl, ‘Muslim Minorities and Self-Restraint In Liberal Democracies’ (1996)
\item Loyola of Los Angeles Law Review 1525, at 1527. as follows:
Every Muslim must discharge God’s covenant by living according to his or her personal understanding of the Sharia. Yet, personal individual understandings cannot be entirely autonomous.\textsuperscript{*} There are two main restrictions. First, the personal understanding must be consciously and reflectively held. The individual may not adhere to a position without full awareness of its evidentiary basis and consequences. Second, the individually held position must engage and, at times yield to a consensus building process called \textit{ijma}.'
\item S G Vesey-FitzGerald, Nature and the Sources of the Shari'a (1955), 94.
\item N J Coulson, A History of Islamic Law (1964), 64.
\item Abdullahi Ahmed An-Na’im, Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law (1990), 23.
\item Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000), 230; The Shafi'i School however, accepts that a dhimmi can be a competent witness: Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (2005), 61. See also Quranic reference at n 202, 444.
\item See also Shaheen Sardar Ali and Javaid Rehman, 'The Concept of Jihad in Islamic International Law' (2005) 10 Journal of Conflict & Security Law 321, 33. where the authors state that expansion of dar al Islam was only halted through necessity. The point made remains that should the exigencies causing ‘necessity’ cease to exist
\end{itemize}
\end{footnotesize}
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quoting the publications of Le Centre Culturel Islamique surmises that Muslims and non-Muslims are equal.\textsuperscript{283} This characterisation may be unequivocal but it a position that is not so clear-cut in the sources. A more accurate position lies somewhere between these two extremes.

The view that non-Muslims cannot be competent witnesses on the basis that they lack 'adala (justness/trustworthiness) developed well after the time of the Prophet and the orthodox caliphs, during Muslim hegemony. The Qur'an describes [some] Scriptuaries (as it does Muslims) as believers\textsuperscript{284} and as utterly trustworthy\textsuperscript{285} and therefore, must be presumed competent and just witnesses\textsuperscript{286}. That is, the presumption of 'adala (justness/trustworthiness) must be extended to all people and rebutted by evidence or on cross-examination. The right of a non-Muslim to be a witness should therefore now be entrenched in the shari'a as a matter of Qur'anic right as opposed to on the weaker legal basis of necessity. Non-recognition of the testimony of non-Muslims must therefore be rejected on principle.

Muslims and non-Muslims are not always equal in the jurisprudence,\textsuperscript{287} not dissimilar to the privilege given to nationals under that Muslims may then legitimately eventually rescind all concessions granted on this legal basis.

\textsuperscript{283} Malekian refers to \textit{musawin}, (as) equal to or generally to \textit{uswaawin} (as) equality. Farhad Malekian, \textit{The Concept of Islamic International Criminal Law: A Comparative Study} (1994), 23; Bernard K Freamon, 'Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence' (1998) 11 \textit{Harvard Human Rights Journal} 1, 18. cites the Qur'an 49:13 which states that all people are equal except for the degree of \textit{taqwa} they possess.

\textsuperscript{284} Qur'an 3:110; Qur'an 3:113-115; Qur'an 98:6. Muslim Sufi Schools also included Christians and Jews disciples as equals who followed Muslim \textit{sufi} practices while otherwise following their own (Christian or Judaic) Covenants in their daily lives. Idris Shah, \textit{The Sufis} (1964), 161; The word 'Muslim' is not a synonym for 'believer' and many 'Muslims' are not 'believers' and are sometimes referred in the Qur'an to as hypocrites; A follower of the People of the Book may also be 'successful': (Qur'an 2:62, Qur'an 5:69), which in Islamic parlance means that they will enter heaven even though they have not accepted the Muslim Covenant.

\textsuperscript{285} Qur'an 3:75.

\textsuperscript{286} See n 202, 444.

domestic legislation and courts, but these discriminatory aspects can be left out of an international Tribunal. This also does not however, mean that Muslims and non-Muslims cannot be treated equally in a criminal court. While these are not uncontentious issues, and while the requirements of witnesses are not always equal between Muslim and non-Muslim, male and female, specifying that the testimony of individuals is prima facie presumed equal is intra vires the shari'a.

Some Strategic Implications of Establishing and IILC and a Separate Tribunal

Legal Impediments to Prosecution

On the other hand, contemporary Muslims could use the legal bases and methodology of sadd al-dhari'ah or maslahah to challenge the validity of what defendants purport to be the 'intrusion' of non-shari'a laws, and which in

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"Some pre-modern jurists did differentiate between Muslim and non-Muslim, especially in matters pertaining to criminal liability and compensation for torts".

Further, Muslims often assert that women and men are 'different but equal' or 'separate but equal' but as discussed the Qur'an does give men a 'degree' above women. While what constitutes this 'degree' must be open to discussion. Asserting absolute gender equality appears to be contrary to the Qur'an;

According to the Qur'an 2:228:

[...] And women shall have rights similar to the rights against them according to what is equitable; but men have a degree (of advantage) over them and God is Exalted in Power Wise. (Emphasis added)


Please refer to discussion of Qur'an 32:18 Abdullah Yusuf Ali, The Holy Qur'an: Translation and Commentary (1934), 1096. for the juxtapositioning of the terms 'believer' (and not Muslim) with 'fasiq' (iniquitous) see Appendix.

This is not however a generally accepted interpretation of the Qur'anic verse. 'Hard line' Muslims tend to brand all non-Muslims as disbelievers (including those of the people of the book). A Western based Islamic shari'a Tribunal will however be able to counter 'traditional' interpretations and seek to present more than their own subjective biases to defeat the ordinary meaning of a Qur'anic verse.

Qur'an 2:282

O ye who believe! when ye deal with each other in transactions involving future obligations in a fixed period of time reduce them to writing. Let a scribe write down faithfully as between the parties: let not the scribe refuse to write as God has taught him so let him write. Let him who incurs the liability dictate but let him fear his Lord God and not diminish aught of what he owes. If the party liable is mentally deficient or weak or unable himself to dictate let his guardian dictate faithfully. And get two witnesses out of your own men and if there are not two men then a man and two women [...].

There is a misconception that the shari'a does not recognise non-shari'a law. This is incorrect as marriage, etc conducted under other legal systems are accepted as matters of fact. Therefore, evidence collected say under statute in a common law
their subjective views appear to circumvent, or intend to circumvent shari'a norms. Permitting of the 'reservations' in Steps 1 and 2 in chapter 6 above will help prevent or resolve some of these issues. Another example of a challenge could be to contest the validity and admissibility of evidence that is adduced against a defendant, but say which was obtained by harsh methods of interrogation, the use of 'coercive questioning techniques' (say water-boarding), which is permitted by (domestic) 'executive instrument' and the intent of which appears to be to circumvent the international or domestic laws against torture. The Tribunal in addressing these tricky issues in live cases will simultaneously help develop contemporary jurisprudence. Jurists such as Ibn Taymiyyah have 'discounted' maslahah and sadd al-dhari'ah as good sources of law,

jurisdiction may have been validly extracted under that system (say for example evidence collected under duress, but under legal warrant) may be otherwise accepted as a matter of fact. 10 U.S.C. §948r(c) provides that, with respect to interrogations occurring prior to Dec. 30, 2005, evidence gained by 'coercive means' may be admitted, essentially at the military judge's discretion: Robert M Gates, Manual For Military Commissions (2005) <http://www.docstoc.com/docs/1066652/MEMORANDUM-THRU-GENERAL-COUNSEL-DEPARTMENT-OF> at 30 January 2009. Such evidence however is unlikely to be admissible in an Australian, UK or domestic US Court. However, sadd al-dhari'ah provides a legal basis for challenge of any such 'factual' material presented in a shari'a system.


For example if the individual or the organisation to which the defendant belongs had not made a 'reservation' with respect to a specific issue then the evidential threshold for the individual defendant must clearly be much higher. On the other hand if the individual or his/her organisation has made a 'reservation' on the issue, then the Tribunal can engage with the relevant substantive issues raised, thereby inter alia developing the law.

For example the techniques referred to by Karen J Greenberg and Joshua L Dratel (eds), The Torture Papers: The Road to Abu Ghraib (2005); Mamdouh Habib (with Julia Collingwood), My Story: the tale of a terrorist who wasn't (2008); Moazam Begg (with) Victoria Brittan, Enemy Combatant: A Muslim's Journey to Guantanamo and Back (2006).

What actually constitutes this method of questioning or how this differs from torture is not entirely clear but is the term used by the Bush Administration in its official documents: See above n 290.


For example Muslims could use sadd al-dhari'ah to defeat the USA's claims (a) that Guantánamo Bay is outside the USA's jurisdiction and therefore, had a legal basis to deny detainees/prisoners legal rights; (b) that the USA used domestic law to overwrite non-derogable legal rights deriving from other legal systems such as International law (or in the case of Muslims shari'a rights), and even though the US is not bound by SHL that it is by its own undertaking bound by the relevant international law.
perhaps because of its potential to circumvent positive law, a position endorsed in this thesis.

It would be useful to adduce evidence available in the public sources. Even on such evidence it appears that a prima facie case can be made out, for example, against Khalid Sheikh Mohamed, who has been actively engaged in armed activity (and in December 2010 is still in US custody at Guantánamo), or against Umm Khaled (alias Mrs bin Laden) an active supporter of her husband’s armed struggle and allegedly involved in shari’a crimes. Umm Khaled is a lawyer with a PhD in shari’a law and has the potential to test her prosecution in a positive sense. Subject to general ‘due process’ protections to which all defendants must be entitled, she is competent and able to challenge and test both the law and the process at a shari’a tribunal in an effective and capable manner. Al-Suri is another person whose activities in the jihad movement are self-documented, publicly and voluntarily made available and is likely to be admitted as evidence at a criminal trial. That is, in summary, even where intelligence and defence interests of the Executive take precedence with respect to all these considerations, in many cases it is still possible to try defendants openly, relying on evidence, from public statements freely made by the defendant.

298 The claims such as, that the US has secret evidence that Bin Laden admitted to the attacks must therefore, like all evidence, must be tested in an open court. On the other hand Corbin writes that Bin Laden would not even discuss the attacks even with one of his wives: Jane Corbin, Al-Qaeda: The Terror Network that Threatens the World (2002), 88. Much evidence that was obtained under torture also appears to be available in the public domain, and if true would help the prosecution to avoid trying to adduce evidence obtained under questionable circumstances.
300 Even if only the issue of the ‘co-lateral’ deaths of Muslim victims is considered, there appears to be a prima facie ‘case to answer’ for Muslim leaders involved at a high policy level in this armed conflict.
Political Impediments to Prosecution

The legal definition of terrorism remains ‘elusive’. While the terrorist attacks of 11 September 2001 (9/11) resulted in the ‘war on terror’, it must not be allowed to colour or mask all other considerations. Consequently however, al-Qaeda rose to even greater prominence as the US’s nemesis, an unwarranted position given the disparity by almost any criterion between the two entities other than perhaps sheer brutality. However, the military impact of terrorism, while spectacular, in practice causes fewer deaths and injuries than due to car accidents, deaths by disease, hunger, famine, suicide or other preventable causes. Terrorism and the war against it have however become a useful, eye-catching, pragmatic and practical cause célèbre in the West and the symbiotic relationship serves the instrumental needs of elements on both sides. The emotion and fear that al-Qaeda has been allowed to generate has given some governments carte-blanche to oppress minorities, ‘réfoule’ refugees, transgress on civil rights and pass restrictive legislation in an opportunistic manner. Terrorism has triumphed because it suits the interests of powerful minorities on both sides.

Characterising armed conflicts in a favourable way is not an uncommon means of serving particular political interests. For example,

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303 Ben Golder and George Williams, ‘What is Terrorism? Problems of a Legal Definition’ (2004) 27(2) University of New South Wales Law Journal 270, 288. ‘Terrorism’ as used in this paper is not a technical term. There are several legal definitions of the term both in Australian domestic legislation and International Conventions. There does not however, appear to be an universally accepted definition of terrorism: Tim Stephens, ‘International Criminal Law and the Response to International Terrorism’ (2004) 27 The University of New South Wales Law Journal 454, 458. Whether the common elements of international definitions of terrorism as identified by Antonio Cassese, International Criminal Law (2003), 124. will find acceptance under the shari’a is a matter that is not yet settled.

304 According to Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 167. some Muslims have been able to paint the War on Terror as a War against Islam, although according to Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 5. it is a perception widely held as such.

305 What this means from a Muslim view is the using the Qur’an in an instrumental way, for example according to Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 181. Sunni fundamentalism is the same movement that brought us Osama bin Laden. As early as the seventies, Sunni fundamentalism turned messianic, drifting towards nihilism, a force only for destruction. Sunni fundamentalism knows how to tear down but offers nothing to rebuild on. The Koran is not a true constitution or any sort of political prescription. A Sunni layman can take a verse from the Koran, interpret it as he wishes, and use it to justify an act of violence, no matter how senseless, cruel, or wasted it may be.
since the advent of the UN, the world has indeed seen several ‘defensive’

wars. States have been critical of this pragmatic characterisation, and

belligerent parties, including even the most powerful States, have not easily

been able to avoid censure with simple characterisations. Condemnation

can take different forms but of interest here are judicial findings such as

that of the ICJ in the Nicaragua Case. Scholarly or critical analysis of

States’ apparently illegal acts are more useful and therefore credible,

particularly in the longer term. However, the emergence into respectability

of those once labelled ‘terrorists’ and belonging to ‘terrorist organisations’

(such as the African National Congress among others) simultaneously

demonstrates not only the old adage that one person’s terrorist is another’s

liberationist but that ‘recognition’ of Statehood is associated with power

and not the ‘history’ of those in power. That is, recasting the ‘terrorist’ as a

statesman is not based on the intrinsic merit of the cause or the means

through which power was achieved. There is little or no disincentive to

using terror or brutality in gaining political power and terrorism continues

inter alia because it is allowed to benefit those who use it and because it is


306 See particularly Article 2(4) and Article 51 of the UN Charter which broadly

speaking prohibit all but ‘defensive wars’.

307 For a critique of what the author calls the ‘American jihad’ see generally Abdullahi

Ahmed An-Na‘im, ‘Upholding International Legality Against Islamic and

American Jihad’ in K Booth and T Dunne (eds), Worlds in Collision: Terror and the


308 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA),


309 For example, Nelson Mandela, later president of South Africa, was head of the

ANC which at one time was declared a terrorist organisation: Michael Moran, Terrorist Groups and Political Legitimacy (16 March 2006)


such as the Dalai Lama have also been accused of fermenting or supporting


according to Jimmy Carter, Palestine: Peace not Apartheid (2006), 41. Mr. Meacham

Begin — once branded a terrorist by the British — was later invited to the White

House by President Carter. There are of course many more examples of once

‘terrorists’ now occupying positions of power such as President Mugabe in

Zimbabwe to the most recent cases of Prime Minister Xanana Gusmao in East

Timor and Prime Minister Hashim Thaci, both recent former separatist guerrilla

leaders. While the West demonised bin Laden and reasonably in its view would

never compare him to the likes of Mandela, ‘Osama’ is a more popular name in

Britain than ever before: ‘Osama a popular name in the UK’, The Electric

(Singapore), 15 January 2003., showing a degree of ‘disconnect’ between the

mainstream and Muslim communities in the UK, a phenomenon arguably

replicated in most Western democracies.
in the interest of the merchants of weapons, arms, death and destruction, who profit handsomely.

‘Political Islam’ has also served the West well in the past. The political, as opposed to legal, characterisation of those fighting against Soviet occupation of Afghanistan as *mujahideen* is documented,\(^{310}\) as was the use of the term *djihad* by the Ottoman imam for political purposes (in this instance at the instigation of Germany\(^ {311}\)). As in those cases, determination of the validity of an individual *djihad* claim is at present left to those who accept the claim. This paper argues that this practice of accepting mere assertions of *djihad* is counterproductive, except for a minority.

No analysis of Islamist violence could be complete without taking into account perceived breaches of law, whether international or otherwise, by the United States or its allies, acting in collusion or on their behalf. There is no reason why the United States should be given the benefit of the doubt in favour of the legality of its actions,\(^ {312}\) nor why the onus should be placed *exclusively* on the so-called *djihadists* to justify their reactions to what they regard as the wrongs perpetrated by the United States and the Coalition.\(^ {313}\)

\(^{310}\) For those actually participating in a *djihad*, this belief was subjectively true as many young men gave up comfortable living to fight against their Afghan co-religionists. For the Arab governments and the West the acceptance of the characterisation of their struggle as *djihad* was instrumental.


\(^{312}\) Abdullahi Ahmed An-Na‘im, ‘Upholding International Legality Against Islamic and American Jihad’ in K Booth and T Dunne (eds), *Worlds in Collision: Terror and the Future of Global Order*, (2002) 164. For example the British Labour Government confirmed as correct to the British Parliament the official US position that British facilities had not been used in extraordinary rendition. This however, turned out to be untrue. The secrecy around the CIA’s extraordinary renditions was so great that British facilities had not been used in extraordinary rendition. This however, turned out to be untrue. The secrecy around the CIA’s extraordinary renditions was so great that the British Government in February 2008 had then to admit to the House of Commons that it was ‘not told’ that the CIA had used the British Bases at Diego Garcia as a transit point on at least two occasions: Francis Elliott and Frances Gibb, ‘British apology over US renditions’, *The Australian* (Melbourne), 22 February 2008.

\(^{313}\) David Jull, *Intelligence on Iraq’s Weapons of Mass Destruction*, (2003) 58. As a further example, the US air force/intelligence services bombed the al-Shifa (the Cure) factory. Jerry Seper, ‘Bill Clinton Bombs an Aspirin Factory’, *The Washington Times* (Washington DC), 5 May 1999. reported that:

The U.S. government has retreated systematically from declarations that high officials made two years ago to justify the attack on the plant, "except for the claim that a chemical component of VX nerve gas known as Emptia was found in a soil sample […]".


which, while appearing to state the obvious, must be done because of the self-censorship in the West on this score.

Further, the pre-trial detention without charge for several years in Guantánamo of enemy combatants appears to be justified on a presumption of guilt. Ratner predicted with respect to Guantánamo prisoners Hicks, al-Bahlul, al-Qosi and the British prisoners that, 'the [US Government] may have expected immediate guilty pleas with some quick sentences' which in the case of David Hicks has to some extent belatedly come to pass, giving the US military commission its sole successful prosecution to date. Given the public criticism of the legal process coupled with the silencing of Hicks, it is a disappointing outcome from a rule-of-law perspective. The hypocrisy and the anti-Muslim stance of Australian politicians of the two major parties is evident in the invocation of habeas corpus rights for businessman Mr Stern Hu, and rightly so, who was also held without charge for some months on allegations of corruption and bribing public officials, charges, to some of which Mr. Hu later confessed. Further, the breadth of the scope of anti-terror laws in the West is demonstrated in the action of the UK government under this law to seize the assets of Icelandic banks with no demonstrated link to the Icelandic government, of preparatory acts, or the use or threat of use of armed force, that could reasonably be described as 'terrorist' in the meaning of the Terrorism Conventions.

Western intervention in Muslim States has also resulted in use of force, including military intervention, sometimes through proxies. The

The US has not proven that there was VX neither has it compensated the victims (co-laterally killed) nor the owners for the loss of the factory. On the other hand, these unfortunate events are also exploited in the Arab world as indication that the West treats ‘Arab blood’ as cheap or somehow less worthy.


Danielle Cronin and James Massola, 'I Spoke to Chinese, Rudd says', The Canberra Times (Canberra), 15 July 2009, 2.


For a current example of the US attempting to unseat a democratically elected government which is not West 'friendly' by military proxy. See generally: Aron Heller, 'UK rights groups: Gaza in severe crisis', Associated Press (London), 5 March 2008. On the other hand, Hamas has permitted or has been unable to control the
Western-backed generals of the Algerian Army infiltrated and exploited the already bloody campaign of the *Groupe Islamique Armé* (GIA)\(^ {318} \) to kill even more indiscriminately but succeeded in completely alienating, but not eliminating, the GIA. Groups such as al-Qa’eda have also been infiltrated and have progressively become bloodier,\(^ {319} \) although in doing so, similar to the GIA have lost the support of the majority of Muslims, including some quite ‘fundamentalist groups’.\(^ {320} \) In turn al-Qa’eda and its sister groups have turned on Muslims with ever increasing ferocity and bloodiness for their perceived apathy or collusion with the ‘infidel’ as demonstrated in Iraq, Pakistan, Jordan and other countries and the number of civilian firing of missiles towards nearby Israeli cities. Further, it is not suggested that this is intervention through the use of proxies is solely a Western practice. For Iran’s intervention in the Lebanon and in Iraq through its proxies see generally: Robert Baer, *The Devil We Know: Dealing With the New Iranian Superpower* (2009), 18 (Iraqi Arab Shī‘īs).

318 *Le Groupe Islamique Armé* is known in Arabic as *al-]ama’ah al-Islamiah al-Musallahah* (GIA). Although the GIA has the words *al-]ama’ah al-Islamiah*, often referred to as ‘JI’ in the English speaking world, they do not have any formal (publicly announced) ties with say JI in Indonesia or South East Asia although they do share the common view of many Muslims of belonging to a single *umma*. Mirak-Weissbach quotes *Le Monde* that the Algerian Military made the claim that they had infiltrated the GIA and had repeatedly manipulated the organisation: Muriel Mirak-Weissbach, *The case of the GIA: Afghanistan out of theater* Executive Intelligence Review 41 13 October 1995.

319 Loretta Napoleoni, *Insurgent Iraq: Al-Zarqauh and the New Generation* (2005), 23; Montasser Al-Zayyat, *The Road to Al-Qa’eda* (2002), 60; While al-Qa’eda under bin Laden’s predecessor, Abdullah Azam (d.24 November 1989) leader of *Maktab al-Khidamat* (as it was then know) was a formidable fighting force there was never use of suicide bombers or intentional targeting of civilians. There are claims that the CIA through its partner the ISI (The Pakistani Intelligence Service) helped kill Azam and bring bin Laden and his present deputy (from the Egyptian Islamic Dijihad movement, and a group already with the blood of tourists on its hands) into power. While bin Laden was close to Azzam and his hard fighting but ‘military’ only type targeting, and certainly not targeting civilians or Muslims. Bin Ladin was unable to control al-Qa’eda’s move to a bloodier path, it is alleged supported by the CIA and the West: Abdul Bari Atwan, *The Secret History ofal-Qa’ida* (2006), 73; Brynjar Lia, *Architect of Global Jihad: The Life of al-Qaida Strategist Abu Mus’ab al-Suri* (2007), 174.


Islam rejects all kinds of unjust violence, breach of peace, bloodshed, murder and plunder and does not allow it in any form’. [...] He said that while terrorism is destructive, jehad is constructive. “Terrorism is the gravest crime as held by Quran and Islam. We are not prepared to tolerate terrorism in any form and we are ready to cooperate with all responsible people,” he said.

For the significance of the ‘fundamentalist’ Deoband group’s fatwa refer to Phillip Adams and Kate MacDonald, ‘Interview with Newsweek Editor Mr Fareed Zakaria’ in Late Night Live ABC Radio National, 31 July 2008.
Muslims killed is far greater than the number of Muslim ‘enemy combatants’ or Coalition soldiers.

The Struggle for Legitimacy

Indonesia’s success in reducing terrorist attacks on its soil is attributed to its approach of countering *dijihadists*’ legitimacy, some debate about which is ‘taking place spontaneously’ within groups like JI. The Indonesian method of bringing Muslims to a traditional understanding of armed *djihad* as strictly regulated religious duty appears to be effective. It is an overall conclusion of this analysis that the Indonesian approach and methodology of critical analysis of *djihad* from within the *shari’a* will also be effective when globalised appropriately.

The Tribunal’s jurisprudence may in time eventually become part of the *shari’a* through consensus. As a body of jurisprudence develops, and its limits are clarified, residual support for those using ultra vires means will progressively diminish within the broader Muslim community, thus improving prospects for international peace and security. The work of the jurists quoted exhibit the complexity, diversity and a sometimes conflicting range of views generally, in a balanced manner. The legitimate views of learned non-Muslims which enrich the *shari’a* may on the other

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321 According to Mr Habib’s lawyer Joseph Marguilies, *Guantanamo and The Abuse of Presidential Power* (2006), 205. Green J, asked Mr Boyle from the office of the Attorney-General a series of questions to ascertain the scope of the term enemy combatant. Marguilies (ibid, 206) summarises the scope as ‘It became apparent that, in the Administration’s view, the power to designate a person and enemy combatant is, as a practical matter, unlimited, bound only by the president’s unenforceable promise to exercise it wisely’.


323 According to Di Martin, ‘Tackling Indonesian terror’ in Background Briefing ABC, 23 September 2007: Brigadier-General Suryadarma is head of Indonesia’s counter-terrorism task force. […] He is a devout Muslim who says he has a religious obligation to help terrorists find true Islam. She quotes Ali Imrom, convicted Bali bomber who said ‘I think it is an effective approach’.


325 Di Martin, ‘Tackling Indonesian terror’ in Background Briefing ABC, 23 September 2007. Note also that ethnic Malays (who make up the majority of Indonesia) are also the largest single ethnic community in the Muslim world: Robert Day McAmis, *Malay Muslims: the History and Challenge of Resurgent Islam in Southeast Asia* (2002), 12.
hand further increase its complexity vis-à-vis application, although all legal traditions face and overcome this hurdle.

**Paradigm Shift**
The creation of a Tribunal and an Appellate body with general and supervisory jurisdiction as discussed so far is likely to require a paradigm shift. There are clearly many hurdles that are likely to be encountered, perhaps because the paradigm shift requires the overcoming of significant entrenched attitudes, biases and vested interests. There are also reasonable implications for peoples of other faiths, no faith or of a secular tradition. There is also the likelihood of an initially violent surge of Islamist reaction, together with a strong media campaign denouncing the Tribunal and its process as 'heretical' by the Islamists and as caving into terrorism by the 'hawks' in the West. Doing nothing seems to be the pragmatic path of choice. The deaths and destruction will however continue unabated as is now the case and people should not consider this evil as acceptable, notwithstanding the fact that it is the death and destruction of the poor and dispossessed in the main.

We live in a ‘topsy turvy’ world where President Obama who is openly conducting two wars, wins the Nobel Peace Prize. Unusual times however bring about unusual responses. An example of a contemporary paradigm shift is perhaps that of Wikileaks, there Julian Assange has released hundreds of thousands of documents that range from the banal and gossip to information that show lying and deception by secretive governments operating in the so-called free world — say for example on the true levels of civilian deaths in Iraq and Afghanistan, that the PM of Spain was told to ‘shut up’ when he criticised the USA wars, that the Chilcot Enquiry in the UK would ‘go easy’ on the USA, the ‘true’ levels of corruption in the Afghan and Iraqi governments and the spying upon the UN, thus undermining this organisation. Governments around the world are hardly ignorant of these happenings. The aim of silencing Assange is arguably to keep the Australian government (and others in the general public) in the dark or at least making denial of such knowledge reasonably plausible. Thomas Jefferson said that ‘information is the currency of
democracy' and Assange's acts, while questioned by many within
government, has also informed many members of the general public.
Governments including the Australian Government have reacted
shamefully by refusing to protect Assange, an Australian citizen, and
colluding with foreign governments to prosecute him, even while no
criminal allegations have been made. It is said that all that good men must
do, is to do nothing, for evil to flourish. The world remained silent for most
part when black and coloured men from the Middle East were held without
charge. Emboldened, these same governments are now doing this to
mainstream white men as well.
Conclusion: The Waterfall and the Snowflake

There are reasonable calls for the international legal community to reflect the plurality of human legal traditions. Muslims constitute about a fifth of the world’s population. For fair representation, comprehensive coverage of legal systems and for transparency, it would seem reasonable that the international criminal justice system inter alia should at least consider including an Islamic formulation.

Muslims who have experienced rough justice at treatment at Guantánamo Bay and elsewhere, including in secular Muslim States, reasonably appear to be sceptical of secular legal systems. A Tribunal set up to try crimes against humanity, war crimes and genocide can operate on law rooted in the Qur'an and sunna might arguably help to restore some confidence in the rule of law. An emphasis on the independence and autonomy on all aspects of the Tribunal is a key aspect of establishing trust in the institution. Trying Muslims accused of these crimes and who ‘opt in’, is a better way to achieve this end of justice under law.

Widely publicised, fair and transparent Tribunal decisions will provide an objective jurisprudence that will form a reasonable basis for a balanced and impartial legal and further a factual basis for substantive debate on Islamic law. Clearly, active and genuine engagement by Muslim defendants in a transparent legal process with an active, competent defence must add to the legitimacy of the prosecution in the eyes of the

326 See generally Bernard K Freamon, ‘Slavery, Freedom, and the Doctrine of Consensus in Islamic Jurisprudence’ (1998) 11 Harvard Human Rights Journal 1, 1. for a discussion of the strategic importance of this large minority and the argument that the shari’a can no longer be dismissed a pre-modern anachronism.


328 Professor Badr forcefully argues that Islamic Law is a major world legal system: Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26 American Journal of Comparative Law 187, 187.

329 See Disillusionment with Secular justice, 11.
international community, including among the majority of Muslims.\textsuperscript{330} Non-participation/cooperation on the part of Muslim defendants for \textit{inter alia} the absence of \textit{shari'a} law deprives the prosecution of some of its legitimacy.\textsuperscript{331}

Not all Islamist groups are likely initially to consider the Tribunal’s decisions as authoritative, although once an overwhelming majority recognise these decisions as fair, Islamists will have little choice but to engage with the jurisprudence. A Tribunal will not prevent Islamists from moving to a more secular ideological platform, but in doing so they are likely to lose the financial and moral support of a Muslim majority. While the loss of financial support is not likely to prove fatal to al-Qa’eda, the loss of Muslim moral support is likely to be quite debilitating.

A practical contemporary reason for the creation of the Tribunal is that the West is unlikely to gain a comprehensive military victory. While there are clear differences with the Soviet occupation of States in its heyday as a superpower, al-Qa’eda’s strategic aim is to bankrupt the USA through costly wars, a strategy that apparently worked with the Soviet Union but may not work against the USA which has a much bigger and stronger economy.\textsuperscript{332} The human cost on all sides however is unconscionable.

A significant barrier to be overcome is to engender sufficient confidence in the use of \textit{shari'a} as a positive force, particularly among Coalition States, so that they will consider bringing terrorism suspects (they hold) to trial at the Tribunal. This confidence will be enhanced if the processes leading up to the creation of the Tribunal are supervised by the

\textsuperscript{330} The non-recognition of the ICTY by President Milosevic and Dr Radovan Karadzic shows that the existence of an international tribunal is no guarantee of co-operation. What is submitted in this paper is that it would be more difficult for an Islamist defendant to reject a \textit{shari'a} tribunal as compared with a tribunal not using \textit{shari'a} law.

\textsuperscript{331} The co-operation of the Serbian Government with the ICTY shows that there is a level of acceptance among Serbs that the ICTY is likely to deliver justice to Serb defendants. [Nedim Sarac, 'Serbia: Will New Government Cooperate With ICTY?' (2008) TU No 559 ICTY – Tribunal Update.]

\textsuperscript{332} While nothing turns on this point, it is possible that the current global economic crisis may weaken the USA and its allies and while it is unlikely to be connected to the War on al-Qa’eda as such bin Laden and his followers have claimed that this crisis is God's answer to their prayers in financially crippling the US and her allies. While the West may not give any credence to the al-Qa’eda views, it should be
international community. The preferred options for creating a Tribunal posit a two-staged process: the first, creating an ad hoc Tribunal by Security Council Resolution that is given sufficient time to develop a jurisprudence and secondly, a Convention based Tribunal in the image of the ICC. The question of what constitutes ‘sufficient time’ should be determined in conjunction with the processes in for developing SHL as discussed in Steps 1-3 above.

For the West, justifying its own violence is often couched in the language of spreading freedom and democracy. Al-Qa’eda sets out its claim for legitimacy of its armed actions in its ‘Declaration of Djihad’. The West does so in its ‘war on terror’ through the language of international law, while Islamists employ the language of fighting oppression, corruption, foreign interference and liberation. While there is some truth in the claims and statements of both sides, exceptions are plentiful and duplicity is rife. These characterisations have been ‘accepted’ both by governments and the public, Muslim and non-Muslim, without proper scrutiny or serious challenge by the ‘other’, partially because of the ‘non-recognition’ of the other’s law and arguably also because it suits each side to do so. There is little difference in this regard in behaviour between the parties.

careful of dismissing these perspectives (out of hand) which do have some traction in the Muslim world. While nothing turns on this point, it is noted that the individuals responsible were prosecuted and convicted for this crime in the NSW Courts. It is not suggested that Islam is the only used instrumentally in Australia or elsewhere: Janet Albrechtsen, ‘PM Proves a Convert to the Politics of Faith: Dietrich Bonhoeffer wouldn’t approve the way Rudd uses his religion for political purposes’, The Australian (Sydney), 15 July 2009, 12.


The word ‘acceptance’ is used here in the default sense. It appears that neither side has examined the ‘other’s legal case within the ‘other’s legal tradition. Al-Qa’eda judges the West under a modified version of the shari’a law according to a minority version of the wahhabi school and the US (or the West) analyses al-Qa’eda’s case from within domestic common law traditions or sometimes under International law. This critical examination is an important step.
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It is likely in the initial stages of the Tribunal’s operation that there will be some scepticism of a ‘Western’-based shari’a Tribunal and is a reticence likely to be exploited by the early defendants and Islamists alike. As with other international Tribunals and Courts however, a properly constituted and functioning shari’a Tribunal will silence the sceptics within a relatively short time-span. It may even in time become a forum for trying grave crimes not prosecuted under domestic law for political reasons. There will clearly be a financial cost to creating the Tribunal and the necessary infrastructure. This ‘cost’ however should be viewed as an investment in peace. The cost of the present ineffective ‘solutions’ has run into thousands of millions of pounds/dollars/euros and has been incalculable in terms of the loss of life and pain and suffering. The cost of not acting is not just financial bankruptcy but also of moral bankruptcy.

Further, it likely that a legal or political solution is more likely to produce an enduring peace, and will bring justice to those who have suffered damage. It is proposed that reconciliation will be achieved through the principled and proper use of Islamic law. It is conceded that law alone is not likely to solve all the problems of (Islamist and other) violence but nonetheless that justice according to the law will and must remain a key component of any long-term solution to the present conflicts. Muslims like all people desire positive change, and it is proposed that positive evolutionary change through the Tribunal is a better outcome for international peace and security than revolutionary change through the gun, which in any event is not delivering the desired outcomes for the majority on both sides.

Generally however, although all sides to the dispute speak to their own value systems, it is argued here that much of the actual content of these values, when stripped of the emotive language of its delivery, is not significantly different.336 Leaders on both sides in reality seek power,

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336 According to Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 74. ‘Iran’s “ideological” war was, like so many others, won on the field of battle, not from the pulpit.’; Further, and although nothing turns on this point, Islam refers to base tribalism or jingoism as ‘asabiyya which in a more generalised form is arguably a key ‘uniting’ factor of our contemporary nation States. Islam strongly discourages appeal to this herd instinct and is a reason why groups like al-Qa’eda have very limited appeal among Muslims, and unless it
hegemony and to project a ‘strong’ leadership that can then impose its preferred mode of governance. The protagonists portray their own motives as *djihad*/spreading freedom and their enemies’ motives as materialistic/spreading terror. For Muslims however, it is crucial that *djihad* claims, like all other ‘religious’ claims, must be objectively tested, as they are obliged under the *shari’a*. Closer legal scrutiny of claims will largely de-legitimise much of rhetoric of the violent Islamist cause and thus further degrade their capacity to gain the support and protection of Muslims, vital for their survival and viability. Significantly however, over time neither side has convinced the majority even among its own constituency of the validity of its actions, although each side has succeeded in demonising the other.

The fundamental *shari’a* framework that emerges from this work is influenced by the common-law tradition and thus misses the finer points and nuances of the Civil law tradition. In practice these gaps will be ‘read-in’ by judges trained in this legal tradition.

Muslims, as discussed, are required temporally to settle their grievances as between people. On the international plane at least, a *shari’a*-based international Tribunal can provide a temporal forum, at which at least the most egregious of crimes/wrongs against the person may be addressed and can thus at least partially serve this vital function.*337*

Criminalisation of acts will necessitate the US and Coalition States recognising ‘terrorism’ as a *shari’a* crime (with *shari’a* elements) in both peacetime and in war*338*. The US has the Islamic legal capacity within its

changes its approach radically in line with broader *shari’a* principles, it is highly unlikely ever to become a uniting force Even if it wins the ‘war’, whatever that may entail, like the US and other hegemonists who sugar coat their own base grab for power, it is as the old adage goes, very unlikely to ‘win the peace’ in a Muslim society. On the other hand, (ibid, 180) notes the failure of Arab nationalism, the Sunni Islamic Revival and secular nationalism to ‘deliver’ peace or progress to Arab states.


borders to contribute to both the judicial and prosecutorial areas. The West will be able to recognise the competence of such a Tribunal for nonnationals who ‘opt-in’ without necessarily endorsing the validity of the *shari’a* itself. Eligible Muslim nationals of Western States who elect freely to become subject to the Tribunal’s jurisdiction should also pose no legal problem for Western States. However, the will to do this will require a paradigm shift in the West’s thinking, politics and approach, first to move from the battle field to the arena of law and secondly to embrace the potential effectiveness of *shari’a*, albeit in a very limited context, but to do so with knowledge and understanding of the system.

The Tribunal will replicate some existing judicial functions, although arguably justifiable from a perspective more broadly of representing the world’s legal cultures. Further, the creation of parallel laws may appear to be at odds with harmonisation. However, the policy objective of being inclusive is in line with a broader policy objective of a more representative international legal regime. A Tribunal is arguably a better option as it permits the broadest input into legal development while providing greater transparency — qualities in the main arguably lacking in the domestic legal systems of Muslim-majority States. Trying individuals allegedly involved in the most egregious crimes in a free and fair environment will establish the truth or guilt, create its own positive ‘blow back’ and help to promote the rule of law within the Muslim community.

The existence of practical Islamic judicial international institutions that adhere to and promote the notion of the ‘rule of law’, on the other hand is likely to dissipate the dissonance alluded to above. It will engender confidence and promote positive change in the Muslim world by providing both the promise and avenues for substantive justice through an institution that will in time be perceived as transparent, ‘indigenous’ and equitable, thereby contributing to international peace and security through the promotion of the rule of law. In summary, it is about using the law to hold

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a defendant to account but to do so according to legal standards which are significant and meaningful to the defendant and those likely to support or understand the defendant’s perspective.

Australia’s then Foreign Minister Mr Steven Smith aptly but unfortunately in the most clichéd of clichés called for ‘new ideas’^339 to solve these seemingly intractable problems of ideologically driven violence that has appropriated the legitimate dispossession of others. There are few calls as old as the call for ‘new ideas’ and nothing is as tired as dressing up old ideas as new. It is not posited that the use of a judicial committee to address problems of justice or the issues of dispossession are novel. On the other hand, the West appears however to be bound to the status quo, unable to see itself clear of this ever-deepening cycle of violence. A level of helplessness and desperation is highlighted in a ‘solution’ written in this case by the otherwise incisive historian, Burleigh, who suggests that al-Qa’eda should be pushed towards ‘organised crime’ so that they may then be eventually be ‘bought off’^340. However, it is a ‘solution’ that is as unlikely to work as have the huge bounties on the heads of bin Laden and Mullah Omar. Such a desperate strategy could promote further crime while failing to provide a satisfactory outcome. Bounty payments offered have brought in few of the serious leaders and instead, as was the case in Guantánamo, many innocent Afghans and other foreigners were ‘sold’ to the Americans by warlords capitalising on what must be one of the more hair-brained solutions, which allowed some warlords to rid themselves of opponents and/or to profit from the sale of innocents. The West’s ‘cure’ in most cases appears to have changed little from Molière’s comedy and is worse than the disease itself.^341

Facing few challenges to their legitimacy from either the West or from within the umma, the so-called Islamists, radicals or fundamentalists emphasise the armed aspects of djiang as a means of eradicating ‘oppression’ (at least from within dar al-Islam) but in doing so appear to

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^340 Michael Burleigh, Blood and Rage: A Cultural History of Terrorism (2008). It is noted that the Professor Burleigh is not partial to legal solutions as outlined in the following article: Michael Burleigh, ‘Lawyers sap our will to combat terrorism’, The Times Online (London), 27 July 2007.
^341 Jean-Baptiste Poquelin Molière, Le Malade Imaginaire (1673).
physically eliminate those whimsically categorised as disbelievers, together with the unacceptably large numbers of collateral casualties. The Qur'an refers to 'limits' in armed *djihad* that must not be transgressed. These limits are not explicitly defined in the Qur'an and therefore must be judicially identified for emerging circumstances. It is argued in this paper that present IHL 'limits' on the means employable in war, even if generously permissive, are a reasonable starting point, except where there are explicit *shari'a* opinions to the contrary, such as the prohibition on the first use of fire, or the use of nuclear weapons, (both permitted under IHL.) Existing IHL will help frame relevant *shari'a* elements of crimes[^342] and develop rules of evidence and procedure. In doing so however, one ends up with a universalism — while still imperfect in that it does not include, Judaic, Confucian, Hindu law, Aboriginal Australian, Canadian or Native American laws, is at least 'just a little more representative' of the world's great legal traditions than is the case at present.

The sheer brutality of the Islamists is at odds with the introspection prescribed by Islam. It is the genius of al-Qa'eda and the short-sightedness of the audience that has enabled it to focus the eyes of the world on what is ugly, the vulnerability of the 'other', while drawing a veil on its own vicious misdeeds.

From the Islamic perspective the *sunnat Allah* (or 'Nature' for convenience) is God's way of doing things. For those do not subscribe to the existence of a Higher Being or higher purpose for human existence, they could perhaps for a time accept that those who do believe should reasonably be expected to live by their best criteria. If this much is accepted or at least conceded, then the *sunnat Allah* prescribes pluralism. In Nature there is a plethora of species while humanity prescribes neat rows of a monoculture. When *sunnat Allah* is that minerals mix and combines to produce a rich beauty in its minerals, humanity finds beauty and value in the purest gold.

[^342]: The appears to be an international consensus on the value of outlining a list of non binding elements of crime: Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2004), 8.
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*Sunnat Allah* is also meant to take away the veils that block our perception. It asks humanity to see, through the eyes of the learned, the eyes of the kind, the eyes of the artist and to hear the music of the desert and forest. The Prophet said ‘all belong to God’s family; from the mosquito to the elephant’,\(^{343}\) and in this context Shah Niamatullah writes ‘do not hurt the mosquito’s weary heart, for there is a doorway in all hearts to His Majesty’\(^{344}\) How much more should we care for the human created in God’s image or who represents the ‘peak’ of the evolutionary tree.

From a distance of a 100 yards, the Niagara Falls is a teaming chaos with its eddies, turbulent flows, rocks and waters of every hue. From a mile away its majesty and serene beauty are evident. On the other hand, a million melting snowflakes produces a messy slush, yet at close view they reveal a breathtaking beauty. So the *shari’a*, the *sunnat Allah*, simultaneously appears beautiful, chaotic and ugly to different people. As is the case with nature one must learn to see in the right perspective this is perhaps another meaning of *sunnat Allah*.

It is then the law of God, according to the Qur’an, that plurality must flourish, that diversity must co-exist and enrich, that the mind that is amazed by the universe is in itself amazing and must be free to serve its true purpose: that of expressing its free-will. Thus in Islam it is the many flowers that must flourish, and should never be made to submit to the penury of monoculture. Islamist monoculture has pauperised the *shari’a*, which has long ceased to be the Islam depicted by the great poet Rumi, the sophisticated law as explained by the great jurist Ghazali, its broad compassion as demonstrated by Abu Hanifa, its ability to draw out the best in human faithfulness as portrayed in the life of Jafer al-Sadiq or its brutality and its ugliness as demonstrated by contemporary ‘terrorists’ or perhaps even worse, many Muslim politicians of today. The question for both Muslims and non-Muslims is: Which version shall we let them impose upon us?

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\(^{344}\) Ibid, 61.
CHAPTER 8:

CONCLUSION: CARRYING THE SPRING ICE OR THE DELICATE QUEST FOR PEACE

No one wanted the Ugly Duckling, they mistreated him because he was ugly in their eyes. As the 'duckling' matured, a child saw him, a most beautiful swan, a most graceful sight to behold: Hans Christian Andersen (1805 - 1875).

Introduction

The First Nations Peoples of the Land of the Great Turtle (now known as Mexico, The USA and Canada) have a metaphor for peace. Peace is as precious as the clean water and ice of the high mountain spring. The allusion for peace is as one holding on to the delicate spring ice. Spring ice is fragile, thin and easily broken, as is peace. The largest piece of spring ice that can be held aloft is a simile for the breadth of the reign of peace. The biggest piece of spring ice that can be carried is not determined by the brute force of the individually strong warrior but by the fingers of the many, gently supporting the ice nearest to them, while acting in concert with the larger group. So must we hold on to a delicate and fragile peace, gently, purposefully and in concert with our fellow human beings. The moral of the story is to take care of the 'peace' closest to you but to do so with an eye to the broader peace that reigns over the entire peoples.

The use of extreme force by both non-State actors and States is a significant phenomenon that has led us to the 'war on terror'. In the course of this war against terror the propaganda employed has included the reactionary use of religious fervour and simplistic 'them or us' dichotomies, the use of which appeals to and has benefitted not only the politically savvy 'neo-cons' but also Islamists who unfortunately use such language to confound a not-insignificant, impoverished segment of the Muslim population with little access to education or other modern services.

In principle, such a dynamic is not novel. Over the ages, many groups from diverse backgrounds of race and religion have 'united' on
such jingoistic bases and inter alia have used force as a means of addressing injustice or for gaining access to resources or power. Some ruling elites in the Muslim world and Islamists, have exploited the vulnerabilities of their own people, juxtaposed paradoxically on both the hubris and fears of 'Islam' of the governments and citizenry of the powerful States, and have done so for their own instrumental purposes, which in many cases has resulted in corrupt Muslim leaders running oppressive fiefdoms.

A central underlying contentious issue for our times is the call by Islamists and others for 'change', particularly against these brutally oppressive and corrupt regimes. Sometimes they attempt change through force of arms. The resulting backlash has 'let loose' what appears to be the unrestrained, and in many cases unprincipled use of force, by States on the one hand and by both 'educated' and 'led-by-the-nose' Islamists on the other, who in some cases but not always, have targeted the softest of civilian targets, the most vulnerable and defenceless. This situation must be addressed and fairly be resolved to help improve the peace locally, and thus cumulatively, the prospects for international peace and security. Since the unrestrained and wanton use of extreme force, including 'terrorism' by Islamists collectively, is a global problem, that, addressing the core problem also needs an approach leading to a global solution, that is coherent, and importantly, is likely to be accepted as fair and just by the average Muslim from where Islamists draw their support and funding. Since establishing justice is a central tenet of the shari'a, potentially, an effective and obvious means of addressing injustice to Muslims, is through Muslim law, the shari'a.¹

Ad hoc approaches to fighting Islamist terrorism both by Muslim States and the West have generally involved the use of disproportionate and unrestrained force. Such overwhelming force has sometimes temporarily quelled a problem,² creating a sometimes disastrously false

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¹ It is conceded that litigation and ensuing laws have precipitated change although perhaps slowly and awkwardly: Brown v Board of Education of Topeka, 347 U.S. 483 (1954); DH and Others v the Czech Republic [2007] ECHR 57325/00 (Grand Chamber) (13 November 2007).

sense of security, only to re-emerge in a different geographical area with renewed vigour and force. In practice, it appears that the strategic contemporary means used to combat or neutralise terrorism are not only not working, but that at present the prospects for an enduring peace seem to be remote, resulting in an ongoing disruption to international peace and security.

The protagonists seem to be at cross purposes and the prospect for negotiations between the parties does not seem feasible, not least for intransigence on both sides. It is not in the interests of the extremists of every ilk, as peace adversely affects their parochial interests. There are deeply entrenched vested interests: the trade in arms, drugs and white slaves. Some of these activities are represented by a legitimate ‘tip of the iceberg’, which is protected by politicians, the captains of the military-industrial complex, the lobbyists, ‘big’ business, money and gambling. The Pied Piper’s paymasters, perhaps?

In the view of some ‘Islam is an abomination’, an unsubstantiated view which has not been challenged in any significantly robust manner. In the light of such negative publicity in recent times, and although not entirely unexpected of the uninformed person, such views are clearly not conducive to nor do they advance the cause of co-existence and peace. A deeper level of reliable information and more stringent analysis is therefore crucial in advancing productive debate. A comprehensive solution to the phenomenon of the unlawful use of force by non-State Islamists will require a paradigm shift to include a mixture of military, educational and institution-building measures. The principled use of law to establish

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3 As at October 2008, there over 4,000 US deaths in Iraq; Jay Deshmukh, 'US military death toll in Iraq hits 4,000', Age (Melbourne), 24 March. As at December 2010, the USA has not yet withdrawn all its combat troops from Iraq.


5 According to Declan Walsh, 'Mysterious 'chip' is CIA's latest weapon against al-Qaida targets hiding in Pakistan's tribal belt', Guardian (Peshawar), 31 May 2009 23:

"The problem with the Americans is that the only instrument up their sleeve is the hammer, and they see everything as a nail" said a senior official. [...] Barack Obama has approved the drone campaign, which
institutions that promote an accountability-creating and norm-setting culture is an integral part of countering the Islamists’ strategy.

The majority of Muslims do empathise with some of the central issues of ‘justice’, as identified by Islamists, as genuine and with merit in many instances. However, some of the more extreme means and violent tactics used to achieve these even just and legitimate ends do not appear to have their support. On the one hand, Muslims appear reluctant to blame or condemn the Islamists alone for the resulting carnage. Muslim populations that ‘support’ al-Qa’eda do so for many reasons including because they see them as the underdog, as people fighting oppression even though their means are brutal. On the other hand, turning them over to the ‘authorities’ will be to subject them to horrific treatment by regimes that are just as brutal and given to lawlessness, torture and cruelty. Sympathy for Islamists in most cases is not indicative of positive support for the behaviour on their part.

Denying terrorism refuge can be achieved in several ways, including by force, which appears to be the West’s preferred option. The policy of force has not worked, but more importantly does not appear to be working for either side. One the one hand al-Qa’eda has actually spread to nations previously free from its influence and on the other hand the number of Western troops in Muslim States has grown by several orders of magnitude. President Obama admitted mistakes made in its war against terror which were well received as were his commitment to the rule of law. Muslims are yet to see the fruits of this speech. The USA’s (perhaps qualified) recent support for the uprisings in Tunis and Cairo is promising, and gives hope that it will not continue to support dictators at the expense of bringing the freedoms we enjoy to those peoples as well.

So we return to the question of how one addresses the legitimate concerns of ‘liberation’ groups while curtailing their excesses. That is, how can the international community marshal them towards achieving their

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legitimate ends and addressing their just grievances by lawful means in a manner not unjustly detrimental to others?

The underlying argument in this thesis is that law (and what the Joint Standing Committee on Foreign Affairs and Trade in Australia called ‘the civilising power of law’) is not confined to any particular form of expression of the law. Law is central to Islam. Further, an indigenous law is more likely to have an enduring impact because it is widely recognised by a people. Application of law — in this case an indigenous law — is recommended through the institution of a Tribunal of the type described. The Prosecution in the Lubanga Case reiterated the Court’s function as a deterrent, and is used here as general support for the proposition that such institutions can act as a bulwark against terrorism.

The thesis argues that while Islamic law is circumscribed by the Qur'an and the sunna, these sources are not meant to be a legal straitjacket but to act as a ‘constitutional’ framework, broadly encapsulating the ideals, spirit and aims of the shari’a, the central purpose of which is to ensure the ‘right’ use of free-will. In the Islamic view, creation of the universe begins with a Covenant between God and each individual human and ends with judgment. Thus, a believing Muslim’s Covenant and life are guided by that governing law. Serious crimes against the person when committed by a Muslim have two broad consequences:

(i) they lower the perpetrator’s standing in God’s eyes and

(ii) diminish the victim’s the opportunity freely to consider, to accept or reject the Covenant. For the ‘gap’ created by this diminished opportunity the perpetrator bears a religious responsibility in the hereafter and from a temporal perspective more importantly, is criminally liable on Earth for wrongs against the person.

7 Joint Standing Committee on Foreign Affairs and Trade, Commonwealth of Australia, Bosnia Australia’s Response (1996), 2.
8 Situation in the Democratic Republic of Congo (Prosecutor v Thomas Lubanga Dyilo) (2009) ICC-01/04-01/06-T-107-ENG ET WT 65 Submissions by Mr. Walleyn (Open Session).
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For optimal effect, the delivery of this law must also be independent. The Australian Parliament’s bi-partisan view on the ICTY-ICTR stated that:

The decision of the international community to establish a war crimes tribunal on the former Yugoslavia and Rwanda is an important one. Unlike the Nuremburg Court it is not a tribunal of the victors; it is broadly based and its judges are highly respected jurists, impartial and detached from the conflict and the combatants. If it is successful, it will strengthen international humanitarian law in ways that will greatly improve the prospects for peace in the world.

This view must equally be applied to the use of the shari’a. While people may argue over what ‘success’ means in this context, the establishment of Tribunals and the prosecutions that have resulted, have spurred the development of law. The question for the world is: should Muslims, who constitute a fifth of the world’s population, be prevented from employing their own law?

Under the Covenant, a Muslim is bound to judge, be judged and avoid (by choice) law other than Islamic law. Islamists consider Islam and the shari’a alone binding. Islamists who invoke the norms and morés of Islam can by reciprocity therefore be subject to the ‘rule of law’ as a shari’a norm, which can be used to force those who have breached the law into a shari’a-based judicial process. The requirement for the use of the shari’a should not be fatal to a meeting of minds between Muslims and others. The West does not have to ‘pander to terrorists’ but merely agree in principle to settle disputes through the law, a very reasonable demand.

It is recognised that limiting the sources of international law to the civil law and common law systems is too restrictive. The ICJ Statute in theory contemplates a broader view of what constitutes ‘law’ and it is in this context that scholars such as Watson rightly and persuasively call for the indigenising of international law, a view that eloquently summarises the aspirations of the many non-European civilisations. Although framers of the ICJ Statute were not reasonably likely to have shared this view, as a

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‘living document’, the Statute can and should reasonably be interpreted as recognising the legitimacy in principle of drawing upon the laws of every major civilisation. It is not unreasonable, therefore, that the words of the ICJ Statute, as interpreted today, can recognise Islamic law as a legitimate source of international law.

Islam’s origins share the same moral foundations as the other Abrahamic traditions and its inclusion is therefore not, other than psychologically, a drastic leap with respect to what constitutes ‘law’ in the meaning of the ICJ’s Statute. Islam shares a broad degree of commonality with Judeo-Christianity in the definition of what constitutes an egregious crime and thus with the international legal tradition, although the shift away from a Judeo-Christian approach in recent years is acknowledged.

There are nonetheless significant differences between international law and the shari’a. Notwithstanding this, it is possible to establish a body of shari’a law that is true to the spirit and letter of Islamic law, fairly, while addressing these contentious contemporary differences. Nevertheless, some important and significant differences will remain and include aspects of the rules of evidence, standards of proof and the principle and the quanta of compensation payable to victims but it was argued that these differences are manageable.

The methodology used in this analysis examined the sources of Islamic law (both independent and dependent), and how the law applies in the contemporary context and does this in the form of a positivist, comparative legal analysis. The shari’a criminal, humanitarian and siyar laws have been stagnant and an important issue is how they can legitimately be developed in a principled manner for contemporary use in prosecution. The caveat, therefore, is that jurists must first inter alia identify, with rigour and fairness, the lawful means of warfare, lawful military targets during ‘war’ and further, identify situations of ‘armed conflict’ that can legitimately, be classified as armed jihad.

As importantly however, there are peaceful means for resolving disputes that must be exhausted prior to the lawful resort to force, which must be identified and, where necessary, modified to cater for
contemporary exigencies. At present many Islamists appear to resort to force with impunity. The recommended steps to help counter this impunity include identifying practical, enforceable limits, agreed to through Muslim consensus and articulated in shari'a instruments. It is posited in this analysis that the consensus of the Muslims will not vary significantly from that of the broader international community. The analysis lead to the recommendation for the creation of an Islamic International Law Commission (IILC) and a shari'a Tribunal (Tribunal) as foundational institutions in achieving these broader aims.

Precedent, although non-binding, will be presumed to apply. A shortcoming of this reasonable methodology however is, that shari'a law has become moribund. Therefore, rather than re-examining emerging problems de novo or providing for 'unprecedented doctrinal development' when required, the 'closing of the door to idjihad' had resulted in a progressive, compounded narrowing of the scope of the shari'a along an ever diminishing spiral, which has in cases made the shari'a unnecessarily restrictive. This unwarranted progressive narrowing, with little regard to the sources or the object and purposes of the law (maqasid), has led to the practical abandonment of large parts of law. Many jurists have recognised this trend as unwarranted, unnecessary and wrong in law and have attempted to address and rectify the situation. This is the approach to legal development, when undertaken both within the letter and the spirit of the law, that is endorsed. The other extreme would be apologetically to accept the law of the contemporary hegemon in toto, using the sources only to justify such acquiescence, a notion strongly to be resisted and avoided.

In this light, the work of an IILC should not be viewed as restricted to fourteen centuries of jurisprudence. This broad jurisprudence is sometimes incorrectly conflated with 'the shari'a'. While there is a presumption of the continuity of the law, much SHL jurisprudence is quite out of date. The objective of law generally, but in this context SHL, is to

13 Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 International Journal of Middle Eastern Studies; Sayed Hassan Amin, Islamic Law in the Contemporary World (1985), 20; Appendix 2.
regulate the use of force and modern weapons and promote the broader aim of establishing a just regime.

There is a raft of suitable and shari'a-compatible international law available for maintaining peace and security, inter alia specifically and formally to be identified and developed by an IILC. In the shorter term, in addressing the phenomenon of the unlawful use of weapons, it is proposed that Islamic law scholars draft a Weapons Charter (Charter) which would create a framework for the legitimate use of weapons and war technologies under the shari'a. The Charter would contain key definitions, discuss limits and prescribe the permitted means of combat at a reasonable level of specificity. A Charter would be open to all Muslims for signature, comment or critique and jurists will address any ‘reservations’. This Charter could form a basis for the promulgation of a series of binding shari'a instruments. Jurists must continue the on-going process of examining individual and classes of contemporary weapons in the light of the shari'a so that a clearer picture emerges on the permissibility of using the evolving means of warfare, weapons and defence technologies. This study must be done true to shari'a principles, irrespective of whether the end result appears disadvantageous to Muslims or the West. The broad consensus required under the shari'a would not, it is argued, countenance instrumental justifications.

The question arises, however, as to why we should be seeking to create more law when the existing laws are not, or cannot be enforced. This is not however the right question. People will not fully respond to norms that they believe are outside their traditions or will do so only reluctantly. They are more likely to adhere to and to be motivated by indigenous norms. For believers, their religion is a great motivating force and the argument made here is that this powerful force can be harnessed, in this instance through the Islamic expression of the rule of law on the international plane to help regulate the unlawful use of force in its name. Extending the influence and impact of the law through education will
further subvert the easy, instrumental and unjust invocation of ‘armed dżihad’ as a means of acceding to political power.\textsuperscript{14}

The suggested Tribunal is an international tribunal based on Islamic law and methodology. Defendants who identify as Muslims and who are to be tried for serious international crimes, doubly criminal under international law and the shari'ā, can then ‘opt in’ to be tried at the Tribunal. The creation initially of a Trial Chamber and an Appeals Chamber in the model of the ICTY/ICTR under a Security Council authorisation is the preferred option. The scope of important shari’ā concepts such as legal necessity, proportionality and reciprocity (initially examined in greater detail, by the IILC) should be given judicial expression by the Tribunal. As experience is gained, a broader statute parallel to the Rome Statute can be formulated for signature and ratification which can then form the legal basis for a standing Tribunal. However, the Tribunal is a longer-term programme which will require significant ‘movement’ or overcoming the entrenched inertia of States.

The absence of support of some of the P5 for the ICC did not prove fatal for that institution. However, the major hurdles facing an international shari’ā tribunal must not be underestimated as the ICC enjoyed the backing of powerful proponents. There are also likely to be many political impediments to the creation of a Tribunal from among secular States including the powerful Western States and China. Paradoxically however, it is likely that the greatest obstacles to the Tribunal are likely to be created by the leaders of often unrepresentative Muslim States who may fear being subject, one day, to its jurisdiction.

Even if the practical benefits rendered to the rich world by their client regimes were not an issue, it is still not likely to be an easy task to convince a sceptical secular world to support a Tribunal. The P5 States are likely to be reluctant to countenance any compromise unless it is in their interests to do this. In principle however, the mere fact that something is

\textsuperscript{14}While the following proposition is considered axiomatic, Professor Anthony Burke of the Australian Defence Force Academy notes that the phenomenon (which is generally well understood by Muslims) is that as the practice and knowledge of Islam increases the incidence of terrorism among such Muslims decreases: Stephen Crittenden,
difficult alone should not be a deterrent, particularly if the end result is just, fair and right and in this case has the scope for reducing wanton violence and carnage. Terrorism and the fight against it, is a 'war' with few winners and it is in the interests of the majority of the West's peoples, the desired target of terrorists, to support a Tribunal.

The status quo serves the interests of powerful nations that have cosy relations with the corrupt, brutal and unrepresentative leaders, the 'pious' princes, in less developed countries (which encompasses the majority of the Muslim world). This relationship has allowed the 'outsourcing' of torture, extrajudicial killings or indefinite detention without access to due process. Further, many Muslims have not and do not receive a fair trial in either domestic or international tribunals as presently constituted.

Muslims often claim that the shari'a is superior to other legal systems. If Muslims are held to their word, then the international community can rightly subject Muslims to this 'better law' in practice. Non-Muslims, or people who refuse to publicly declare that they are Muslim, should however never be subject to the jurisdiction of this Tribunal. A transparent and accountable Tribunal with independent judges using Islamic law that is true in text and spirit will generate a greater degree of trust among Muslims, promote the concept of the rule of law and hence improve global peace and security. As Muslims participate actively in the international system, Tribunal prosecutions, Tribunal decisions and case law are likely to become increasingly respected. A Tribunal will also help the crystallisation of emerging shari'a norms and, as with other courts, act as a 'norm setting' institution.

The Indonesian experience can and should be adapted and be internationalised as a means of successfully combating the mindless use of violence and for opposing the simplistic, instrumental exploitation of the complex notion of djihad. Indonesian Courts' use of open and transparent means of shari'a-informed justice, including the obtaining of evidence without torture or coercion, has led to some success in reducing the levels

'Critical Terrorism Studies pt 2' in Religion Report ABC Radio National, 1 October
of violence in that large, predominantly Muslim country. In a farsighted manner, Australia has assisted Indonesia in promoting this programme by significantly funding pesantren (religious boarding schools\(^\text{15}\)) through its aid programmes.

The creation of a Tribunal is lawful under shari'a law. It is feasible, practical and highly desirable as a matter of policy and can help inter alia to restore confidence in the universality of the international regime, presently being disingenuously criticised by those such as bin Laden as imposing Western ways on a reluctant, hapless and powerless Muslim world. Such statements, however, help to create an element of doubt in a largely information-starved Muslim world, who in turn reasonably give bin Laden and his colleagues the benefit of the doubt, as the weaker Muslim party who otherwise is likely to be killed, tortured or held without due process rights, as has been the fate of many other Muslims in the recent past. Tribunal decisions will provide precedents that make it increasingly more difficult for Islamists to characterise their brutal and murderous use of force as armed dhijad. All such claims will face much greater shari’a scrutiny.

The use of a Tribunal to prosecute serious shari’a crimes, with its deeper level of analysis and understanding of the issues, and through the correct, open and explicit use of the shari’a, will likely have a significant and positive impact over the entire Muslim world. Successful judicial diffusion of tensions must improve the prospects of reducing violence. This is because opposition to Islamist violence will now become internal to the umma. At present, their corrupt ‘leaders’ on the other hand are often perceived by the masses as being ‘hand in glove’ with the hegemon\(^\text{16}\) and doing their bidding.

The West has either advertently or inadvertently greatly helped violent extremists in their venture. Muslims’ doubts keep them from

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\(^{16}\) Declan Walsh, 'CIA chief in Pakistan leaves after drone trial blows his cover: Jonathan Banks, station chief in Islamabad, back in US after calls for him to be charged with murder over drone attack', *Guardian* (Islamabad), 17 December 2010.
actively opposing such violence as they would be obliged under the *shari'a*. The argument in this thesis is that if truly independent jurists presented a fair and convincing legal case against Islamists who have transgressed SHL norms and rules, and who have gone ‘beyond bounds’, that the majority of Muslims will reverse their support or neutrality and actively help combat terrorism. This is particularly so given the Qur'anic injunction on all Muslims to fight the party, Muslim or otherwise, that transgresses ‘beyond bounds’, and is thus capable of putting substantial pressure on the aggressor.

This thesis proposes to translate the silenced Muslim masses’ desire for transparent justice, outside the manipulative control of their leaders, into a practical model. For the Western ‘street’, it proposes a means for achieving peace and security by exposing allied warlords and terror-mongers on the one side and the equally duplicitous leaders and their cynical manipulations, including on the behalf of the military-industrial complex and the ‘greed-is-good’ school of international relations on the other. Terrorists exploit genuine frustration and aspirations, mostly in their own quest for power. Similarly, Western leaders exploit genuine fear and insecurity of their peoples in their own quest for power and on behalf of the Pied Piper’s paymasters.

The initial stages of the *shari’a* development suggested in this thesis can be carried out by civil society, individuals and small interested groups. Further, and perhaps while not ideal, this development will nonetheless largely be free of direct negative State influence and manipulation, particularly if the processes are funded by the UN and private individuals. As with the creation of the Rome Statute, the greatest hurdle to the broader use of the *shari’a* from an institutional perspective, is likely to be faced at the Tribunal creation stage. This is because many Muslim leaders will reasonably suspect the likelihood of being found guilty under its provisions and therefore, are likely to prevaricate. Simultaneously however, it is politically difficult for Muslim leaders publicly to refuse to endorse the *shari’a*. They are therefore, likely surreptitiously to forestall and

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act to undermine the process. In the longer term however, the existence of a Tribunal will likely result in an agitation for greater liberties in the Muslim world.

A real modern miracle is that in spite of the odds against it and the concerns, and perhaps even machinations, of powerful countries such as the US and Australia, an ICC was created. Once created, countries like Australia face strong internal political pressure to join, a phenomenon that is likely to be mirrored in Muslim States vis-à-vis a Tribunal. A hope for a shari'a Tribunal may however seem to require an even greater miracle, but as the Qur'an itself states ‘God will not change the condition of a people unless they change what is in their hearts’. So here is to hoping that when enough ‘ordinary people’ in both the East and West truly desire justice, peace and security in their hearts, in spite of the odds, the unseen forces of goodwill will collude to deliver this outcome. The crucial task then appears to be to improve public awareness, to satisfy a general desire for ‘truth’ that is shared by many, perhaps the vast majority, of those outside governments’ inner circles and their ‘spin doctors’, as seen in the Wikileaks saga.

Human beings naturally make assessments about other peoples, their cultures and civilisations. This process is an important and necessary part of good, positive and productive social intercourse. We must however be careful about to whom we entrust the leadership of this vital task. The question arises as to why we in the West possess such high quality information, yet our governments often make poor choices with respect to ‘the other’, notwithstanding our competent, independent and professional governmental agencies. However, our parliaments and decision makers, while apprised of this information, nonetheless need to pay heed to ‘the people’ for their political survival. The important underlying issue appears to be; who leads or informs ‘the people’? Who is the Pied Piper of our times?

No doubt we have excellent resources to inform us and we in the West do enjoy the freedom to pursue knowledge. On the other hand, the

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18 Qur’an 13:11.
greatest impact on public opinion in contemporary societies arguably is led by the mass media. While ‘Hollywood’, used here as a metonym for the entertainment and media industry more broadly, is the appropriate place for light entertainment and to make us feel good, civilised and at the pinnacle of ‘all civilisations’; is this the right medium to shape opinion on the vital questions of peace, security, international relations and justice? So the question is, what motivates this Pied Piper?

Contrary to the popular media image shared by the majority in contemporary Australia, the UK or the USA, our civilisation does not, by an objective measure, represent the ‘pinnacle’ of human civilisation. There is great good in our civilisation, no doubt, but the great and noble values we cherish are not a monopoly of our civilisation but are part of the common weal shared by the ‘lowest’ indigenous black person in Australia’s Western Desert, the archetypal ‘coon’, to Her Majesty in Buckingham Palace, to use one Australian yardstick of worthiness or importance.

Most of us, unless self-reflective, tend to be blind to our faults. We see ourselves as subjectively good, and collectively better than the ‘other’. Others see our shortcomings as well. Is it only an ‘outsider’ who can ask, ‘How is it that President Obama, a man conducting two bloody wars, is granted, accepts and is applauded for receiving the most famous peace prize of our times, the Nobel Peace Prize, so unselfconsciously, while simultaneously criticising China for condemning the Nobel Committee for its grant of the Nobel Peace Prize to Mr Liu Xiaobo, a person convicted for ‘inciting subversion of the State’, an inchoate but serious crime, broadly described as terrorism or sedition, in Australia, the USA and in the UK?

As a species, we are susceptible to and have a propensity for selective blindness. It is perhaps for this reason that the most ancient civilisations trusted the vital task of deciding upon matters that determined...
the future course of their societies to the sages and oracles, to the best their civilisations could produce. When these ‘sages’ and ‘oracles’ became corrupt or ‘blind’, or more likely, were controlled by the ‘one eyed’, the greedy and the corrupt, then their civilisations perished.

‘Hollywood’ is a mutual admiration club, ironically described appropriately in the words of the BBC’s ‘Minister for the Arts, The Honourable James Hacker M.P.’, as composed, in the main, of ‘loveable people who eagerly lap up praise and admiration as lavishly they dish it out’. While such people are an important part of our community and civilisation (because paradoxically the better ones can hold up a mirror to who we truly are), on their own, they are not the right people to set the tone or strategic path for our futures, or for deep engagement with other civilisations and peoples, or to chart the way for posterity.

The modern media, have been able to disseminate a very negative view on indigenous peoples, Blacks, Jews, refugees and Arabs among other groups. According to Shaheen, ‘Cannon Films’ distributed over 30 films depicting Arabs as bloodthirsty fanatics, as less than human and therefore not deserving of our sympathy.22 In the early 20th century the Australian Government disseminated ‘information’ among the white immigrants that the Indigenous population was incapable of raising its children. While Shaheen also cites more realistic depictions that show Arabs and Muslims in their more nuanced and complex roles within society, the preponderance of footage on the subject was (largely) negative.

So who pays the Pied Piper? ‘Hollywood’ dances to the tune of the highest bidder, which in our community means the wealthiest — the captains of the military — industrial complex, the lobby groups of the powerful and those closest to power. They vie for influence, pay the Piper and thus call the tune.

‘Hollywood’ helps to maintain the status quo, caters for the mundane and allows us to camouflage our vested self-interest as public good or high principle but it will not in general Speak Truth to Power. It is an earlier stage than is usually the case for other kinds of criminal conduct [...].

22 Jack Shaheen, Reel Bad Arabs: How Hollywood Vilifies a People (2009), 33
foolhardy to expect or entrust them to do this as a matter of course. It is posited that for this existentialist task, we want the ultimate efforts of our sages and oracles, our most broad and open-minded, most moral, strategic, long-term and farsighted people on the job.

In the final analysis however, making peace with Muslims, as is strongly endorsed here, is a necessity, a pragmatic choice. Muslims make up a fifth of the world’s population and there is some justified criticism among Muslims generally that their legal tradition is ‘ignored’ by the ‘powers that be’. Given their numbers, control of strategic resources and guided by a unifying ideology, it is almost inevitable that they will rise to power in the future, their civilisation will flourish and their law will prevail once more. The question is whether we will do so on equal terms, for the right reasons and because it is the right thing to do. It is our wisest, noblest and most just sages who must decide these important questions. But so much for realpolitik!

It is said that the only thing history teaches us is that we don’t learn from history. Nonetheless, the disastrous consequences of relying on the ignorant, the arrogant and the self-righteous for vital information and decisions is borne out in the brutality of the Spanish Conquistadors which resulted in the near wiping out of the South American continent’s indigenous peoples. The deeply respected Lakota Elder, Brave, warrior and the hero of Wounded Knee, Sioux leader Russell Means explains (paraphrased): 23

Spain in the 14th Century was brutally expunged of its Moorish artists, architects, artisans, jurists and scientists. It was also emptied of Jewish business and commerce. Spain was left with an ignorant, arrogant community devoid of learning. It is such people who sailed to the ‘New World’, the one-eyed with nothing but the lust for gold in their eyes. These are the people, who by their own base standards, seeing the Aztecs performing surgery in the rarefied, clean air at the apex of their pyramids, interpreted this act of humanity as ‘human sacrifice’.

So should we leave vital international relations decisions to the greedy conquistadors of our age? The answer clearly must be ‘no’. Yet in the West we have let such conquistadors dominate the public discourse for

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much too long. It is time to change this disastrous and self-destructive course. We must not continue to let them lead us by our noses like cattle.

The proof of the pudding they say is in the eating, so the real test of the West’s morality and humanity will be demonstrated by how it deals not just with Muslims, although this paper strongly attempts to persuade the West to do this decently and honestly. But this is not the end point. We must persist beyond what is prescribed by self-interest, that is doing right by those who may one day have power over us. The law of the jungle mandates that we must always deal with the strong.

However irrespective of whether one believes that humanity is spontaneously descended from the lower life forms as described in the theory of evolution or whether humanity is created along with the rest of what we perceive, as a Species, we have passed this stage of being merely ruled by the laws of the jungle. The question is about the values of our own civilisation, our own ‘right mindedness’ and whether the high aspirations of our brightest philosophers will be translated into also doing the ‘right thing’ by those unlikely ever to accede to great power, such as the indigenous peoples of the world.

If the arguments made in this thesis about the laws of civilisations generally are correct for Muslims, then in principle, there is no reason for not extrapolating the results, mutatis mutandis, to other similar but less powerful groups. This is a defining test of our own humanity and for our times. The question to be answered by posterity in this context is: did our forbearers’ and their leaders behave as did the ‘one-eyed’ conquistador who looked at the ‘other’ and saw a savage making a human sacrifice, or did they act as would a decent fellow human being who sees the skilled surgeon and treats the ‘other’, the noble, the wise, the elder and the child of the land in a manner befitting their deep and enduring humanity?
APPENDIX 1

TRUST GOD BUT TIE YOUR CAMEL*: CONCEPTS & METHODOLOGY IN ISLAMIC LAW

Knowledge is the lost property of the Muslim, so wherever you see it you may pick it up.*

Introduction
This chapter examines some necessary concepts and terminology in a manner that will help to define, highlight and illustrate (i) commonly used terms that sometimes lack precision in general use, (ii) the sometimes deep differences attaching to otherwise similar concepts between the shari'a and international law and (iii) particular obstacles to the practical use of Islamic law. This includes examining the meanings1 of the terms Islam, Muslim and the shari'a, and involves the examination of some relevant shari'a crimes and evidentiary issues, which will help to identify the means for contemporary development of the shari'a with integrity, including by examining governance issues, particularly the areas which touch on the use of violence by Muslims. The sources of Islamic law, which are discussed in Appendix 2, are unavoidably and inextricably interwoven with these concepts. The aim of Appendices 1 and 2, in concert, is to identify the foundation on which is built a body of shari'a criminal law. While in great need of development, it is argued that shari'a is nonetheless adaptable for use in litigation in a contemporary judicial environment within a reasonable timeframe.

What is Islam? Who is a Muslim?
The word Islam derives from the Arabic root (سلم peace) and means ‘to submit’.2 All Qur’anic prophets urged humanity to submit to God’s will3

* The Prophet’s Sayings.
1 The word ‘definition’ is avoided as there are few universally accepted ‘definitions’ as such.
2 In a Qur’anic context ‘to submit’ is to submit to the will of the One True God. There is a distinction between Muslim (one who merely submits to God’s will: Rodolphe J. A. De Seife, The Shari’ah: An Introduction to the Law of Islam (1993), 50. and a mu’min (one who truly believes) as discussed. See also Qur’an 49:14:
and by this definition, they all taught Islam. For clarity however, the Qur'an variously refers to the followers of the earlier prophets as Jews, Christians or the people of Noah. In this paper Islam is the religion taught by the Prophet Mohammed, encapsulated in the Muslim Covenant, and his follower, a Muslim.4

To become a Muslim, one must consciously and freely make two declarations, cognisant that this act formally enters one into a binding Covenant with God.5 The Qur'an states that God chose the name ‘Muslim’

The desert Arabs say "We believe." Say "You have no faith; but ye [only] say 'We have submitted our wills to God. For not yet has Faith entered your hearts".  

3 Qur'an 40:75; Qur'an 4:164.  
4 Qur'an 22:78. The noun 'muslim' (which derives from the same root as Islam (ie ﷽), in Arabic is masculine, singular. In its general English usage the word covers both the male and the female, ie muslim (m.s) and muslima (f.s). The plural used in this paper is the anglicised plural 'Muslims' and will be used to represent the Arabic, muslimoon (m.p) and muslimaat (f.p). Further, the term Sunni (Muslim or Islam) used in this paper refers to the four major recognised Sunni schools. The term Shi'i (Muslim or Islam) refers to the Jafiri or Twelver and the two other recognised Shi'i schools. The generic English term 'Muslim' as used here includes Sunni and Shi'i, male and female Muslims. The Qur'an rejects the 'partial acceptance' of Islam: Qur'an 2:85.  
5 The declaration of faith is called the shahada and constitutes the dual declarations (shahadatin) that there is but One God: Izzeddin Ibrahim and Denys Johnson-Davies, Forty Hadith Qudsi (1991), 74. and acceptance of the apostleship of Mohamed: Izzeddin Ibrahim and Denys Johnson-Davies, Forty Hadith Qudsi (1991), 130. A person must in the presence of 2 witnesses recite the shahada (to bear witness) and in order formally to convert to Islam.  

The shahada in Islam is:  

I testify that there is no god but God and I testify that Muhammad is the Messenger of God.'.

In Shi'i Islam sometimes a third declaration reinforcing the centrality of the position of Imam Ali [the rightful successor to the Prophet in the view of Shi'i Islam] is added to the declaration (شَهَادَةُ أَبْنَى اِبْنِيّ): Shahid, N Shah, Islamic Terms Dictionary: Alim Software Version 4.5 (1996). In contemporary terms, Muslims are defined at least as those who may legitimately - ie at the discretion of the Custodians of the Holy Sites — visit the Kaba to perform the pilgrimage (hadj), and generally includes Sunni and Shi'i Muslims: See generally <http://www.saudiembassy.net/Travel/hajj.as> (18 May 2006). but broadly should include anyone who has voluntarily made the two declarations:

It is noted that in secular societies a 'Muslim' generally self-identifies as such with no formal requirement vis-à-vis the 'two declarations'. According to Javad Nurbakhsh, Traditions of the Prophet (1981), 65. against this low threshold for becoming and remaining a Muslim however, the Qur'an and sunna requires those who would be Muslims to do so wholeheartedly and develop spiritually to the higher grade inter alia that of a believer (mu'min). The import of these distinctions both in law and in theology, will become evident in the analysis. The Qur'an cites the three 'categories' of Muslim as:

(1) An (ordinary) Muslim (aslama) - One who outwardly performs the five pillars of Islam (Submits to God / accepts the prophethood of Mohammed, prays, fasts in Ramadan, pays the poor rate and if possible undertakes the pilgrimage to the hadj in Mecca, Saudi Arabia.  

(2) A believer (mu'min, the amana) - One who truly believes in the angels, the books, the prophets etc; and
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to describe the followers of the Prophet Mohammed. The Qur'an however makes a key distinction between a Muslim (who merely submits) and a mu'min (who truly believes) and this distinction has significant legal implications. The Qur'an describes a believer inter alia as one possessing the 'inner' quality of taqwa described below. However (and for fairness, because the standards expected of believers are significantly higher than the normal international standard of behaviour expected of soldiers) international standards must apply to Muslims involved in fighting. Once a shari'a system is accepted by the international community, jurists may make the case to move to the higher Qur'anic standards expected of the mu'min, and as Muslim consensus crystallises. Such a move is likely to benefit and find the approval of most practising Muslims, but is a matter initially that should be left to the jurists and then subject to consensus.

The Qur'an states that humans can soar above the angels but can also sink to the lowest levels. In this context, Muslims, guided by the shari'a, are expected to live a moral and decent life and is arguably the reason why Muslims are critical of the juxtapositioning of the words 'terrorist' and 'Islam'. Muslims claim that Islam demands standards which

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(3) One who has attained to ihsan (the highest form of worship: where a believer worships God as if s/he 'sees' God).

The Qur'an also refers to nafsul amara: Qur'an 12:53, nafsul lawama: Qur'an 72:2, and nafsul mutmainna: Qur'an 89:27 but these categories of 'souls' do not have a direct (temporal) legal significance: See discussion on Dar al-Islam (The Domain of Peace or Islam), 523. As in domestic laws however, legal personality has different shades of meaning depending upon the status of an individual, for example in Australia, a resident has different legal rights to a temporary resident who in turn has different rights as compared with a citizen or an asylum seeker. Islamic law gives shades of meaning to legal personality, generally based upon an individual's religious affiliation but unlike most other legal systems legal personality is not directly based on race, place of birth or naturalisation status but on one's own declaration and acceptance of the shahada.

6 Qur'an 22:78.
7 See n 5, above.
9 It is conceded that effectively granting jurists a veto on legislation is likely to be problematic in the contemporary legal framework. In this context Cass Sunstein, 'Justice Scalia's Democratic Formalism' (1989) 107 Yale Law Journal 529, 529. refers to as '[Guido Calabresi's] most dramatic proposal':

That courts should be given the authority to declare statutes that were out of step with the prevailing legal landscape void for 'obsolescence'.

On the other hand, the striking down by courts of laws not in keeping with say the Constitution is accepted as a norm. Therefore, the judicial declaration of core Islamic norms, that are widely recognised by consensus, will help make the development of the shari'a by jurists perhaps a bit less controversial.

10 See 'consensus' as a source of law in Appendix 2.
are self-evidently at odds with this crude characterisation, and that Islamists' claims of acting within the Islamic ethic must be measured against this yardstick. On the other hand, although some Muslims accuse others of distorting their faith, and there is no doubt some truth to this allegation; the reality is that while there is indeed ignorance and distortion of Islam among non-Muslims, there is also ignorance, distortion, apathy or indifference to knowledge of Islam among Muslims. This paper argues that such distortion is detrimental to all. For example, it permits Islamists to claim salaf or 'martyr' (shahada) status, even while breaching the basic tenets of Islam, breaches which appear largely to go unchallenged, let alone punished.

Classification of People under the Muslim Covenant
The Covenant imposes binding obligations, some of which are progressively discussed in this paper. While adopting the Muslim Covenant is voluntary, once adopted it is unilaterally binding, as with any other unilateral contractual obligation. The shari'a characterises people collectively depending upon their Covenant status.

The Umma
Muslims collectively are called the umma (or the Muslim community), which, according to the Qur'an, forms a single entity of believing men and believing women who are friends/protectors of each other and who command good and forbid evil. Of particular interest to this analysis, the umma is comprised of people who, when necessary or when called to do so,
will aid the oppressed. The Qur'an describes the *umma* as the mid-most community (ie one that avoids the extremes) because it is upright and equitable. The *Sunna* notes however, that Islam 'is easy and consequently, that the *umma* is against extremism of any form'. As An-Na‘im notes however, the *umma* is not a ‘State’.

The *umma* comprises two broad categories of people: Muslim and *dhimmi*. Lands in which Muslims hold political power are sometimes referred to as the domain of peace (*dar al-Islam*) and the rest of the world

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16 Qur'an 42:37-39 (emphasis added):

Those who [believe and trust in God] avoid the greater crimes and shameful deeds and when they are angry even then forgive;

Those who hearken to their Lord and establish regular prayer; who (conduct) their affairs by mutual consultation, who spend out of what We bestow on them for Sustenance;

And those who when an oppressive wrong is inflicted on them (are not cowed but) help and defend themselves.

The *umma* is an important concept to the political and legal theories of Islam. Coulson posits that the political theory of Islam ‘rests’ on this concept, which tends to imply that the establishment of a single *umma* is a necessary prequisite for establishing a political theory and therefore arguably for establishing political or legal institutions. Coulson does not provide evidence of this ‘centrality’ on which the ‘political theory rests’: Noel J Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (1969). This work accepts that the unitary *umma* (in the sense of a political unit) is unlikely to emerge in this epoch but that it is nonetheless possible to establish legal institutions based on the political and legal theories of Islam. Professor Michael Levi for example stated (paraphrased) that ‘Global capitalism will not allow the *umma* to emerge’: Michael Levi, (Speech delivered at the ‘Crossing Borders: Promoting Regional Law Enforcement Cooperation: European, Australian and Asia Pacific Perspectives’ National Europe Centre, Australian National University, Canberra 8–9 April 2009). While Levi did not cite reasons for this conclusion, it is likely that a possible rationale is that as both global capitalism and the *umma* are universal, that the antagonism most likely arises because Islam prohibits both interest on capital and speculative transactions, both necessary elements of capitalism: Qur’an 2:275, Qur’an 5:90.


Indian Muslims, for instance, probably have more in common with their Hindu neighbors than they do with Nigerian or Senegalese Muslims. I am not suggesting that being Muslim is irrelevant, or that there are no differences between religious communities.

20 N Shah Shahid, *Islamic Terms Dictionary* (1996) at A ‘*dhimmi*’ is defined as a non-Muslim living under the protection of a Muslim ruler; Patricia Crone and Michael Cook, *Hagarism: The Making of the Islamic World* (1977), 7. describe the Jewish community in Medina as part of the *umma*.

21 The terms *dar al-Islam* (the land of peace) and *dar al-harb* (the land of war) were coined later than the term *umma*. Note that the term *umma* is based on the language of both the Qur’an and the *hadith* of the Prophet. While not discounting non-Qur’anic/hadith terminology, it is noted that in coining the term *dar al-Islam* jurists must have meant to
is divided between *dar al-sulh* (treaty partners) and *dar al-harb* (domain of war). The terminology is archaic but is sometimes still employed and for this reason examined briefly below. With the partitioning of the *umma* into the several States, some Islamists prefer to use the terminology of the ‘near’ and ‘far’ enemy, to reflect the anti-Islamic ‘Muslim’ regimes at home and their more distant foreign backers respectively.

The idealised Muslim nostalgia for a ‘golden age’, now long past, often appears to take a sterilised view of history. In practice, the political union of Muslims ceased in around 750 AD and was never fully restored. Ford posits that this view of a ‘unitary theocratic state [which has been succeeded by] multiple fractious States [has] exacerbated a radical bifurcation in Islam between sacred law and secular law’. However, in spite of the break-up of the political union, Muslims sometimes still refer to the term *umma* in aspirational terms. Without putting too fine a point

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23 H A R Gibb and J H Kramers (eds), *Concise Encyclopaedia of Islam* (4th ed, 2001), 68. For Khadduri’s characterisation of *dar al-harb* see n 148, 525.
24 This terminology of *dar al-Islam* and *dar al-harb* is quite anachronistic but is nonetheless retained here as it is still used, although perhaps much less frequently. In questioning the appropriateness of the terms *dar al-Islam* and *dar al-harb*, Taha Jabir al-Alwani, *Ijtihad* (1993), 28, rightly points out that:

[Muslim States’] almost total dependence on others [thus makes war with the West quite impractical. He states further that] most of the Muslims who settled in the West did so because, in their own countries, they were deprived of their civil liberties and freedoms, security and human rights. People could not – and cannot – in certain cases even organise congregational prayer (*ṣalah*). And it often happens that when one or two or a group of people sit together in a mosque to read some Qur’an they are accused of belonging to a clandestine movement […]

25 See note and text accompanying n 23, 504.
26 Fawaz A Gerges, *The Far Enemy: Why Jihad Went Global* (2005), 13. This terminology is also employed by Faraj: R L Euben and M Q Zaman (eds), *Princeton Readings in Islamic Thought* (2009), 322. Faraj goes on: at 322, to add that ‘the *djihad* against the far enemy must be deferred’.
on it, the International Court of Justice (ICJ) has also indirectly ‘recognised’ the umma in granting leave to the Organisation of the Islamic Conference (OIC) to intervene in the case concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (request for advisory opinion).31

The re-establishment of a single umma has sometimes been expressed in strongly emotional language, by contemporary groups including, the Muslim Brotherhood (al-ikhwan al-muslimeen), The International Islamic Front, al-Qa’eda, Hamas, Jama’a Islamiya (JI) (the Muslim Group) in Pakistan, Bangladesh and Indonesia, the Taliban, al-tawhid wal-jihad (the Unity and Jihad Movement) all of which are broadly labelled as ‘Islamist’.32 This call is not always rhetorical and the links between some organisations are also deep and enduring.33 Further, and

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2005) 4 UCLA Journal of Islamic and Near Eastern Law 143, 146. refers to this phenomenon as ‘token kinship’. This view that the concept of an umma was a convenient political ploy is supported by Yaroslav Trofimov, The Siege of Mecca: The Forgotten Uprising in Islam’s Holiest Shrine (2007, 21):

[Egyptian President] Nasser’s idea of secular Arab nationalism, which viewed Saudi Arabia as a feudal relic that should dissolve into a single pan-Arab state sharing oil riches equally among all its citizens, presented a mortal danger to al-Saud. There was only one alternative to this pan-Arab dream – the idea of a global Islamic nation, the ummah.


32 The USA maintains unofficial links with some ‘Islamist’ groups and their affiliates through for example Martin Indyk (Former US Ambassador to Israel) now director at the Saban Center for Middle East Policy, Brookings Institution, who support the US-Islamic world Forum held annually in Doha Qatar. 

Some groups such as Hamas, Hizbullah and the Muslim Brotherhood have engaged in a process broadly called ‘Islamisation through democratisation’: Zaki Chehab, Inside Hamas: The Untold Story of Militants, Martyrs and Spies (2007), 190. and have successfully engaged in parliamentary elections in Algeria, the Lebanon, Jordan, Egypt and the Occupied Territories. See also generally Pawaz A Gerges, The Far Enemy: Why Jihad Went Global (2005); Syed Naguib Al-Atas, Preliminary Statement on a General Theory of the Islamization of the Malay — Indonesian Archipelago (1969). However, ‘mainstream’ politicians such as Dr Mahathir Mohamad also refer to the term. See generally Hashim Makaruddin (ed) Islam and the Muslim ummah: Selected speeches of Dr Mahathir Mohamad : Prime Minister of Malaysia. (2000).

33 On the other hand, although these groups are broadly categorised as Islamist, some of these groups are both ideologically and in practice mutually hostile. Hamas leader Shaik Yassin described the Taliban’s understanding of Islam as ‘completely wrong and misleading’: Zaki Chehab, Inside Hamas: The Untold Story of Militants, Martyrs and Spies (2007), 108. Sometimes the groups work against the interests of each other. Zaki Chehab, Inside Hamas: The Untold Story of Militants, Martyrs and Spies (2007), 182. quotes PLO Chairman Yasser Arafat (who was also once classified a terrorist, later a Nobel Prize winner) stating that:
although Hamas and al-Qa‘eda are in effect competitors in the Occupied Territories, the Palestinian cleric34 Abdullah Azzam ‘who established his own military organization that would evolve into al-Qa‘eda’35 was also responsible for writing Hamas’s Constitution.36 The links between the Muslim Brotherhood and many contemporary ‘Islamist’ groups is also well documented. On the other hand groups such as JI in Indonesia, Malaysia and the Philippines, which legitimises the use of force in its struggles,37 shares its name but not its modus operandi with JI in Pakistan and Bangladesh, where JI is involved in their respective countries’ political and electoral processes. Notwithstanding these links, each named non-State group is, for convenience, treated as notionally independent.

Muslim groups such as the Palestinian Hamas, while unselﬁconsciously Islamic and appealing to Islamic values and concepts,38 do not take a global perspective and are focused purely on the Occupied Territories39 excluding even other traditional parts of al-Sham.40 They do

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34 The use of the term ‘cleric’ is not strictly accurate in the Muslim context. Muslims would usually refer to such learned personalities as al-Sheikh or hodja and who do not formally belong to a clerical structure within an organised church. However, the English term ‘cleric’ is used as is a term of convenience, although it is important to note that some Christian concepts used do not always easily transfer across the faiths.

35 Peter Bergen, The Osama bin Laden I Know (2006), 92. According to Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 55 (footnotes omitted), ‘Abdullah Azzam called his vanguard al Qaeda al sulbah – meaning the solid base. After Azzam’s death in 1989, bin Laden took over ‘the base’ which became known simply as al Qa‘eda’.


37 The Indonesian Courts acknowledge the existence of JI: Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 319. The Indonesian Government has however, denied the existence of JI as a group in Indonesia but have on the other hand accepted its existence in Malaysia and the Philippines: Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 331. The term JI is used here broadly to include the group involved in the Bali bombings, the bombings of the Australian Embassy and the Marriott Hotel in Jakarta.

38 R L Euben and M Q Zaman (eds), Princeton Readings in Islamic Thought (2009), 356.

however, recognise the existence of the several independent nation States in what was once a unified Muslim entity and respect the present international borders. One of the few international non-State groups that consistently refers to and acts as if there were a single umma is Hizb al-Tahrir, a group which, while arguably radicalising Muslims, does not support the use of force in re-establishing the umma.41

Although al-Qa’eda refers extensively to the umma, it explicitly has accepted the contemporary notion of statehood42 and has expressed this parochial and non-umma based view by stating that (i) Saudi oil wealth must be distributed among Saudis43 and (ii) has demanded a free choice in the selection of Saudi leaders.44 Therefore, while al-Qa’eda’s rhetoric appears universal, its main focus appears primarily fixed on Saudi Arabia and at most, arguably the Persian Gulf Arab States. Bin Laden has characterised al-Qa’eda’s own rebellion in Saudi Arabia as its practical contribution to the re-establishment of the umma.45 Al-Qa’eda has however, collectively and strategically inspired the creation of other regional organisations committed to the use of force, although it is not entirely clear whether its ultimate aim46 is to establish the umma. In practice however, its use of crude and brutal methods has led to the ‘Talibanisation’ of Islamic law, which tends to ignore the subtlety and complexity of the law and

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40 John Bagot Glubb, A Short History of the Arab Peoples (1978), 135. Al-Sham, traditionally included the States now know as The Lebanon, Syria, Israel, Gaza, the West Bank and Jordan.
42 Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 273. See also above, n 33.
43 Ibid, 265. See also note and text accompanying n 30, 504.
44 Ibid, 273.
45 Groups such as JI in Indonesia have similar local aims as part of their contribution towards a greater strategic aim: Sally White, ‘Gender and the Family’ in G Fealy and V Hooker (eds), Voices of Islam in Southeast Asia, (2006) 363.
46 According to Brynjar Lia, Architect of Global Jihad: The Life of al-Qaida Strategist Abu Mus'ab al-Suri (2007), 3. al-Qa’eda’s aim as articulated by its strategist was:
[to] liberate the Islamic world from direct and indirect occupation, and overturning non-Islamic governments.

This statement of intent appears to concede that there are ‘Islamic governments’ that will not be overturned showing at least that there was no overall aim at creating a single umma. Further, there is no explicit programme of Islamisation other than for Muslims to take it on trust that al-Qa’eda would somehow deliver ‘Islamic government’ if it gained power. The inconsistency of ideology between close Muslim allies such as the Taliban in Afghanistan who have problems with schooling for girls in their Pachtoun Islamic custom contrasts with two of the Arab wives of bin Laden who have PhDs.
theology and give preference to a ‘simple’ deterministic Islam which appears to have little real traction with the majority of the Muslims.\textsuperscript{47}

\textbf{Qur’anic Classifications of Humanity (and Djinn)}

The Qur’an inter alia refers to Muslims, believers, prophets,\textsuperscript{48} followers of the previous prophets\textsuperscript{49} (or Scriptuaries\textsuperscript{50}), disbelievers (kafir), polytheists (mushrik), and hypocrites (munafiq), which are all categories that apply to the two species endowed with free-will (1) the djinn, genies\textsuperscript{51} and (2) ins(an), humanity.\textsuperscript{52} The djinn are of no particular significance to this analysis.\textsuperscript{53}

The significance of these categories is now addressed briefly. The multiplicity, particularly of religious traditions, however leads to the recognition of a plurality of legal traditions. This view of religious legal plurality may prima facie be viewed as uncritical acceptance but is in principle no different from the legal plurality that exists within the European Union or more broadly the UN.

\textit{Dhimmis}, non-Muslim faith groups under Muslim rule, may follow their own respective Covenants.\textsuperscript{54} Historically there was some fluidity in practice, as for example Christians sometimes followed Muslim legal

\footnotesize{\textsuperscript{47} Sally Neighbour, \textit{In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia} (2004), 59. interviews a Malay Muslim neighbour of a school run by JI Malaysia, a group closely affiliated with and sharing the ideology of the Taliban, who said:

‘We weren’t allowed to talk loudly, weren’t allowed to laugh, we had to look serious .... We’re friendly, we like socialising and then they come here and tell us we’re not allowed to do anything [...] We weren’t allowed to listen to the radio. We’re used to TVs and radios. I like watching music shows but they said we couldn’t do any of that. They say its forbidden by Islamic law. Everything was forbidden by Islamic law’.

\textsuperscript{48} The Qur’an 10:47, refers to prophets as sent to every people. However, the Qur’an only names 25 of these prophets.

\textsuperscript{49} Qur’an 2:62; Qur’an 5:69.

\textsuperscript{50} That is: \textit{ahl al-kitab} or literally the People of the Book.

\textsuperscript{51} See for example Qur’an 51:56:

‘djinn and insaan (people) were created only for worship’ [...].

\textsuperscript{52} See discussion on Free Will, 537.

\textsuperscript{53} The djinn and their antics are an almost inseparable part of the lives of people of some Muslim societies, see generally William Dalrymple, \textit{City of Djinns: A Year in Delhi} (1994). The djinn are of no particular importance here other than for the issue of consensus or \textit{idjma} as briefly discussed in Appendix 2 and that in Islam, Satan is not a fallen angel as it is in the Judeo-Christian tradition, but an errant djinn: Qur’an 38.76.

\textsuperscript{54} Qur’an 5:48.}
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schools in Sufi circles without formally adopting the Muslim Covenant.55 Further, in practice, customs (‘adaat) of peoples other than Scripturaries also coexisted with Islam.56

Dhimmis however, do not generally serve in the Muslim military and instead, pay a poll tax called *djizya*.57 Dhimmis may form the majority of a population and for example, even though Muslims ruled India and Spain for nearly 700 years, Muslims remained a minority in both countries. Some Muslims use this as evidence of Muslim ‘tolerance’ although this characterisation is arguably not entirely accurate.58 Perhaps the better general statement regarding the treatment of dhimmis is that they were treated according to the whims of the rulers.59 However, in a contemporary

57 Shahid, N Shah, *Islamic Terms Dictionary*, Alim Software Version 4.5 (1996). Defines *djizyah* as ‘a tax paid by non-Muslims living in a Muslim State. Since the non-Muslims are exempt from military service and taxes imposed on Muslims, they must pay this tax to compensate. It guarantees them security and protection. If the State cannot protect those who paid *djizyah*, then the amount they paid is returned to them’.
58 Sally Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* (2004), 72 (footnotes omitted), paints a positive picture of Muslim treatment of dhimmis when she states quite accurately that:

> In Islamic lands not only Muslims but also Jews and Christians enjoyed the good life. They dressed in fine clothing, had fine houses in splendid cities serviced by paved streets, running water and sewers and dined on spiced delicacies served on Chinese porcelain.

While Neighbour’s description of the treatment of dhimmis is fair in certain periods it is not a general statement of how dhimmis were treated in history. Generally, dhimmis were treated well during the time of the Prophet and the early Companions. Later, at times, they were treated either as second class citizens and/or humiliated in public places: Sami Zubaida, *Law and Power in the Islamic World* (2003), 35. Another perspective is that Muslim rulers preferred collecting the *djizya* and thus had a particular financial incentive for discouraging dhimmis from becoming Muslims or alternatively not recognising their conversion to Islam. On the other hand, forcing male slaves or boys to convert in order to co-opt them into the army was not unknown: at, 115. It is not suggested that ill treatment or humiliation was unique to Muslim hegemony. For Britain’s humiliating treatment of the Chinese in Hong Kong in the 20th Century see: John Flowerdew, *The Final Years of British Hong Kong: The Discourse of Colonial Withdrawal* (1998), 19. Further, the Muslim Turks ruled cities such as Budapest in Hungary for over 150 years and hardly a recognisable trace of this period remains, partly due to forced conversion and also due to emigration.

context, even groups such as Hamas which accept the use of force as legitimate in achieving strategic ends, nonetheless acknowledge Qur'anic distinctions: for example, that they are not fighting a people of the book per se but are fighting against those occupying their lands, and who happen, incidentally, to follow the Jewish faith.\(^{60}\)

**Secular Muslims**

The term ‘secular Muslim’ is also now used in contemporary discourse. There is some contradiction in the terms ‘secular’ and ‘Muslim’ when viewed from either a theological or even etymological perspective.\(^ {61}\)

Nonetheless, the term is used to describe people who are historically and culturally ‘Muslim’, who advocate ‘separation’ of ‘church’ and State and include the leadership of predominantly Muslim States, particularly States such as Turkey and Bangladesh, which are constitutionally secular.\(^ {62}\)

**Muslims and ‘Heresy’**

There does not appear to be either a shari’a or etymological connection between the two concepts of ‘being Muslim’ and being a heretic.\(^ {63}\) The use of an arabicised concept such as ‘heresy’\(^ {64}\) requires clarification and elucidation for its legitimate use in a legal context.

The active Qur'anic phrase used to describe those who ‘submit’ but will not believe wholeheartedly is that they ‘will not believe’.\(^ {65}\) That is, while failure to believe wholeheartedly prevents one from reaching the higher

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\(^{60}\) Antony Lowenstein, *My Israel Question* (2006), 245

\(^{61}\) There is no formal ‘Church’ in Islam – and notwithstanding the ‘clerics’ of Shi‘i Islam who at any rate are more an academic hierarchy as opposed to a clergy – which makes ‘separation’ *ipso facto* nonsense. What ‘separation’ arguably means for Muslims is the separation of religious values for the determination of temporal matters as is the case for example in the UK or Denmark (which are arguably ‘secular’ in practice but nonetheless recognise the Church of England and the Lutheran Church as the formal Church of the State respectively.): See generally: Margaret Coffey, ‘Caesar’s Coin: How should Church and State interact?’ in Encounter ABC Radio National, 28 October 2007. Parliament in the two States is not bound by Church determinations (eg. on abortion etc).

\(^{62}\) Article 1 of the Turkish Constitution; Preamble of the Constitution of Bangladesh (*Bangladesh Shongbidhan*).

\(^{63}\) A Muslim who has strayed in practice is referred to as ‘fasiq’. *E W Lane, Arabic English Lexicon* vol 2 (1984), 2397. The term *fasiq* appears to go to a person’s actions (ie one might think/believe that adultery is forbidden under religious law but does so anyway), while a heresy goes to belief, (ie one does not consider/believe such action to be wrong whether or not one does or does not engage in adultery).


\(^{65}\) The Arabic لا يؤمنون is rendered into English as ‘(they) will not believe’.
station of a 'believer', a person's standing as a Muslim nonetheless remains. Note the Qur’an recognises 'believers' from among people who may not formally classify themselves as Muslims. This inference is drawn from the Qur’an itself, which refers to only some of the 'People of earlier revelations' as disbelieving.

The Qur’an refers to errant Muslims as fasiq and juxtaposes the spiritual attainment of a believer (mu’min) against that of a fasiq. The significance of these distinctions is that the Qur’an reserves the true knowledge of what is in people's hearts to the Creator and that judgment on matters of 'submission' and ‘faith’ should find no temporal jurisdiction. Thus 'self-promoted' spiritual grades must find no advantage in litigation. That is, for the purposes of temporal prosecution, it is or should not be easy to displace the status of a person as a 'Muslim'.

On the other hand, the issue of who is or is not recognised as 'a Muslim' can in cases become a problematic practical temporal issue. This is partly because some Muslims seek to classify others as heretics/non-Muslims/apostates or heretics. Fighting such 'enemies' was in the past religiously more acceptable and this arguably remains true in the contemporary world. The declaration that a person is a non-Muslim is

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68 E W Lane, Arabic English Lexicon vol 2 (1984), 2621.
69 Qur’an 32:18.
70 It is not surprising that the contemporary ulama of Pakistan could not agree on the definition of a Muslim: Abdullah Saeed and Hassan Saeed, Freedom of Religion, Apostasy and Islam (2006), 50. This is not because the Pakistanis suddenly discovered a gaping hole that had eluded scholars for 1400 years but precisely because of the 'political nature' of these determinations.
done by a process called takfir, and although theologically strongly discouraged, is not uncommon. This process of takfir goes back in Islamic history to quarrels between governments and their opponents. Al-Qaeda has used both takfir and declarations of heresy against Muslim rulers, arguably in order to legitimise their own use of force under Islamic law. Bin Laden uses Qur'anic verse 4:65 to support his view that the Saudi Government is 'apostate' (murtad). Alternatively, bin Laden declares the Saudi government as apostate based on Qur'an 5:44 ['because the Saudis don't apply the shari'a', although Saudi Arabia's claim that shari'a is the

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Lane defines takfir as the process of declaring someone a disbeliever (kafr or kufr) because he veiled or covered something: E W Lane, Arabic English Lexicon vol 2 (1984), 2620. In an Islamic religious context it is the covering of the 'truth', for whatever reason. Lane also describes takfir as the process by which you annul ones sins by doing something good: E W Lane, Arabic English Lexicon vol 2 (1984), 2620. which is the annulling of the 'sin of the rejection of Islam' by the good deed of 'excommunicating the person in question'. The following is an example of a contemporary use of takfir: Mustafa Qadri, 'Al-Qaeda, our kin', The Canberra Times (Canberra), 17 January 2009, B7. Qadri writes from an interview of a Taliban leader Mulla Noor Allam in Pakistan, in reference to a question of the 54 people killed at the Marriott Hotel bombing in Islamabad in September 2008 where many Muslims were also killed. The leader Mulla Noor Allam responded: 'We are only killing the hypocrites, they are not Muslims'. See also n 83, 513.

Some examples include the declaration of Egyptian novelist Naguib Mahfouz or British/Indian author Salman Rushdie, as apostates. For a description of the takfiri ideology see Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 123. Rudolph Peters, Jihad in Classical and Modern Islam (1996), 7. See also the discussion of: The Umma, 499.

Qur'an 4:65. Rosalind Gwynne, Al-Qaeda and al-Qur'an: The "Tafsir" of Usamah bin Ladin (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004. Gwynne notes that the asbab al-nuzul (the reason for the revelation of Qur'an 4:65) was a dispute over irrigation rights and in which the Prophet gave judgment in favour of a cousin; (the reasoning being that people should trust that the Prophet made the decision on the facts and was not influenced by the relationship, as to find against a cousin purely because of the relationship would also be unjust.)

But no by thy Lord they do not believe (in reality) until they make you a judge in all disputes between them and find in their souls no resistance against your decisions but accept them with the fullest conviction.

Abdul Bari Atwan, The Secret History of al-Qa'ida (2006), 52; Al-Qa'eda also consider Shi'i Muslims as apostates or disbelievers: Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 126.

Qur'an 5:44:

[...] If any do fail to judge by (the light of) what God hath revealed they are (no better than) unbelievers.

law of the land is not generally disputed.81 Further, while there is a
distinction between a Muslim majority State and an Islamic State82 which
may support bin Laden’s position, he does not engage with this distinction.
Note that Muslim consensus which is discussed later is critical. There is
consensus among Muslims that the Saudis and other Muslim rulers,
although subjectively perhaps not good Muslims, are nonetheless Muslims.
The importance of this somewhat low threshold for (becoming and)
remaining a Muslim is that the presumption in favour of the validity of the
claim ‘of being a Muslim’ is not easily displaced by others,83 and is an
important issue with respect to standing and legal personality.

During the Iraqi invasion of Kuwait however, when Saudi Arabia itself feared that it
might have also been overrun by Saddam Hussein’s regime, Bin Laden offered to
mobilise his forces to defend the Saudi Government and to evict the Iraqis from
Kuwait: Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from
Afghanistan to Australia (2004), 64.

81 Bin Laden therefore, presumably means that the Saudi government does not apply the
shari’a in ‘its entirety’. On the other hand, as discussed, much of the criminal law and
public international law (siyar) aspects of the shari’a have been neglected, although it
would be grossly unfair to blame this on the Saudi Government. On the Bin Laden
analysis and conclusion the vast majority, if not all, governments in Muslim States
would be classified as murtad (apostate). Al-Qurtubi’s commentary (tafsir) of the
Qur’anic verse 5:44 as analysed by Gwynne: (Rosalind Gwynne, Al-Qa’ida and al-
Qur’an: The "Tafsir" of Usamah bin Ladin (2001)
<web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004.14-5) cites the
arguably better view (of Qurtubi) that even if a Muslim commits a great sin (kabirah),
h/ she does not become a disbeliever. The vast majority of contemporary Muslims
would consider Qurtubi’s views as more persuasive than that of Bin Laden. Further
according to Sheikh Qardawi: R L Euben and M Q Zaman (eds), Princeton Readings in
Islamic Thought (2009), 231., such accusations, if not substantiated are themselves major
sins (kabirah).

In the context of this paper, the Saudi use of shari’a does not however automatically
translate into a ‘rule of law’ regime. For a more nuanced and accurate characterisation
of the use of law in Saudi Arabia (and arguably some other Muslim majority states) see
Fordham International Law Journal 4, 8. El-Fadl also makes the distinction between the
supremacy of law and the supremacy of legal rules which he states is the case in Saudi
Arabia, a country run by an absolute monarchy; Khaled Abou El-Fadl, ‘Islam and the
Challenge of Democratic Commitment’ (2003) 27 Fordham International Law Journal 4,
1026.

82 Syed Abul ‘Ala Maududi and Khurshid Ahmad, Islamic law and the Constitution (2nd
ed, 1960), 6 (particularly 1n). Muslims sometimes refer to Medina under the Prophet
as an Islamic State. Although there were similarities between what we refer to today as
a ‘State’ (ie an entity possessed of territory, a fixed population etc.), the terms can mean
different things given the time that has elapsed since the time of the Prophet and the
Orthodox Caliphs. The closest temporal Islamic entity that would resemble a
contemporary nation state but still view Muslims as one umma is arguably the
Ottoman empire of the early 20th Century. See also Khaled Abou El-Fadl, ‘Islam and
the Challenge of Democratic Commitment’ (2003) 27 Fordham International Law Journal 4,
28.

83 The Prophet stated that if a person calls another a disbeliever, then one of the two
antagonists is a disbeliever. This means that if a person called another a disbeliever,
and that person was a Muslim in God’s eyes, then the accuser becomes a disbeliever
notwithstanding a claim to being Muslim. It is inter alia for this reason that the process
of takfir is only sparingly and cautiously used by the majority of Muslims. As
mentioned: Qur’an 49:14 also makes the distinction between those who have submitted
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Disbelievers
As opposed to the Muslim, the disbeliever (kafir\textsuperscript{84}) is an individual who has ‘seen the truth’ but nonetheless is unwilling to enter into a Covenant. Notwithstanding the reasons, those who have not accepted the Qur’anic Covenant are not bound by its specific terms.\textsuperscript{85} In such cases the Prophet’s tradition was to try the person according to the ‘[defendant’s] own religious law’.\textsuperscript{86} This concept however, covers a broad and complex area which is not discussed here in detail as it is not directly of issue.

Hypocrites
The Qur’an characterises ‘those who say that they believe in God and the last day but are not at all believers’\textsuperscript{87} as hypocrites.\textsuperscript{88} Again, as in the case with disbelievers’,\textsuperscript{89} the Qur’an juxtaposes and contrasts the spiritual attainment of a hypocrite with that of a believer and not with that of a ‘Muslim’.\textsuperscript{90} However, individual hypocrites are known (with certainty)

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\textsuperscript{84} The triliteral forming the word \( kafara \) means to cover. The word \( kafir \) literally means one who has covered the truth. There are also rejecters or \( kafirs \) from among the People of the Book (Jews and Christians etc): Qur’an 98:6.

\textsuperscript{85} Qur’an 109:6. Followers of the other prophets are notionally bound by their own Covenants although the \( shari’a \) does not impose their covenant. The Qur’an only notes that followers of the earlier prophets who do not judge by their own covenants are no better than disbelievers: Qur’an 5:44, but does not actually categorically classify them as disbelievers.

\textsuperscript{86} While this is an incidental point, the practical use of the \( shari’a \) on the international plane will set a precedent for the international community to include or engage legally with many other cultures/groups, particularly including indigenous groups. The Qur’an holds that every people was sent a prophet arguably obliging Muslims to recognise the laws of these groups: see n 56, 509. Muslims may argue that these laws have been changed or have become corrupted. Qur’antically however, this is not sufficient a reason for Muslims not to recognise these legal systems, just customs and traditions. For example, Muslims make the argument that priests and rabbis have corrupted their laws, against say the Christians or Jews. However, Islam does not give Muslims the right to interfere or not recognise the laws of Christians or Jews: Qur’an 5:44, even though Muslims may perceive these laws as having been changed or corrupted. The point is made that the \( shari’a \)’s view on plurality of religious laws may \textit{prima facie} be viewed as uncritical acceptance of other legal traditions and is essentially a reasonable characterisation of the \( shari’a \)’s position of engaging but not critiquing other legal or religious traditions. Muslim jurists however, have always critiqued the \( shari’a \) and will legitimately continue to do this in the future.

\textsuperscript{87} Qur’an 2:8.


\textsuperscript{89} See also the discussion in the text accompanying n 68, 511, on errant Muslims.

\textsuperscript{90} Qur’an 2:8.
only to God. Thus theologically, while a hypocrite cannot ipso facto be considered and is in God’s eyes not a believer, nonetheless can in the temporal plane legitimately claim to be a Muslim. That is, while some of their acts may show hypocrites as such, it is not a matter that can decided upon with any degree of certainty, and thus, while hypocrisy is a serious shari’a crime it must remain outside temporal jurisdiction.

Wahhabis and Neo-Salafis

Wahhabis are the predominant sect in Saudi Arabia. Wahhabism is often described as one of the more puritanical contemporary strains of Islam. The practice of the Prophet was to leave ‘hypocrites’ free to their own activities, including allowing them to pray in the Sacred Mosque in Medina: Adil Salahi, Muhammed: Man and the Prophet (2002), at 310. This was true even in the case where (to Muslims’ belief) God revealed their true nature to the Prophet, as in the case of the ‘king’ of the hypocrites, Abdullah ibn Ubayy and his followers. Abdullah ibn Ubayy’s opposition to the Prophet is understandable from one perspective, as he was to have been crowned king, prior to the conversion of the majority of Medina to Islam and thus their change in allegiance. The main point here however, is that with the death of the Prophet and the cessation of the revelations, hypocrites cannot be identified with certainty under the shari’a, and any such charge is therefore, non-justiciable.

Wahhabis of Saudi Arabia and the synchronist school of the Salafis.

The 19th /20th centuries have produced some puritanical strains of Islam, which at times appear utterly to disrespect other faiths and traditions. This was evident in the destruction of the Bamiyan Statues in Afghanistan by the Taliban: although Muslim rulers and citizens for the over the 1000 previous years largely did not see fit to destroy objects sacred to another faith. Mogul Emperor Aurangzeb, the last Mughal emperor distinguished for his religious severity, and Genghis Khan had made some attempts to destroy the statues. The Qur’an requires Muslims not to revile the sacred icons of other religious traditions: Qur’an 6:108:

Revile not ye those whom they call upon besides God lest they out of spite revile God in their ignorance.

Clearly many in the Taliban were not so arrogant to consider that they had hit upon a ‘truth’ that had eluded the best of their forbearers. Luke Harding reports that (Luke Harding, ‘How the Buddha got his Wounds’, The Guardian (London), Saturday 3 March 2001.):

In July 1999 Mullah Omar [The leader of the Taliban] issued a decree that said the Bamiyan Buddha should be preserved. There were, he pointed out, no Buddhists left in Afghanistan to worship them. But he added: ‘The government considers the Bamiyan statues as an example of a potential major source of income for Afghanistan from
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and is the political/religious ideology of al-Qa'eda.97 Saudi Arabia has at times used its political power and wealth for funding (and to lend legitimacy to) ideologically sympathetic non-Saudi (sometime also referred to as ‘Wahhabi’) organisations, indirectly through ‘charities’98 and directly through support for groups such as the Taliban.99 Wahhabism’s international legitimacy is enhanced by the UK’s ‘close’100 and the US’s ‘special’ relationships with Saudi Arabia.101 Saudi Arabia’s dependence on international visitors. The Taliban states that Bamiyan shall not be destroyed but protected.

It is claimed that the Taliban really used the situation to demonstrate its anger and highlight the world’s hypocrisy towards Afghanistan’s starving children: Sahar Kassaimah, Afghani Ambassador Speaks At USC (2001) <http://www.islam-online.net/english/news/2001-03/13/article12.shtml> at 25 May 2006. Afghan (Taliban) Ambassador Sayyid Rahmatullah Hashimi said:

This decision [to destroy the Bamyan Statues] was taken after a Swedish monuments expert proposed to fix and rebuild the statues’ heads, which were already destroyed. When the Afghan head council asked them to provide the money to feed the children instead of fixing the statues, they refused and said, ‘No, the money is just for the statues, not for the children’. Herein, they made the decision to destroy the statues.

However, this 20th and 21st century iconoclasm must be viewed in the broader context of the Islamic world where historically important Islamic sites such as; the birthplace of the Prophet, locations where historical treaties were executed, etc are being intentionally destroyed by Wahhabi Muslims, generally out of fear (and with some historical justification) that Muslims might worship/unduly venerate these objects. See generally: Hassan Fattah, The Price of Progress: Transforming Islam’s Holiest Site, New York Times (New York), 8 March 2007.

97 Adam Robinson, Bin Laden: Behind the Mask of a Terrorist (2001), 53.
99 The Taliban were recognised as the legitimate government of Afghanistan only by three pro-Western governments, Saudi Arabia, Pakistan and the United Arab Emirates; see QAAH OF 2004 v Minister for Immigration and Multicultural and Indigenous Affairs [2004] FCA 1448 para. 26 per Dowsett J.
this support\textsuperscript{102} shows both the UK and US’s duplicity in condemning \textit{wahhabism}. There is thus a perception in the Muslim world that while on one hand condemning ‘Islamic fundamentalism’, in practice the US and its allies favour \textit{Wahhabism}.\textsuperscript{103} although this support is based on practical rather than on an ideological basis. It is unlikely that Western support for Saudi Arabia remains as strong after the attacks of 11 September 2001, although its large oil reserves make it a necessary (and thus far a faithful) ally to be tolerated.\textsuperscript{104} However, if the West seeks better overall relations with the Muslim world, it must arguably show that its support is not limited to friendly regimes’ versions of Islam as represented by that of Saudi Arabia or even that of the Northern Alliance.\textsuperscript{105} Further, while the incidents of Islamist terrorism are clearly significant, the issue is nonetheless arguably overplayed and parties selectively demonised for pragmatic and instrumental political reasons.\textsuperscript{106} This level of political


\textsuperscript{103} Anthony M Cordesman, \textit{Saudi Arabia: Guarding the Desert Kingdom} (1997), 194. Further, there is also evidence that the US supported the Taliban directly (Clive Stafford Smith, \textit{Bad Men: Guantánamo Bay and the Secret Prisons} (2007), 52.) which supports the popular perception that the West supports religious groups in an opportunistic manner rather than on principle, as claimed by the US in some of its public statements. For example one can juxtapose the US’s principled support for democracy in strategically unimportant or less important States such as Burma, Bosnia and Fiji but its willingness towards a pragmatic acceptance of certainly undemocratic and sometimes even despotic regimes when its strategic interests are involved in places such as in the Arab States around the Persian Gulf, the Indian Sub-continent and North Africa. The US has also permitted drug trafficking by its warlord allies which has also indirectly helped Al-Qa’eda in its own drug trafficking operations: James Risen, \textit{State of War: The Secret History of the CIA and the Bush Administration} (2006), 25.

\textsuperscript{104} The sudden deaths of three (relatively young) Saudi princes who were implicated by Abu Zubaida, an al-Qa’eda operative, as having provided funding to al-Qa’eda, is arguably an example of US-Saudi covert cooperation in ‘cleaning up’ support for terrorism among the Saudi Royal family: Clive Stafford Smith, \textit{Bad Men: Guantánamo Bay and the Secret Prisons} (2007), 240.

\textsuperscript{105} The Coalition’s ally, the Northern Alliance’s human rights record was, according to Amnesty International, not dissimilar to that of the Taliban.

cynicism is not lost on the so called ‘Arab/Muslim street’ as is indicated by the many web posts to this effect.

The term ‘salafi’\(^{107}\) is also used widely as a synonym for militant Islamists and has a place in any analysis of the use of force. Historically the term salafi refers to a person from the generation of the Prophet or the two succeeding generations and is a meaning based on the hadith.\(^{108}\) The term salaf from which the word salafi derives, occurs in the Qur’an\(^{109}\) although not in the meaning of term as used today.

Contemporary salafi largely describe themselves in negative terms.\(^{110}\) They do not claim directly to be like the original salaf (other than

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\(^{107}\) The word salafi derives from the trileterals (\(ـلاـف\)). (salafi (s.) / salaf (pl.)). The word salaf literally means to be over, be past, precede or antecedent: Milton J Cowan (ed) The Hans Wehr Dictionary of Modern Written Arabic (1980), 422. The contemporary usage is taken to mean ‘acting like the righteous forebears’ and the closest Qur’anic meaning is at Qur’an 43:56:

> And We made them (a people) of the Past and an Example to later ages.

Note however, that this Qur’anic verse refers to the time of the Biblical Pharaoh, although conversely Rosalind Gwynne, Al-Qa’ida and al-Qur’an: The “Tafsir” of Usamah bin Ladin (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004, quotes an alternate hadith which in contradistinction refers to Muslims who did not see the Prophet and yet believed in his message, as ‘blessed’:

> Blessings on the believer who saw the Prophet and seven blessings to the believer who believed without seeing the Prophet.

Al-Qurtubi – whose view on the Qur’an is important in this context as it is a tafsir (or exegesis) referred to by bin Laden: Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), at 60/1 footnote 8., — states that there is not a contradiction between the hadith (see n 108, 518) mentioned because the latter reference in (n 108, 518) is to particular individuals: Rosalind Gwynne, Al-Qa’ida and al-Qur’an: The “Tafsir” of Usamah bin Ladin (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004.

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> God’s Apostle said, “The best of my followers are those living in my generation (ie my contemporaries), and then those who will follow the latter.” Imran added, “I do not remember whether he mentioned two or three generations after his generation, then the Prophet added, “There will come after you, people who will bear witness without being asked to do so, and will be treacherous and untrustworthy, and they will vow and never fulfil their vows, and fatness will appear among them.”

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\(^{109}\) Quran 2:275; Qur’an 4:22, 23; Qur’an 5:95; Qur’an 8:38, Qur’an 10:30; Qur’an 69:24.

The following extract reflects this largely — though not entirely ‘negative’ - self-identification:

> A true salafi is not of the khawarij [see glossary] who consider most Muslims to be kafirs (disbelievers) because of committing sins. He is not of the shia who revile the Companions (sahabah), who claim that the Qur’an has been altered, who reject the authentic sunna, and who worship the Prophet’s family. He is not of the qadariyyah who deny qadar (the Divine Decree). He is not of the marijiah who claim that faith (iman) is only words without deeds. He is not of the mu’attilah who deny God’s Attributes. He is not of the sufis who worship graves and
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by the use of the term itself and/or by implication/omission). The recent origin of the use of the term *salaf* is traced to Mohamed Abduh (d. 1905) and is described by El-Fadl as those originally striving to project a ‘modern’, or perhaps more accurately ‘Western’, image for the times.111

Paradoxically, contemporary *salaf* who denounce ‘innovations’ (*bida*) as a matter of principle112 and generally are opposed to ‘Western’ innovations including democracy, an elected parliament and voting rights for women do not ‘sit comfortably’ with the *salaf* of Abduh. In common with Abduh however, the *Wahhab* could see the advantage of such characterisation in promoting their aims and those once loosely called *Wahhabi* now tend to call themselves *salafi* and the two terms, once quite distinct and different, have since the 1970’s have come to be used synonymously.113 *Wahhabism* universalised the particular Bedouin culture, initially of the Nejd, but was later developed to include a broader Arab culture, its adherents now claiming to represent ‘true Islam’.114 The Encyclopaedia of Islam refers to this process as the ‘Arabisation’ of Islam.

claim Divine incarnation. He is not of the *muqallidun* [one who follows *taqlid* or precedent] who insist that every Muslim should adhere to the *madh’hab* (School) of a particular imam or sheikh, even when that *madh’hab* conflicts with the clear texts of the Qur’an or authentic *Sunna*. Thus the true *salaf* are *ahl us-sunnati wal-jamaah*. They are *al-ta’ifat ul-mansurah* (the Aided, Victorious Group) and *al-firqat un-najiyah* (the Saved Party) which have been described in several hadiths.


Its founders strove to project contemporary institutions such as democracy, constitutionalism, or socialism onto the foundational texts, and to justify the paradigm of the modern nation state within Islam. In this sense *salafism* [...] betrayed a degree of opportunism. Its proponents tended to be more interested in the end results than in maintaining the integrity or coherence of the juristic method.

112 Juan Jose Escobar Stemmann, ‘Middle East Salafism’s Influence and Radicalization of Muslim Communities in Europe’ (2006) 10 Middle East Review of International Affairs. This contradiction or even confusion is perhaps most humourously demonstrated in the *salafi* T-shirt which proclaims in English:

‘b’ is for *bida*

It is noted that the Prophet and his Companions did not wear T-shirts, did not use the English language nor did they use their clothes to carry slogans and therefore, by the *Wahhabi* definition, the anti-*bida* ‘T-shirt is itself *bida*’ (an innovation in religion).


114 Ibid, 52.
On the other hand, the Wahhabi have, when convenient, adopted non-Muslim practices such as the employment of body guards,\textsuperscript{115} fund-raising through petty crime and the drugs trade,\textsuperscript{116} and as mentioned, even re-inventing the term *salaf*. While al-Qa'eda and other Islamist groups could argue reasonably that they are acting out of necessity, with the use of contemporary innovations such as bodyguards for ‘personal security’,\textsuperscript{117} this is not the real *shari'a* question. Three of the four orthodox caliphs were killed because of the easy access the public had to the then ‘Head of State’ and none of these original *salaf* took ‘security precautions’ even remotely comparable to measures adopted by their contemporary namesakes. The original *salaf* were easily accessible to their subjects, and while clearly cognisant of the dangers, lived among their people. They lived simple, lawful and dignified lives and based their precedent on their belief in the Qur'anic view that a person’s life-term is fixed.\textsuperscript{118} While bin Laden and his followers, have been accused at times, with little sound evidence being adduced, of crimes, including terrorism, introducing Varroa bee destructor mites into the USA\textsuperscript{119} and spreading anthrax via mail,\textsuperscript{120} they have also had

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\item \textsuperscript{115} Peter Bergen, *The Osama bin Laden I Know* (2006), 136.
\item \textsuperscript{117} Michael Burleigh, *Blood and Rage: A Cultural History of Terrorism* (2008), 457.
\item \textsuperscript{118} Qur'an 15:5:
\begin{quote}
Neither can a people anticipate its [death's] Term nor delay it.
\end{quote}
Note however, that while this concept of fixed terms (*ajal*) is commonly accepted in Islamic tradition it is not a licence to suicide. The Arab scholar Sa'di articulates a general view of Muslims that "Everyone dies in the end but there is no need to rush into the dragon’s jaws" Translated by Arthur Scholey, *Sa’di: The Discontented Dervishes* (2002), 71; Patrick Cockburn, *Muqtada Al-Sadr and the Fall of Iraq* (2008), 110. Further, and although there is some variety in their approach, and while some in the leadership of contemporary proscribed Islamist groups such as Hamas in the Occupied Territories do take some preventative and precautionary measures, they do not seem to accept that their general lack of care assists Israeli intelligence to track them down and assassinate them based on the belief in the Qur'anic verse 15:5. In this regard Chehab points to (the successful but) sophisticated, complex and expensive assassination operation of ‘The Engineer’ [d. 1993], a regular mosque attendant (ie several times a day), on the payment of a US$1 million to Kamal Hamad, a *Shabak* informer. Zaki Chehab, *Inside Hamas: The Untold Story of Militants, Martyrs and Spies* (2007), 60.
significant bounties placed on their heads, have had several attempts on their lives and are therefore naturally entitled to defend themselves, to invoke ‘legal necessity’, to avail themselves of 21st century innovations for their physical security and have in practice done all of the above. The harsh realities of the difficulties of survival among Muslim rebels, which is a situation arguably not very different from the position of other rebel groups, is conceded. What Islamist leaders must not be allowed to do however, is (without proper scrutiny) to characterise themselves as salaf thus to a degree acquiring the kudos of the original salaf in the minds of some Muslims while acting in a manner that is contrary or inconsistent with the behaviour of the original salaf. The distinction is important particularly for the imprimatur that attaches to the original meaning of the term among Muslims, which is the obvious reason for its adoption.

El-Fadl also notes that Wahhabi groups take a very selective, abusive and restrictive view of the Hanbali School, one that opportunistically concentrates on sections of the works of some great Hanbali scholars, but arguably for pragmatic reasons ignore other great Hanbali scholars such as ibn ‘Aqil and al-Tufi, rendering contemporary Wahhabi legal opinions partial and unbalanced. Bin Laden particularly favours the works of Ibn Taymiyyah (a great Hanbali scholar, particularly popular with the salaf)

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Further, Islamist groups such as the Muslim Brotherhood have been blamed for so-called ‘false flag’ terrorist attacks carried out by State parties. For some examples see Zaki Chehab, *Inside Hamas: The Untold Story of Militants, Martyrs and Spies* (2007), 186. David Willman, 'Apparent suicide in anthrax case', *The Los Angeles Times* (Los Angeles), 1 August 2008.

Other Muslim leaders such as the assassinated leaders of Hamas have said that they have literally accepted the Qur’anic principle of a fixed life-term, have acted upon it and have sometimes been killed. Both Sheikh Ahmed Yassin (assassinated on 22 March 2004 outside a mosque after morning (fajr) prayers) and Dr. Abdul Aziz al-Rantissi (assassinated on 17 April 2004) refused to take ‘even the most basic security measures’: Zaki Chehab, *Inside Hamas: The Untold Story of Militants, Martyrs and Spies* (2007), 120. and in Dr al-Rantissi’s case, even after a tip-off from French intelligence that an assassination attempt on his life was imminent: at, 125; see also: Patrick Cockburn, *Muqtada Al-Sadr and the Fall of Iraq* (2008), 110. It is not suggested that had they taken security precautions that they would have survived the ‘sophisticated’ tracking and assassination techniques employed against them. Zaki Chehab, *Inside Hamas: The Untold Story of Militants, Martyrs and Spies* (2007), 120. notes the difference between al-Qaeda and Hamas in this respect is the ability of their enemies successfully to infiltrate their inner circles often using large cash rewards/bounties which appear to work better in the impoverished Occupied Territories than have so far in say Afghanistan or arguably even in Iraq.


and ibn Qudama (also a great Hanbali scholar). This idiosyncratic use of ‘methodology’ has allowed the Wahhabi selectively to ignore Islamic precedent. This opportunistic use of law has sometimes resulted in the justification of cruel methods for killing not only and principally Muslims, including the children of ‘Muslims’, who were first and arguably unlawfully declared heretics, but also, and from a shari’a justice perspective, more importantly non-Muslims.

The Encyclopaedia of Islam uses the term ‘neo-salafiyyah’ to reflect the evolution in meaning of the term salafi from the time of Abduh. The neo-salaf are the products of post-colonialist globalisation. They have consciously or recklessly ‘innovated in faith’ (ahl al-bida’), a ‘crime’ by their own standards. Some groups self-identified with salaf are al-Qa’eda, the World Islamic Front (WIF), Jama’a Islamiyyai in Indonesia (JI), Taliban, GIA, and some non-Arab groups. This particularisation

124 Ibid, 60.
125 Under the shari’a, legal responsibility does not attach until a child has reached the age of discernment, which can vary according to the Schools: Shi’i Muslims are classified as ‘heretic’ by the Wahhabi. However, Bernard K Freamon, ‘Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History’ (2003) 27 Fordham International Law Journal 299, 360. notes: those Wahhabis who now advocate self-annihilatory violence have appropriated the theology and methodology of these behaviours from the Shi’a.

127 The reason for this qualification is that Muslims wrongly killed believe that under the shari’a they will be forgiven their sins – arguably a comfort for the surviving relatives. Non-Muslims do not generally hold similar beliefs or theological sources of comfort to assist in healing their grief, and therefore should be entitled to exercise talion (or more crudely retribution) in full.

128 Khaled Abou El-Fadl, The Great Theft: Wrestling Islam from the Extremists (2005), 101. For a different perspective on the reactive nature of political Islam in the contemporary situation, as juxtaposed with the situation when the Muslim world was the ‘undeniable political, military and cultural hegemon’ see Babak Rod Khadem, ‘The Doctrine of Separation in Classical Islamic Jurisprudence’ (2004 –2005) 4 UCLA J Islamic and Near Eastern Law 95, 109.

129 Some salafi groups use the expression mubtad’iun fil din (those who innovate in faith) to describe the acts of their opponents, by implication claiming that they do not. It is argued in this paper that this implication when tested does not stand up to objective scrutiny.

132 Ibid, 112.
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‘narrows’ the scope of the standard definition of a Muslim

in the view of the neo-salaf but lacks broad acceptance. It is an important issue with respect to standing and legal personality.

Free Practise of Religion

A Muslim has a shari'a ‘right’ to ‘unimpeded’ practise of his or her faith, whatever this might mean subjectively. The denial of such a right legitimises certain actions by Muslims, which will be discussed below. The right itself includes:

(a) The ‘right’ of Muslims to live under the shari'a as opposed to the 'non-implementation of the shari'a [in Muslim majority States]

(b) Freedom from the State's 'interference' or the existence of other 'impediments' to the free practice of faith.

The direct implications for this paper are whether any 'impediments' to the 'free practice' of Islam are sufficient to:

(1) Make migration necessary, inter alia to another part of the umma or

(2) Make rebellion against the ruling authority legitimate or

(3) Make djihad136 necessary or even mandatory in defending the rights of Muslims

In addressing these issues it is first useful to examine the makeup of the umma as geographical entities. While the historical entities are theoretical in the contemporary context, they nonetheless help in locating issues related to the extreme violence used, purportedly to ‘liberate Muslim lands’.

Dar al-Islam (The Domain of Peace or Islam)

In a geographical sense, dar al-Islam comprises the lands ruled by Muslim rulers, ideally where the shari'a is the law of the land and justice and peace prevail. The umma is not necessarily identical with dar al-Islam.137 There is

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133 This distinction is made here because there is a view among Arab Muslims that any Muslim (Semitic or otherwise) who speaks Arabic can be called an Arab: Albert Hourani, Arabic Thought in the Liberal Age 1798-1939 (11th ed, 2002), 260. and many — although not all — salafi speak Arabic as a mother tongue, it appears to be the lingua franca of the movement and it is not uncommon for non-Arab salafi to adopt the dress and manners of contemporary Arabs, which they incorrectly appear to believe reflects the dress etc of the Prophet.

134 See: n 5, 482.

135 This is essentially a view supported by al-Qa'eda and while the argument has some emotional appeal, it breaks down in the detail when shari'a is viewed as broader than Qur'anic crimes or legal requirements.

136 The concept of djihad is discussed in some detail in chapter 2.

137 As happened from the very early history of the Muslims, a small part of the Muslim community in Mecca (where they were also a minority) sought sanctuary from Meccan
no dispute that Muslims living as minorities are also legitimately part of the umma.\(^{138}\) In practice however, dar al-Islam is where there is a Muslim majority and the leaders are notionally Muslim.

The meaning of dar al-Islam, as one may arguably construct from the Qur'an, is somewhat more nuanced and one that lends meaning not so much to a geographical entity but rather to a state of spiritual attainment of a group of people. The (major) djihad aims primarily at taming the animal soul (nafs al-ammara)\(^{139}\) and is mandatory on all Muslims.\(^{140}\) The shari'a provides a path and a discipline by which this animal soul can tame itself, particularly by contemplation and reflection, inter alia of the natural world, by behaving justly and walking gently on the earth (including by not behaving arrogantly).\(^{141}\) The major djihad properly undertaken elevates the animal soul to a point of spiritual development when a soul questions its own raison d’être, and becomes nafs al-lawatna,\(^{142}\) a self-reproaching soul. Further spiritual development occurs when this self-reproaching soul reaches the point of peace and satisfaction (nafs al-mutmainna).\(^{143}\) When souls reach this point, they will not want, covet or create mischief and are at peace. Hence the term dar al-Islam (the abode of peace) when viewed from this perspective is not confined geographically but is a collective of (disparate) souls at peace with themselves, their surroundings and their Creator. They recognise each other with mutual affection.\(^{144}\) Therefore, when a soul has exerted itself to the utmost (djihad al-akbar) and likewise has encouraged others to do so, so that every soul of the domain of war (dar

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138 See n 137, 523.
139 Qur’an 12:53.
140 Qur’an 25:52.
141 Qur’an 31:18; Qur’an 25:63.
142 Qur’an 75:2.
143 Qur’an 89:27.
144 Qur’an 8:62–63:

Should they intend to deceive thee verily God sufficeth thee: He it is that hath strengthened thee with his aid and with (the company of) the believers:

And (moreover) He hath put affection between their hearts: not if thou hadst spent all that is in the earth couldst thou have produced that affection but God hath done it: for He is Exalted in might Wise.
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*al-harb*), which by definition is war with, and wrongs itself,\(^{145}\) may come to be at peace and ipso facto become part of *dar al-Islam*. The better view therefore, is that *dar al-Islam* is where a soul can practise faith freely and without hindrance, irrespective of the actual religious persuasion of the leader or the prevailing orthodoxy of the geographical area in question.

In practice, belief is internalised to the highest degree in Islam and ostentatious or even an outwards show of faith are not only not required, but discouraged in the religious texts. There is therefore very little a leader can do to alter or interfere with this internal *djihad*. Sometimes, leaders of old were said to have forced people to drink alcohol or eat pork,\(^{146}\) but as discussed in the section on necessity in Appendix 2, such ‘force’ or persecution has very little if any adverse spiritual effect and in fact can increase the believer’s standing in God’s eyes, provided the person who is ‘forced’ into this position did not intend to disobey God in ‘committing’ the transgressions.

Conversely, in this ‘spiritual’ context, *dar al-harb* is ‘where’ Muslims (and others) do not strive to elevate their souls, even if the geographical entity in question is notionally ruled by a Muslim,\(^{147}\) and is now examined.

**Dar al-harb (The Domain of War)**

The antithesis of *dar al-Islam* is *dar al-harb*, or the domain of war ‘as place’ described by Majid Khadduri as follows:\(^{148}\)

> The relations between these two worlds (ie between the *dar al-harb* (the domain of war) and *dar al-Islam* (the domain of Islam), were in theory not peaceful; each world was at war with the other. But this state of war should not be construed as actual hostilities; it was rather equivalent to what is called in Western legal terminology non-recognition, that is, the incompetence of the world of war to possess a legal status under Muslim law so long as it lacked the essential doctrinal prerequisite of true faith. This non-recognition did not imply, as in the case of the modern law of nations, the impossibility of initiating negotiations and concluding treaties, for such actions were neither considered to imply equality between the two contracting parties nor necessarily to possess a permanent character.

He then referred to Lauterpacht’s definition of insurgency\(^{149}\) to conclude that:

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\(^{145}\) Qur’an 7:23.

\(^{146}\) Consuming alcohol and eating pork are generally prohibited under the Muslim Covenant.

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The nearest equivalent, perhaps, to this situation in the modern law of nations is the recognition of insurgency which neither precludes an intention of later de facto or de jure recognition nor approval of the regime under insurgency; it merely means that an authority to enforce the law in a certain territory was needed under certain circumstances.

**Dar al-Sulh (Domains with which Muslims have a Peace Treaty)**

There is also a category of States in a peaceful treaty relationship with Muslims, which is generally referred to as *dar al-sulh*. In this vein and while no formal peace treaties appear to exist, al-Qa'eda have agreed not to attack Sweden, and after the defeat of Jose Maria Aznar's government in 2004, Spain, together with other States which did not participate in the Coalition.150

**Conclusion on umma as ‘place’**

Muslims must honour their ancient undertaking to exercise their free-will, and when necessary, to follow the Qur'anic obligation to move away from areas of persecution, and if possible should do so, as the *shari'a* provides no ‘carte blanche’ authority to fight.151 *Dar al-Islam* in its geographical sense was seldom, apart from the very early years, a single contiguous physical political entity. However, other than in the contemporary era with restrictive border controls, Muslims were generally able to travel freely between the various political entities headed by Muslim ‘sovereigns’.152 For practical purposes, therefore, *dar al-Islam* is a place where Muslims may freely practice their faith, including by debating, writing, expressing and developing the practices of their faith, and *dar al-harb*, places where Muslims may not do so freely.153 This crude distinction will no doubt raise many issues as to what constitutes ‘freely’. However, the dichotomy that *dar al-Islam* is ruled by Muslims while *dar al-harb* is ruled by non Muslims is...
superficial and in some cases quite false, not least because Muslims living in Western liberal democratic, Anglophone States arguably enjoy greater religious freedoms than do Muslims living in just about every Muslim majority State. Perversely though, this ‘Anglophone Club’ is the main responsible for keeping the same despots in power.

What is the Shari'ah?
The term shari'ah is often translated into English as Islamic law and broadly encompasses a body of legal obligations arising under the Islamic Covenant. Weiss describes the shari'ah as having the character of both law and morality, although, as a counter-point we would hardly concede that our Australian secular law is wholly devoid of morality. Cognisant of the general critiques of declaratory theories, which are not engaged here, it is

154 E W Lane, Arabic English Lexicon vol 2 (1984), 1534. The root of the word shari'a is شرار. Lane’s lexicon states that the word shari’a inter alia means a path to water (a source of something good) or something that God made apparent or plain. It is a place where one leads an animal or person to water, actual drinking is something that cannot be compelled. The word shari’a also has the sense of being ‘in’ (اصحاب) the drinking place, ie that one is immersed in it in order to drink which gives the sense that the shari’a is primarily applicable to those in Islam. It is also important that the metaphor is viewed in its desert origins and setting. Therefore, one may imagine that one has seen water in the form of a mirage, and be fooled by it, and the mirage will lead to one’s destruction. Thus the ‘right path’ must be followed if one is to be lead to sweet water and not to the mirage and one must use one’s ‘inner sight’, that is, insight and wisdom coupled with right knowledge, to prevent one from being fooled by one’s own eyes.

Adil refers to the trial of the Jewish tribe of Banu Quraiza (who were meant to be neutral by treaty) switched sides to join the Meccan forces attacking Medina. When the Meccans were repelled Banu Quraiza, were tried for treason, NOT by the Prophet under the shari'a but under Jewish law, presided over by a judge (in this case their ally Sa'd bin Mu'adth) nominated by the Chief of the Jewish tribe of Banu Quraiza, a request acceded to by the Prophet: Adil Salahi, Muhammad: Man and the Prophet (2002), 466.

There is also a distinction made between the Qur’an and fiqh, the former eternal and unchanging whereas the latter is changed by Muslims and their jurists to suit contemporary circumstances (although still in keeping with the shari'a): Yvonne Yazbeck Haddad, ‘Sayyid Qutub: Ideologue of Islamic Revival’ in J L Esposito (ed) Voices of Resurgent Islam, (1983) 71. This distinction is acknowledged but the terminology is not followed for convenience, as for this paper, nothing turns on this distinction.

There is also a distinction between din (دين) the basic tenets of the faith such as the belief in One God, belief in the Day of Judgment etc which is fixed under the Muslim Covenant and is in fact constant to all prophets. The shari’a on the other hand of each prophet changed and will keep changing through time (Abu Hanifa agreed with this position): Ahmad Hasan, The Early Development of Islamic Jurisprudence (1970), 7. That is even though the Prophet in the Muslim belief is the last prophet the shari’a will keep evolving to suit contemporary needs: Ahmad Hasan, The Early Development of Islamic Jurisprudence (1970), 7.

155 Bernard G Weiss, The Search for God’s Law: Islamic Jurisprudence in the Writings of Sayf al-Din al-Amidi (1992), 9. Weiss: at, 10, also draws a comparison with Lon Fuller’s distinction between the morality of duty (positive law) and the morality of aspiration (which is not positive law).

156 See generally James Crawford, The Creation of States in International Law (2nd ed, 2007), 22, although the discussion is framed in a different context. A key issue for the shari’a law is that when law is ‘discovered’, in keeping with its non-retrospective nature must
noted that the shari'a is arguably declaratory\textsuperscript{157} and jurists determine or declare the 'scope and content' of law,\textsuperscript{158} a key criterion being that the resulting law is just.\textsuperscript{159} The shari'a is also often described as both a sacred law and as a jurists' law\textsuperscript{160} and the existence of a particular 'rule of law' is declared by the jurists. However, these jurists do not operate in a vacuum. Other jurists and engaged lay Muslims act as a means of peer review, critiquing and refining the law, with the aim of confirming the existence of 

\begin{quote}
be applied prospectively and \textit{ex post facto}. For this reason for example the Military Commissions Act, (MCA) \textsection 950p(b) 'Statement of substantive offences', states:

[Substantive offences] are declarative of existing law and do not preclude trial for crimes that occurred prior to the enactment of this chapter.

Such analogy is problematic under the shari'a and therefore should not constitute a valid crime. The 'double' criminality test under the shari'a will cut in here if the alleged crime occurred prior to enactment.

\end{quote}

\textsuperscript{157} The 'declaratory theory' of Islamic law is not universally accepted by Muslims and the terminology is inexact to describe Islamic law. Muslims usually describe the shari'a in the following terms: (a) \textit{mukhatti'ah}, that there is a correct legal answer to every problem but that only God know the correct response and that the result will be revealed on the last Day. [while this may not seem terribly useful to humans of the time, note that a Muslim only has to exert 'best efforts' to be rewarded once, and is rewarded twice if the answer also happens to be correct: Georges F Hourani, 'The Basis of Authority of Consensus in Sunnite Islam' in I Edge (ed) Islamic Law and Legal Theory, (1996) 184n.] and (b) \textit{musawwibah}, that apart from a few fundamental and basic matters, that there is no specific and correct answer (\textit{hukum mu'ayyan}) that God wants human beings to discover, in part because if there were a specific answer God would have made the evidence indicating a Divine rule conclusive and clear. Thus human beings will have a diverse and varied range of interpretations of the law: Khaled Abou El-Fadl, 'Islam and the Challenge of Democratic Commitment' (2003) 27 \textit{Fordham International Law Journal} 4, 97; Khaled Abou El-Fadl, 'Muslim Minorities and Self-Restraint In Liberal Democracies' (1996) 29 \textit{Loyola of Los Angeles Law Review} 1525,1525. See also Noel J Coulson, \textit{Conflicts and Tensions in Islamic Jurisprudence} (1969), 2.

\textsuperscript{158} This mode of legal development is not dissimilar to that of the common law, which is sometimes described as "judge made law". For a discussion of the concept please refer generally to the works by the world's leading common lawy'ers: Benjamin Kielv (ed) \textit{Judicial Activism: Power Without Responsibility?} The Boston, Melbourne, Oxford Conversazioni on Culture and Society (2006).

\textsuperscript{159} Qur'an 4:135: 

\begin{quote}
O you who Believe, stand out firmly for justice as witnesses to God even as against yourselves or your parents or your kin and whether it be (against) rich or poor: for God can best protect both. Follow not the lusts (of your hearts) lest ye swerve and if ye distort (justice) or decline to do justice [...].
\end{quote}

Izzeddin Ibrahim and Denys Johnson-Davies, \textit{Forty Hadith Qudsi} (1991), 82; Muhammad Al-Mughirah al-Bukhari, \textit{The Translations of the Meaning of Sahih al-Bukhari} \textit{vol 3} (1976), 373; Majid Khadduri, \textit{The Islamic Conception of Justice} (1984), 2. By definition, a just law will be intra vires the Qur'an and sunna and conversely an unjust law will be ultra vires.

‘that law’ which suits that particular set of circumstances and around which, in time, a consensus may form. As society and conditions change, other jurists declare the discovery of newer rules or modify existing rules, within the constraints and the methodology of the shari’a, to better fit emerging circumstances. Thus the never ending cycle of development continues for as long as human society persists.

The shari’a broadly is divided between ibadaat, laws related to ‘worship’, and mu’amalaat, laws of general application.161 Ibadaat obligations include prayer, fasting, the rights of the hadj (pilgrimage), charity162 and to avoid adultery, stealing, cheating or lying.163 Mu’amalaat inter alia encompasses Islamic international law, the ‘siyar’, which is examined briefly below.164

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The Qur’an is far from being a legal code. In fact it contains very few legal provisions. Out of a total of 6237 verses only 190 verses or 3% of the total can be said to contain legal provisions. Most of these deal with family law and inheritance. In its ‘mu’amalat’ branch, which is all that other legal systems deal with, Islamic law is indeed man-made law and has no pretence to being a religious law except that it may be said to lay more emphasis on moral considerations than is usual with other legal systems.

162 Charity in Islam consists of two broad categories (i) zakat the mandatory tithe, the distribution of which is prescribed in the Qur’an: Qur’an 9:60, and (ii) sadaqa is recommended charity above the zakat and the distribution of which is not restricted, including among non-Muslims: Abu Abdellah Mohammed Al-Ansari al-Qurtubi, Al Jami’li Ahkaam al Qur’an vol 2 (pt 3 & pt 4) (1987), Part III at 336. (u’Al-Qurtubi’) was discussing Qur’an 2:272.


164 Muhammed ibn al-Hasan al-Shaybani, The Islamic Law of Nations Shaybani’s Siyar (1966), 40. quotes Shaybani (b. 132 AH) who defines the siyar as:

[Siyar] describes [the law governing] the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (musta’mins) or permanently (dhimmis) in Islamic lands, with apostates, who were the worst of the unbelievers, since they abjured after they accepted [Islam]; and with the rebels (baggis), who were not counted as unbelievers, though they were ignorant and their understanding [of Islam] was false.

This definition of siyar is in principle quite comprehensive and has stood the test of time although it is unclear whether the contemporary Muslims States will substantially accept this definition. However, the general insistence by some Muslim States that their laws are subject to the shari’a arguably means that if it can be shown that this definition of siyar is part of the shari’a then there is at least a prima facie case that they are bound. This is because it is also settled in general international law that unilateral declarations by senior governmental officers concerning legal or factual situations are
While there is some overlap and there are some exceptions, the division between ibadaat and mu'amalaat broadly is valid. Muslims are bound by both mu'amalaat and ibadaat whereas non-Muslims are only bound by the mu'amalaat. However, the Qur'an states that even in dispute settlement between Scripturaries, the Scripturaries should do so under the Judaic or Christian law.

There are conceptual similarities and even some degree of overlap between the siyar and general international law. However, as with Islamic criminal law, the siyar has not, in more recent times, progressively been developed with changing circumstances and therefore, while conceptually useful, broad generalisations or unqualified comparisons with the general international law can in instances be misleading.

binding according to their specific terms: Nuclear Tests (Australia v France Merits) (1974) ICJ Reports 253, 267. The siyar, as the Islamic law governing the conduct between Muslims and non-Muslims and ipso facto is binding upon Muslims irrespective of its acceptance or otherwise by non-Muslims: Muhammed ibn al-Hasan al-Shaybani, The Islamic Law of Nations Shaybani's Siyar (1966), 41.

Note however, that while its specific discussion is beyond the scope of this paper, that the concept of 'worship' is complex and wide. In fact some state that every conscious act of the believers (mu'umin, although perhaps not the 'mere' Muslim) is an act of worship, including the important quest for peace and justice at least for all free-willed souls. See generally Qur'an 6:162:

Truly my prayer and my service of sacrifice, my life and my death are (all) for God the Cherisher of the Worlds.

165 In Sherbert v Verner (1963) 83 S.Ct. (possibly) 1790; (U.S.S.C. 1963) 374 US 398, the issue was that the secular purpose of a law (Sunday holiday) may have some implications on the believers of other faiths (such as those of the Jewish faith whose Sabbath falls on Saturday).

166 Peters characterises the obligation differently. For example, unlawfulness of some acts is connected to a person's religion (drinking alcohol etc) whereas for other crimes such as homicide the question is whether the victim's life and body were legally protected ('isma): Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (2005), 24.

167 Qur'an 5:47. A fortiori Muslims are also expected to apply 'God's law'. The Qur'an is also referred to by the Qur'an as al-furqan. Furqan means criterion and is a synonym for the Qur'an: Qur'an 19:23.

168 According to Clark B. Lombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis' (2007) 8 Chicago Journal of International Law 85. siyar concepts were used by Morocco in its submissions to the ICJ.

169 The view that the siyar is not at least at parity with International Law generally is not universally accepted. See for example, Marcel A. Boisard, 'On the Probable Influence of Islam on Western Public and International Law' (1980) 11 International Journal of Middle East Studies 429.

The term *shari'a* as used generally, also refers to the accretion of the body of both law and Islamic jurisprudence (*fiqh*),\(^{171}\) including case law,\(^{172}\) and generally, is a product of the human mind. The best juristic practice within the jurisprudence is the normative practice of the Prophet, while the codified or positive law is called *qanun*.\(^{173}\) Clearly much of this general jurisprudence developed over the centuries will not be relevant to our times.\(^{174}\) While the *shari'a* carries the imprimatur of the Qur'an, which to Muslims is God's Word, nonetheless the jurisprudence is in essence 'man-made law'\(^{175}\) and is not considered 'God's law' *per se*, which Badr correctly points out is a misnomer.\(^{176}\)

*Shari'a* is more accurately referred to as 'the common law of Islam'.\(^{177}\) This jurisprudence, together with *shari'a* methodologies, should

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\(^{173}\) Ibid, 718.

\(^{174}\) Khaled Ali Beydoun, 'Dar Al-Islam Meets "Islam as Civilization": An Alignment of Politico-Theoretical Fundamentalisms and the Geopolitical Realism of this Worldview' (2004 -2005) 4 *UCLA Journal of Islamic and Near Eastern Law* 143, 153. does not agree with this position and notes that 'much of the Islamic public international law is still good law'.

\(^{175}\) Gamal Moursi Badr, 'Islamic Law: Its Relation to Other Legal Systems' (1978) 26 *American Journal of Comparative Law* 187, 190. argues with reference to early Islamic history that:

> [...] everyone realised that the bulk of the rules of Islamic law [mu'amalaat] was man-made, its pseudo-divine character was kept alive because it strengthened the supremacy of the law. Islamic law was rhetorically referred to as God's law [...] .

but that: at, 197:

> the strong link between religion and law in Islam [was maintained] to keep all the man-made rules of mu'amalaat in line with the guiding principles of the Qur'an and the prophetic tradition, or more correctly to avoid conflict between the two [...] .

a view endorsed in this paper and is a key reason why so many Muslims long for the 're-creation' of the political and governance model of this early period.

\(^{176}\) Ibid., 188; Bernard G Weiss, 'Interpretation in Islamic Law: The Theory of Ijtihad' (1978) 26 *American Journal of Comparative Law* 199, 199. notes that:

> The Islamic tradition places great emphasis upon the centrality of the Holy Law [...] . At the same time it affirms with equal emphasis that the Holy Law is not given to man ready made 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.

\(^{177}\) John Duncan Martin Derrett, *An Introduction to Legal Systems* (1968), 55. On the other hand, according to: David F. Forte, 'The Comparative Lawyer and the Middle East' (1978) 26 *The American Journal of Comparative Law* 305, 305. and while not denying the title of a 'common law', rightly points out however that (in practice) 'there seems to be no Islamic 'common law' to fill in the gaps found in the modern codes. The existence of a single 'common law' for Muslims also sits comfortably with the notion in Australia where despite the several separate State, Territory and Federal jurisdictions their
thus facilitate the process of defining specific contemporary crimes, their elements and evidentiary requirements, particularly for a class of the ‘most serious crimes’, and to do so in a manner that is authentic and thus finds ready acceptance among the majority of Muslims. This view that the shari’a can be developed is not always uncontentious in Muslim circles. However, the position taken here is that while there were pragmatic reasons in the past for freezing the law, there is no legal basis for this proposition. Without understating the difficulties likely to be encountered in developing the shari’a criminal and humanitarian laws, if such development is done in a principled manner — that is, in accordance with Islamic legal methodology and within its sources of law — the result is likely to be a body of law that is shari’a compliant, and thus acceptable to the majority of the umma.

Some further general development will nonetheless be necessary to bring applicable shari’a criminal laws to a standard where a prosecutor could be sure that a breach had occurred. As a practical measure, existing IHL and ICL custom could also be used as a starting point and the legal case for doing so is made in this paper. That is, IHL/ICL that prima facie is not incompatible with the Qur’an and sunna can be developed and minor inconsistencies and incompatibilities can be addressed by a competent group of recognised jurists.

However, in practice neither the Qur’an nor the sunna are viewed as legal a straitjacket as is evident by the diversity and the plurality the Schools. Finally, law as developed inter alia by Islamic jurists is

Honours noted that ‘the [High] Court has spoken with respect to ‘the common law of Australia’, ie as a single common law: Lipohar v The Queen (1999) 200 CLR 485, 506.


179 For example, the ‘closing of the doors of ijtihad (ie the exercise of analogy (quiyas ’): C G Weeramantry, Islamic Jurisprudence: An International Perspective (1988), 41.

180 Please refer to custom (‘urf) as a source of law as discussed in Appendix 2.

181 This is not to say on the other hand that there is an open ended permissiveness. With respect to practicing Muslims, who accept the Qur’an as the literal word of God, Malcolm H. Kerr, Islamic Reform: The Political and Legal Theories of Muhammad ‘Abduh and Rashid Rida (1966), 209. notes that: ‘As long as it [the Qur’an] is regarded as no less than God’s final Truth, verbally revealed, then every idea to which Muslims attach value must be harmonized with it’.

182 Another side of this plurality is that Muslims may fight together even bravely and against the odds against a common enemy. This was arguably the case with the
ultimately subject to acceptance by the umma, who generally form an interpretative community and who, by consensus, will ultimately accept or reject individual legal rules as developed by the jurists and scholars.\(^{183}\)

Conceptually, the shari‘a is usually depicted as a metaphorical tree, drawing upon its sources ( usuul al-fiqh or roots of law\(^{184}\) ) and producing the branches of law (fiiru‘), describing an organic system.\(^{185}\) Weeramantry describes the process of how a single verse becomes the legal basis for the development a whole branch of law.\(^{186}\) The study of the legal aspects of the Qur’an can therefore approximate the study of constitutional law in its broadest sense.\(^{187}\) What actually constitutes a ‘branch’ of law under the shari‘a varies with time and circumstance.

The shari‘a does not however exist in a vacuum. In this context, jurists refer to its objectives (maqasid).\(^{188}\) A key objective of the shari‘a, in the

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2. Noel J Coulson, Conflicts and Tensions in Islamic Jurisprudence (1969), 3. also refers to usuul al-fiqh as the sources of understanding and thus equivalent to legal theory; Taha Jabir Al-Alwani, Towards a fiqh for Minorities (2003), 11. quotes Imam al-Ghazali (d. 1111AD) who described usuul al-fiqh as follows:

\[
[Usul al-fiqh] is the science that combines reason with oral tradition, opinion with religious text, producing an elegant synthesis of both.
\]

3. Ahmad al-Raysuni, Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law (2005), 44.
5. The ‘English Constitution’ is arguably conceptually similar in its organic nature of being composed of several constituent parts, the Magna Charta and the Bill of Rights: Egan v Willis (1998) 195 CLR 224. The English Constitution is sometimes said to be ‘unwritten’ and perhaps means that it is unwritten in a form that is similar to the Australian Constitution or the American Constitution.
6. See Ahmad al-Raysuni, Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law (2005). There are a range of jurists over the centuries who have postulated many variations to the actual content of maqasid: See generally Jasser Auda, Maqasid al-Shari‘ah as Philosophy of Islamic Law: A Systems Approach (2008). Auda however refers to al-Shatibi as the ‘most significant’ of these jurists: at, 13–21. The science of maqasid itself is a relatively later development in Islamic law and began to take shape perhaps 300 years or so after the death of the Prophet: at, 13–21.
language of the Qur’an, is to help to return humans to the ‘right path’. In this vein, the Qur’an speaks of a natural human disposition or innate human inclination (fitra) towards the worship of one God and individual men and women can use the guidance of the shari’a to perfect their faith in God by working (spiritually) to remain on, and inevitably when humanity strays from fitra, to return to, the ‘right path’. Further, according to al-Jawziyyah (d. 751/1350) the maqasid includes ‘educating individuals, establishing justice, hindering injustice and promoting the interests of the public’, in order inter alia that a person’s innate belief (fitra) can sincerely and freely be expressed in this life and in this context through the Covenant and shari’a of the Prophet.

189 The word ‘return’ is used because in the Muslim view, one’s parents, the animal soul, Satan etc can deviate the human soul from the ‘right path’ and to which it should seek to return: Qur’an 12:53. A combination of prayer, charity, other forms of worship, right action and supplication to the Creator etc. may together with God’s mercy ‘return’ a person to his/her fitra and thus to this ‘right path’ and enable him/her to remain on the path until death overcomes the person.

190 Qur’an 1:5. The terminology of ‘the right path’ is central to Islam and Islamic civilisations. For example, Smith—who represented several Guantanamo Bay detainees/prisoners—ironically quotes a torturer in a US facility in the Middle East chiding his victim for not being on the ‘right path’; Clive Stafford Smith, Bad Men: Guantánamo Bay and the Secret Prisons (2007), 261. Note however, that there is only one absolute standard common to every shari’a and that is the First Commandment [that we shall not worship gods other than the One God]. The other Covenantal rules may change between the prophets. For example, while marriage to one’s sibling is prohibited in Mohammed’s shari’a; Qur’an 4:23 it was not prohibited in Adam’s shari’a (according to Muslim mythology Adam and Eve had fraternal twins in each pregnancy and although the siblings from the same pregnancy were prohibited to each other, siblings from other pregnancies were lawful). Further, while the flesh of swine is not permitted in the shari’a of Moses and Mohammed: Qur’an 2:173, it was not prohibited in the shari’a of Noah: AbuAbdellah Mohammed Al-Ansari al-Qurtubi, Al jami’ li Ahkaam al Qur’an vol 1 (pt 1 & pt 2) (1987), Part II. (‘Al-Qurtubi’). The triliteral, of the word fitra are (فُتْرَة) and means to open etc. For the etymology see E W Lane, Arabic English Lexicon vol 2 (1984), 2416. Lane also refers: at 2416, to a hadith of the Prophet (paraphrased) which states that ‘a child is born with fitra but it is its parents that raise it on a different path.’ This fitra is spiritually linked to humanity’s acceptance of free-willed worship of One God (discussed below) but factors such as our society, ego and Satan conspire to urge our souls to ‘go astray’.

191 Qur’an 30:30. This idea of a natural inclination to the belief in the supernatural with its variations is clearly evident in human societies and is not unique to Islam. Frithjof Schuon, From the Divine to the Human (1981), 6. Schuon notes that “[T]he ideas of the Great Spirit and the primacy of the Invisible are natural to man”. Schuon’s views appear to support the Islamic view that all peoples essentially have similar spiritual, religious and/or fundamental values and views (which Islam explains as necessarily being the case because all prophets essentially preached the same message) and which approximates the Ten Commandments.

The Centrality of the Shari‘a

The centrality of law to Islam is often acknowledged and is also evident from the large body of Islamic legal works in Arabic, Turkish, Persian, English, French and many other languages. However, the following short analysis attempts to demonstrate the centrality of law to Islam from a theological perspective. When David, a prophet in the Islamic tradition, asked God:

“O Lord! Why did you cause creation to come into being?” God replied: “I was a hidden treasure and I wanted to be known, so I created creation.”

Thus God said: ‘Be’ and the universe began to establish over ‘six days’. To be ‘known’ however, it appears, required un-coerced recognition by a being that was both self-aware and free-willed. To this end the Qur’an relates how ‘free will’ was offered in turn to each element in

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197 Ibid. (682.

198 Ibid. (671.


200 Qur’an 36:82. In the Qur’an however the word ‘BE’ (kun, كن) is a continuing command (ie the imperfect tense) and Muslims refer to our present life as being between (الب) the b (the ‘b’, the a, the start) and the ج (the ‘e’, the o, the end). Genesis 1:1 – Genesis 2:25; See for example Qur’an 7:54; The Qur’an states that a ‘day’ in God's reckoning is several [50,000] thousand years on the human time scale: Qur’an 70:4.

202 Qur’an 7:172 and footnote. alastu be rabi kum' (الست بركم) – “Am I not your Lord?”

When thy Lord drew forth from the children of Adam from their loins their descendants and made them testify concerning themselves (saying): "Am I not your Lord (who cherishes and sustains you)?"

They said: "Yeal we do testify!" (This) lest ye should say on the Day of Judgment: "of this we were never mindful."

Footnote to 7:172:

This passage has led to differences of opinion in interpretation. According to the dominant opinion of commentators each individual in the posterity of Adam had a separate existence from the time of Adam, and a Covenant was taken from all of them, which is binding accordingly on each individual. The words in the text refer to the descendants of the Children of Adam, ie, to all humanity, born or unborn, without any limit of time. [...] These obligations may from a legal point of view be considered as arising from implied Covenants. In the preceding verse (vii. 171) a reference was made to the implied Covenant of the Jewish nation. Now we consider the implied Covenant of the whole of humanity, for the Holy Prophet's mission was world-wide.
creation, but foolishly and unjustly to itself. Thus each of us is bound by our ancient acceptance of God’s overlordship. Each person was forewarned of the horrific consequences of failure and the ecstatic joys of the ‘correct’ use of free will. This precedent however, clearly establishes the principle of free, informed and prior consent to be bound.

In a similar vein, ancient Australian tradition, many tribes refer to the Dreamtime, which paradoxically refers to a timeless period, in which we lived not in a dream but in reality. It is this life that is the dream. On a soul passing on, Australian tradition refers to ‘return to the Dreamtime’ where we will once again see things in their fullest light, as we did on that first ‘day’ and not through the filtered, distorted and cluttered images of a material world. The Law, in ancient Australian tradition, is also central to human existence and it is the proper discharge of the timeless Law that will help each soul to return, having fulfilled its ‘purpose’, intact, undamaged and ‘whole’, back to the Dreamtime. This paragraph is not a gratuitous reference to a parochial view of the universe but to recognise that in the Islamic tradition all prophets referred to a common set of ‘central truths’ expressed in its myriad forms. The Qur’an legitimises the views of the many human manifestations of ‘the Law’.

However, according to the Qur’an, some unspecified time later, ‘human history’ begins and each soul is born into this world as a baby, with a ‘clean slate’ and with no memory of the ‘past’. The Covenant of each prophet offers individuals an opportunity and a means of re-establishing a contractual relationship with the Creator, and contains all the information

203 Qur’an 33:72.
204 Qur’an 33:72.
205 Qur’an 7:30.
206 Qur’an 7:172.
207 The Qur’an in several places uses the word (or related word) muqaribun (المقربون) to who draw close (to God): e.g. Qur’an 83:28, to describe success and describes this as a fawzul azim “supreme achievement” (فضلًا من رزقك، ذلك هو الرزق الأعظم) Qur’an 44:58. On the other hand it promises (in many places) a painful chastisement for those who deny or reject the ‘Truth’.
necessary to discharge the obligations of free will.\textsuperscript{208} Thus a believer choosing to follow Prophet Moses or Abraham will adhere to the Mosaic or Abrahamic Covenant.\textsuperscript{209} To this end, life on earth is the ‘test’ where each individual is allocated a sojourn, with the necessary infrastructure (rizq),\textsuperscript{210} to discharge the burdens of this ancient contract, a reminder from the dawn of time.

The Qur'anic reference to a Covenant is similar in function — although perhaps not in content — to the Biblical Covenant.\textsuperscript{211} ‘Correct’ performance of the Covenant of any prophet leads to ‘success’.\textsuperscript{212} Human history however, as we know it, will end on the Day of Judgment, when every human will be judged against their individual Covenanted obligations and the individual’s success or failure publicly proclaimed.\textsuperscript{213}

**Free Will**

In the beginning, there were, broadly speaking, two types of covenant established. The first covenant constitutes the immutable physical laws of nature to which every part of creation is subject, and laws which bind absolutely but separately.\textsuperscript{214} This ‘infrastructure’ is necessary for the life of each soul in its physical form\textsuperscript{215} and ipso facto is not judged.

The second is a covenant of a prophet that is freely adopted by the individual and requires performance in the form of one exercising ‘choice’

\textsuperscript{208} Qur'an 7:172.  
\textsuperscript{209} Qur'an 2:93.  
\textsuperscript{210} *Rizq* is a word used to describe a very complex Qur'anic concept and includes all human sustenance and includes food etc. The Qur'an states that every creature has its *rizq* /sustenance allocated. Qur'an 11:6:  

> There is no moving creature on earth but its sustenance depends on God: He knows the time and place of its temporary deposit: all is in a clear Record.  

See also Qur'an 15:20; Qur'an 17:31; Qur'an 29:60 Qur'an 51:58.  
\textsuperscript{211} Genesis 9:1–7 for example God's Covenant with the Prophet Noah and his followers.  
\textsuperscript{212} Qur'an 2:62, which is repeated at Qur'an 5:69, states:  

> Those who believe (in the Qur'an) and those who follow the Jewish (Scriptures) and the Christians and the Sabians and who believe in God and the last day and work righteousness shall have their reward with their Lord; on them shall be no fear nor shall they grieve.  

\textsuperscript{213} Qur'an 36:51.  
\textsuperscript{214} What is meant by ‘separately’ is that each genus is bound by law and is bound differently, but absolutely. For example, most fish will not survive when exposed to air for long periods but such exposure alone will not kill a bird although both species needs air to survive.  
\textsuperscript{215} Although the soul in Arabic is always feminine, humanity (and the other species with souls) in its earthly form comprise both genders.
as discussed above. A person chooses how to live his/her own life and each free-willed individual independently decides the extent of their own (moral) performance. The Qur'an further states that God, in mercy, sent revelation through the prophets to warn, to remind and to invite humanity towards fulfilling the binding obligations resulting from our ancient decision to accept free will. Thus, for Muslims, the shari'a of the Prophet (and in its various manifestations, of all prophets), is the law necessary to lead an individual along a 'right way' and is thus central to both the individual and therefore, a fortiori collectively, the umma and humanity.

The Omnipotent God who is outside time,²¹⁶ by definition knows all outcomes and the concept is sometimes referred to as qada wa qadar (فَدَار وَقَدَار).²¹⁷ Earthly life however, is given to humanity to play out its

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²¹⁶ Qur'an 103:1-3. Time is a 'created thing' in Islam and 'time' as we know it, will end on the Day of Judgment.
²¹⁷ Sami Zubaida, Law and Power in the Islamic World (2003), at 24. This term (qada wa qadar) is sometimes translated as predestination although as a concept predestination is prima facie inconsistent with free-will and thus clearly inconsistent with the notion of a just God: Qur'an 41:46. The phrase qada wa qadar does not appear in the Qur'an as such but is a concept synthesised from two other concepts. The word qada appears at Qur'an 2:117; Qur'an 3:47 and Qur'an 19:35. When He decrees a matter He saith to it: 'Be'; and it is. The word qadar (measure) does not appear in the Qur'an in this context. The word qadar however appears in the Islamic creed or aqeeda (اعتقاد): Rodolphe J. A. De Seife, The Shar'ia: An Introduction to the Law of Islam (1993), 7. It would seem that although a bit cumbersome 'God's foreknowledge, which nonetheless is freely is acted out by an individual, as if that person were free of all external moral constraints' is a better translation of the phrase qada wa qadar than is 'predestination'. The Qur'an reminds humanity that God knows that '[some] humans will [in the end] deny [God] but yet they are allowed their full term [in order to decide whether or not to submit]': Qur'an 69:49. The Qur'an refers to the 'two highways' (الجِنََّتَانِ) offered to humankind: Qur'an 90:10, and are described as fujuraha wa taqwaha (فجورة و تقوىها) good and bad. The conjunction wa (و) shows that God taught (or ilhumaha وَالله) inspired her (ie the soul) the instinctive knowledge of both good and bad. Each soul's free-will elects how it will travel. Predestination in its ordinary meaning would have required that God taught a soul good or bad, thus giving it no choice but to follow that predetermined path. Predestination in such a deterministic sense is clearly contrary to the concept of free-will and appears prima facie unjust. Muhammad Iqbal, The Reconstruction of Religious Thought in Islam (1996), 73. describes 'predestination' as 'God being pre-aware of the entire sweep of history'. Meliorism is not inconsistent with Islam as indicated by the very existence of a duty of djihad, and Islam is therefore inconsistent with a passive notion of 'predestination' in the sense that everything is predetermined and fixed, thus making human 'struggle' or effort ipso facto futile. Although not central to the subject of the thesis, it is posited that what qada wa qadar really means is that all outcomes are ipso facto known to an Omniscient God, including the knowledge of how human beings would, if this was physically possible, act if completely independent of God. The concept helps put in context the concept in Islam that all power and independent existence belongs to God alone arguably giving rise to a Hindu perspective that everything that exists is ipso facto God (or Godlike). The concept of qada wa qadar permits the co-existence of a free-willed and 'independent' species and the Omniscient God who is fully cognisant of the free-willed agent's
individual un-coerced decisions, so that judgment is fair and is accepted as fair by every individual.

In ‘acting out’ free will, humans will interact with the rest of creation. This interaction creates the opportunity for doing both good (or right) and bad (or wrong). In dealing with ‘crimes/wrongs’, there is a well-known axiom in Islam that God will forgive unstintingly of ‘crimes/wrongs’ against God\textsuperscript{218} although ‘crimes/wrongs’ committed against others must be settled as between them.\textsuperscript{219} Thus a Muslim perspective of justice creates an overriding imperative for the resolution of human disputes on earth and is the key underlying the Islamic rationale for the proposals made in chapter 6.

An important distinction made in Islam is that between ‘sin’ and a ‘crime’. A ‘sin’ between an individual, God or another person who is willing to forgive, is considered forgiven in God’s eyes. ‘Crimes’ between people, particularly in cases where the victim/s do not forgive, but where the injured parties seek temporal justice and must therefore find temporal solutions. That is, crimes against persons, when proven, may be punished according to the law or forgiven by the injured party (or their agent), no matter how heinous.\textsuperscript{220} Therefore, for the believing Muslim, there is a crucial need for a temporal Islamic judicial forum for the final, just settlement of wrongs as between people. The basic shari‘a concepts necessary to enable this examination to occur are now considered.

\textsuperscript{218} This is demonstrated in the Qur’an by the superlative attributes of God, ‘al-Rahman’ and ‘al-Raheem’ the most compassionate and the most merciful. The 114 Chapters (except Chapter 9) of the Qur’an start with the formula including these two attributes. A specific discussion of why Chapter 9 is an exception is outside the scope of this paper.

\textsuperscript{219} See for example Khaled Abou El-Fadl, ‘Islam and the Challenge of Democratic Commitment’ (2003) 27 Fordham International Law Journal 4, 51. The shari‘a recognises the sometimes human desire for vengeance but urges individuals to overcome this primal desire by offering, in the Islamic view a significantly better ‘exchange’ for forgone substantive right of revenge in the form of an ‘eye for an eye’ type retribution.

\textsuperscript{220} Qur’an 17:33:

However, although the injured party has a right to redress, forgiveness will win a handsome reward from God.

Forgiveness expiates that wrong and the defendant will not be answerable for that particular wrong on the Day of Judgment, and the victim according to Muslim tradition has all his/her sins forgiven to the time the choice to forgive is exercised.
The 'Rule of Law' under Shari'a

An assumption made in this paper is that the desire for a 'rule of law society', defined here as the principle that every person and organisation including the government or ruler is subject to the same laws, is universal and self-evident.\(^2\) That is, cognisant of the critiques of this notion, not to say that the 'rule of law' is of paramount or of overriding importance, but only that in the form used by Hayek, that it is of significant utility when examining rule under law and thus good governance.\(^3\) The notion of the 'rule of law' arguably provides a culturally neutral yardstick that bridges the divide between an uncompromising universalism, based largely on the mores of the dominant

\(^2\) For a Muslim perspective on the 'rule of law' see generally Khaled Abou El-Fadl, 'Islam and the Challenge of Democratic Commitment' (2003) 27 *Fordham International Law Journal* 4. For a discussion of: the manipulation of the shari'a, the problems of characterising the Islamic regime as that of a 'rule of law' regime, the abuse of law and the flouting of the 'rule of law' and the problems of 'knowing the Divine intention': see at 73-75. The action by Pakistani lawyers in support of the 'rule of law' is another example of the universal desire for the 'rule of law'. It is a submission of this paper that lawyers are arguably in the better position to agitate for the maintenance or restoration of this right. The difficulties of defining 'rule of law' are acknowledged: see for example Rachel Kleinfeld, *Competing Definitions of the Rule Of Law Implications For Practitioners* (2005) <http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf> at 22 July 2009. The problems of universalising 'Anglophonic' notions of such as the rule of law: at, 14, which conflate law as rules and laws as right) are also acknowledged, including the high level of generality that would be necessary to make the doctrine 'truly universal'. For a Muslim critique of the 'rule of law' notion see Nadirsyah Hosen, Shari'a & Constitutional Reform in Indonesia (2007).

However, at least some of the elements identified by Kleinfeld such as (1) a government bound by law, (2) equality before the law, (3) predictable and efficient rulings, will find resonance in the shari'a. Her other two indicia, law and order and human rights, while likely to find general agreement will be clearly subject to Islamic notions of permitting rebellion against oppressive rulers and, the definitional issue of what constitutes a human right. Kleinfeld (at, 15) acknowledges that the 'human rights' element of 'rule of law' is likely to be contentious in some cultural contexts. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005). For an alternative view on the 'rule of law' see generally: John Hasnas, 'The Myth of the Rule of Law' (1995) *Wisconsin Law Review* 199; Justice J D Heydon, 'Judicial Activism and the death of the rule of law' (2003) 23 *Australian Bar Review*.

\(^3\) Joseph Raz, *The authority of law: essays on law and morality* (2nd ed, 2009), 210. cites F. A. Hayek's characterisation which Raz refers to as the 'clearest and most powerful formulations of the idea of the 'rule of law'. Hayek's formulation of the 'rule of law': at 210, is:

\[[...\] stripped of all technicalities this means that government in all its actions is bound by rules fixed and announced beforehand- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.\]

In addition, the positive law in the shari'a is clearly tinged with the moral and ethical values of the Qur'an and *sunna* and the 'rule of law' in Islam thus arguably takes on a more Dworkinian twist rather than say a purely Austinian, or to a lesser extent Hartian view of a positive law, devoid of moral content.
It is clearly possible that a ‘rule of law’ regime can result in purely majoritarian rule without protection for minorities, but it is noted that in the contemporary system of international relations, external sources of obligation, such as customary law, provide the weak and other vulnerable groups, with at least some measure of protection. Koskenniemi argues, even within the liberal tradition, that there should be an external criterion for scaling competing values. That is, a legal system must address conflicts from within its own norms. This is the view favoured in this paper and includes, in the application of the ‘rule of law’, that the doctrine must operate within a society’s own cultural, (including religious) context.

However, an important question is whether the ‘rule of law’, as defined above, is a valid legal principle under Islamic law. The Qur’an provides for a society governed by law. The terminology of the ‘rule of law’ does not find direct expression in the shari’a. The concept however, that every individual is accountable is easily sustained under the Qur’anic principle of individual accountability and the practice of the Prophet. A hadith from the Prophet states that even his daughter Fatima, a great

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223 Please refer to the discussion on relativism at: Cultural Relativity and Pluralism, 571.
224 Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2005), 89.
225 The Security Council for example unanimously adopted Resolution 1040 (1996): UN Press Release SC/6165 (29 January 1996), which put Burundi on notice to adopt ‘rule of law’ measures. While democracy was also mentioned in the resolution, the wording that accompanied the concept of the ‘rule of law’ itself was non-prescriptive.
226 Qur’an 5:48.

Islamic society was a society based on the ‘rule of law’, long before this concept became a cornerstone of Western societies. Although everyone realised that the bulk of the rules of Islamic law was man-made, its pseudo-divine character was kept alive because it strengthened the supremacy of the law. Islamic law was rhetorically referred to as God’s law and as such applied equally to the rulers and to their subjects.

This view is endorsed in this paper and is a key reason why so many Muslims long for the ‘re-creation’ of the political and governance model of this early period: see for example Sohail H Hashmi, ‘Islamic Ethics and Weapons of Mass Destruction: An Argument for Nonproliferation’ in S H Hashmi and S P Lee (eds), Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives, (2004) 321, n3. A consequence of this lack of trust is that the level of confidence is quite low in this period. There is little confidence among Muslims that the ‘rule of law’ model finds expression in many Muslim majority States.
scholar and jurist in her own right, a noblewoman of the Qureishi elite, the daughter of the Prophet, wife of a caliph would, if the case ever arose, be subject to the same criminal law as is every other Muslim,228 conceding no preference based on distinction with respect to an individual’s social, economic, kinship or other status.

Bassiouni states that the shari’a recognises the principles of legality229 but that it is applied in a different manner.230 Further, he confirms that the application of quisas and tazir crimes parallel the common law tradition,231 a view supported and adopted in this paper.

That is, and without diminishing concepts that are arguably capable of other interpretations, and a conclusion that would require a much greater depth of analysis, the shari’a appears prima facie intrinsically to be capable of sustaining a contemporary ‘rule of law’ notion, an assertion supported in the literature.232 What is arguably much harder to sustain on the evidence available in most contemporary Muslim societies, is the existence of institutions capable of enforcing ‘rule of law’ accountability measures against those in power.233 El-Fadl discusses the practical problems associated with enforcement of law against the rulers in a historical context,234 and Peters discusses the excesses of some Muslim

228 Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 5 (1976), 416. See also footnote to Qur’an 66:11. Fatima is one of ‘the perfect women’ in the Islamic tradition. The Prophet was also constrained by the shari’a and performed his Covenant obligation in his personal capacity.

229 According to Cherif Bassiouni and Peter Manikas, The Law of the International Criminal Tribunal of the Former Yugoslavia (1996), 265., the principles of legality in a criminal context are reflected in the maxims nulla poena sine lege and nulla crimen sine lege, and the legal consequences that attach.

230 Ibid. (279).

231 Ibid. (279).


233 According to Elie Kedourie, ‘Middle Eastern Lectures’ in M Kramer (ed) ‘I Would use the Term Despotism ‘: An Interview, (1995) 73, 77., the shari’a helps ‘old fashioned despots […] rulers under God […] to keep their power’. It is a matter of record however that the vast majority of Muslim States are indeed secular. This paper asserts that it is not so much the shari’a that allows this to happen but the pretence by rulers to characterise their despotic (and in the main secular) societies as being ‘Islamic’ societies, by paying lip service to the shari’a in some form. A more informed challenge to such simple unsubstantiated characterisations will make it much more difficult for rulers to pass off their whimsical rule as ‘Islamic’.

The upshot for this paper however, is that, in expecting that the criteria applied would approximate international standards, it would be difficult in general to depend on the domestic courts in Muslims States to try fairly the cases/crimes considered in this paper. Powerful elites would escape prosecution for corruption and the poor and marginalised would suffer for the absence of free and fair trials; thus the appeal to the international community to establish a system where Muslims have access to free and fair *shari'a* trials.

Even if this *shari'a* analysis does not sustain the existence of a contemporary notion of the 'rule of law' in the *shari'a*, Ku and Jacobson note that this is a rule of international custom, and thus as such that both Muslim States and Muslims are tacitly bound by these obligations as a matter of *shari'a* treaty law and consensus. There must be little dispute however, that in Islam, both governor and governed are prima facie bound by the same rules of law and that, when necessary, the law can in principle and should in practice equally be enforced.

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237 If this perception of an absence of trust in State institutions is as widespread, as appears to be the case, then the 'complementarity' provision in the Rome Statute may prove problematic in practice and therefore should be avoided until the Muslim level of confidence in their domestic courts reaches a level comparable to that we generally enjoy in Australia.

238 See *idjma* in Appendix 2, and particularly to the discussion on tacit consensus.

239 Mallat notes however that a certain degree of caution was employed by jurists, particularly in the choice of words used, to minimise the chances of a backlash. He also quotes Abu Hanifa that a man should be attentive to his own interest, keep his tongue and respect the ruler even though the ruler is equal to others before the law: Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (pt I)' (2003) 51 *American Journal of Comparative Law* 699, 734.

240 It is clearly possible that Muslims indicted in the international plane may find refuge by exploiting other general international rules or principles such as sovereign immunity or by placing themselves beyond capture in friendly sovereign States, but this situation is no different to the case, notwithstanding Article 7(2) of the Statute of the ICTY, of the 'protection' of persons indicted for example by the ICTY: Azizah Y. al-Hibri, 'Islamic and American Constitutional Law: Borrowing possibilities or a history of borrowing?' (1999) *University of Pennsylvania Journal of Constitutional Law* 492, <http://www.un.org/icty/indictment/english/kar-a19950722e.htm>. [Accessed April 2005].
Finally, a central aspect of a 'rule of law' regime is the 'right' to a fair trial. While the following proposition does not appear to have direct shari'a authority, it is posited that the following words of the War Crimes Tribunal in *Wilhelm List and Others* will find resonance in the shari'a:

> A fair trial […] affords the surest protection against arbitrary, vindictive or whimsical application of the right to shoot human beings […] but notwithstanding this] acts prohibited are without deterrent unless they are punishable as crimes

Further, there is arguably the tacit consensus from the Muslim jurists of Bosnia, a Muslim-majority State, who did not appear to have contradicted the judgment on this point which was examined by the Chamber in the *Tadić Case*.

**Making a Case for the use of the Shari’a in the International Plane**

Materialistic secularism is arguably the dominant contemporary global ideology.

Although its genesis is 'Western', it reflects the humanistic values founded on the deep and enduring Christian notions of charity, compassion and forgiveness. One third of the world’s population is counted as ‘Christian’ and it appears fair that the better part of the world’s international laws reflect the values of this civilisation.

The moral argument for inclusion of the shari’a is that the next major group as a discernable, identifiable, collective is perhaps the Muslim civilisation, reflecting the faith and culture of about one in five of our planet’s population. This should then be the next major civilisation to be reflected within the international legal system. The Statute of the ICJ provides a clear legal basis to do this and although the problems associated with the use of the shari’a are noted and documented, this paper considers some of the means by which these problems can be overcome.

The more practical arguments and reasons for using the shari’a are examined throughout this paper but in essence, they are that, in addition to

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242 *The Prosecutor v Duško Tadić* (1999) Case No IT-94-1-A; Article 3 Genocide Convention; Article 25(3) Statute of Rome; Article 2(3) of the Statute of the ICTR; Article 4(3) of the Statute of the ICTY
the distribution of the world's equitable legal traditions, the shari'a may be the better tool to reduce wanton use of violence by Islamists. This paper cautions against the notion that the shari'a could be used in domestic Muslim jurisdictions to do this, for the absence of free and fair legal process. While this denial of a free trial is also a moral issue, this paper posits that it is the perception that Muslims are being treated unjustly that fuels the Islamists' struggle, even when acting contrary to their accepted faith positions, and provides an added impetus to provide free and fair trials where these criminal trials are conducted at the international level.

The Shari'a in a Contemporary Context

The basic socio-religious aims of the monotheistic ministries of Moses, Christ and Mohammed must be very similar, particularly with respect to the change they wish to effect on individuals and arguably but perhaps less so, with respect to their respective societies.243 These faiths aim at personal salvation although the means/path (shari'a) to achieving this end may vary. What is fundamental to the faiths is that the exercise of free will should not be hindered and this end arguably is greatly facilitated in a free and just society.244 To this end, all of these traditions emphasise justice.245 Western secularism is a product that mainly emerges from the Judaeo-Christian, and particularly Protestant tradition. The 'Christian' means of achieving justice is through a separation of what is Caesar's from what is God's.246

On the other hand, while conceding that pluralism is a 'salient feature' of the shari'a,247 Mayer approves of the trend to unify and secularise the law. She does not however, appear to address the question of whether eliminating plurality is a retrograde step with respect to individual autonomy. Commentators such as Gellner have posited that

243 This is because in the views of each the three faith traditions they come from the same source (ie the God of Abraham).
244 It is conceded that if 'outward practice alone', without more, (ie excluding the mental elements) is the desired 'end', then a dictatorial society would arguably best help achieve this outcome.
Islamic society is uniquely resistant to secularisation. Problems, both real and perceived, associated with the use of the *shari'a* in a secular environment are amply documented. It has already been noted that the polity in a majority of Muslim States is secular. Mayer also notes that secularism helps to bring uniformity, and consequently reduce legal pluralism, which may make the law easier to administer, although it would appear that it is the *uniformity* criterion rather than secularism *per se* that is likely in this instance to be the determining factor with respect to the ease of administration.

These current controversies however are not new to Islam. For example, Ibn Taymiyyah, among others, have addressed the issue of secularisation, in practice, if not in name, from within the bounds of the *shari'a*. He contrasted the Mamelukes whom (although corrupt) he regarded as Muslims, against the ‘secular’ Mongols (also nominally Sunni Muslim) but whom ibn Taymiyyah treated as infidels because they used the *yasa* and not *shari'a* as the basic law, although in practice there was ‘little difference between the two sets of rulers’, and was a triumph of form over substance. In more recent times and based on the precedent set by ibn Taymiyyah, Rashid Rida dismissed the use of Western legal codes but did not endorse *shari'a*-based law. At any rate, Gellner’s general position is not entirely vindicated as neither Rida nor Ibn Taymiyyah had the legal authority to act on behalf of the Muslims of their respective times. They certainly had no authority to decide for posterity.

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248 Ernest Gellner, *Postmodernism, Reason and Religion* (1983), 5. This is both a theological and definitional problem. If ‘secularism’ is the separation of Church and State, then secularisation in its strict sense is *ipso facto* impossible, as Islam does not have a ‘Church’ hierarchy as such. The absence of a clergy and ‘church’ in Islam means that ‘secularisation’ is a very complex issue the nuances of which are arguably underplayed or generally only superficially addressed by these critics. Gellner’s statement does touch on an issue addressed by ibn Taymiyyah and is considered below.


250 See text accompanying n 257, 547.


252 *Ibid.*, 1028. Mayer discusses the case of Turkey’s secularised personal status law, which is a single system for all Turks, as compared with the diversity of personal status laws under the various Islamic Schools.


254 *Ibid*.

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Zubaida critiques Gellner’s ‘essentialist position’ as ‘ahistorical’ and notes in practice, that there appear to be ‘few objections to the growing spheres of secular culture [in Muslim lands].’

Khadem rightly observes that the ‘separation of religion and State’ doctrine is not universal but historical, and in the case of the West, with respect to the Christian tradition. Although Muslims through the centuries have also sought to separate the law-making function from oppressive rulers, the religious traditions have evolved differently. The onus of proof rests with those who seek to impose, for example, the Christian historical evolution on Muslims. Muslims, in the main, are seeking not relief from the tyranny of religion, but social and economic justice and relief from the tyranny of essentially secular regimes. Muslims must find a way of dealing with what they confront and many Muslims appear to believe that shari’a is capable of effecting such change, although Muslims must do more than merely assert this view.

Islam is a belief system that requires its adherents to look ‘beyond’ the material and not to neglect the realm ‘of what lies beyond our immediate perception’ (al-ghaib). To Muslims, the true shari’a leads to sweet water and not to a mirage, notwithstanding its ‘clearly visible appearance’ to the weary eye in the desert. Not everything the mind ‘sees’ is true. The shari’a, insight and ‘seeing’ with one’s heart helps the Muslim to see through the deception of the mirages in life. Those who do not share these perspectives are often sceptical and ask for more tangible proof of Islam’s claims. Islam has dealt with base materialism and scepticism from its inception and should continue to engage with the more enlightened

257 Ibid. (40. See also Anne Elizabeth Mayer, ‘Law and Religion in the Muslim Middle East’ (1987) 35 American Journal of Comparative Law 127.
259 Recall the shari’a characterisation as a jurists’ law see above: n 89, 23.
260 God centeredness is the basic tenet of Judaism, Christianity and Islam. There is however, a deep division on this score between Islam and secularism.
261 For example Qur’an 2:3 (يؤمنون بالله) – you’minoon bi ghaib – describes ‘those who believe’, as those able to accept that there are things beyond (normal) human perception.
262 See n 154, 527.
263 Qur’an 25:7-8:
forms of contemporary secularism and its reasonable scepticisms. Those antagonistic to Islam do sometimes give the impression of deliberately misquoting, or it may be that they simply misunderstand, the basic concepts of the religion. The task of confronting these criticisms is often left to individuals. From a legal perspective, it would be preferable if Shari'a scholars should take up this challenge, not only within the framework of the narrow confines of their own religious culture, but of greater value, in the light of the values of wider community. It is posited in this paper that the freedom provided by the institutional and political framework existing in Western secular democracies provides an ideal setting in which to undertake this task.

Developing the Shari'a

Sources of Islamic law

The sources of Islamic law and obligation are identified here but discussed in some detail in Appendix 2. There are four major sources of Islamic law in both the Sunni and Shi'i branches of Islam. These are the Qur'an, the sunna (or traditions which are compiled as collections of hadith), ijma' (informed consensus) and fourthly, for Sunni Islam, quiyas (analogy) and ra'y (independent reason) in the Shi'i schools. Custom ('urf or 'adaat), maslahah (public good) and daruraat (necessity) are also sources of Islamic law.

And they [the doubters] say: 'What sort of an apostle is this who eats food and walks through the streets? Why has not an angel been sent down to him to give admonition with him? Or (why) has not a treasure been bestowed on him or why has he (not) a garden that will sustain him? [...]'.

265 For an international legal perspective on the sources of Islamic law see for example C G Weeramantry, Islamic Jurisprudence: An International Perspective (1988), 30.
266 For a judicial discussion of the sources of Islamic law see Aga Mahomed v Kolsom Bee Bee (1897) 24 Ind App 196, 106. per Rahman S. A, Fazle-Akbar, Hamoodur Rahman, Mohammed Yaqub Ali and Mahmood S.A., JJ.
268 Imam Ali ibn Abu Talib, Nahjul Balagha : Peak of Eloquence (1986), vii: 'These four principles (are), the Qur'an, traditions (hadith) of the Prophet and imams (sunna), consensus (ijma') and reason (ra'y)'.
269 Khaled Abou El-Fadl, Speaking in God's Name: Islamic Law, Authority and Women (2001), 35.
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law,\textsuperscript{270} of interest here. The Qur’an and the sunna are called independent sources (nass) and ijma‘a, ra’y, quiyas and other sources, the dependent sources.\textsuperscript{271}

**Immutable Laws (usuł) and Evolving Laws (furu’)**

The independent sources were described inter alia by al-Shafi‘i as the roots (usuł\textsuperscript{272}) of law and the dependent sources as the branches (furu’) of law, which grow out of these ‘roots’,\textsuperscript{273} Usul laws and farad ‘ayn (individual obligations such as the canonical prayer, fasting and the payment of the poor rate) are generally\textsuperscript{274} immutable, presumably because some of the shari‘a-regulated’ aspects of human nature are unchanging and therefore, one would not expect the law regulating these intrinsic qualities to vary with time. The specific scope of what constitutes usuł can differ slightly between the Schools.\textsuperscript{275} While there is broad acceptance of the independent sources and thus the scope, content and use of the usuł, there is some disputation on the scope of the dependent sources and thus the resulting scope, content and use of the derived laws.\textsuperscript{276}

The regulation of other aspects of human activity requires laws that will evolve and change with time. These evolving laws must however, be based on, developed in concert with and intra vires the usuł, and are often called the furu’ laws.\textsuperscript{277} In this paper, a law is treated as usuł only when it is

\begin{itemize}
  \item \textsuperscript{270} Ibid. (Note that custom is also a source of international law: Art. 38(1)(b) Statute of The International Court of Justice,
  
  \item \textsuperscript{271} C G Weeramantry, Islamic Jurisprudence: An International Perspective (1988), 31.
  
  \item \textsuperscript{272} The root/s of law: asl singular, usuł: plural.
  
  \item \textsuperscript{273} Qur’an 14:24-25:
  
  Seest thou not how God sets forth a parable? a goodly Word like a
goodly tree whose root is firmly fixed and its branches (reach) to the
heavens

  It brings forth its fruit at all times by the leave of its Lord. So God sets
forth parables for men in order that they may receive admonition.

  \item \textsuperscript{274} Exceptions legitimately do apply for illness, poverty or other causes as provided for in
the sources, but this is not directly to point in this context which is examining the issue
from a higher level of generality.
  
  \item \textsuperscript{275} For example Sunni schools hold that the five daily prayers fall due at separate fixed
times in the day (unless one is sick or on a journey when the five prayers may be
combined into three separate time intervals). The Shi‘i schools hold that the five
prayers generally may be combined into three separate time intervals although it is
better to separate the five prayers.
  
  \item \textsuperscript{276} For example, for a discussion of the relevant legal issues such as the ‘closing of the
doors of ijtihād (ie the exercise of quiyas ) which affected the development of the law
  
  \item \textsuperscript{277} See also text accompanying the organic nature of furu’, 533.
\end{itemize}
accepted as such by the vast majority of Muslims, for example, the requirement for the belief in One God or the belief in the prophethood of Mohammed, Jesus, Moses and Abraham.

Coulson describes the effect of the Qur'an and *sunna*, arguably when applied as positive law, as 'modifying] existing customary law ('urf). This is accurate inasmuch as it superimposes non-derogable Qur'anic rules such as the enduring prohibitions on alcohol and pork, but does not otherwise affect neutral and local customary matters such as the language spoken, (permitted) foods, land laws, kinship rules and other equitable local pre-Islamic cultural practices, and explains the regional differences between otherwise 'Islamic societies'.

In examining this methodology, consider what happens when there is not an explicit legal rule in the usul. The methodology that answers this general question is found in the oft-quoted hadith of the Prophet in conversation with Mu'adh ibn Jabal when the latter was appointed Governor of Yemen, and broadly approximates a common law

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278 John Duncan Martin Derrett, *An Introduction to Legal Systems* (1968), 57. This 'existing' customary law according to Islam is 'Islamic' inasmuch as in the Qur'anic view, God sent prophets to all peoples: Qur'an 10:47. Thus while these peoples corrupted some of the 'Truth', residual vestiges of Truth remained. Thus what is corrupted needs to be abrogated or reformed by future prophets. What is not explicitly against the *shari'a* is therefore, arguably still good law.

279 *Shari'a* tribunals would make a suitable forum for the examination of land issues arising from customary law once domestic remedies are exhausted. While this is unlikely to suit Western interests (particularly the CANZUS group (Canada, Australia, New Zealand and the USA) who for example voted against United Nations Declaration on the Rights of Indigenous Peoples by the General Assembly, 13 September 2007, Doc. No A/61/L.67. There should be few impediments on issues of law or principle.

280 Wael B Hallaq, *A History of Islamic Legal Theories* (1997), 86. (The text of the hadith has been modified slightly to assist reading):

Sometime after the Prophet had returned to Medina, messengers of the kings of Yemen came to him announcing that they and the people of Yemen had become Muslims. They requested that some teachers should be with them to teach Islam to the people. For this task the Prophet commissioned a group of competent teachers and made Mu'adh ibn Jabal their *emir* /leader. The Prophet then put the following questions to Mu'adh:

"According to what will you judge?"

"According to the Qur'an" replied Mu'adh.

"And if you find nothing therein?"

"According to the *sunna* of the Prophet"

"And if you find nothing therein?"

"Then I will exert myself (exercise *ijtihad*) to form my own judgment."

The Prophet was pleased with this reply and said: 'Praise be to God Who has guided the messenger of the Prophet to that which pleases the Prophet.'
methodology for arriving at a judicial decision.281 A problem arises, however, when one group of Muslims classifies something as *usul*, for example the covering of a woman’s hair, and another considers this a matter of *furu*. On the other hand, a mere difference of opinion and arguably even significant differences do not pose a major problem within Islam as is evident with (the albeit sometimes uneasy) co-existence between Schools.282 Another problematic issue occurs, when one group declares a second group as disbelievers on a matter of importance and uses this declaration as a basis for fighting that group.283 This is a matter of practical importance and the concept of abrogation that is used by Islamists to interpret law in a manner that allows them to declare people ‘heretics’ is now examined briefly.

**Abrogation in Islamic Law (naskh نسخ)**

The concept of abrogation in the Qur’an or the *sunna*, broadly speaking, holds that in the event of an inconsistency, the Qur’anic revelation or *sunna* that is ‘later’ in time must prevail over an earlier revelation or *sunna*.284 It is

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282 Mohd. Hameedullah Khan, *The Schools of Islamic jurisprudence: A Comparative Study* (2nd ed, 1997), 135. reported the Prophet as saying: ‘Difference of opinion (*ikhtilaaf*) is a boon to my followers’.

283 See notes associated with the concept of *takfir* above n73,512.

284 The word *naskh* literally means to delete, to abrogate, to annul. Milton J Cowan (ed) *The Hans Wehr Dictionary of Modern Written Arabic* (1980), 961. For example, the sun annulled the shade (تَمَسَّك الشمس الظُّل). For some putative examples of abrogation please refer to the entry under *naskh* in the Encyclopaedia of Islam. For a Shi’i concept of abrogation please refer to the Encyclopaedia of Islam. A generally accepted and standard legal analysis of *naskh* is found in Abu‘Abdallah Mohammed Al-Ansari al-Qurtubi, *Al jami‘li Ahkaam al Qur’an vol 1 (pt 1 & pt 2)* (1987), Part II 63. (Al-Qurtubi) takes a much broader view of *naskh* and criticises the narrower views as ‘ignorant’ (الطهْر) and ‘stupid’ (الغَايَة) (at. 66). Al-Qurtubi is right in a sense that by definition an Omnipotent Power can do whatever it pleases and thus *naskh* in a broader sense can mean that God in history replaced one plant/animal species with another (in an evolutionary sense) etc. Al-Qurtubi also refers to a *hadith* from Ayse, the wife of the Prophet, which states that there was a time when Sura Ahzab (Sura 33 with 73 verses) was as long as Sura al-Baqara (Sura 2 with 286 verses) but that God made everyone forget the extra verses (which were originally revealed by God). Al-Qurtubi also refers to Qur’an 22:52:
noted however, that the concept of *naskh* as applied between the various verses of the Qur'an appears prima facie conceptually and internally inconsistent with the notion of an Omnipotent, All Knowing God, who knows the past and the future and who is the author, and has undertaken to protect and preserve the Qur'an for all time. Abrogation of *sunna* is conceptually more acceptable because of its human agency.

Notwithstanding this inconsistency, great scholars such as al-Shafi'i and Ibn Abbas among others refer to the abrogation of a particular Qur'anic verse or Prophetic *sunna* by a later verse or *sunna*. That is, for example, the 'verse of the sword' could in theory abrogate some earlier Qur'anic verses that require Muslims to try to achieve peace and refrain from aggression, a view held by a minority such as Faraj.

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Never did We send an apostle or a prophet before thee but when he framed a desire Satan threw some (vanity) into his desire: but God will cancel anything (vain) that Satan throws in and God will confirm (and establish) His Signs: for God is full of knowledge and wisdom.

and in this context God obliterates ab initio the 'corrupting influence' of Satan. This issue is not exactly to point, as what 'comes from Satan' — not by definition — the Qur'an anyway and therefore, the question of abrogation of the Qur'an (as God's word) does not arise. Al-Qurtubi also does a grammatical and etymological analysis in his 15 point analysis of *naskh* which are not (in its entirety) discussed here. Al-Qurtubi’s criticisms on the view of *naskh* taken in this paper are acknowledged. An authoritative Shi'i Muslim view of *naskh* as presented by Ayatollah Mutahhari is in principle similar to the al-Shatibi’s view: Ayatollah Morteza Mutahhari, *jihad: The Holy War of Islam and its Legitimacy in the Qur’an* (1985), 55.

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285 Qur’an 9:105; Qur’an 13:9; Qur’an 32:6; Qur’an 34:3; Qur’an 39:46 etc. *alim al ghaib* — One who knows that which is beyond the perception of human beings.

286 Qur’an: 2:106:

None of Our revelations do We abrogate or cause to be forgotten but We substitute something better or similar; knowest thou that God hath power over all things?

287 Qur’an 15:9. Further, the *mu’tazila* group who argued that the Qur'an was created used the argument of *naskh* and Qur’an 2:106 to argue that if the Qur'an is subject to abrogation then it is not eternal: Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (1970), 64. There is some consensus that Qur’an 2:106 means that previous scriptures are annulled. (at. 60) (ie a reference to the previous scriptures. This view is as opposed to the Qur'an and or the *sunna* abrogating other (previously revealed) parts of the Qur'an or *sunna*. Abu Hanifa also states that every prophet invited people to his own *sharia’a* and forbade his followers to follow the *sharia’a* of previous prophets: Ahmad Hasan, *The Early Development of Islamic Jurisprudence* (1970), 7.

288 See text accompanying n 285, above.


293 According to R L Euben and M Q Zaman (eds), *Princeton Readings in Islamic Thought* (2009), 339. Abd al-salam Faraj who was executed for the killing of Egyptian President Anwar Sadat, held in his treatise *al-farida al-ghu’iba* : at 338, para 77, that verses on
This is also a view taken by and supported by Islamist groups seeking to take the fight to non-Muslims and by making all or at least most non-Muslims legitimate targets for violence and using this as a basis to declare Muslims who disagree, as heretics. Clearly, this is a perspective that must be addressed if the violence used by Islamists is to be regulated.

However, the reality of abrogation is more about differences in interpretation between the Schools rather than an issue of the Qur'an per se and Burton notes that:

the entire structure of the theory [of abrogation] was merely an exegetical tool of incomparable utility to later generations of scholars aware of the differences between the individual theses of the rival madhahib to which they severally belonged. Their varying fiqh views, inherited from earlier ages, had allegedly arrived at by consideration of different [sunna] sources of differing dates.

Al-Razi (d. 606/1209) — the famous philosopher and theologian, who was considered a disbeliever by the Wahhabi — stated that ‘it is improbable that God brings some verses together in pairs of which one abrogates the other’. Further, there is no ‘agreed-upon’ list of abrogated Qur’anic verses and perhaps for this reason no one has produced a revised version of the ‘Qur’an’ sans the abrogated verses.

The interpretation of abrogation is a critical and practical issue informing the formulation of Islamic law. However, the non-universal acceptance of the concept of naskh and an absence of consensus must mean that the consequences of naskh in practice are not always binding. The utility of the theory of naskh in principle is not denied. Shatibi’s (d. 1388) long-standing view on naskh is:

That the Qur’anic text represents a closely interrelated and complete whole, means that for a particular verse to be properly understood it must be viewed not only in light of its general textual context but also mainly with reference to the verses which precede it in time.

peace were all abrogated by the verse of the sword (Qur’an 9:5): at, 338, para 79. This is a minority view.

298 The difficulties encountered in this process are illustrated by Hasan who attempted to enumerate what he described as “the alleged abrogated verses”: Ahmad Hasan, The Early Development of Islamic Jurisprudence (1970), 81.
As an illustration of this methodology, there are general Qur'anic verses, usually Meccan, and the exceptions to these general provisions are particularised, usually by Medinan verses. General 'legal rules' should therefore, as a matter of interpretation, be read in the context and in association with the particular exceptions. The view taken in this paper is that Shatibi's view is the better view on naskh. The prevailing view on naskh with respect to the 'books' and teachings of the other older prophets is that the teachings of (the Prophet) Mohammed have (for some Muslims) abrogated the other scriptures, which for convenience is the view adopted in this paper.

Shari'a Interpretation

Interpretation generally aims to give meaning to text. The object in this case is to give meaning to the sources, the writings of the jurists and to legal provisions, as an aid to assisting the application of the law. The juristic nature of Islamic law has sometimes, over time, resulted in a broad range of interpretations of the same text. The Prophet encouraged this diversity by stating that 'difference of opinions is a boon to my community'. On the other hand, El-Fadl opines reasonably that classical Muslim jurists created

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300 For example Qur'an 2:186 states:

> When my servants ask thee concerning Me I am indeed close (to them); I listen to the prayer of every suppliant when he calleth on Me; let them also with a will listen to My call and believe in Me; that they may walk in the right way.

and the later (in time) verse Qur'an 6:41 states:

> Nay On Him would ye call and if it be His Will He would remove (the distress) which occasioned your call upon Him and ye would forget (the false gods) which ye join with Him!

The first verse refers to an unconditional grant of the supplication whereas the second refers to a grant if God wills. While not engaging with the philosophical discussion surrounding these verses (as it raises the more convoluted discussions about intervention etc which are well outside the scope of this work), it is noted that there is the Prophetic hadith that refers to the timing of God grant of the supplication. That is, the Prophet said that the (relatively minor distress) in this world is not alleviated and the greater distress is alleviated on the Day of Judgment when the human would wish that all of his/her supplications were deferred to that Day.

301 That is, only the shari'a, the Muslim law, is binding on Muslims. However, those adopting other Covenants are still entitled to follow those scriptures and to be judged by the laws under those Scriptures. Muslim law may incorporate elements of the laws of previous peoples, or as discussed as 'urf or custom, and the Biblical punishment of the stoning of adulterers is one such example.

doctrines such as *idjma'* and the concepts of *usul* and *furu'* to limit the indeterminacy that emerges from this juristic concept of authority.303

The Qur'an states that, read in its own context, the Qur'an is *'ahsana tafsir'*.304 That is, the Qur'an is its own best commentary,305 in that it will make all things clear306 and arguably provides some authority for a textual approach to interpretation. The concept of the *maqasid* on the other hand favours a purposive approach to its interpretation. Also to this end, is the *sunnat Allah*,307 ie 'God's way of doing things', or God's laws as described in the Qur'an and observed in nature. Between these two means is the practice of the Prophet and his Companions, which provides an added perspective on the texts and which form precedent. Consensus among Muslims results in 'binding precedent', which will remain until a new norm appears through consensus. One aspect of how *sunnat Allah* informs interpretation, examined in chapter 5, is where it is used as the analytical tool for examining the rationale for specific Qur'anic prohibitions vis-à-vis humans, as against what is permitted to living beings generally in the laws of nature.

Generally, Muslim jurists recommend taking the most obvious meaning of the text as the best meaning308 and to avoid convoluted interpretations that stretch the ordinary meanings of words. The form of words that best describes this recommended mode of Qur'anic interpretation, and which is used as the starting point with respect to interpretation in this paper, is called *khabar*, or giving the text 'the apparent meaning according to contemporary usage'.309 The Qur'an further claims

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303 Khaled Abou El-Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (2001), 64.
304 Qur'an 25:33.
306 Qur'an 43:2.
And particularly Qur'an 35:43:

> But no change wilt thou find in God’s way (of dealing): no turning off wilt thou find in God’s way (of dealing).

both clarity and established meaning (muhkam) in some verses and ambiguity or allegory (mutashaabih) in other parts of its text. For the ‘correct’ interpretation of mutashaabih text, the Qur’an instructs Muslims to avoid seeking ‘hidden meanings’, to avoid what El-Fadl reasonably refers to as the ‘abuse of the text’.312

Historical methods which were developed in interpreting Islamic law are not greatly different from general techniques used in interpreting common law313 or international law, as demonstrated by contemporary and respected Islamic legal scholars including Bassiouni, El-Fadl, Hallaq, Kamali, Nyazee and Peters. In practice however, the actual approach to interpretation taken legitimately can, depending upon the facts, range from a strictly textual approach (say for muhkam verses) on one hand to a broad purposive approach (say for mutashaabih verses) on the other,314 and a range of ‘approaches’ are used in this paper.

When faced with novel problems, jurists will often examine the text of the Qur’an in the light of the sunna and the other sources to ‘discover’ a solution to the new problem and then declare the existence of a rule.316 The legal methodology involves the identification of the ratio legis (‘illa or the reason) of a particular (pre-existing) rule (hukum),317 which is then applied to the new problem and a modified or an extended legal rule is

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310 Qur’an 3:7:
He it is Who has sent down to thee the Book: in it are verses basic or fundamental (of established meaning); they are the foundation of the Book: others are allegorical. But those in whose hearts is perversity follow the part thereof that is allegorical seeking discord and searching for its hidden meanings but no one knows its hidden meanings except God and those who are firmly grounded in knowledge say: "We believe in the Book; the whole of it is from our Lord"; and none will grasp the Message except those of understanding.

311 Ibid.
312 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 116.
317 The process of extracting legal rules under the shari’a technically is called istinbat.
then identified. The resulting legal opinion is individually referred to as a *fatwa*. The *shari'ah* is thus continually a 'work in progress' and is analogous to the accretion of common-law as a body of law that is never finally determined.

However, in highlighting the subtle complexities of Qur'anic commentary (*tafsir*), El-Fadl writes:

Some of the categorical analytical tools developed by Muslim jurists are the following *zahir* and *khafiyy* — what is the apparent external meaning versus the subtle hidden meaning; the *wadhi* and the *mubham* — whether the words used are of clear meaning or unclear meaning; the *mufassar* and the *mujamal* — whether the words taken in their context are unequivocal and specific, or ambivalent and non-specific; the *muhkam* — whether words and sentences are inherently clear, beyond doubt, and not open to abrogation; the *mushkil* — whether the words and sentences used are inherently ambiguous or rendered ambiguous by their context; the *mutashabih* — words whose meanings are not known at all because of the lack of precedent in usage; the *amm* and the *kahass* — whether the words and sentences used are general or specific in scope etc.

Consider the following illustration as an example of the traditional approach to interpretation. The Qur'an makes some strict and literally unconditional prohibitions. These include the prohibition against consuming blood (*dahm*), dealing in usury (*ribaa*), gambling (*qamara*), consuming the flesh of animals which have died naturally (*maith*), and drinking wine. In practice however, the Prophet and the jurists have 'clarified' these prima facie absolute, strict prohibitions, based on necessity, the Qur'anic principle for interpreting Qur'anic laws cognisant that God does not intend to make things difficult for humanity. The *shari'ah* in these cases has 'softened' the prohibition against 'consuming blood' by permitting blood transfusions, the prohibition against usury by permitting *salam* contracts (a form of pre-Islamic usurious contract

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319 The word *fatwa* (singular) should take the plural *fataawa*. However, in this paper the anglicised plural of *fatwas* is used.
323 See discussion on legal necessity in Appendix 2.
324 Qur'an 2:185. Mohammad Hashim Kamali, *Equity and Fairness in Islam* (2005), 60. Kamali notes: at 60, that the essence of equity in Islam (*istihsan*) is to prevent harm and alleviate hardship and is a reasonable and defensible position.
facilitating the trade in commodities,\textsuperscript{325} by allowing some exceptions to the prohibition on aleatory transactions,\textsuperscript{326} and the use of alcohol in medicines. There is thus in cases, a general ‘softening’\textsuperscript{327} of provisions, which on their plain meaning, appear to be absolute prohibitions. On the other hand, and while nothing of significance to this paper turns on this point, the strict prohibitions on gambling and alcohol are generally observed socially in the community and appear to some extent to prevent the social problems that accompany these activities in less strict, more permissive societies.

Purposive interpretation, together with legal necessity provides a legal basis for taking a broader approach to interpretation with regards to what is permitted for the smooth running of society. There is precedent therefore that an absolute prohibition say on the use of fire as a weapon of war could accordingly, be modified for necessity. It is noted however, that the Prophet construed criminal provisions strictly and narrowly,\textsuperscript{328} as a Quran’ic exception to broad interpretation as a principle, that must continue to apply, and for ex post-facto application, is unlikely to be ‘relaxed’ for necessity.

Given the complexities of a range of the Qur’an’s subject matter, it is therefore not surprising, in the context of the use of force, that some Muslims can use the interpretation of its texts to support ‘terrorism’, while others simultaneously, can portray Islam as a ‘very peaceful faith’. It is possible that both ‘sides’ are not entirely unreasonable in their positions under certain conditions. It is therefore important to take a careful, nuanced approach to dealing with text, particularly when a provision is not entirely clear on its ‘plain meaning’ or is required to be read in the context of other Qur’anic verses or applicable Sunna.

The interpretation methodology taken herein, but cognisant of El-Fadl’s caution, is the ‘hermeneutic approach,’ which in this context


\textsuperscript{326} Joseph Schacht, \textit{An Introduction to Islamic Law} (1975), 147.

\textsuperscript{327} Qur’an 2:143 refers to ‘ummatan wasata’ which means the ‘middlemost’ community.

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examines the text and develops the meaning given to this text by the Prophet or the jurists. When there are differences of opinion, as exist between the various Schools, this paper will give preference to Qur'anic and shari'a meanings that have generally stood the test of time, applied in conjunction with the interpretative tool of *khabar*, 'the apparent meaning according to contemporary usage' and the effect of justice and equity of its application.\(^{329}\) The resulting meaning must be one that is not rejected by a majority of this interpretative community.

**Law Making In Islam**

There is no central institution for developing the *shari'a*. The question thus arises as to who has the authority to develop new rules for emerging contingencies. As discussed, jurists have a clear role and a general authority to provide legal opinions, and which by consensus, can crystallise into 'law'.

There is however, some contention on which specific jurists are qualified to create law.\(^{330}\) During the time of the Prophet and the Orthodox Caliphs (c. 610 AD- 661 AD),\(^{331}\) leaders who were also great jurists in their own right, were considered authoritative to legislate,\(^{332}\) although generally jurists were a separate, independent entity to the ruling class.\(^{333}\) Therefore, political leaders who are also qualified jurists are likely to satisfy the requirement as lawmakers under the *shari'a*. Mayer rightly points out that Muslim leaders, who are not also jurists, lack de jure law-making.


\(^{333}\) Taha Jabir al-Alwani, *Ijtihad* (1993), 9. The separation of powers is not a principle of the *shari'a* as such and in fact the Prophet and the Orthodox Caliphs explicitly did not follow this principle of separation: at, 8. Since then however, (and apart from the brief period of the Caliphate of Omar bin Abdel Aziz (717AD - 720 AD), there has been a de facto separation between the legislative function and the judicial function and the various attempts through Islamic history of rulers trying to co-opt jurists (with varying degrees of success) confirms the proposition that even the rulers knew that in principle the legislative function did not belong with them. The early caliphs wielded both Executive power and Judicial power: Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), 8.
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authority.\textsuperscript{334} Since the \textit{miḥna} (the ‘inquisition’ 217-234 AH)\textsuperscript{335} the jurists had the added moral authority to declare laws created by the political leaders as ultra vires the Qur’an and sunna.\textsuperscript{336}

However, those in power often quote the Qur’an to remind Muslims that they are instructed to obey their leaders.\textsuperscript{337} There appears to be consensus nonetheless that obedience is only due to what is good or just (\textit{ma’ruf}).\textsuperscript{338} Therefore, if and when Muslim leaders create laws, jurists generally have an obligation to examine and critique these laws to ensure that the laws, inter alia, are just. Muslims are ipso facto obliged to obey these just laws. Alternatively, if the laws are unjust then Muslims may legitimately disobey these laws and agitate for justice. The problems associated with this approach, under a ‘nation State’ model where States

\begin{itemize}
\item \textsuperscript{334} Anne Elizabeth Mayer, ‘Islam and the State’ (1991) 12 Cardozo Law Review 1015, 1022.
\item \textsuperscript{336} The \textit{miḥna}, or inquisition, was instigated by the Abbasid Caliph Ma’mun during the ninth century. He demanded that all the scholars subscribe to his rationalist doctrines, and many scholars, including the eponym of the Hanbali School, Ibn Hanbal, refused and were subsequently imprisoned.
\item \textsuperscript{337} Qur’an 4:59. The Qur’anic term used is (ولِلْأَمْرِ الْأَلْلَهِ) \textit{ulu Vamr} (those in authority) and has been rendered in this context as ‘leaders’.
\item \textsuperscript{338} Wael B Hallaq, ‘The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse’ (2002) 2 UCLA Journal of Islamic and Near Eastern Law 1, at 12. Islamic law differs in this regard from the common law where in the early periods the Crown’s power (the divine rights of the king, as God’s representative on earth) was absolute and final.
\end{itemize}

JI Indonesia’s \textit{bay’a} to the leader as translated from Malay in Sally Neighbour, \textit{In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia} (2004), 26. reads:

\begin{quote}
In the name of Allah, I promise that I will always believe in Allah and not commit adultery, steal or kill anything forbidden by Allah and will obey the leadership, as long as its orders do not conflict with the will of Allah and his Prophet.’
\end{quote}

Neighbour: at, 26, notes however, that the Arabic version of the \textit{bay’a} reads: ‘I swear to you that I will hear and obey all your commands’. In contrast, Imam Samudra (a.k.a Abdul Aziz, the commander of the Bali bombings): at, 84, concluded his \textit{bay’a} with ‘[...] and reprimand my leader when he errs’.
possess plenary powers, including extensive, overarching and coercive powers, say under national security for example, are acknowledged.

This method of law making, while similar to the formation of the common law and customary international law, however, does not easily fall within contemporary rule making processes of the UN such as the treaty or code-based approaches. Thus exigencies of contemporary society necessitate examining the question of whether leaders, or for the purposes of this paper, bodies such as shari’-a-based equivalents of the International Law Commission (ILC) or a Security Council-mandated Tribunal in the mode of the ICTR or ICTY, can have the shari’a authority to create law, and is considered in chapter 6. Another possible means to achieve this end of identifying legitimate law-making processes, but for the absence of the freedom of academic pursuit in many Muslim States, would be first to identify legitimate institutions for lawmaking in a domestic context, and then by extension for some ‘representative’ jurists to ‘legislate’ collectively on the international plane. The absence of such freedom means that such development should take place in the international plane, and based in countries, Muslim or otherwise, which enjoy academic freedom. The recommended role of such instruments and bodies in the international plane is further explored in chapter 6.

**Practical Use of the shari’-a**

Some parts of the shari’a are recognised as ‘law’ in some Muslim countries both in the civil and criminal jurisdictions. In theory, Iran and Saudi Arabia employ a broader spectrum of the shari’a than most Muslim

339 The tension between a ‘domestic’ nationhood power and the concept of the umma is acknowledged. It has been noted that as a matter of practice Muslims have adopted the ‘nation State’ model. Consensus of the validity of this ‘nation State’ model appears to be emerging, although as noted a minority such as hizb al-tahrir reject the model in favour of the unitary umma: International-Crisis-Group, Radical Islam in Central Asia: Responding to Hizb ut-Tahrir, Report No 58 (2003).


341 See generally Tahir Mahmood, Criminal Law in Islam and the Muslim World (1996), 311 339.


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States, according to the prevailing majority School and local custom. Dwyer notes correctly in her introduction that in most Muslim States shari’ā is limited to personal law matters such as marriage, divorce and succession. Many Muslim States also make general or non-specific reservations to international treaties to the effect that their obligations shall be not inconsistent with the shari’ā. Al-Qa’eda’s key criticism however, appears to be not about the absence of rhetorical or even formal support but that the actual scope of application of the shari’ā in Sunni states is somehow incomplete.

On the other hand, and when politically expedient, sections of the secular world have been quick to label Muslims as ‘Islamist’. Even activists such as Leyla Şahin, seeking peacefully to manifest faith at a low threshold, such as wearing the hedjab/ headscarf in public, are also

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344 Muslims experience can be positive under the shari’ā. For example under Islamic law of marriage a women kept her name and was not expected or required to take on her husband’s name and second, Hooker refers to the Tijah Case: Tijah v Mat Ali (1890) 4 Kyshe’s Reps. 124 Taylor, 1937-15. In the Tijah Case a divorced woman sued (under shari’ā) for and was granted, an equal share of their earnings during the marriage. The decision unfortunately was reversed, in favour of her ex-spouse, on appeal under English law: M. B. Hooker, _Adat Laws in Modern Malaya: Land Tenure, Traditional Government and Religion_ (1972), 228. The significance of this decision is that the shari’ā courts in Malaysia have reverted to the original default position vis-à-vis asset splitting in a divorce arguably displaying no reluctance to abandon precedent when necessary.

345 Daisy Hilse Dwyer (ed) _Law and Islam in the Middle East_ (1990), 5.


347 Such lip service however was, however, sufficient to prevent Islamist action against the rulers, see text n 254, above.


349 It is noted here that secularist in the Muslim world appear to be more strident generally than Western secularists (perhaps with the exception of France). See generally Abdullahi Ahmed An-Na’im, _Islam and the Secular State: Negotiating the Future of Shari’a_ (2008).

350 Most countries permit the wearing of the hedjab by Muslim women in most circumstances, including in public, at work and at school. There are some exceptions such as Turkey (see n 351, below), France (where hedjab is not permitted in public schools) : see Human Rights Watch <http://hrw.org/english/docs/2004/02/26/france7666.htm> (Accessed 26 May 2007), and Singapore: John Burton, ‘Singapore headscarves ban angers Muslims’, _The Financial Times_ (London), 14 February 2002.

351 Leyla Sahin v Turkey (2004) ECHR 44774/98. The term ‘hedjab’ in the Qur’an 24:30-31 includes covering for both men and women but is employed here for the head cover of women only, the contemporary popular use of the term.
somewhat gratuitously labelled 'Islamist', a validation for radical Islamists, who refer to the Qur'anic verse which states that elements of the 'people of the book' will not tolerate Islam until Muslims have adopted 'their' form of how a religion ought to be practiced, i.e. in a contemporary sense, by secularising Islam. Some Western activism can reasonably be characterised as falling within this Qur'anic definition. Many Muslims, however, appear to conflate 'People of the Book' with those espousing secularism in the West, a situation that is neither self-evident nor accepted as common knowledge, thus making the conclusions drawn by Muslims on this point unconvincing.

The pre- eminent place of secularism in contemporary society over other 'core' values was confirmed by the ECHR decision which upheld a Turkish court's decision to disband the Refah Partis. In the Turkish Court's view this was an 'Islamist' political party for 'activities contrary to the principles of secularism' and consequently prevented its elected members from taking up their seats in the Parliament legally camouflaging a policy decision to place secularism over democracy. The other side of this argument is the ECHR's willingness to subordinate one important regional 'enlightenment value,' such as personal freedom, to the other important European group norm of secularism. This particular gloss on democracy is therefore an issue, and sometimes a problematic one, particularly when this particular understanding of democracy is applied to Muslims who share a different cultural and religious history. On the other hand however, in this instance the decision of the Court shows that when 'several norms bear on

352 Qur'an 2:120.
353 Tony Eastley, 'Ashdown withdraws from Afghan post contention' in AM News Programme ABC Radio National, 27 January 2008; According to Andrew Buncombe, 'Lord Ashdown drops bid to be UN envoy in Kabul', The Independent (London ), 28 January 2008.; Lord Ashdown withdrew his name as special envoy to Afghanistan and named one of the problems in Afghanistan was the absence of agreement and a view among Afghans that the West was pushing its model too hard. While the problems in Kenya (a non-Muslim majority country) are also complex perhaps the current ethnic fighting could also to some extent be attributed to inappropriate models being super imposed on societies with different social and power structures and indicates that the West's 'problem' is not so much solely a religious issue as sometimes portrayed by Muslims but one of insufficient thought being given to the particularities of a problem: Caroline Elkins, 'Kenya: Ethnic Woes a Legacy of Colonialists' Power Game', Pambazuka News (Daressalam), 10 January 2008.
a single issue', and in this case a 'Muslim related' context, the mainly continental civil law judges appeared to favour stability.

Islamic Law and its Application between Muslims and Non-Muslims (siyar)

Although this paper is about exploring the trial of Muslims under the shari'a, it is nonetheless important briefly to mention the application and scope of the siyar as follows:

[Siyar] describes the conduct of the believers in their relations with the unbelievers of enemy territory as well as with the people with whom the believers had made treaties, who may have been temporarily (musta’mins) or permanently (dhimmis) in Islamic lands, with apostates, who were the worst of the unbelievers, since they abjured after they accepted [Islam]; and with the rebels (baghis), who were not counted as unbelievers, though they were ignorant and their understanding [of Islam] was false.

This definition of siyar seems to have stood the test of time although it is not possible to know whether the Muslims States substantially subscribe to this definition. It is also settled in general international law that unilateral declarations concerning legal or factual situations are binding according to their specific terms and is a rule that appears to apply in Muslim States under Islamic law. Generally, the siyar is unilaterally binding upon Muslims.

Siyar Treaties

Treaties are binding in Islamic law and must be performed in good faith as they are under general international law. The Qur'an refers to

355 Article 9(1) of the ECHR states:

Everyone has the right [...] to manifest his religion or belief, in worship, teaching, practice and observance.

Martti Koskenniemi, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, (2007). In the Refah Partisi Case while the issue of hedjat belonged to a different cultural tradition (ie Islamic), the key values in contention in the case are secularism as against the freedom to manifest one’s faith which are both European values as codified in the ECHR. Yet in this instance Turkish domestic legislation favouring secularism appears to have been given precedence over the European Convention.


357 Nuclear Tests (Australia v France Merits) (1974) ICJ Reports 253, 267. Vanessa Martin, Creating an Islamic State: Khomeini and the Making of a New Iran (2003); Sami Zubaida, Law and Power in the Islamic World (2003), 134. Martin refers to the hadith of the Prophet ‘al muslimuna ‘ala shuruhuhim, which means that the Muslims are bound by their own unilateral conditions.


359 Ibid. (; It is not however, asserted here that the treaty law of the shari’a is co-extensive with contemporary treaty laws, for example under the Vienna Convention. Only the
both peace treaties\textsuperscript{362} and general treaties\textsuperscript{363} into which Muslims may enter with non-Muslims, including with polytheists. Even pre-Islamic treaties were binding on Muslims by custom,\textsuperscript{364} thus, for the contemporary situation, arguably making all except the unjust elements of the ICL/IHL treaties prima facie binding under the \textit{shari'\textasciiacute{a}}.

Many jurists, however, have in the past argued that treaties ought to have a maximum term of ten years but that treaties may be renewed indefinitely in ten-year increments.\textsuperscript{365} This fixed term ten-year limit may owe its origins to the limit set in the \textit{Treaty of Hudaibiyah}\textsuperscript{366} where the Prophet negotiated the 'truce'\textsuperscript{367} for a ten-year period. In that case the two parties mutually agreed to a limited period. It is difficult to see, how the 'time limit' in \textit{Hudaibiyah} creates a general and binding precedent. For example, the Muslims' treaty with Nubia lasted over 600 years.\textsuperscript{368}

To this end a large number of scholars, including the medieval scholar Ibn Taymiyyah, concluded that treaties may in fact be temporary,

\begin{footnotesize}
\begin{enumerate}
\item[362] Qur'an 4:90.
\item[363] Qur'an 9:7.
\item[366] The Treaty of \textit{Hudaibiyah} (صلح الحديبية) was a treaty between the Meccans and the Muslims regarding access to the Kaaba at the time of pilgrimage. Rudolph Peters, \textit{jihad in Classical and Modern Islam} (1996), 38. refers to this agreement as a truce which is a reasonable view as a truce in Islamic law does not have a 'time limit' built into its meaning (ie time limits are placed on a truce or treaty with reference to external criteria such as other hadith as opposed to intrinsic, etymological considerations.). The word truce (\textit{muhadana}) is however not used with respect to \textit{Hudaibiyah} but instead contains the word \\textit{صلح} or treaty: E W Lane, \textit{Arabic English Lexicon} vol 2 (1984), 1715. The term treaty therefore is given to be the better meaning here. See also Majid Khadduri, \textit{War and Peace in the Law of Islam} (1955), 202. The Hanafi and Malik Schools state that treaties with unbelievers should not exceed more than three or four years except in the most extraordinary circumstances. David A. Schwartz, 'International Terrorism and International Law' (1991) 29 \textit{Columbia Journal of Transnational Law} 629, 638.
\item[368] Majid Khadduri, \textit{War and Peace in the Law of Islam} (1955), 261. notes that Muslims also bartered for goods with the Nubians under this treaty, including by making payments in wine (a prohibited substance) showing here that the Muslims were not averse to breaching \textit{sharia}'s norms when it was pragmatic to do so.
\end{enumerate}
\end{footnotesize}
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indefinite or permanent,\textsuperscript{369} but may be abandoned if \textit{seriously} breached\textsuperscript{370} by the other party. The binding effect of treaties subsequently found to have been negotiated in bad faith or fraud may be easier to invalidate or revoke.\textsuperscript{371} Ibn Taymmiyah's views on treaty law have stood for centuries\textsuperscript{372} He is a jurist whose views are generally acceptable even to \textit{salafis},\textsuperscript{373} views which arguably reflect the consensus of the \textit{umma} on the issue of \textit{siyar} treaties.

Against this, however, there may be some questions on the legitimacy of the treaties entered into by unrepresentative governments and leaders in Muslim States. The majority of leaders and governments in Muslim States do not receive popular and freely expressed endorsement by their peoples.\textsuperscript{374} Thus the question is whether these leaders can be considered \textit{imams} of their people in the meaning of the \textit{shari'a} and legitimately competent to bind the people. While people do not generally appear to accept their leaders as imams,\textsuperscript{375} on the other hand, they do not appear to reject obligations entered into on their behalf.

The position taken in this paper is that ibn Taymmiyah's views on enduring treaties is the better view. Thus, in the contemporary context,

\begin{itemize}
\item \textsuperscript{370} Qur'an 9:3-4.
\item \textsuperscript{371} As an example of bad faith negotiations: Jimmy Carter, \textit{Palestine: Peace not Apartheid} (2006), 151, states that during the peace negotiations that the Palestinians were made an offer which they could not accept but that President Clinton and PM Barak were able to convince the world that it was Palestinian terrorism that was the stumbling block to the peace treaty.
\item \textsuperscript{372} Ibn Taymmiyah was born in 661 AH/1263 AD.
\item \textsuperscript{374} David Smock, \textit{Islam and Democracy} (2002) <http://www.usip.org/pubs/specialreports/sr93.html##democracy> at 7 June 2006. The Qur'anic view, however, appears to be that irrespective of the mechanism used by a society to select or change its leadership, that this leadership somehow reflects the inner disposition of the ruled. Thus the best way (in a spiritual sense) of changing the nature of the leader is for example to change our hearts to become good and just and that God will ipso facto change the leadership to reflect our just (or unjust) actions. See Qur'an 13:11:

\begin{quote}
Verily never will God change the condition of a people until they change it themselves (by changing their own souls).
\end{quote}
\item \textsuperscript{375} Iran and the Sudan are probably the exceptions where the temporal leaders are usually referred to as Imam (Khomeini for example).
\end{itemize}
treaties such as the UN Charter and the Rome Statute acceded to by the leaders of Muslim States are most likely to be binding under shari’a law.\textsuperscript{376}

Consultation (\textit{shura}).

\textit{Shura} is an important Islamic legal concept and is usually translated into English as mutual consultation. The Qur’an describes the use of \textit{shura} as a characteristic of a Muslim.\textsuperscript{377} Etymologically, \textit{shura} is an active process of seeking out the opinion of those who have specific knowledge of a matter.\textsuperscript{378} Some describe the ‘\textit{shura system}’ as being democratic although the etymology shows that unlike a democracy not every opinion is considered equal. Nonetheless, contemporary scholars such as Quaradawi acknowledge the role democracy can play in reducing tyranny and speak of it approvingly, although perhaps not convincingly, other than for those who accept democracy as an unmitigated and self-evident ‘good’.\textsuperscript{379} He does not appear to explain why the Qur’an warns of what can roughly be translated as the ills of ‘the tyranny of the majority’ and states that the views of the majority can in cases lead one astray,\textsuperscript{380} and majoritarian rule without more is not a panacea. Further, consultation (\textit{shura}) is to be repeated on every substantial issue by eliciting informed opinion, as opposed to ‘consultation’ through periodic popular elections. In summary however, and in keeping with its etymology, \textit{shura} is not equated with popular suffrage.

A Parliament comprised of elected members with geographical constituencies did not occur within the Muslim world till around 1876 AD.\textsuperscript{381} Many Muslim countries now have parliaments that also act as legislatures,\textsuperscript{382} although it is probably fair to state that, other than in name,

\begin{footnotesize}
\begin{enumerate}
\item Qur’an 42:38. The etymology however, derives from ‘extracting honey from a small hollow in a rock in which it was deposited by wild bees’ or ‘to gather it from hives or other places’: E W Lane, \textit{Arabic English Lexicon} vol 1 (1984). (s.v. شور).\textsuperscript{378} See n 377 above.
\item R L Euben and M Q Zaman (eds), \textit{Princeton Readings in Islamic Thought} (2009), 231.
\item Qur’an 6:116.
\item The general \textit{shari’a} term for those who make and enforce the law, elect the rulers etc. is ‘\textit{ahl al-hall wal aqd}’ (أهل الحل والعقد), which is translated as ‘those who loosen and bind’.
\end{enumerate}
\end{footnotesize}
in many cases these legislatures are neither part of a functioning democracy nor a consultative (shura) council. These limitations are problematic in the development of law in domestic jurisdictions.

It is important however, that notwithstanding the absence of free societies in Muslim-majority States, to ensure that law is not ‘developed’ instrumentally or in a purely utilitarian fashion, such as suggested by al-Qa’eda or the Islamists at one extreme or their ‘secular’ protagonists on the other.\(^{383}\) That is, the developing shari’a should not be constructed to give prevailing custom or ideology legal warrant for purely instrumental reasons. Included in this sort of ‘development’ is the use (including by States, rebels, Islamists and non-State actors) of Islam and its law, purged of its subtlety and variety, and used purely as a means for gaining greater legitimacy or justification for their actions,\(^{384}\) to strengthen their control and influence and for consolidating power.\(^{385}\) This sort of instrumental law is rightly portrayed as backward and inflexible, often quite ignorantly but often supported by Western States, perhaps for convenience,\(^{386}\) but as discussed, does not fit in with either the letter or the spirit of Islamic law, and has at times had quite severe consequences both for international peace and security and for civilians.

**Common Law and the Shari’a**

The link between these two systems of law within the British Commonwealth is quite long standing, as demonstrated by decisions of the

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Article 3 of the Judicial Sources Act introduced the principle of *ijtihad* or ‘free interpretation’. This meant that if the judge in a shari’a court fails to find an appropriate offense in the codified law under which to convict the defendant, he is able to search the Koran and *hadith* to find a charge to his liking. This principle was open to massive abuse. In the most notorious example, the widely-respected 76 year-old leader of the Republican Brothers, Mahmoud Mohamed Taha, was hanged in January 1985 for apostasy. Apostasy was a crime for which Mohamed Taha had not been tried […]


385 Ibid., 1025.

386 Ibid.
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Privy Council touching on aspects of *shari’a* law. Makdisi suggests that the common law may have originally developed the concept of the jury and the concept of precedent or *res judicata* from Islamic law ('the common origins'). Certainly there are parallels in the process of decision making. Thus al-Alwani described the concept of *shari’a* judgments as follows:

> Having arrived at a decision, they [the Judges] would explain to others how they had adduced the arguments that led them to their judgments, whether these had been derived from the letter of the text or from its spirit.

There is also a similarity and significant overlap of crimes and elements of crimes between the common law and the *shari’a*. For example, Badr points to the similarities in the two systems with regard to the concept of a trust (*waqf* of Islamic law) and the principle of an undisclosed principal in agency law. Jessup J. of the ICJ opined that in its heyday Islamic law was taught by the ‘case method’. In a contemporary context, Brunei and the Maldives, for example, are considering

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387 Abul Fata Mahomed Ishak v Russomoy Dhur Chowdhry, (1894) 22 I.A. 76 (P.C.). For other decisions of the Privy Council see Moore's Indian Appeals, in the English Reports.


389 Taha Jabir al-Alwani, *Source Methodology in Islamic Jurisprudence* (2003), 12. The content of *shari’a* judgments is not dissimilar to that of common law reports. The Fourth Orthodox caliph/first Shi’i imam, Ali’s decisions were in the following style: at, 18:

> He cited the Qur’an, and then the *sunna*, then used *quiyas*, *istihsan* (considering the circumstances in the process of adducing legal argument), *istihsan* (the juristic preference) and *istislah* (legal consideration of the welfare of the individual and society at large but basing his opinion on the broader aims (*maqasid*) of the *shari’a*.

390 Please refer to the lists of crimes and their definitions at Table 3: Matthew Ross Lippman, Sean McConville and Mordechai Yerushalmi, *Islamic Criminal Law and Procedure: An Introduction* (1988), 39. Note however, these authors did not cite this as a reason for the commonality nor is it asserted that this similarity is because of the ‘common origins’.


393 There are of course dissenters to drawing such parallels. In the view of Peters however distinguishes the *shari’a* from both common law and civil law: Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), 1. but: at, 9, also notes that the role of the judge under the civil law is active whereas the *shari’a* and the common law are adversarial systems.


merging the common law and Islamic legal systems. This ‘synthesis’ is to some extent already a reality in Malaysia and Pakistan.395

The shari‘a like the common law is a ‘dualist’ system of law. This means inter alia that from a shari‘a perspective, laws, norms and customs otherwise considered binding erga omnes, say under the international law,396 are not self-executing and will not be binding unless rooted independently in Islamic sources. This creates a potential conflict for an international tribunal automatically not recognising otherwise binding international obligations.397 Fortunately, and although the analogy is neither complete nor exact, in practice the dualist nature of the shari‘a is not likely to prove an insurmountable barrier as it is with the practice of common law States (other than the USA398), where ratified treaties or customary international law do not self-execute.399

While Islamic law does not subscribe to the strict principle of stare decisis, Islamic law decisions are guided, but not necessarily bound, by precedent400 and by the writings and accretion of religious opinions (fatwas)

397 The question here being that the shari‘a tribunal itself will not consider itself bound by other than shari‘a law, as opposed to a state being generally ‘not bound’ by the rules of general international law. Notwithstanding the Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, 27 January 1980, many common law states do not generally consider a law as binding until the law in question is explicitly incorporated into domestic law.
398 United States Constitution art vi, §2, provides that treaties lawfully made become part of the supreme law of the land. The USA has at other times and under certain circumstances such as in its detention of enemy combatants at Guantánamo Bay, arguably disregarded some international laws. This issue of disregarding international law per se however is not problematic under the dualist notions of the common law. Islamic law however, properly derived and on which there is some consensus, is in theory anyway immune to domestic means of circumvention.
399 For example, International Criminal Court Act,

The issue of the binding nature of the Prophet’s sunna is settled. The binding nature of the Prophet’s Companions’ actions however is not. Osman – the Third Orthodox Caliph – accepted the binding nature of his predecessors, but Ali – the Fourth Orthodox Caliph – did not
of the most eminent jurists and jurisconsults. These form part of the corpus of shari'a law and have some overlap with the common law.

Cultural Relativity and Pluralism
Islamic theology holds that individuals are judged on the performance of their personal and collective duties. The Qur'an alludes to a Just God. Just judgment requires that all duties and responsibilities, for which a person is answerable, are clearly and unambiguously articulated. Thus, if relevant, differences in human populations on the basis of religions, race, gender or other intrinsic human characteristic that are capable of impacting upon the performance of the Covenant, must be clearly identified and catered for in the Qur'an and sunna. Therefore, if a Hokkein-speaking Chinese woman were for example fundamentally different from a Swahili-speaking African man, then their mandated duties (fard 'ayn), should be clearly and separately identified and be in keeping with their presumed regional, gender and/or other differences. Islam, however, subscribes to the view of a common human origin, conceding no inherent or systematic variation between tribes or nations.

A clear example of the use of precedent in a manner similar to that later used by the common law is the art of distinguishing (al-furuq) cases: Imran Ahsan Khan Nyazee, The Methodology of Ijtihad (2002), 17; Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (pt I) (2003) 51 American Journal of Comparative Law 699, 735.

Some Islamic sources of law are also coincidentally sources of international law: see ICJ Statute 38(1)(d).

401 Qur'an 24:64: Be quite sure that to God doth belong whatever is in the heavens and on earth. Well doth He know what ye are intent upon: and one day they will be brought back to Him and He will tell them the truth of what they did: for God doth know all things).

402 Qur'an 41:46: Whoever works righteousness benefits its own soul; whoever works evil it is against its own soul: nor is thy Lord ever unjust (in the least) to His servants.

403 Some geographical differences are catered for in the Qur'an. For example, people who live in the desert and may not have water for their mandatory ablutions wudu for prayer are allowed to perform the ritual using dust (tayammum). While this concession was apparently for desert dwellers, it became an exemption for those living in snow/ice bound lands and also as a general exemption for those too sick to use water: Qur'an 4:43 and commentary.

404 According to Z. Bashier, Sunshine at Madina (1990), 120. the Prophet stated that:

O People, surely your Lord is one, you all descend from Adam and Adam was created of clay. No Arab is superior to a non-Arab nor a non-Arab superior to an Arab and no white person is superior to a
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races and national and cultural differences but recognises no fundamental distinction on the basis of these differences. Islamic law

black person nor a black person superior to a white, surely the most noble of you are those who are the most God fearing (taqwa).

Qur'an 49:13:
O humanity! We created you from a single (pair) of a male and a female and made you into nations and tribes that ye may know each other, not that ye may despise each other.

From an Islamic theological perspective, discrimination between humans (insan), on the basis of gender (or any other intrinsic human quality) does not 'make sense'. See for example Qur'an 33:35–36 which calls on all Muslim men and Muslim women equally to serve their Creator:

For Muslim men and women, for believing men and women, for devout men and women, for men and women who are patient and constant, for men and women who humble themselves, for men and women who give in charity, for men and women who fast (and deny themselves), for men and women who guard their chastity and for men and women who engage much in God's praise, for them has God prepared forgiveness and great reward.

It is not fitting for a Believer man or woman when a matter has been decided by God and His Apostle to have any option about their decision: if anyone disobeys God and His Apostle he is indeed on a clearly wrong Path.

Much of the material that claims general male superiority over women comes from the two following Qur'anic verses:

Qur'an 9:71:
The believers men and women are protectors one of another: they enjoin what is just and forbid what is evil: they observe regular prayers practice regular charity and obey God and His apostle. On them will God pour His mercy: for God is Exalted in power Wise.

For a contemporary woman's view of this verse - and this view appears to be closer to the actual practice of the Prophet - see Sally White, 'Gender and the Family' in G Fealy and V Hooker (eds), Voices of Islam in Southeast Asia, (2006) 303.

The second is Qur'an 4:34:

Men are the protectors and maintainers of women because God has given the one more (strength) than the other and because they support them from their means. Therefore the righteous women are devoutly obedient and guard in (the husband's) absence what God would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct admonish them (first) (next) refuse to share their beds (and last) beat them (lightly); but if they return to obedience seek not against them means (of annoyance): for God is Most High Great (above you all).

Laleh Bakhtiar, The Sublime Quran (2007), lii. persuasively argues against this position of an inherent male superiority by basing her arguments on the Qur'an, the practice of the Prophet, etymology and context. The Prophet explicitly stated that key difference between people is solely dependent on the central spiritual quality of the taqwa that a person possesses: Z. Bashier, Sunshine at Madina (1990), 120., As mentioned the Qur'an states that God created humans and djinnen for worship: Qur'an 51:56. Why the Creator would place impediments to worship, - which must be the effect of systematic discrimination on 'a soul' (which is always 'female' in Arabic) is however, not explained, as the logical perspectives are discounted in a generally materialistic analysis and worldview. The existence of race discrimination, religious discrimination and discrimination based on place of birth etc in Muslim (and indeed human) society — although there is no textual basis for such discrimination in the Qur'an — is indicative perhaps that gender discrimination is more a human construct than a Divine construct. Another example is provided by the claim by some Arabs that because the
does concede difference, for example that of religion or that of custom, but recognises such difference through legal plurality. Further, and while there are clearly differences within human populations such as the rich and the poor, the healthy and the infirm, Islamic law caters for these differences on a universal basis. That is, for example, all rich or sick people (irrespective of race etc) universally are subject to the same general laws and exceptions.

However, the ‘only’ true criterion in God’s eyes is *taqwa*, a quality independent of race, gender, colour or social status. Thus, the issue in Islam is not so much about relativism as the recognition of plurality. While there is some practical tension between universalism and relativity, a dichotomy that is arguably unlikely completely to resolve, there appears no basis in Islamic law for the stipulation of fundamental norms and obligations, in other than universal terms. Universalism however, is not to say that there may not be quite significant differences in the ‘content’ of the law between private/commercial and criminal aspects within Islamic law or in relation to international law, and the *shari’a* caters for these necessary differences through its recognition of legal plurality.

This said, Islam has, often fairly, been criticised from a secular legal perspective for its unequal treatment of women and minorities and there is little doubt that there are indeed gender, colour and race ‘imbalances’ or de facto discriminatory practices in many Muslim countries. These critiques are not specifically examined here as they do not directly relate to

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408 Qur'an was revealed in that language, therefore *ipso facto* that they have a greater claim to the faith.

409 Many Muslims do not accept this position and there are a significant number of Muslims who are cultural relativists: Anne Elizabeth Mayer, *Islam and Human Rights: Tradition and Politics* (1999), 7.


412 However, the lack of sensitivity applies to both sides. The following anecdotal evidence is presented: Mr John Dauth ‘Reform of the United Nations (Speech Delivered at the 14th Annual Conference of the Australian & New Zealand Society of International Law Wellington, 20 June 2006), to show that even specifically trained diplomats often miss the point of particular cultural and religious practices and equally that people on the other side can exaggerate the degree of harm done and even those doing PhDs in Western States have such a very superficial understanding of Western cultural mores, humour or sensibilities. What transpired was that, at this conference session, there was a student from the country to which this diplomat was referring. The anecdote is presented as accurately and as closely as possible as how the student conveyed his sentiments:
Islamist use of force. It is argued that while this discrimination exists — and even when attributed to Islam — it generally occurs independently of Islamic law. In fact, although women are perceived as being unequally treated under Islam, just after the time of the Prophet, Ayse (also spelt 'Ayshe, the widow of the Prophet) was considered an able jurist and in her time issued the most fatwas, and while people may have been critical of her views, these criticisms were based on her politics or the content of her reasoning and only seldom based on her gender. There have been other women jurists, though many fewer than their male counterparts, a criticism in the past equally applicable to Western societies.

What must be challenged, however, is the improper 'grounding' of cultural particularities that have not been subjected to acceptance as lawful through consensus in the shari'a; for example, 'rights' uncritically and erroneously ascribed to the shari'a as 'scripturally-based', or conflating

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There is a perception among Muslims of a sense of either arrogance or total cultural insensitivity on the part even of some senior Western (non-Muslim) diplomats, even those with long standing experience in the Muslim world. The following excerpt provides some context as to why Muslims are reluctant to believe Westerners who otherwise seem to have some grasp of Muslim sensitivities (and even say the right sorts of things in the presence of Muslims or when posted in Muslim States). The speaker, a senior Australian diplomat who was once stationed in a populous Muslim State, recounted the story of how he and a junior officer circumvented the law of the land by bootlegging large quantities of alcohol, albeit by fairly clever and circuitous means. At the end of the talk the student responded at how the audience had enjoyed the anecdote and stated that he was amazed at how little the diplomat really understood the culture of his nation. He admitted that many people bootlegged, as did engage in child sex activity, even though both sets of actions were considered reprehensible. What he was surprised was as to how openly the diplomat admitted his ignorance and lack of sensitivity and said that perhaps the only reason why the diplomat did not speak about the Embassy staff's sexual exploits with children (which the student stated was also well known among diplomats) was that, paedophilia was illegal behaviour in Australia and also in New Zealand, the country in which the diplomat gave his address.

413 Taha Jabir al-Alwani, Source Methodology in Islamic Jurisprudence (2003), 11.
414 The armed conflict in this case was between Caliph Ali and Ayse, the widow of the Prophet: Imam Ali ibn Abu Talib, Nahjul Balagha: Peak of Eloquence (1986), 53.
415 For example, Khaled Abou El-Fadl, Speaking in God's Name: Islamic Law, Authority and Women (2001), 111. notes Abu Bakra al-Thaqafi's (d. 52/672) opposition to Ayse as a leader purely based on her gender. Abu Bakra's testimony may however, generally prove unacceptable to a majority of Muslims as he was convicted of qadhf (slander) against al-Mughira: at, 112. The Qur'an 24:4 states of those guilty of qadhf, 'reject their evidence ever after: for such men are wicked transgressors'.
416 The following quote is from a judgment of the NSW Court of Appeal (NSWCA) Kavanagh v Akhtar (1998) 45 NSWLR 588., involving the case of a Muslim woman who suffered psychiatric injury following an accident which resulted in her cutting her hair...
rape with fornication (zina). On the other hand, and although not directly sanctioned by the Qur'an and sunna, the reality in many Muslim States is that many prevailing laws and customs are particularly detrimental to women, and also in cases, racial, linguistic and religious minorities. Although it is recognised that 'women's position is not determined by the principles of Islam, but by social custom', there is little doubt as to the existence of discriminatory practices between men and women, rich and poor in most Muslim States. It therefore seems poor form on the part of Muslims to point to similar or much less severe shortcomings in the West or non-Muslim communities generally, while claiming to be the 'best nation' — a selective, incomplete and therefore inaccurate quotation from the Qur'an.

It is sometimes claimed that the general wording of many points of the primary sources resulted in past jurists adopting a very narrow approach to construction. The reason for this 'constriction' of the law is to make its application more certain. The practice of taqlid among many jurists, however, led to a further and ever-narrowing scope for law and clearly Muslims over the centuries have not allowed this to happen in practice, although they have done so by characterising the shari'a as 'so which in turn, it was claimed by the wife, caused her husband to divorce her. Mason P. (with whom the Court agreed): at, 594, referred to:

[the] extreme displeasure based on defiance of his scripturally-based right of control over his wife as well of her defiance of religious injunctions about women cutting their hair without permission of their husband (as confirmed by an Imam) [...] Arguably while some judges in Muslim States would have affirmed the NSWCA's view of male-female relations, it is unlikely that a shari'a based decision referring to the primary sources would have been able to point to specific rules on permission with respect to hair. There is also no authority in the shari'a for a court uncritically to accept the 'confirmation' of an imam, particularly one whose legal qualifications have not been first declared openly or subject to challenge under cross-examination. The transcript makes no reference to such an examination or challenge though undoubtedly such a challenge should have been made.

417 See text accompanying n 539, 598.
418 Katherine Bullock, Rethinking Muslim Women and the Veil: Challenging Historical & Modern Stereotypes (2003), xx.
419 Mai Yamani (ed) Feminism and Islam: Legal and Literary Perspectives (1996), 3, summarising Afaf Lutfi al-Sayyid Marsot "Entrepreneurial Women in Egypt" ibid, 33.
421 Qur'an 3:110.
sacred' that they have been able to ignore it by not 'touching or defiling its sacredness'. This ever-diminishing spiral of the scope of the law through construction is, over time, unlikely to reflect the law's original spirit, breadth and depth. For example, Berktay examines how some historical positions and interpretations have been used to make 'oppression of women appear tolerable'. Thus generally, while a nuanced purposive approach (maqasid) to interpretation of the primary sources is recommended and used by independent jurists, in other cases where appropriate a 'textual approach' coupled with the original text, read in the light of the Prophet's interpretation of the text, could be used as a starting point and will improve the law-making process.

Classes of Crime (jinayyah جناية)
War crimes, crimes against humanity and genocide as characterised and defined in the Rome Statute are, in this formulation of a 'crime', a relatively new phraseology and do not find direct expression as such, in the shari'a. The physical elements of these crimes generally are criminalised in the shari'a, certainly in peacetime, and, unless expressly permitted during war or can be constructed as an exception, then during armed conflict as well. The mental element of the serious Rome Statute crimes referred to above can, it is argued, find parallel in the shari'a.

In order to examine shari'a crimes in the contemporary context, it is necessary to examine the notion of a crime more generally under the shari'a. For convenience, the nomenclature of a 'sin' is adopted for that which is dealt by God in the hereafter, while a temporal court has jurisdiction over a 'crime', although for completeness it is mentioned that in theological terms a crime is also a sin.

Crime under the shari'a has been variously categorised but the types adopted here are as follows: as transgression against the rights (1) of

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God (only), a sin; (2) of the person (only), a crime; and (3) the rights of God and the person (which is further subdivided into two sub-categories depending upon 3(a) whether the predominant right belonged to God, arguably a sin or 3(b) to the person), a crime.

As discussed, crimes against God, type 1, are not justiciable in the temporal plane, and crimes against the person, type 3, must be settled on earth. The third type will have justiciable aspects depending upon the type of harm caused to the person, and is a factor that takes preference over God as justice to the weakest is the one that takes the highest priority in this formulation. There are three broad, technical, established categories of crimes analysed here according to the category of punishment under the shari'ā: (a) hadd crimes (b) quisas crimes and (c) (i) ta'zir crimes (when it involves the person) and (ii) siyasa crimes (when the infringed right belongs to the State). The first two categories are mentioned in the Qur'ān (‘Qur'ānic crimes’) and the third is a ‘catch all’ residual category.

The general characteristics of the three punishment-based categories are now examined. The importance of doing so is that the most serious Qur'ānic (huḍūd) crimes are, in the Islamic view, divinely mandated and should therefore be treated as a separate category. It is a legal requirement also that a person must be aware of the punishment for a particular hadd crime when committed, for it to be executable. It appears reasonable also that punishment for ta'zir or siyasa crimes should not ipso facto exceed the severity of those of hadd or quisas crimes.

There is a also general consensus that hadd or quisas punishments only apply in dar al-Islam during ‘peacetime’, because the ruler has the power execute judgments only in this jurisdiction. This jurisdictional issue with respect to dar-al-Islam is potentially problematic because it might imply (albeit incorrectly) that non-Muslims tried in a Muslim jurisdiction could be tried under the shari'ā (because the ruler can do so instrumentally to increase his legitimacy) although as an issue of law, only Muslims can legitimately be tried under the (complete) shari'ā.


426 See discussion on mu'amalaat, laws of general application, 529. See also, n 456.
**Hudud Crimes**

Hudud crimes are the most severely punished crimes in Islam. There is no consensus on the actual number but are broadly seven, namely:

1. apostasy
2. transgression
3. theft
4. armed robbery
5. adultery
6. slander
7. drinking alcohol.

Hudud crimes include all three types of crimes referred above. The special case of apostasy as a hadd crime and the associated issue of the death penalty that may attach to some hudud crimes are discussed separately below. Hudud crimes carry 'fixed' punishments and in this

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427 A *hadd* (حَد) crime is a crime belonging to a class of Qur'anic crimes against God as well as against persons. These crimes are called 'hudud Allah' or crimes against God some of which are prosecuted by the State (on God's behalf) and carry fixed punishments (tquipaat maquaddara). Some of these crimes however, such as theft and slander, also directly affect human beings. An analogy, in the common law jurisdictions are crimes which are prosecuted by the Public Prosecutor (Department of Public Prosecution /Crown Prosecution Service). Prosecutions in Islamic law are usually initiated by the *mojtahid* (the one in charge of complaints) Abd-el-Malek al-Saleh, 'The Right of the Individual to Personal Security in Islam' in C Bassiouni (ed) *The Islamic Criminal Justice System*, (1982) 76. Peters notes – a fairly widespread and reasonable view – that hudud crimes very difficult to prove: Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century* (2005), 55. The view taken in this paper is that crimes against God should be and are best left to God's judgment. The development of the *shari'a* should be redirected towards the *ta'zir* end of the spectrum where lower standards of evidence and proof are accepted, but still at or above internationally acceptable standards, but that lower penalties apply.


429 See text accompanying n 424, 576.

430 Sayed Hassan Amin, *Islamic Law in the Contemporary World* (1985), 28. While the punishments are fixed and often severe, in addition to the strict rules of evidence discussed, there are several excuses that help reduce or mitigate the impact of the severity. For example Boyle-Lewicki refers to the allowances made for stealing food in poverty, considering alcohol consumption as a sickness etc: Edna Boyle-Lewicki, 'Need World's Collide: The Hudud Crimes of Islamic Law and International Human Rights' (2000) 13 New York International Law Review 43, 72. For example while drug use is prohibited in Islam, drug use is also considered a sickness and is treated as such and hudud punishments are suspended. Dr Norman Swan, 'The Health Report: Female drug users in Iran' in 'The Health Report ABC Radio National, 17 December 2007
context means fixed by God and must mean that human agency cannot extend (or reduce) these fixed punishments, including extending such punishments to other classes of acts not specifically criminalised in the independent sources. For this reason drinking alcohol is not strictly a hadd crime as its punishment was fixed by Omar I using the analogy of slander. Mansour includes transgression or rebellion (baghi) as a hadd crime but as it is not a Qur'anic crime with a fixed punishment in the Qur'an, and is what can broadly be categorised as a political offence, it is treated in this paper as a siyasa offence. Only legitimately obtained evidence is admissible but is particularly rigorously applied for hadd crimes. The requisite a standard of proof is 'certain' (ie beyond doubt) and is discussed below in chapter 3.

The 'statute of limitation' (taqaadum) for hadd crimes according to the Hanafi School is one month. Confessions are acceptable only if made in the presence of the judge. Fornication (zina) carries the harshest penalty, a crime for which the elements and evidential requirements are

431 'Prescribed punishments' are for the Qur'anic offence only. Hence (for example in the Hanafi School) the punishment for intoxication is only for one intoxicated by khamr (grape wine) only and not other analagised 'intoxicants'.
432 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 103.
435 For example that for example evidence obtained by the breach of privacy is inadmissible to establish a crime: Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 80.

This has legal implications for evidence collected by common law authorities in their jurisdictions irrespective of the fact that this evidence (say by phone tapping or mail interception etc.) was authorised by legal warrant.
436 Some Malikis permit the use of circumstantial evidence (such as pregnancy) with respect to zina: Noel J Coulson, Conflicts and Tensions in Islamic Jurisprudence (1969), 62. this however is a minority view in conflict with the Qur'an.
437 Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (2005), 11. Article 29 of the Rome Statute provides that the crimes in the Rome Statute are not subject to the statue of limitations. The concept of a limitation period in Arabic is taqaadum (تَقَاآذَم).
438 Ibid. (14. the admission is to be made in three separate occasions, independently (ie with no duress) and must be confessed in presence of a judge.
439 Proof for the crime of zina requires the testimony of four upright/just Muslim eye witnesses:** Qur'an 4:15 and Qur'an 24:4. Documentary, DNA, photographic etc. evidence or other evidence is inadmissible or insufficient to prove the crime. The evidence of women is not generally admissible for this crime except in the case of a spouse who make the accusation absent witnesses: Qur'an 24:6-9, although no temporal punishment is permissible on the evidence of a spouse. Non-hudud or quisas
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clearly and strictly articulated, although the reasons for such a high degree of culpability are not widely discussed beyond a general opinion than it provides for the 'protection of lineage'. There is a reasonable reluctance to prosecute zina, as it is a type 3(b) crime, that is, the predominant 'right' that was violated belonged to God. The strict evidential requirements and limitation periods make the prosecution of hadd crimes difficult, although the high degree of culpability associated with hadd crimes must act as a deterrent for the believer. The difficulty in prosecuting hadd crimes however, is also used as a critique of the practicality of prosecutions under the shari'a criminal law generally. The fallacy of this critique is that it 'colours' all prosecution with a hudud 'brush' which is problematic because such generalisation is prima facie invalid and lacks analytical depth.

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**See Edna Boyle-Lewicki, 'Need World’s Collide: The Hudud Crimes of Islamic Law and International Human Rights' (2000) 13 New York International Law Review 43, 64. See also Uzoamaka N Okoye, 'Women's Rights under the Shari'a: A Flawed Application of the Doctrine of Separate but Equal' (2006) 27 Women's Rights Law Reporter 103, 112; Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (2005), 14 (Shi'i law permits female witnesses (two females equalling one male) but requires at least one male witness). Note however that although the masculine is used in Qur'an 24:4; that as a matter of Arabic grammar, the masculine words include the feminine.**

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**See text accompanying n 424. Fornication between consenting adults, although in the Islamic view is greatly detrimental to the individuals is a crime against God and one which if know to others is one that must not be broadcast. If allegations are made against individuals or couples, and the four eyewitnesses not produced, then the accusers are liable to qadhf or a punishment including flogging.**
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The Islamic position on crimes drawing the application of *hadd* punishments may arguably be summarised as follows.\(^4\)\(^4\) First, Muslims are encouraged to ‘cover up’ the commission of crimes against God’s rights.\(^4\)\(^5\) Reason would demand that refraining from exacting severe penalties would be a primary objective with regard to offences which do not involve injury to an innocent third party eg, the shari’a crimes of fornication or adultery, but not rape, the private consumption of alcohol, but not accidents or ‘hit-and-run’ cases involving alcohol, or other mind-altering substance.\(^4\)\(^6\) For crimes against the person, the general principle with respect to punishment is that the injured person has the right of redress for type 2 or 3(a) crimes,\(^4\)\(^7\) but that patience and forgiveness are the better options for the victim or his/her agent with a great reward for the victim in the hereafter for this forbearance,\(^4\)\(^8\) and is the strongly recommended option for Muslim victims or their heirs.\(^4\)\(^9\) The Prophet said that God will in turn forgive those who forgive those who have injured them; and for those with a legal right to talion, generally to consider forgiving wrongdoers, before a crime involving persons is reported.\(^4\)\(^5\)\(^0\)

### The Death Penalty

In part, the death penalty for both apostasy and adultery continue from the Biblical tradition\(^4\)\(^5\)\(^1\) as crimes and punishments not specifically abrogated

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\(^4\)\(^4\) Cherif Bassiouni (ed) *The Islamic Criminal Justice System* (1982), 112.


\(^4\)\(^6\) Hashim bin Mehat, *Malaysian law & Islamic law on Sentencing* (1991), 37. Although the referred material does not explicitly state this covering up does not include ‘covering up’ murder. Further, for theft, one must do one’s best to encourage the thief to return the property to its rightful owner and for the owner to then forgive and make no more of the issue hoping to be rewarded by God for his/her forbearance. Prosecution for crimes with harsh punishments generally must be seen as an option of last resort.

\(^4\)\(^7\) See text accompanying n 424, 576.

\(^4\)\(^8\) Eg: Qur’an 42:40.

\(^4\)\(^9\) Qur’an 17:22; Qur’an 42:43.


\(^4\)\(d\)\(1\) Death Penalty for apostasy is prescribed in the Old Testament: Deuteronomy, 13:6-9; and the Death Penalty for blasphemy is prescribed in Leviticus 24:16; 1 Timothy 4:1-3; Hebrews 3:12; Al-Qurtubi refers to a ‘verse of rajm’ (stoning to death) which was once in the Qur’an but removed by God by abrogation (*naskh*). His explanation (at point 11 of 15) is that while God ‘removed/abrogated the verse’ that God allowed/ permitted the *sunna* to remain:** Abu Abdellah Mohammed Al-Ansari al-Qurtubi,* Al Jami‘I li Akkaam al Qur’an vol 1 (pt 1 & pt 2) (1987), Part II 66.**

\(^4\)\(d\)\(2\) The crime of adultery as
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by the Qur'an or the *sunna* and therefore in force,\textsuperscript{452} but is not a view adopted in this paper.

Generally, after a due process of law, the *shari'a* prescribes capital punishment for a certain fixed number of crimes,\textsuperscript{453} but appears to reserve the death penalty exclusively for some *hudud* and *quisas* offences,\textsuperscript{454} arguably because the Qur'anic posits that God alone grants life and deals death.\textsuperscript{455} While non-Muslims are entitled to receive the protection of the *shari'a* they are not subject to some *hudud* punishments including for apostasy or adultery\textsuperscript{456} which can draw the death penalty, although this is not the Qur'anically-mandated punishment.\textsuperscript{457} It is conceded that the death sentence would be an unacceptable option in the international plane.\textsuperscript{458}
Further, Muslim States have extended the death penalty to numerous other offences, including for many political and economic crimes which would appear to be ultra vires. That is, crimes carrying a death penalty not explicitly sanctioned by the Qur'an or the Prophet should be reversed, a view that is in keeping with contemporary international custom. A further legal justification for suspending the death penalty is that, in some Schools, a Muslim is not punished by death for the killing of a non-Muslim as stipulated in the Qur'an, and an argument could therefore be made that, since the precedent of suspending the death penalty...
sentence for a Muslim killer is established by consensus, for fairness and equity, the punishment for killing a Muslim should also be suspended.

**Apostasy**

Apostasy is a Qur'anic crime. The Qur'an however, does not provide for a temporal punishment for apostasy alone but instead warns of a severe punishment in the hereafter. In this context, the sunna, which is consistent with the Qur'an, reserves the death penalty only for those who apostatised *and fought against the Muslims*. That is, capital punishment is permitted against apostates who treasonously fought against the Muslims but even in this case, punishment is not mandatory and pardon is preferred. There is also a view that the evidence and rationale for the death penalty for apostasy by some contemporary scholars such as Maududi (d. 1979) 'is farfetched'. The sunna of the Prophet in the overwhelming majority of cases was to pardon even treason. For example, the Prophet released, among others, Abd-Allah b. Sa'd bin Abi al-Sarh, who was held on a charge of apostasy and fighting during the conquest of Mecca, due to

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463 Qur'an 2:217; 5:54; 47:25.
464 Those who apostatise and then fight against Muslims however may be fought, and killed if necessary: Qur'an 4:89.
465 Qur'an 3:90; 4:89; 4:137; 63:3. The key point being that even though the Qur'an recognises vacillating faith as a fact of life, which in the Qur'anic view is ipso facto for material or worldly reasons, it prescribes no temporal punishment (or rather while such a person is punished by God in this world by 'the sealing of their heart', that without more, a temporal judge is not given jurisdiction over apostates). If a death sentence is prescribed for the first 'change of heart', then clearly, one will not have the option of vacillating faith. While, a counter argument is that the apostatising in this case may be within/private/internal to an individual the text of the Qur'an does not appear to limit the more general meaning.
466 The Prophet said that apostates are, with certainty, known only to God. Since apostasy is a crime against God, it must mean that, the Prophet pardoned treason and not apostasy: Please refer to n 470, below. There are other hadith that make it clear that the Prophet was aware of existence the hypocrites (such as Abdullah ibn Ubay) but did not act against them. This argument also supports the view that non-Muslims fighting against Islam is ipso facto, not a crime. In a 'State centred' international system however, the meaning of what 'fighting against Muslims' is examined in chapter 5.
467 Adil Salahi, *Muhammad: Man and the Prophet* (2002), 603. The Hanafi School and Shi'i Schools do not consider apostasy a hadd offence: Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (2008), 25. Even in the contemporary situation apostasy per se is not punished by death, and while not commenting on the accuracy of the facts of the situation, the following is a case in point as shown from the quote 'Somali extremists behead seven for 'abandoning Islam'', *Hong Kong Sunday Morning Post* (Hong Kong), 12 July 2009, 8. (emphasis added):

| Somali Islamist fighters have beheaded seven prisoners accused of abandoning the Muslim faith and spying for the government in the largest mass execution since the militants were pushed from power. |
469 See n 466, 584.
the intervention of Othman b. Affan.\textsuperscript{470} Further, the Schools disagree agree on the ‘death penalty’ for women apostates,\textsuperscript{471} which must mean at least that it is not the ‘apostasy’ per se that draws the death penalty.

The following theological analysis will demonstrate that the ‘death penalty’ for apostasy generally is untenable. The Prophet stated that all humans were born in fitra, \textit{i.e.} born as ‘Muslims’,\textsuperscript{472} with a natural inclination to submit to God, and it is the parents or society that ‘changes’ a child’s natural inclination.\textsuperscript{473} On this argument therefore, every non-Muslim should be put to the sword because their individual apostasy is clearly apparent, a position for which there is no Qur’anic, \textit{sunna} or jurisprudential support. The death penalty for apostasy is also problematic because of the unprincipled and instrumental reasons for bringing on charges and accusations of apostasy,\textsuperscript{474} for example, when a person is

\textsuperscript{470} Abdullah Saeed and Hassan Saeed, \textit{Freedom of Religion, Apostasy and Islam} (2006), 62. Othman b. Affan was the third Orthodox Caliph.


\textsuperscript{472} The word ‘Muslim’ is used here in the broadest sense as discussed, \textit{i.e.} as one submitting to God and believing in the Last Day [and not restricted to the more common use as that of a follower of the Prophet.] It is for this reasons that some Muslim converts/reverts use the word Revert, \textit{i.e.} meaning that they have reverted to their original faith here again clearly admitting that there was a period of apostasy (during which they should have been killed).

\textsuperscript{473} On the other hand, Shaheen Sardar Ali and Javaid Rehman, ‘The Concept of Jihad in Islamic International Law’ (2005) 10 \textit{Journal of Conflict & Security Law} 321, 336. note that the ‘death penalty view’ is supported on the basis of the Prophetic saying, ‘He who changes his religion must be killed’. Hanafis interpret this (‘he’) to mean that the death penalty is applicable only for males who apostatise: Ahmad-ibn Naqib Al-Misri, \textit{Reliance of the Traveller: A Classic Manual of Islamic Sacred Law} (1994), 595. As noted however, the Arabic masculine encompasses the feminine prima facie which makes the \textit{hanafi} interpretation problematic. Further, such a strict construction must mean that the words ascribed to the Prophet when strictly interpreted must mean that any male who converts to Islam must also be killed, a position clearly not supported in history. While not stating that this interpretation is valid it is used only to point to the problematic nature of the application of the death penalty for apostasy, and the pragmatic use in the past and on the other hand the possible pragmatic avoidance of the death penalty to suit the prevailing political climate.

\textsuperscript{474} Some prominent Muslims accused of apostasy include Abu Hanifa (d 150/767); Ahmed ibn Hanbal; Al-Husayn b. Mansur al-Hallaj (d309/922); Abu al-Husayn al-Nuri (d295/907); Abu al-‘Abbas al-Sufi; Abu Hamid Muhammad al-Ghazali (d.505/1111); Ibn Hazm (d.456/1064); Muhy al-Din b. Arabi (d.638/1240) and Ibn Taymiyyah (d.728/1328) among others: Abdullah Saeed and Hassan Saeed, \textit{Freedom of Religion, Apostasy and Islam} (2006), 30. An interesting contemporary example of the political nature of the charge of apostasy is that of Salman Rushdie who was declared an apostate and sentenced to death by Ayatollah Khomeini because he defamed the family of the Prophet in his writings. On the other hand, Tariq Ali, a self-confessed atheist and ‘cultural Muslim’: Tariq Ali, \textit{The Clash of Fundamentalisms: Crusades, Jihads and Modernity} (2002), 22. - and also a well known and respected high profile author and commentator – is quite rightly left unmolested. In recent history (19th–21st Centuries) both Muslims and Orientalists have been involved in this project of selective use of Islam. See for example Wael B Hallaq, ‘The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse’ (2002) 2 \textit{UCLA Journal of Islamic and Near Eastern Law} 1, 2. For political prosecutions using apostasy as a charge
declared an apostate often for political reasons. It is a charge that is difficult to defend.

The Prophet also stated that 'We make judgments on the basis of what is apparent, and God takes charge of hidden things'.

One may make the point that apostasy is sometimes indeed apparent. However, in the final analysis, the Prophet said that the worst of all (false) gods worshiped by people is 'our self-love', and is a matter that is not always apparent. The reality however, is that many respected commentators both past and contemporary apparently advocate the death penalty for mere apostasy and therefore it is not an issue that can be dismissed so easily.

Quisas crimes

If a person kills or injures intentionally and without legal right, the Qur’an mandates quisas. Quisas (punishments), although sometimes translated as retaliation or retribution, arguably is best translated into English as

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477 For a survey of various historical and contemporary opinions on the subject please refer generally to: S. A Rahman, Punishment of Apostasy in Islam (1996).
478 Qur’an 2:178. In the Commentary of the Qur’an Yusuf Ali states that quisas applies only to intentional murder. He does not quote an authority for limiting quisas. Although the words of the verse specifically speaks here of what specifically is permitted under talion for murder

Quisas (from the triliterals ذِمْرِثُل) other verses extend the concept as talion and as is now broadly accepted in Islamic law.

Quisas provides the heirs the right to just retribution or the payment of diyat in the case of murder; Qur’an 2:178 or manslaughter: Qur’an 4:93. The reference made here is to all believers in every faith tradition. For a discussion on Believers please refer to Appendix 1. For battery etc causing loss of limbs or actual bodily harm: Qur’an 5:45, the body of shari’a law comes under the law of jiraha (root £ j <r) which is to wound, to injure, etc. For elements of crimes and evidentiary aspects please see: Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000).

According to the Qur’an anyone who is wrongfully slain, receives God’s grace as a spiritual compensation: Qur’an 17:33, although this theological factor alone has not in the past and therefore, prima facie should not in contemporary law, reduce the defendant’s culpability.

479 Quisas (from the triliterals ذِمْرِثُل) can be translated into English as: ‘like for like’ or ‘equality between crime and punishment’: E W Lane, Arabic English Lexicon vol 2 (1984), 1382.
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talion' and draws its legal authority from the Qur’an. A slain or injured person (or their agent) has legal right to talion against the guilty party or parties. The victim may of right (‘quisas right’): (1) forgive the crime and the guilty parties or; (2) seek compensation, (diyat payments) or; (3) demand punishment to be meted out to the guilty (but not exceeding the extent and severity of the original injury). This reflects quisas in peacetime.

The Qur’an also makes a distinction between intentional and accidental killing during war. Punishment for the intentional killing by a believer (in all cases) of a believer is reserved for the hereafter. In any event, Muslim societies have adopted international law to cater for these contingencies. Killing of a believer by a believer (and note the text does not say a Muslim by a Muslim), which for the development of the shari’a means

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483 Qur’an 2:178; Qur’an 5:45.
485 Qur’an 5:45; Qur’an 17:33. Forgiveness is encouraged and anyone who has the right to do so and does forgive (or foregoes the right to the retaliation of) a killer is (in Muslim theology) guaranteed a place in Paradise: Saved Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000), 121.
488 Qur’an 4:92-93:

Never should a believer kill a believer; but (if it so happens) by mistake (compensation is due): if one (so) kills a believer it is ordained [...] compensation to the deceased's family unless they remit it freely. If the deceased belonged to a people at war with you and he was a believer the freeing of a believing slave (is enough). If he belonged to a people with whom ye have a treaty of mutual alliance compensation should be paid to his family and a believing slave be freed. For those who find this beyond their means (is prescribed) a fast for two months running: by way of repentance to Allah: for God hath all knowledge and all wisdom.

If a man kills a believer intentionally his recompense is Hell to abide therein (for ever): and the wrath and the curse of God are upon him and a dreadful penalty is prepared for him.

O ye who believe! when ye go abroad in the cause of God investigate carefully and say not to anyone who offers you a salutation: "Thou art none of a believer!" Coveting the perishable goods of this life: with God are profits and spoils abundant. Even thus were ye yourselves before till God conferred on you His favors: therefore carefully investigate for God is well aware of all that ye do.

489 Qur’an 4:93.
that at least a part of the crime is not temporally justiciable (as God alone
knows the believer) and again as discussed, ‘believer’ is not identical with
the term ‘Muslim’. The temporal aspect of such a crime should be
carried out under the rules for homicide. If a Muslim kills a Muslim
accidentally, including co-laterally, the punishment is dependent on
whether (a) the victim was part of the same general community as the killer
or (b) a member of a community at war. Between these two ends of the
spectrum of intentional and accidental killing is an area of law that
involves issues such as recklessness and negligence, areas of law that need
to be developed under the shari’a.

The physical administration of talion generally in the international
contemporary criminal justice system which abjures capital punishment is
likely to prove problematic. While the standard of proof must remain
very high in these quisas cases, there does not appear to be a legal
impediment (as opposed to the strict evidential requirements in hudud
cases) to employing evolving technological measures (once proven reliable)
which may therefore be used in establishing questions of fact. Note under
the shari’a, that some crimes, such as apostasy or missing of the mandatory
fast in the lunar month of Ramadan, both crimes against God, are effaced
by repentance kaffara, and is encouraged in principle. Repentance,
however, does not fully touch upon remedies for the serious crimes against
the person or the compensation owing to the victim.

Another serious crime which is not listed as a hudud or quisas crime
is that of fasad fil ard (creating corruption in the land) which appears in the
Qur’an arguably over 30 times. This specific crime is discussed under the
discussion on Genocide in Appendix 3.

It is suggested that a key policy reason for the Qur’an characterising
homicide as a quisas crime as opposed to a hudud crime is because homicide
is such a great wrong that one person can inflict on another and therefore,

490 See text accompanying n 67, 511.
491 According Antonio Cassese, *International Criminal Law* (2003), 427. ’International provisions rule out only the death penalty’ although it is likely that the only reason why stoning and flogging are not also considered is because the international community has long abandoned such punishments.
492 Qur’an 4:92.
493 Qur’an 2:11; Qur’an 2:27; Qur’an 2:251; Qur’an 5:32; Qur’an 7:56; Qur’an 7:85 etc.
freeing up this crime from the strict rules of ‘fixed’ evidential hudd requirements permits human technological evolution to bring killers to justice with the ever-expanding range of accurate, reliable analytical and forensic tools that are becoming available to the prosecution. Islamic law precludes the ‘development’ of Qur’ anically mandated and fixed crimes such as fornication (zina), but not general crimes such as rape, and confectioning these distinct crimes has led to great injustice in the modern Muslim world.

Further, in contemporary conflict situations where it may become very difficult to identify the killer precisely, the questions are then: who (if anyone) is directly or vicariously liable for the crime494 and thus for diiyat payments? Although still subject to debate,495 the talion paid by the Libyan Government on behalf of Libyans found guilty in the Lockerbie attack (and while the issues of criminal law are yet to be settled to the satisfaction of

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494 The validity of principle of vicarious liability under the siiiri'a appears to be settled: Khaled Abou El-Fadl, 'Islam and the Challenge of Democratic Commitment' (2003) 27 Fordham International Law Journal 4, 48; Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (pt I)' (2003) 51 American Journal of Comparative Law 699, 702. The question of to whom the responsibility devolves, if the principal is unable to pay (for example if dead or otherwise incapacitated etc) appears to be open. These payments are known as aqilah (see for example Malik ibn-Anas, The Beated Path Al-Muwatta' (1979), 342 (hadith 1502). The concept traces back to pre-Islamic Bedouin culture (au) but applied only to non-deliberate or accidental killings: Norman Calder, Studies in Early Muslim Jurisprudence (1993), 202. and the various Schools have discussed the matter, although there is scope for developing this area of law to suit contemporary contingencies. Again the Libyan domestic law: ‘Law on the Rules of Talion (qisas) and Criminal Compensation (Blood Money diyya)’ Translated in Eugene Cotran and Chibli Mallat (eds), Yearbook of Islamic and Middle Eastern law (1994), 543., is a useful precedent and states that (at Article 4) that the family in the first instance is the aqilah but (at Article 5) that ‘if there is no aqila , it is owed by society’ thus arguably ensuring that the injured party is not left uncompensated and falls within the meaning of the prophetic hadith on the issue of compensation that ‘money is to be paid from the Muslim public treasury (bait al-maal)’; Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000), 156. See the general discussion on aqilah in Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000), 156.

495 The Islamic Schools generally value a free Muslim male above others including females, and people of the book: Matthew Ross Lippman, Sean McConville and Mordechai Yerushalmi, Islamic Criminal Law and Procedure: An Introduction (1988), 85. Although people may argue that all lives are equal in Western law, that in practice these Islamic Schools' valuations are not dissimilar to Americans and European lives in practice, being granted a higher value. This is not to suggest there is a legal basis for this difference in any civilised system of law, it is apparently purely a practical matter that is reflective of relative power. It is an area of law that must be developed in both systems to reflect the intrinsic equality of value of human life. However, specific payments must for equity consider cost of living differentials in regions and States and specific issues such as the differences in cost of hospitalisation, cost of living, cost of funerals and cost of schooling for victims' children, etc is widely different in different States and must be considered relevant factors in determining equitable compensation payments.
the parties), still may serve as a model for contemporary law.\textsuperscript{496} It arguably falls within the meaning of doing justice to the victim under the shari'\textsuperscript{a}, and is thus a reasonable precedent. The offer of the German Government to pay just €3800 per Afghan killed in a botched NATO raid must be condemned and discarded as a model of compensation, for its racial devaluation of non-German lives.\textsuperscript{497} Further, if a killer is also killed in the attack, as happens in \textit{kamikaze} attacks, the question becomes how, where necessary, one can attach vicarious legal liability to co-conspirators, and the further how, the charge when proven, draws talion and how it would apply in practice.

There is a view among Muslims, and one that is effectively harnessed by al-Qa'\text{eda} and its affiliated groups,\textsuperscript{498} that Muslim blood is 'cheap'\textsuperscript{499} and is one that should be effectively addressed by the international community as an issue both of justice and as a barrier to winning the hearts and minds of Muslims. Muslims use the example of reparations required of Libya to (predominantly) Westerners killed in the Lockerbie\textsuperscript{500} and Air France\textsuperscript{501} attacks (and rightly so according to Islamic law), although, on the other hand, Iranian families of the victims of the USA's attack on their passenger airline were never compensated by the

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\textsuperscript{496} That is, that if the estate of the killer is unable to meet the liability or leaves the killer's spouse or non-adult children in poverty, that as a last resort the nation State of which the killer is citizen, or for which he fought, be called upon to make the payments. Muslim charities should also be encouraged to pay the killers liability, which in effect becomes a debt owing from the killer's estate and therefore, and while not examined here as an issue of law, is entitled to be considered a debt for the purposes of debt relief under Muslim charity law.

\textsuperscript{497} Matthias Gebauer, \textit{Aftermath of an Afghanistan Tragedy: Germany to Pay $500,000 for Civilian Bombing Victims} SPIEGEL ONLINE 8 June.


\textsuperscript{499} Sally Neighbour, \textit{In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia} (2004), 131. See text accompanying above n 497.

\textsuperscript{500} Matthew Weaver, 'Families of Lockerbie bombing victims receive compensation from Libya', \textit{The Guardian} (London), 21 November 2008. notes that Libya pays US$2,700 million to Pan-Am 103 Victims.


\textsuperscript{501} Libya paid €30 Million in compensation: Eric Margolis, \textit{Murders in the Air} February 04, 2001;.


USA,\textsuperscript{502} and as discussed above, Afghans are 'priced' somewhat less than Westerners.\textsuperscript{503}

On the other hand, there is also precedent in Islam (with respect to \textit{quisas} crimes) for what in contemporary terminology is characterised as permitting discrimination on the basis of religion,\textsuperscript{504} for gender\textsuperscript{505} under the \textit{shari'a}. It is at odds with prevailing international norms, which appear to permit discrimination based on nationality only. While Islam is not expected to conform to the changing norms of other civilisations, jurists may (as they have done in the past) nonetheless have to develop the law to address or better explain these concerns so that the law becomes universally understood, even if not quite accepted, among non-Muslims.

\textbf{Siyasa and Ta'zir Crimes}

\textit{Siyasa} crimes are a special sub-category of \textit{ta'zir} crimes and are a special case where the rights of a State are breached,\textsuperscript{506} the State is the aggrieved party and charges can be brought against the defendant by a public prosecutor. \textit{Ta'zir} crimes against individuals can also in cases be brought by a public prosecutor, although perhaps in a \textit{shari'a} context acting for or at a minimum taking instructions from the victims, and therefore not identical to the model of a public prosecutor in common law States.

The nomenclature of \textit{siyasa} crimes is used to describe crimes of interest in this paper by jurists such as Nyazee,\textsuperscript{507} and is correct, but for consistency with the broader literature the more inclusive term of \textquote{\textit{ta'zir} crimes} will generally be used.

\textsuperscript{502} The shooting down of an Iran air passenger airliner killing all 300 passengers by the USS Vincennes is another example of the pragmatic characterisation of armed attacks. In this case the Commander of the USS Vincennes went on to receive a medal for his actions. \texttt{<http://news.bbc.co.uk/onthisday/hi/dates/stories/july/3/newsid_4678000/4678707.stm> 3 July 1988>}

\textsuperscript{503} See text accompanying above n 497.

\textsuperscript{504} See for example Malik ibn-Anas, \textit{The Beaten Path Al-Muwatta'} (1979), 342 (hadith number 1500).

\textsuperscript{505} See for example Ibid. (342, hadith number 1482).

\textsuperscript{506} Imran Ahsan Khan Nyazee, \textit{General Principles of Criminal Law (Islamic and Western)} (2000), 59.

\textsuperscript{507} Ibid, 17.
Ta’zir crimes

Hudud and quisas crimes are enumerated in the primary sources and in principle are ‘closed’ categories. New crimes or categories of crime may be created in the ta’zir category, in parallel with IHL and ICL, or other legitimate purpose, to suit emerging contingencies. The principle underlying this broad statement is that crimes against God may be left for the hereafter, while crimes against the person must be punished, compensated or forgiven according to the law and in the Muslim ethic is to the benefit of both victim and perpetrator. Serious international crimes paralleling the Rome Statute could therefore, prima facie, legitimately be created under this head. Penalties prescribed for ta’zir and siyasa crimes, which have lower evidential thresholds, must be less severe than that for hudud or quisas crimes. The limitation period for prosecution of ta’zir crimes under the Ottomans was 15 years, and while this precedent serves as a useful starting point, it should be re-examined for contemporary validity.

Joint Criminal enterprise and Other Inchoate Ta’zir Crimes

An important general issue that touches upon ta’zir crimes is the issue of inchoate crimes. Does each criminal have to satisfy every element of a crime to be found guilty? Maliki law recognises that there are cases in which guilt may be present in inchoate crimes or when all elements of the principal crime are not satisfied. In the common law world this forms a class of crimes including conspiracy, aiding and abetting and joint criminal

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510 The reasoning here is that God’s punishment is much more severe and that God’s forgiveness for a crime committed against a person (ie other than God) is not a possibility. That is God forgives crimes against God but people have the right and responsibility to forgive or seek punishment for crimes against themselves. Therefore, forgiveness sought on earth, or punishment received which expiates the crime is the better option for the believing Muslim.

511 Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (2005), 11. Although this limit is although longstanding and thus presumed valid, it should nonetheless be re-examined for its contemporary validity.
enterprises, and are all legal principles that do not appear ultra vires the Qur'an, sunna or the shari'a generally.

The Shari'a and Wartime Exceptions
Killing enemy combatants during war is permitted under the shari'a (enemy combatant exception)\textsuperscript{513} and it is settled that no diyat is payable.\textsuperscript{514} There are, however, Qur'anic conditions and limits to this permission,\textsuperscript{515} whether or not these conditions and limits have been expressed as positive law. The general Qur'anic command to Muslims 'not transgress [these] limits'\textsuperscript{516} is individually binding in armed conflict and is further qualified by: 'for God loves not transgressors',\textsuperscript{517} thus defeating the purpose of djihad through these ultra vires means as a 'path' to drawing close to God, the primary purpose of the djihad.\textsuperscript{518}

It is re-iterated that, while there are general prohibitions to some means of war, this prohibition does not necessarily translate into clear positive law limits set on the means and methods that may be employed by contemporary Muslims and Muslim armies in situations of armed conflict. Further, and consequently, there does not appear to be an existing genre of crimes, for breach of these intra vires means, when committed during times of war, which makes prosecution under the shari'a impossible.\textsuperscript{519} This permits Islamists disingenuously, although perhaps not untruthfully, to assert that they are not committing any shari'a crimes.

Qur'anic boundaries to the legitimate means employable in war were established in the practice of the Prophet and his Companions and have become part of Islamic custom through consensus. As the means of warfare has evolved however, these laws have not kept pace, for the pragmatic reasons mentioned above, but principally so that Muslim leaders could resort to the much less stringent standards of the 'world community'.

\textsuperscript{512} Ibid. (29.}
\textsuperscript{513} Qur'an 22:39; Qur'an 2:190-191.
\textsuperscript{515} Qur'an 2:192; Qur'an 194-5; Qur'an 4:90.
\textsuperscript{516} Qur'an 2:190.
\textsuperscript{517} Qur'an 2:190.
\textsuperscript{518} See discussion on Dar al-lslam (The Domain of Peace or Islam), 523.
\textsuperscript{519} See n 229, 542.
The question for today however is: Can intentional breaches of the Qur'anic and sunna principles of armed conflict, be criminalised under the shari'a? Can killing of both Muslims and non-Muslims, non-combatants or collateral deaths be analagised and formulated as crimes in a manner similar to the equivalent Rome Statute crimes? The answer must (according to the arguments proffered in this paper) be 'yes'. The question is whether there is a will to do so, not so much on the part of Muslims as will be shown below, but on the part of the non-Muslim Powers? 'New shari'a crimes' should be placed into a category of ta'zir or siyar crimes.

Reviving the principles of the Prophet (here meaning the laws of war and associated criminal law) has universal support among Muslims and this venture should not therefore fail for want of support on this account and by the majority of this constituency. On the other hand, there is a minority of both Islamists and their allies on the secular extreme who advocate for the status quo, each for their own instrumental reasons but desiring the same outcome with respect to allowing the carnage to continue. In the case of the secular extreme this is arguably because the vast majority of the victims are Muslims and are therefore out of sight of the voting Western public.

While Islamists may at present be exhibiting wilful blindness, it will be difficult for them to continue on this path if the shari'a is made a relevant factor. This is because the promise of the spectre that God will confront killers with their victims on the Day of Judgment\footnote{Unlawful taking of a single life in the Qur'an does not equate to the taking of one soul, but the taking of every soul: Qur'an 5:32. According to Ibrahim M Kunna, \textit{110 Ahadith Qudsi} (2006), 63. unjust killing \[even\] in djihad is prohibited and the killer will bear the 'sins' of the victim.} presents a confronting situation for the Muslim, as recognised by bin Laden.\footnote{Bruce Lawrence (ed) \textit{Messages to the World: The Statements of Osama Bin Laden} (2005), 267.} This 'fear', does not appear to deter them other than in seeking the forgiveness of their Muslim victims only.\footnote{This 'seeking of forgiveness of Muslim victims' appears to be emerging as a general trend/innovation in mass killings where Muslims are also killed in attacks. A Bali bomber expressed similar sentiments: 'Bali bomber 'cried for Muslim victims'', \textit{The Sydney Morning Herald} (Sydney), 1 November 2007. <http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl?path=/articles/2007/11/01/1193619006858.html> [Accessed 4 November 2007]} This approach by al-Qa'eda is arguably based on...
the Islamically unfounded devaluation of non-Muslims by Islamists, a view that is clearly negated by the Qur'an, but nonetheless not unknown in practice in the course of Muslim history. Muslims, when sensitised to the Prophet's traditions and thus law surrounding such killings, will not as easily be assuaged as the Islamists. Paradoxically, it is ignorance of the shari'a that most greatly assists the Islamists. On the other hand, Islamic law mandates justice, and there must be fair criminal sanction and redress available to the injured party. What is missing at present is a means for delivering such justice. This compensation, or restitution, is particularly important for non-Muslim victims who do not share the Muslim version of receiving compensatory justice in the Hereafter, and for fairness they must be provided temporal justice.

Where Islamists attack a mosque, church, synagogue, temple, hospital or school, cultural/religious property or otherwise protected under the Qur'an and where the religion/civilian status of the vast majority of the victims is known, or should reasonably have been known to the attackers, such attacks can prima facie be criminalised. Such attacks on unlawful targets, other than perhaps for mistake of fact, can prima facie be prosecuted. Related inchoate acts could also generally be treated as reckless or criminally negligent and hence in additional to any criminal liability that attaches, are also prima facie likely to be liable for diya or financial compensation, under Islamic law.

Further, and while it appears settled that the principled rebel is not criminally liable for attacking legitimate targets, even such rebels

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523 Qur'an 3:75.
524 See text accompanying n 20, 503.
525 Qur'an 22:40. The sunna also protects several classes and groups. Jurists will need to draw out specific principles of protected classes of life and property with quantised damages.
526 Qur'an 22:40.
527 If a defendant asserts necessity and necessity is a legitimate factor in these situations the onus of proof should be on the defendant.
528 Qur'an 22:40.
529 For a general discussion on causation in Islamic Law, evidentiary requirements and compensation payments for deaths caused, absent the specific mens rea element (al qatl shibh al-'amd), see Appendix I. Sayed Sikandar Shah Haneef, Homicide in Islam: Legal Structure and the Evidence Requirements (2000).
530 Please refer to discussion on Rebellion (bugha) in chapter 5.
should be held financially liable for at least avoidable or unjust damage, including liability (diyat) for damage to life or property of non-combatants. Clearly identifying both legitimate and non-legitimate targets in the meaning of the shari'a is therefore crucial and urgent, but again IHL/ICL, including the Geneva Conventions and other internationally binding norms and customs can legitimately serve as a starting point or a default position for Muslims, until shari'a jurists provide a greater degree of clarity on these issues inter alia through means discussed in chapter 6.

The general question, however, on easing or relaxing the strict, exacting shari'a prohibitions on the killing or injuring non-combatants remains to be addressed. The possible legal grounds for creating exceptions are necessity and reciprocity, which will be examined in the subsequent chapters. That is, it is yet to be resolved how the strict limits on how Muslims conduct warfare can be modified to accommodate the practical realities of contemporary weapons and delivery systems and to regulate the behaviour of Muslim fighters with respect to the large number of collateral deaths. It is clearly a matter of great urgency. On the other hand, it must be recognised that justice must nonetheless be done, even if the remedy is limited to financial compensation.

While the levels of co-lateral death and damage tolerated by contemporary IHL is the starting point, the shari'a’s less compromising position on the taking of life must be honoured, and the shari’a law clarified and articulated so that those who claim to be Muslims can be held to this better yardstick, as would be the desire of the believing Muslim.

Rape as distinct from fornication (zina)
While zina clearly does not equate with rape, including rape as a tool of war, for its perpetrator/s it must, nonetheless, constitute a most serious

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532 Muhammad Hamidullah, Muslim Conduct of State (3rd ed, 1953), 314.
533 For example the characterisation of rape as zina bil-jabr ('zina' by force) is ipso facto problematic: Asifa Quraishi, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective.' (1997) 18 Michigan Journal of International Law 287, 289 (referring to the Pakistani Legal provisions on zina). This is because zina (adultery or fornication) presumes mutual consent, a presumption that must not be carried across to rape where the onus is on the perpetrator to establish the existence of consent (even if this is a subjective belief), to a standard beyond doubt. It would be preferable to use a more neutral verb such as igtisaab amraat.
shari'a crime. On the other hand, the perennial reluctance to prosecute zina, a
crime against God, also appears unfortunately and unjustly to extend to the
prosecution of rape, a crime against the person. Rape is not a hadd crime
but, as a morally reprehensible and culpable act, can legitimately be made a
separate ta'zir crime, with different elements and evidentiary requirements,
admitting evidence such as DNA, documents and photographs, pregnancy
or paternity tests, all of which (and more) are inadmissible evidence in zina
cases.534 However, it is mentioned for completeness (but not as a
recommendation for future action as it was in the past and mentioned
below) that in cases of rape, such as rape in war or gang rape, where the
perpetrator/s additionally satisfy Qur'anic evidentiary requirements for
zina for the public nature of the act, then the punishment for zina can
become applicable against the perpetrator but clearly not against the
victim, absent the element of intent, consent or for duress.535

The reluctance to prosecute rape in such jurisdictions appears to be
relatively recent phenomenon. Fatwas from the eighteenth and nineteenth
centuries confirm the analysis in this section that rape of a woman, if
proven to the zina standard, draws the hudud punishment on the man plus
the payment by the rapist of the mahr (the bride price) to the raped
woman.536 Sexual violation crimes such as rape, which unlike 'killing at
war', do not find a wartime exception, can never, other than perhaps again
as a mistake of fact, find an exception under the shari'a.
There is a view that it is difficult to prove crimes such as rape under the shari'a. This is a mistaken view which is generally arises because in some jurisdictions the prosecution is required to satisfy the same elements and standard of proof as that for zina. Zina per se has been described as 'impossible' to prosecute because of the high standards of proof required, but this is clearly not a relevant consideration with respect to prosecuting rape, properly characterised, as this is an entirely separate crime. Thus, while the criticism is noted, the 'problem' arises in the improper use of analogy and of associating 'rape' with zina. This approach, of conflating one crime with the other, is highly prejudicial to victims, ultra vires and wrong in law, but is a fact in some jurisdictions as is now considered.

If the elements of zina are not made out (say for the absence of the four eye-witnesses), '[...] the rules of evidence and punishment allowed muftis a certain flexibility [...]', punished as a separate a ta'zir crime, and which is NOT contingent on every rape case being first tried as a zina case. This is very different from the contemporary situation. For example, Quraishi refers to the Pakistani legal system permitting 'zina cases to be prosecuted as ta'zir crimes' inter alia for the 'lighter' evidentiary requirements. This approach is problematic as a matter of law as zina is a hadd, not ta'zir, crime and failure to prove zina results in a mandatory prosecution for qadhf (slander) against the accusers, which carries a severe punishment and legal ostracism, thus strongly discouraging witnesses from providing testimony. 'Legal shortcuts,' such as in Pakistan, sometimes

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[...] four witnesses known for their righteousness and their integrity, were present at the accomplishment of the sexual act, in a manner that would exclude the possibility of any doubt; it would not be sufficient if they had seen the accused completely naked and stuck together.


539 Asifa Quraishi, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective.' (1997) 18 Michigan Journal of International Law 287, 311. The law of qadhf (slander) forms part of a zina prosecution. If the prosecution of a zina case fails then qadhf ipso facto becomes applicable. Pleading ta'zir in the alternative (to zina) is therefore not possible in the shari'a sense.

540 Qur'an 24:4:
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create utterly unjust outcomes, which in the main target Muslim women. They must be highlighted and better still reversed, if not in the domestic plane, then at least in the international plane. Such international jurisprudence will make it difficult for Muslim States to give their unjust cultural norms the imprimatur of the shari'a.

Elements of Crime

For analytical purposes, every element of every crime and cause of action in Islamic law can be said to comprise three basic components: motive, intent or the mental element, and the actus reus or the physical element. These components may generally, but not necessarily or always, be applied to all crimes. The practical question to be examined is: which of these elements must satisfactorily be established by the prosecution in a temporal court to secure a conviction fairly?

Motive

The Qur'an mandates that a Muslim’s actions must be motivated by obligation (wajib), by love for God’s sake alone, or broadly speaking And those who launch a charge against chaste women and produce not four witnesses (to support their allegation) flog them with eighty stripes: and reject their evidence ever after: for such men are wicked transgressors.

Note that the presumption is that the woman (and by analogy and reciprocity the man) being accused is chaste, and is a presumption that can only be rebutted by the evidence of four male eye-witnesses: see n 537, above.

Please refer to Nyazee’s critique of Western Criminal methodology and the limits of the discussions of the ‘elements of crime’ but does not oppose the use of these common law concepts for analytical purposes. He also discusses the historical reasons for jurists avoiding the strict enumeration of the elements of a crime, discusses the use of this common law methodology in Pakistani criminal law and notes that in general the methodology is compatible with the shari'a: Imran Ahsan Khan Nyazee, General Principles of Criminal Law (Islamic and Western) (2000), 79.

In the Qur'anic view of law all elements, including the innermost hidden thoughts of an individual are examined by God. Qur'an 36:65:

That Day shall We set a seal on their mouths. But their hands will speak to Us and their feet bear witness to all that they did.

The word ‘motive’ in Arabic is da'fa' (دافع); N. S. Doniach (ed) The Oxford English-Arabic Dictionary of Current Usage (1972), 792. The (root of the) word da'fa' (دافع) grammatical construct) appears (in its various forms) in the Qur'an: Qur'an 22:38; Qur'an 50:2, but not in the context of ‘motivating ideology’. The Qur'an uses the idea of ‘motivating’, the impetus for action, as in the metaphor of ‘seeking the pleasure of seeing God’s face’. In Islam ‘right’ motive brings both God’s help and assistance and thus if one is motivated (push oneself for the right reasons) God (somehow) mutually progressively further motivates (or pushes) the person further ‘in the right direction’ in the sense of a positive feedback. The reverse in terms of de-motivation (or in Islamic terms ‘being mislead’ does not carry the idea that God will ‘push them away’ but only the God leaves them to their own devices. A common law understanding of motive was described as ‘an emotion prompting an act that is quite
that one acts or desists from certain acts because one sincerely believes that one is obliged to do so under the Covenant. A Muslim’s act that is devoid of the ‘right motive’ can amount to naught. The Qur’an commands Muslims to be fair and just in all circumstances, including against one’s relatives, kin and even oneself, and fairness must be manifest in action. The shari’a does not provide for derogation with respect to fairness and justice in times of war. In support of the proposition that fair and just behaviour is mandatory in all situations, including situations of war, Peters states that:

Even when fighting in self-defence, the Qur’an requires that the motive must be in God’s cause alone and not for revenge or retribution.

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544 Qur’an 2:272; Qur’an 13:27; Qur’an 30:38. The formula used repeatedly in the Qur’an and sunna to describe right motivation is Qur’an 4:75: *fi sabil Allah* (ie in Qur’anic parlance) — ‘in God’s path’

545 Please note that ‘sincerity’ under the shari’a is not a purely subjective criterion. Please refer to the discussion on *ittiba* in Appendix 2.

546 Qur’an 25:20–23. For example, as discussed above, the mere declaration of the shahada enters one into the Covenant and human agency is unable to distinguish the ‘genuine’ from that which is not genuine. Qur’an 10–90–92 provides and example that illustrates this is the declaration of the Pharaoh, which even though uttered by the Pharaoh in his dying moments, was not accepted by God, who knew the Pharaoh’s motives with certainty and could make this statement without any injustice, but would otherwise be sufficient to enter the Pharaoh into Prophet Moses’ *umma*. The key point here is that true motive is not discernable by human agency with the requisite degree of absolute certainty.

547 Qur’an 4:135.


549 While this observation is historically accurate, the ‘eternal nature’ of the Qur’an and law that is thus derived, must mean that Muslims can compare their contemporary situations against the historical precedents, if the contemporary situation so necessitates. It is not suggested that that Muslims may never fight, because the contemporary norms do not recognise Islamic norms, but that the reasons and conditions that lead Muslims to fighting should objectively be measured against the shari’a criteria to which Muslims claim to adhere and consider binding on themselves.
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What is Islamically a ‘good’ motive is, however, exculpatory in God’s eyes. It appears therefore, that the role of motive under Islamic law is different in principle from the common law, where a defendant’s motive is only an aspect to the prosecution’s case, but for reasons just discussed might not make a significant difference in practice.

Further, the Qur’an refers to hypocrisy (nifaq) as among the greatest misdemeanours/sins, although again it is something that is known with certainty to and thus punishable only by God, and goes directly to the motive element. Hypocrisy is a universally recognised phenomenon, and it is evident that mere declaration of ‘good motive’ may not be sufficient as people may lie about their true motives, including through self-delusion. Further, some Muslim Schools such as the Djafari and the

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551 That is, that a Muslim has acted in a manner that attempts to deceive his/her companions and in reality were acts motivated by other than to please God. This principle is illustrated in the hadith reproduced in Izzeddin Ibrahim and Denys Johnson-Davies, Forty Hadith Qudsi (1991), 52.

The first of people against whom judgment will be pronounced on the Day of Resurrection will be a man who died a martyr. He will be brought and God will make known to him His favours and he will recognise them. [The Almighty] will say: And what did you do about them? He will say: I fought for you until I died a martyr. He will say: You have lied — you did but fight that it might be said [of you]: He is courageous. And so it was said. Then he will be ordered to be dragged along on his face until he is cast into Hell-fire. (The rest of this hadith describes a learned scholar and a wealthy person who were also similarly self-deluded and who in both cases meet a similar end.)

552 Qur’an 2:8-12:

Of the people there are some who say: "We believe in God and the Last Day" but they do not (really) believe. Fain would they deceive God and those who believe but they only deceive themselves and realise (it) not! In their hearts is a disease; and God has increased their disease and grievous is the penalty they (incur) because they are false (to themselves). When it is said to them: "Make not mischief on the earth" they say: "Why we only want to make peace!" Of a surety they are the ones who make mischief but they realise (it) not.

553 The term ‘political spin’ indicates that not even those making the statements or those around them believe that what they are saying is true.

554 The Qur’an 31:15; notes that self delusion is counterproductive and in the end destructive as:

"[God] will tell you the truth (and meaning) of all that you did."

That is, hypocrisy or acts which although apparently for God’s sake (such as prayer or charity), which in reality were motivated by other ‘worldly motivations’ such as purely to gain a reputation as a pious individual or to be spoken of as a generous person etc.

555 Vanessa Martin, Creating an Islamic State: Khomeini and the Making of a New Iran (2003), 233. For the general acceptance of dissimulation in Shi’i schools see Patrick Cockburn, Muqtada Al-Sadr and the Fall of Iraq (2008), 62.
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Wahhabis explicitly permit dissimulation (taquia) while ‘Hanafi permit dissimulation (takiye) in Sufi related matters, thus making it difficult for a court to determine motive objectively. That is, from an Islamic theological perspective motive is difficult to judge objectively, partly because we humans are able to disguise our ‘base’ acts, and include instincts, or Qur'ically described as ‘diseases of the heart’, from all but God, and further, base motives can be disguised, even from ourselves, through euphemisms such as ‘nationalism’ (al-asabiyya) or self-aggrandisement.

McSherry notes that ‘the legal suppression of the notion of ‘motive’ in the formation of an offence has kept political, social and cultural explanations for the commission of offences out of the courtroom at the trial stage’, which from the vantage of this paper is a positive development. The inclusion of a motive element is some crimes in the meaning of the Australian Anti-Terrorism legislation arguably also adds perhaps unnecessarily to a perception that the law is ‘anti-Muslim’, although in practice the laws are nonetheless aimed at the acts mainly of

556 Wahhabis permit dissimulation (taquia, see also n 557 below) for example in the form of mesyar marriages. This is a ‘marriage’ in which the husband (for the example given at the web page below from a Saudi scholar* advising a Saudi student studying overseas) who sought permission to marry ‘temporarily’ and who intends to divorce his wife after a fixed period but does not disclose this intention to his future spouse: Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 179. Muta’a or temporary marriage as known and recognised in Shi’i Islam, but makes the disclosure of this intention mandatory: Baqer Moin, Khomeini: Life of the Ayatollah (2000), 29.

**For example see <http://www.answers.com/topic/abdul-azeez-ibn-abdullaah-ibn-baaz>. (accessed 5 April 2006). Note that cruelty and deception are forbidden in Islam but the scholar does not seem to address these concerns and prohibitions.

557 Taquia (or sometimes spelled takiye in Turkish and Hanafi literature) or dissimulation is permitted when necessary in Islam: Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 27n; Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 75.


559 For example at Qur'an 2:10.

560 Qur'an 92:90. See also n 551, above.

561 The word assabiyya does not occur in this context in the Qur'an, but this sentiment of ‘warm feelings to a tribe’ and how the polytheists ‘get up in their hearts, heat of ignorance (ناراً فيهم) in the context of preventing Muslims from the Kaba’, appears in Qur'an 48:26.


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Islamist groups, and on that score more honest and politically useful, but does not bode well for social cohesion, an important consideration for an immigrant society such as Australia. Further, the motive element, which Schabas describes as being separated by a blurred line from intention.

The Qur’an notes that individuals, can never be certain of satisfying the ‘motive’ element in all its complexity. Thus for judgment by human agency, for fairness and justice, and arguably in keeping with the shari’a methodology, it may be worth adopting and following the common law notion that motive is better considered a factor that may go to intention. At any rate motive, for reasons just discussed, should not be considered as a discrete element of a shari’a crime. From a shari’a perspective, therefore IHL/ICL crimes requiring a ‘motive’ element are, when necessary, thus best formulated as shari’a crimes without this element.

Intention
Theologically, intention (niyaa) is an element of every act, although it is not necessarily an element of every prosecutable crime. Islamic law however in this respect, can differ significantly from secular legal traditions including IHL and ICL in its general treatment of this element. A Muslim is encouraged to ‘intend goodness’ at all times and the Qur’an promotes this by promising believers a reward for good intentions, whether or not the good deed is actually performed. The converse is however not true, ie an

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564 In contemporary society even neutrally phrased legislation, tend to be classified as being or arguably adding unnecessarily to the perception that the law is ‘anti-Islam’ because in the main ‘terrorists’ subject to prosecution detention, control-orders etc happen to be Muslims. See generally: Christian Joppke, ‘State neutrality and Islamic headscarf laws in France and Germany’ (2007) 36, Theory and Society 313.


566 Qur’an 31:15.

567 Plomp v The Queen (1963) 10 CLR 234.

568 For example: s 100.1(1) Criminal Code Act 1995 (Cth.) refers to ‘the intention of advancing a political, religious or ideological cause’ including, (and from a shari’a perspective unnecessarily) an extra element to be proved by the prosecution.


570 Qur'an 6:160:
He that does good shall have ten times as much to his credit; he that does evil shall only be recompensed according to his evil. No wrong shall be done unto (any of) them.
intended bad deed has no adverse consequence for the individual until the act is committed.571

‘Intention’, in shari’a translates quite closely as mens rea when viewed as an element of crime and is technically referred to as ‘amd or qasd jina’ to distinguish it from the broader more encompassing notion of niyaa, although the English word ‘intention’ is used as its narrower mens rea form in the rest of this paper. In criminal law, Islam distinguishes between the crimes of murder (which is intentional, ‘amd) and manslaughter (which is unintentional, khata). That is, if the intention fault element, is not proved, it is possible that an alternate charge could apply.575 There is nothing in Islamic law that prevents the mental element of a crime being inferred, fairly and justly, to determining the level of a defendant’s culpability, and to use common law terminology, that ranges from a conscious premeditated intention to perform the actus reus down through to recklessness or criminal negligence.

In cases where a the target of an intentional attack is protected ‘class’ under the Qur'an and status of the majority of the victims is known or should reasonably have been known to the attackers; such attacks could and indeed should generally therefore, be treated as reckless or negligent and prosecuted accordingly with victims receiving both

571 Izzeddin Ibrahim and Denys Johnson-Davies, Forty Hadith Qudsi (1991), 80.


573 See text accompanying n 40, 104.


576 Qur'an 22:40. The summna also protects several classes and groups. Jurists will need to draw our general principles of protected classes of life and property to assist the judges in their deliberations.

577 See text accompanying n 525, 595.
procedural protections under the shari'a and substantial rights as provided for, say in the Qur'an.578

**Actus Reus**

The final element of a crime is the *actus reus*. An ‘act’ in Islam must include a voluntary bodily movement and includes all the elements of the crime, except the mental element. For example, a thought does not constitute an act.579

The *actus reus* under shari'a law is also a matter of fact although the shari'a evidential requirements and the standard of proof required may differ from IHL and ICL. Causation (*ta' lil*) is often an important element of a tort or crime and has been extensively discussed in shari'a literature.580

The *actus reus* of *ta'zir* offences may therefore, be formulated to be as similar as possible with the IHL and ICL crimes while keeping these crimes consistent with shari'a principles and methodology.

Thus, in formulating a shari'a *ta'zir* crime might be formulated as follows, and institutions for actually ensuring this happens in a proper manner are discussed in Chapter 6:

- identify a serious IHL/ICL crime which is to be replicated under the shari'a;
- check whether the act criminalised in IHL/ICL is permitted or condoned under the shari'a, (e.g. a principled rebellion against injustice or oppression,) in which case criminalisation under the shari'a is not prima facie permissible;
- examine if this crime exists in a substantially similar form under the shari'a;
- if it does; then identify the type of crime (*hudud*, *quisas* or *ta'zir*), its elements, the evidential requirements, the requisite standard of proof and defences, and exclude *hudud* and *quisas* crimes for reasons discussed.
- else create a 'new' shari'a *ta'zir* crime consistent with shari'a principles, methodology, evidential requirements and standard of proof and with punishment commensurate with IHL/ICL norms.

578 Qur'an 22:40.
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Conclusion

Muslims believe that creation as we see it will end on the Day of Judgment. Every human being will then be judged on use of free will through the performance of their individual Covenant obligations, performance which is guided by the *shari'a*. The *shari'a* is, therefore, central to a practicing Muslim’s belief system. Thus, an international order which purportedly caters for its various peoples must recognise the belief of a fifth of its population, the second largest faith group after Christianity, and make some endeavour to satisfy the fundamental psychological or spiritual ‘needs’ of those who wish to live by and when necessary to be judged under the *shari'a*. Notwithstanding and cognisant of the non-trivial nature of the task and the practical difficulties that the endeavour is likely to encounter, a useful first step would be to at least recognise the *shari'a* as a valid system of law on the international plane and to trust the substantial development of the *shari'a* in the international plane for the existence of open and transparent processes in this domain.381

The *umma* is only a notional concept in today’s society. It nonetheless provides a legitimate basis for universal jurisdiction under the *shari'a*. For both practical and theological reasons, and as with IHL/ICL, only the serious cases transgressing the rights of the person should be prosecuted, and for the purposes of this paper, on the international plane. The *shari'a* processes and procedures are almost universally likely to be seen as largely fair by Muslims and in time, perhaps by non-Muslims as well. It is conceded that there are some aspects of the *shari'a* for example privileging a person’s religious status over his/her nationality or race, or issues of gender are areas with which non-Muslims may take issue, particularly in the international regime that privileges nationality and indirectly and to a much lesser extent, race.

The atrocities of September 11, and the bombings of the US embassies in Nairobi and Dar-es-selam have traumatised the USA and to a

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381 As mentioned previously the international community may seek not to impose *shari'a* penalties such as the death penalty, amputation, flogging etc. are most likely to cause the greatest contention. If such penalties are imposed, it would be necessary to stay such punishments. Sentencing is an area which will require substantial discussion and development in order to gain broader acceptance.
lesser degree the West. The West's sometimes ill-considered armed and legislative responses, at times and cases have had the effect of demonising Muslims and Islam. Further, the atrocities at Abu Ghraib\(^{582}\) and Haditha\(^{583}\) to mention some recent events, indicate that a more nuanced approach, one that examines the complexities of a situation, is often brushed aside and for convenience the conflict is portrayed as a simplistic 'good versus evil' dichotomy.\(^{584}\) What is required in analysing the criminal aspects of the conduct of the protagonists in this war and in armed conflicts generally is a much more nuanced approach, are that is difficult to achieve through politics or diplomacy but to which the law is ideally suited.

The concentration here on Islamists' crimes is not intended to exonerate the criminal activities of others in any way. The US has publicly admitted practical mistakes, and its liberal political system has ensured the disclosure of others. It has not yet however, conceded strategic errors in its dealings with the Muslim world.\(^{585}\) This failure will not help the West to win hearts and minds of Muslims which has resulted in a reluctant but strategic shift in Muslim support towards the Islamists.\(^{586}\) The ill-treatment of Muslim detainees, and selective demonisation, unfortunately, are some reason that are likely to make it politically difficult for the West to support shari'a based trials, notwithstanding the fact that what is proposed, are open, free and fair trials under a "rule of law" regime. The West is clearly supportive of open trials although in these instances 'national security' considerations may be used to cover up military blunders unlawful activity and the deaths of considerable number of civilians, although ‘secrecy’ alone has not prevented the facts from becoming public as in the current case of


\(^{585}\) B H Obama, *Obama in Cairo: Remarks by the President on a New Beginning*, (2009).

\(^{586}\) Sally Neighbour, *In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia* (2004), 6.
Wikileaks, the website that has released thousands of pages of classified material related to the war in Afghanistan.\textsuperscript{587}

On the other hand, and for all the bloodshed, modern day ‘djihadists’ would be hard pressed to show the liberation of even an inch of Muslim soil.\textsuperscript{588} These Islamists are yet to answer for the thousands of non-combatant Muslim and non-Muslim lives they have extinguished, the misery and bloodshed they have wreaked on their own communities and importantly, others’. Nor have these victims or their families been compensated according to the existing Qur’anic laws, which, although they bind the Islamists cannot be enforced for the absence of the necessary legal infrastructure. The West’s strategic errors have allowed criminals, by their own legal criteria, successfully to masquerade as ‘holy warriors’.

Notwithstanding these gaping ‘holes’ in the practical shari’a, Muslims as a community on the other hand are yet to engage in a deeper introspection with respect to their criminal laws although some jurists referred to in this work, although still a minority, are a clear testimony that the process of legal critique is not entirely absent or unknown to Muslims.

On the other hand, broad non-specific calls by Muslims for the imposition of ‘the shari’a’ are however aimed generally at an emotional level and often do no more than to point to the immense jurisprudence, the Qur’an and Sunna, and assert that God ‘has perfected Islam’,\textsuperscript{589} which somewhere in the past became ‘frozen’ for-evermore, and presumably therefore, that further development and elaboration was not essential. As a matter of Muslim law, no one since the death of the Prophet has or had the authority to make such an eternally binding rule of ‘freezing’ the shari’a. Muslim jurists, such as the eponyms, have always recognised the need to

\textsuperscript{587} <http://wikileaks.org/wiki/Afghan_War_Diary,_2004-2010>. [Accessed 1 August 2010].

\textsuperscript{588} Paradoxically, the greatest beneficiary of the interventions has been Iran. The US removed their greatest adversary and competitor to Iranian influence in the region President Saddam Hussein. Israel also handed over Gaza Islamists to Hizbullah in Southern Lebanon and into the hands of the Iranians who had up to that point unsuccessfully tried to influence the Sunni Hamas movement.

\textsuperscript{589} Qur’an 5:3; This argument for not providing substantive content is clearly incomplete as even the orthodox caliphs who were well versed with this Qur’anic verse did continue to evolve and develop the various legal principles a relatively short time after the death of the Prophet. Mallat refers to such ideas as “Any law other than the law of Islam is obsolete”: Chibli Mallat, ‘From Islamic to Middle Eastern Law: A Restatement of the Field (pt I)” (2003) 51 American Journal of Comparative Law 699, 708.
develop the law. Such views such as the freezing of the shari’a however have served both secular Muslim leaders and Islamists very well, and has not delivered substantive justice to the Muslim masses, and is arguably the main reason why it suits these parties.

The need for the development of the shari’a however, is self-evident, and the practice of the jurists is consistent with this statement. It is in keeping with the practice of the Companions of the Prophet and the eponyms and the jurists of the Schools. The view of a stagnant ‘perfect and complete forevermore’ view of the shari’a is a relatively recent innovation borne of contemporary historical exigencies but bears little relationship to the shari’a as it is described in the original sources, the Companions and the eponyms. However, what is particularly important is that there is transparency in contemporary development of the shari’a primarily because in invoking the role of Islam, one is by implication arguably purporting to act in the name of ‘the Muslims’, and although what results is clearly ‘human law’, generally for Muslims their law carries the imprimatur of God and the Prophet, and if not applied fairly has significant implications for justice.

The recommended development of Islamic law should be under laid by appropriately recognised methodology which includes the appropriate modes of interpretation of text. This includes applying the words of the primary sources in their present social and legal context. This methodology, has been approved by the consensus of the early Caliphs, and fits in with the notion that the Qur’an is eternal and still valid for each emerging epoch, and will help to interpret the text anew without imparting – or at least minimising – historically accrued biases which, unnecessarily in cases and unlawfully in others, has permanently been superimposed on the original text, the meaning of which has in time been ‘narrowed by construction’. Thus, it is not so much the ‘approach’ to interpretation that is of greater significance, but giving effect to law’s objects and purposes through legitimate means. What is proposed is a principled easing and reversal of the ‘bottlenecks’ in the law, that have become crusted on or entrenched through neglect. A gradual expansion of the law, done with
due regard to the laws' integrity and purpose, will benefit not just Muslims but those who have to deal with them as well.

Therefore, while there may well be differences between the Islamic and international legal sources as to what actually constitutes a law, a 'right' or an 'obligation', on this analysis, the universality of the application of such law cannot, be in question. That is, arguments based on cultural relativism, and views opposing the law on the basis its universal nature, have no valid legal basis under the shari’a. Islam is hegemonic and seeks to universalise its values. On the other hand, development of the shari’a in the international plane will not directly impact on non-Muslims or even Muslims who do not explicitly submit to its jurisdiction. International development of the law on the other hand will not be beset by the problems of endemic corruption and absence of a free judiciary that inhibits the development and evolution of the shari’a in the domestic plane. Finally, the shari’a is also pluralistic and since it recognises the legitimacy of the teaching of all prophets sent by God to different nations. It therefore provides a legal basis for adjudication based on legal systems and traditions quite different than its own and to do so only on the basis of fairness and justice, as informed by those traditions.

Islam's emphasis with respect to the application of law is primarily focused on justice. It appears that in the absence of alternatives, and therefore almost in a form of defeatist resignation, that disempowered Muslims are seeking justice through Islam. On the other hand, it would seem unwise for the international community to ignore this cri du cœur, notwithstanding the recent political and military weakness of Muslim States. The West, using its substantial Islamic law expertise and its freedom of academic pursuit, an ingredient often missing in many Muslim majority

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590 Statements made by Malaysia's then Prime Minister Dr Mahathir, to the effect that International Human Rights Regimes may need to be revised to allow for what he described as 'Asian values' which he expanded upon at the Second General Assembly of the Regional Islamic Dawah Council of South East Asia and the Pacific (June 1983): reported in 'Arabia: The Islamic World Review', August 1983, 29. In the strictly Malaysian context Asian values may mean 'Malay values', which Hooker states are 'both indigenous and derived': M. B. Hooker (ed) *Laws of South-East Asia Vol. 1 The Pre-Modern Texts* (1986), 351.

591 Qur’an 4:135.
States, has become a haven for Islamic scholars who can assist in the ‘just’ development of the shari‘a with integrity.

Leaving the development of law, as appears to be the case at present, to those, some of whom such as bin Laden, the Taliban or al-Suri, military strategists perhaps but certainly not jurists and by their own admission unqualified to do so, or to otherwise instrumental ‘goal oriented’ people, with little consideration or appreciation for the nuances of the law, have and will continue to result in a harsh ‘uniform’ law that is devoid of subtly and caters to the lowest common denominator as has been say, the case of the shari‘a as practiced by the Taliban.

However, if it is true from the old adage that wars begin in the minds of men, then surely justice for a large segment of the world’s population must reduce this impetus and minimise the motive for war in the minds of at least some of these men. Punishments alone are unlikely to deter ideologically driven criminal activity and this is the great failing of a fundamentalist secular tradition that it appears to be bereft of ideas in dealing with this phenomenon other than to cast its own fury and overwhelming force against an elusive enemy. This strategy is failing, at least vis-à-vis al-Qa‘eda, the Taliban and more recently perhaps al-shabab in Somalia.

Islam on the other hand goes deeper into the psyche of an individual and attempts to both coerce and impel people towards moral and good behaviour and in the longer term, if encouraged among Muslims, is more likely to prove the successful mechanism in avoiding carnage, cruelty and senseless resource based violence among Muslims, and between Muslims and, non-Muslims. Who will and how one restrains the excesses, misbehaviour, greed and misuse of secular power however, is a separate but nonetheless important and related question that remains beyond the scope of this work.
DIVINING THE DEVINE: SOURCES OF ISLAMIC LAW

The saddest aspect of life right now is that science gathers knowledge faster than society gathers wisdom. - Isaac Asimov

Introduction
This section identifies the scope of the shari'a, its sources relevant to this thesis and also ties in closely with the concepts of Islamic law as discussed in Appendix 1. The discussion on sources is neither meant to be exhaustive nor comprehensive. It aims to persuade the reader that the sources and jurisprudence together with the legal concepts and definitions canvassed in Appendix 1 are capable of supporting a body of law that can be generated and used in litigation of genocide, crimes against humanity and war crimes (serious crimes) on the international plane. This Appendix is made up to two distinct parts (i) Part I: the Scope of the shari'a and Part II: Sources of the shari'a, particularly those logically related to this thesis.

Background to the Shari'a
The Qur'an is central to Islamic Law, sometimes described as a Constitution,1 while Weeramantry describes it as the 'bedrock' of Islamic law.2 Whether the Qur'an can be considered a quasi-constitutional document of that law is a contentious issue. Gravelle states that 'the Qur'an could be seen as the equivalent of the United States Constitution in that both are the highest laws of the land in their respective spheres and thus, both negate any other laws contrary to their meaning'.3 However,

1 See generally: Syed Abul 'Ala Maududi and Khurshid Ahmad, Islamic law and the Constitution (2nd ed, 1960), 75.; Azizah Y. al-Hibri, 'Islamic and American Constitutional Law: Borrowing possibilities or a history of borrowing?' (1999) University of Pennsylvania Journal of Constitutional Law 492, 503.; Further, the Qur'an is not a Constitution in the 'traditional' sense as the Qur'an is unchangeable: Qur'an 10:64, whereas there is no expectation that a human constitution is sacrosanct to the extent of never being amenable to amendment.
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this characterisation of the Qur’an is not unproblematic. Indeed el-Fadl suggests that such comparisons are ‘vacuous’.4 One obvious difficulty is that, in its own words the Qur’an is unaltered and unalterable,5 and consequently does not countenance a mechanism for ‘constitutional change’.6 On the other hand the Qur’an is generally interpreted as a ‘living document’ and constituting a legal and moral framework for the believer.7 The better view is arguably that the Qur’an shares some of the elements of contemporary constitutions although characterising the Qur’an as a Constitution is neither necessary nor desirable.

The Prophet’s sunna is considered the best and most authoritative practical interpretation of the Qur’an and serves as binding precedent.8 After the death of the Prophet, interpretative authority passed on to the scholars,9 and to a lesser degree arguably to all Muslims.10 For completeness, the independent sources, the Qur’an and the sunna, and some relevant dependent sources are briefly identified and examined in this chapter with a view to framing and identifying the relevant legal ‘hooks’ for equivalent serious shari’a crimes including: genocide, crimes

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5 Qur’an 10:64.
6 That is, there is no Qur’anic provision comparable with for example Article V of the US Constitution or Section 128 in the Australian Constitution, which provide mechanisms for constitutional change. It is not suggested however that the ability to change is integral to the definition of a Constitution.
7 Qur’an 2:2:

\textit{had\text{d} al lil moutaqueen} نَهَى لِلْمُتَقِينُ translates literally to ‘a guide for those with \textit{taqwa}’ (to protect one’s self).

The word \textit{taqwa} وَقِيَّاً is translated as God consciousness and comes from the root وَقِيَّاً (to protect one’s self).
10 Al-Tirimidhi \textit{Hadith} number 2774. This proposition could also arguably be supported on the basis of individual accountability.
against humanity, war crimes and the broader ‘terrorist crimes’. This section then goes on to examine the specific elements of Genocide as between the Rome Statute and shari’a law in order to illustrate the parallels and differences.

Part I: The Scope of Islamic Law
According to the Qur’an God’s ‘all encompassing law’ is described in its entirety in the ‘Preserved Tablet’,¹¹ which from the human perspective is infinite.¹² Further, the Qur’an itself forms only a part of God’s law.¹³ Other parts of this comprehensive Divine law inter alia are manifested in the laws of nature,¹⁴ in the ‘pure’ or the uncorrupted ‘natural disposition’¹⁵ of human nature (fitra)¹⁶ and in the covenants and moral codes as revealed to the Prophets.¹⁷ As a legal tradition, the shari’a consists of laws derived from the independent and dependent sources which guide humanity to the ‘right path’.¹⁸ Generally, obligations (fard ‘ayn) based on the independent sources (qat‘i) are classified as ‘certain’ while those obligations (wajib) based on the dependent sources are classified as probably correct (zann).¹⁹

Many Muslim scholars, including the eponyms, jurists operating within the confines of a School, and in the more recent periods, scholars including jurists such as Ibn Taymiyyah, Rida and al-Banna, have all opposed the centralisation of judicial power. This observation is also arguably supported in the Schools’ subscribing to the view that the shari’a is a jurist’s law that should be free from State control. Therefore, it is unclear whether the ‘centralisation of law making’ by a State’s jurists, such

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¹¹ Qur’an 85:22.
¹² Qur’an 30:30.
¹³ Qur’an 31:27.
¹⁵ Muhammad Asad, The Message of the Qur’an: Translated and Explained (1984), 621.
¹⁶ Qur’an 30:30.
¹⁷ Qur’an 3:84.
¹⁸ The key distinction between usul and furu’ and the consequences for law’s classification as God’s law or otherwise was made in Appendix 1.
as in Iran\textsuperscript{20} and Saudi Arabia is not entirely unproblematic. On the other hand many Muslim leaders have preferred to centralise Executive power in the Sultan/King/President/ while sometimes simultaneously appropriating religious ‘titles’ such as \textit{emir al-mou'meen} (Commander of the Faithful) thus giving the Executive significant control over jurists and particularly those on the on the State’s payroll.\textsuperscript{21} Muslim reformers have attempted to create accountability but have been frustrated by Muslim leaders who have undermined the rule of law. This trend of centralising Executive power by despots, in the Muslim world, has been tolerated by outside powers including Western countries despite the fact that we have developed institutions to help overcome centralised despotism, to help diffuse the exercise of power and to place checks and controls on the Executive. There is a misperception within the Muslim world, one cynically promoted, exploited and fostered by Muslim leaders, that important contemporary human rights norms and customs that underlie the limits to the exercise of power are ‘Western’ and thus ipso facto anti-Islamic.\textsuperscript{22} Given the opportunity, it is very likely that the majority of Muslims in Muslim majority states will also support a greater level of autonomy and choice for individuals, particularly if Muslims are allowed to develop indigenous law, legal institutions and a ‘rule of law society’ within their own frameworks. This adherence to rule of law processes will likely result in legal and human rights outcomes which while not identical will on the other hand be not very different from what prevails in the free, secular and ‘Western’ world today.

The primary question on this aspect for this thesis however, is because of the stagnation of the \textit{shari'a} and the need to re-start the process of development, is in this context, whether Muslim scholars can

\textsuperscript{20} Mansoor Limba (ed) \textit{Pithy Aphorisms: Wise Sayings and Counsel of Imam Khomeini} (2nd ed, 2004), 98.

\textsuperscript{21} According to Diane Mak, 'Bribe Payers Index (BPI) 2006' in D Rodriguez (ed) \textit{Global Corruption Report 2007 Corruption in Judicial Systems}, (2007) 331, Table 1., there are more Muslim majority states in the ‘worse’ clusters with no Muslim majority state in Cluster 1 (least likely to bribe). While Australian judges are also on the State’s payroll, the protective mechanisms in place satisfy the Australian public of the independence of their judiciary. A similar statement can arguably be made with respect to the judiciary in the UK, New Zealand and the US.

\textsuperscript{22} Statements made by Malaysia’s former Prime Minister Dr Mahathir, for example, to the effect that the Universal Declaration of Human Rights may need to be revised to allow for what he described as ‘Asian values’ and ‘Islamic values’.
legitimately use current ICL and IHL jurisprudence as prima facie valid custom upon which to develop a contemporary shari'a ICL/IHL? The answer to the question lies not so much in recreating an entirely new law purely to set the shari'a 'apart' for ideological reasons but in identifying a valid basis for building upon ICL/IHL that falls within shari'a methodology. Both the sources and methodology of the shari'a will show that the answer to the primary question raised in this paragraph is in the affirmative. Before embarking on this process however, it is first useful perhaps briefly, to examine how and why the laws of war and the criminal law 'fell out' of the everyday body of the practical shari'a in the first place?

Exclusion of the Criminal Law and Laws of War from the Scope of the Shari'a

The Prophet and the orthodox caliphs used the shari'a extensively, within its then evolving scope, and as a comprehensive system of law that applied even as against the Prophet or the orthodox Caliphs. In the later centuries, following the death of the Orthodox Caliphs, the scope of application of the shari'a was for convenience curtailed and applied mainly in areas of personal law such as in matters regulating marriage, divorce, succession and intestacy, trade but much less with regard to criminal law and particularly the laws of war. Even during the early Umayyad period (661-750AD) and Abbasid period (751-1258AD), the laws of war and criminal laws were sometimes excluded from the shari'a, the point made here is that the application of what can be described as the strict rule of law regime progressively 'decreased' or faded as the latter caliphs increased centralisation, including their control over the 'States' jurists'. On the other hand the reasons for excluding criminal and siyar law were however, not always self-serving.

Shari'a criminal laws and the laws of war were sometimes excluded from the scope of the 'everyday' shari'a because the strict rules including

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23 Later is a relative term and is used here with reference to the Prophet and the Orthodox Caliphs' period (610 - 665 AD)
26 Ibid. (234).
the exact rules of evidence made prosecution time-consuming, difficult to administer and expensive. The strict rules of shari‘a with respect to war craft was also too much of a restriction on rulers who saw their contemporaries and adversaries much less constrained in the means they could adopt in war. Limiting the scope of the shari‘a became easier and the opposition to the dilution of the shari‘a protections, less, as the transfer of power/succession became dynastic and contrary to the precedent of the Orthodox caliphs. By-passing the shari‘a criminal law or laws of war for such reasons however, have no authority or precedent from the Prophet, the Orthodox Caliphs or the independent jurists which include the eponyms of the surviving schools. On the other hand the dogmatic inflexibility of jurists, and their reluctance to loosen the absolute prohibitions on the use of fire for example, may have also forced the rulers to abandon the shari‘a rules of war. The practice of excluding criminal law from the shari‘a in most Muslims lands was condoned in practice and for practical reasons by the often ‘state sponsored’ or ‘corrupt jurists’. The two cases with respect to the criminal laws and shari‘a laws of war are now considered.

Excluding the Criminal Law from the Shari‘a

In the more recent past, the Ottoman Turks used (the non-Islamic) qanun regulations for criminal matters. The reason for avoiding the use of the shari‘a was, in Heyd’s view, because ‘[the shari‘a] rules of evidence are so strict that a number of offences cannot be punished adequately.’ While

this reason may have been acceptable in the pre-modern era, in contemporary society which endorses defendants' rights and procedural fairness, contemporary norms will find the stringent shari'a rules of evidence less difficult to accept, particularly in the class of ta'zir crimes, as suggested in this thesis. Abiad notes correctly that a defendant must be aware of hadd punishments for these punishments to apply. It is reiterated however, that in the Islamic view no ever one 'gets away' with crime, for an all encompassing Day of Judgment and 'defeating' the prosecution by employing the strict shari'a rules of evidence is not a means of escaping justice but a means by which, and unless the crime in question is a crime against a person, God’s forgiveness may be sought by the criminal. Generally however, it appears unlikely that restoring the shari'a criminal law should find legal impediment within the Muslim world.

Excluding the Laws of War from the Scope of the Shari'a

On the other hand, the exclusion of the laws of war from the scope of the shari'a was quite pragmatic and allowed rulers to circumvent the absolute shari'a prohibition say against the killing of non-combatants (women, children, old men, clergy and so on) and as importantly, the prohibition on the use of fire. The suggestion here is not that the shari'a prohibitions such as that regarding the use of fire pragmatically be discarded or re-branded as 'shari'a compliant', but that permitted shari'a exceptions should be invoked and regulated, for example explicitly by allowing the use, say of fire in defence, but not in attack. Islamists have now completely adopted

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Twenty-first Century (2005), 54. expresses the proposition accurately when he states that evidential requirements and the concept of shubhah in hudud offences (that is the concept that doubt nullifies hadd punishment) made it difficult to obtain a conviction. Professor Anwarullah, The Criminal Law of Islam (2002), 58. notes a standard of 'beyond doubt' is distinguished from a standard of 'beyond all doubt'.

The notion of contemporary values and norms is useful but is not an exact definition. According to P H Lane, 'The changing role of the High Court' (1996) 70 Australian Law Journal 246, 249. our laws address these contemporary values as:

Parliament's guesstimate of the public interest, communal values and perceptions.

Nisrine Abiad, Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study (2008), 22.


Muhammad Hamidullah, Muslim Conduct of State (3rd ed, 1953), 312.

While the argument will have to be made and the matter examined more thoroughly, an important shari'a consideration is that Muslims can develop the law in a practical
and in their own eyes ‘legitimised’ the contemporary IHL preferences of a secular world that does not consider the killing with fire in attack or the collateral killing of non-combatants, including Muslims, women, children and other protected categories, as morally ‘wrong’. Iran’s governments that are answers to their public on shari’a criteria, refused to reciprocate by inflicting casualties in Iraqi cities, and is a practical example of those who have at least attempted to work with shari’a prohibitions in war, as a matter of principle, even at a significant cost to themselves. Even if such edification fails to curb the carnage in the near term it will reduce the legitimacy of Islamists using extra-shari’a modes of war not just with impunity but as at present even going so far as in characterising such means of ‘terror’ as being Islamically ‘good’.

**Reforms for the Present**

In practice, and arguably for the better part of Islamic history, the jurisdiction of the shari’a courts were therefore limited to private law and ‘religious issues’ and excluded ‘statecraft’. In addition to the period of the Orthodox Caliphs, there are some exceptions, to this phenomenon including most famously under the leadership of Omar bin Abdul Aziz (d 720AD) and Saladin (d 1193AD).

In theory, none of the surviving Schools supports the proposition that criminal law, the laws of war or statecraft are in principle excluded from the shari’a, although these limits are widely accepted in practice. The resulting use of more permissive laws, rules of evidence, by an often corrupt executive and a deferential judiciary, together make political offences easier to prosecute in many Muslim states. This lack of freedom is, clearly not conducive to the freedom of Islamic (and other) worship, study and enquiry so that debate, ideas and learning can flourish. It is proposed therefore that establishing a rule of law regime through the shari’a, and initially on the international plane, would lead to greater and not less

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37 John Kelsay, 'Islam and the Distinction between Combatants and Non-combatants' in J T Johnson and J Kelsay (eds), Cross, crescent, and sword : The justification and limitation of war in Western and Islamic tradition, (1990) 197, 214.
freedom in the Muslim world as is sometimes portrayed by the opponents of the shari'a. The content however of what constitutes ‘freedom’ may vary from Western and other non-Muslim norms.

The important issue of the sources of Islamic law is now examined.
Part II: Sources of Islamic Law

The Independent Sources

The independent sources of Islamic law are the Qur’an and the sunna, and survive as text (nass). El-Fadl disputes the ‘erroneous views’ of Schacht and others who assert that text only became important in Islamic law through the efforts of al-Shafi’i and states that the ‘centrality of the text from the very inception of Islamic legal history has been adequately demonstrated in the literature’, a view endorsed in this thesis. Shi’i jurists, and some Sunni jurists, consider ‘reason’ an independent source of law but it is a minority view, and although an attractive proposition for our times, will not directly be adopted here.

The Prophet’s traditions are the sunna. The term sunna was used in pre-Islamic Arabian customary law although this meaning lost its significance over a thousand years ago. Another term used in Islamic discourse and in Islamic theology is hadith. Sunna are transmitted by means of hadith and, in Muslim societies, reflect either or both (a) the Prophet’s own human acts and (b) the Prophet’s actions reflecting divine will. However, fabrication of hadith was not unknown, although

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41 Kurshid Bibi v Muhammad Amin (1967) 1 Pakistan Legal Decisions 97, 106 per Rahman S. A. The Arabic term for ‘text’ is (nass).
42 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 34.; Others such as Crone: Patricia Crone and Michael Cook, Hagarism: The Making of the Islamic World (1977). and Schacht: Joseph Schacht, An Introduction to Islamic Law (1975). generally hold that law was not central to Islam until the end of the first Century of Islam. They do not appear to explain how the sophisticated and expanding Arabian, early Muslim society survived sans law, or even a rudimentary law, in the intervening period. The issue is addressed by Wael B Hallaq, ‘The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse’ (2002) 2 UCLA journal of Islamic and Near Eastern Law 1.;

Note however, Auda holds that the term ‘nassun fil madhhab’ (the script in the School) was also used by followers of the eponyms and “were practically given precedence over the original scripts i.e. the Qur’an and the prophetic tradition.”: Jasser Auda, Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach (2008), 75. The term nass as used throughout this thesis, however, refers to the original independent sources.

45 Hadith literally means speech or story; however, in the context of Islamic law it means ‘traditions that are traced back to the Prophet (or to an imam in the case of Shi’i Islam) via a chain of named narrators’: H. M. Tabataba’i, Kharaj in Islamic Law (1983), 86.
47 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 95 esp. 5n.
specific examination of this issue is beyond the scope of this present work. The hadith used in this thesis are generally accepted widely as authoritative although it is conceded that this is a proposition that reasonably might be challenged in individual cases.

The term hadith became synonymous with the term sunna around the time of al-Shafi’i (d. 204/820) and they are now used interchangeably. However, el-Fadl notes that ‘as far as Islamic law is concerned, it is the juristic paradigm and categories that dominate all normative discourses on Islamic orthodoxy’ and terms such as sunna or hadith are ‘symbolic constructs that obtain meaning and normative power from the juristic culture’. The Qur’an and sunna act to circumscribe the content of the law by its text but more so by its spirit, an important aspect of Islamic law that will emerge in this present analysis. The view taken here is that the text of the independent sources are and always have been central to Islamic law, and are now examined.

The Qur’an
Muslims regard the Qur’an as the literal word of God, a view not challengeable by believing Muslims. The Qur’an does not reveal God but

50 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 31.
51 Ibid. (97.
52 Jurists distinguish between matn which is the original text and the sharh which is the exegesis; Al-Shatibi (d. 790/1388) is said to have been the ‘first person to insist that no legal ruling is valid unless based on a binding text of the Qur’an or a prophetic hadith’: Wael B Hallaq, A History of Islamic Legal Theories (1997), 18.; Sami Zubaida, Law and Power in the Islamic World (2003), 19. This thesis concedes al-Shatibi’s insistence on basing law on the Qur’an and sunna, as the oldest surviving record of this re-statement. Clearly the Orthodox caliphs in practice used this methodology of operating within the Qur’an and sunna and basing laws upon these sources.
On the other hand, Patricia Crone and Michael Cook, Hagarism: The Making of the Islamic World (1977), viii. state that:
[There is] no hard evidence for the existence of the Koran in any form before the last decade of the seventh century […]
Though they do admit (ibid. viii) that this is ‘a minority view’ and further (ibid.) that:
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to Muslims, but God’s will. Another unique dimension of the Qur’an in the annals of legal texts is that its mere recitation is considered an act of worship and is obligatory in canonical worship which makes its text well known although perhaps not as well understood. The Qur’an describes itself as God’s eternal law, free from all contradiction, protected for eternity, and containing no error or doubt. Those who dispute the Divine origin of the Qur’an are challenged to an objective challenge. The view on the Qur’an adopted here is the almost universal view that the historical authenticity of the content of the Qur’an through the times is ‘beyond doubt’.59

The Qur’an is the main source from which the shari’a flows and it contains the grundnorms of the umma. The view of the Qur’an as a Constitution has already been mentioned. However, ‘Islamic Republics’ or ‘States’ such as Iran (Djafari), Pakistan (Hanafi), Saudi Arabia (Hanbali or Wahhabi), Mauritania (Maliki) or Malaysia (Shafi’i) all have Constitutions in the traditional meaning of the term although these Constitutions may themselves variously refer to Islam, the Qur’an, the shari’a and/or the

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55 Qur’an 4:82.
56 Qur’an 15:9.
57 Qur’an 10:37.
58 The Qur’an challenges its detractors to produce its like (Qur’an 17:88), failing that, 10 similar Chapters (Qur’an 11:13) or one chapter (Qur’an 2:23: Qur’an 10:38). Although poetry was a great pre-Islamic Arabian passion no challenge (and there have been many) has by consensus been considered successful. The Prophet’s opponents however, claimed that he was a magician or alternately that he had a djinn who wrote the Qur’an for him: (Qur’an 81:18 esp. n 5987).
59 Cherif Bassiouni and Gamal M Badr, The Shari’ah: Sources, Interpretation, and Rule-Making (2002) 1 UCLA Journal of Islamic and Near Eastern Law 135, 148.; There is a minority of scholars, including some: see, n 53, who question issues such as the Muslim versions related to the first dates of the earliest written accounts of the Qur’an. The discussion of this matter is outside the scope of this present work. There is some issue among a tiny minority of Shi’i Muslims about the authenticity or rather the completeness of the present version as compiled by the third orthodox Caliph Othman (‘Othmani version’). This contention does not find support among the Shi’i scholars imams or maraj’, however: Jasser Auda, Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach (2008), 78. This is arguably because imam Ali, the first Shi’i imam, succeeded Caliph Othman and had there been errors or omissions he would clearly have been able to correct them. The order of succession in the leadership must mean that Ali approved Othman’s final collection.
61 See Introduction above 613.
The classical Qur'anic view is that sovereignty (hakimiyyah) belongs to God, although it is not an uncontested view. Sovereignty however, is expressed through human agency and arguably gives it a diffused character in the shari'a.

The Qur'an is not a book of law per se. Jurists agree that about 500 verses have legal content and they form the legal framework for, shari'a humanitarian law (SHL). There is also an inherent flexibility both in the Arabic language and in the wording of the Qur'an, which facilitates adaptation, to suit contemporary circumstances.


64 The International Court of Justice (ICJ) has recognised that Muslims had a different understanding of sovereignty as when compared with the contemporary meaning of the term in general international law: Territorial Sovereignty and Scope of the Dispute (Eritrea and Yemen) (1998) Vol. XXII Reports Of International Arbitral Awards Recueil Des Sentences Arbitrales 209, 311 (esp. para 446). Further, according to Khaled Abou El-Fadl, The Great Theft: Wrestling Islam from the Extremists (2005), 84. Hasan al-Hudaybi (director of the Muslim Brotherhood), an Egyptian judge, a Sunni jurist and who describes himself as salafi, argued that political sovereignty should properly belong to the people and therefore that a theocratic government is inconsistent with Islamic Ideology. Ayatollah Khomeini, the supreme Iranian leader and a leading Shi'i jurist, while not addressing the issue of sovereignty directly, stated that '[political and judicial] power should be in the hands of the people.': Ali Khaliqi, Legitimacy of Power (2004), 51. According to Robert Baer, The Devil We Know: Dealing With the New Iranian Superpower (2009), 43. Ayatollah Ali Sistani’s view is that '[in] Shi’a Islam, the mullahs could be voted out, if that is the wish of the Iranians, and replaced with a secular government.’ As previously discussed, n 206, on page 643, Shafi’i took this further to state that the consensus of the people was better than the consensus of the scholars arguably because scholars were susceptible to corruption. This view is borne out in contemporary society with its government-paid and sponsored jurists, not least because of the historical distrust of the public (al-amma) by the jurists: Khaled Abou El-Fadl, ‘Constitutionalism and the Islamic Sunni Legacy’ (2002) 1 UCLA Journal of Islamic and Near Eastern Law 67, 83.


66 While 500 verses in a total of about 6,600 verses in the Qur'an may appear a relatively smaller percentage than that given to other subjects such as faith, the Day of Judgment etc the actual impact of the legal verses is disproportionately higher for at least two reasons. There is no repetition of subject matter in the legal verses and the length of the legal verse on the average is significantly longer. See generally Wael B Hallaq, The Origins and Evolution of Islamic Law (2005), 21.; Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (pt I)' (2003) 51 American Journal of Comparative Law 699, 720. points out that the Qur'an has a higher percentage content of law than the Pentateuch.

67 The Qur'an (13:37; 26:195, 41:44 and so on) emphasises that it is an Arabic Qur'an. While the philology of Arabic is beyond the scope of this work, it should be borne in mind that the structure of the Arabic language greatly lends itself to this flexibility.
The key implication here is therefore that if the Omnipotent God used a particular word then it must have a specific significance and thus that the literal interpretation must be the starting point in interpretation, although for reasons discussed below it is not the only perspective that holds validity. For the purposes of this thesis the Qur'an is treated as a grundnorm which provides a legal framework for the development of shari’a criminal and humanitarian law and is arguably the correct theological position.

Interpretation of the Qur’an

As with sovereignty, the legislative charter under Islam also appears to have a diffused character. While legislative activity in Islam rightfully belongs to God only, it must be carried out through human agency, and the Qur’an grants humanity this legal right. That is, although Islamic Law claims divine origins through its nexus with the Qur’an, it does not claim to have descended wholly ‘ready made’ and its development explicitly requires human agency, inter alia through the agency of jurists/scholars who ‘discover’ and clarify the law. This is a time tested principle of hermeneutics. Arabic commentaries of the Qur’an use the

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68 Note however, the sunna or the Prophet’s practice and not the literal interpretation is classified as the ‘best practice’ see below n 149, 636.
71 Qur’an 2:230 (emphasis added):
Behold thy Lord said to the angels: "I will create a vicegerent on earth." They said "Wilt thou place therein one who will make mischief therein and shed blood? Whilst we do celebrate Thy praises and glorify Thy holy (name)?" He said: "I know what ye know not."
72 There is a tradition from the time of the fourth Orthodox Caliph, imam Ali, when a fundamentalist group denied the ability of the caliph to judge, stating instead that it was only the Qur’an that could judge between people and that there should be ‘No rule save God’s rule’. It was reported then that the caliph Ali then placed a written copy of the Qur’an between the litigants and spoke to the Qur’an instructing it to judge between the litigants. When the Qur’an did not speak, he remained silent until the litigants became quite perplexed and told him that the Qur’an would not speak. To this imam Ali responded; ‘The Qur’an is a book that only speaks through the mouths of men’. The text in quotes was extracted from Taha Jabir Al-Alwani, Towards a fiqh for Minorities (2003), 15.
73 Another expression of the divine will according to the Qur’an is the sunnat of Allah: (Qur’an 33:38; Qur’an 35:43; Qur’an 40:85; Qur’an 43:23; Qur’an 17:77, sunnatuna, Our sunna, that is to say God’s ‘way’): Van Nispen Tot Sevenaer, Activité Humaine et Agir de Dieu: Le Concept de ‘Sunan de Dieu’ dans le commentaire coranique du Manaar (1996), 57. The Qur’an states that God’s signs (ayat Allah) are everywhere, in nature and in life: Qur’an 88:17-20, and are signs through which humanity can learn.
words *tafseer* and well as *ta'weel* to describe the process. While there are
some important issues that attach, the use of the traditional methods of
interpretation in this thesis allows the terms to be treated as practically
synonymous.

Thus the Commandment that ‘thou shalt not commit adultery’ was
interpreted by Jesus, a practicing Jew who came to confirm the Jewish
Covenant, to also mean that ‘Thou shalt not covet’ or the Commandment
that ‘Thou shalt not kill’ to inter alia be interpreted as ‘Thou shalt love thine
enemy’, helping to deepen our understanding of the divine will, writ and
spirit of the law, without altering the letter of the Law.

There is also consensus that the Qur'an will be interpreted
according to its most obvious meaning. However, the Qur'an is in places
allegorical and may have several shades of meaning discernable by those
imbued with insight. It is said that the deeper meanings of the Qur'an are
hidden by veils of light, for the self-righteous who are blinded by their own
arrogance, and by veils of darkness, for those steeped in vice. Nonetheless,
according to Islamic legal theory, discovery of law is possible,

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74 Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of

75 Muhammad Asad, *The Message of the Qur'an: Translated and Explained* (1984), 996. This
is not to say that what is allegorical in one period is not understood in a literal manner
in another. For example the Qur'an 24:43 states:

_seest thou not that God makes the clouds move gently then joins them
together then makes them into a heap? Then wilt thou see rain issue
forth from their midst. And He sends down from the sky mountain
masses (of clouds) wherein is hail [...]

Many Muslims in the past 1,400 years would have believed the description of clouds
eg as 'mountain masses' as allegorical whereas after remote imaging became
commonplace, this description appears to be literally true with cloud height reaching
20 miles which is higher than Mt. Everest: I. A. Ibrahim, *A Brief Illustrated Guide to
Understanding Islam* (1997), 11. for the scientific descriptions of these and other
previously verses that may have in the past be considered allegorical but which now
may be understood literally.

The Qur'an 27:88 states:

_thou seest the mountains and thinkest them firmly fixed: but they
shall pass away as the clouds pass away [...]

Again Muslims of the past may have believed this verse to be allegorical but in the
light of plate tectonics can now also be taken literally: (ibid.) The key point is that
human understanding evolves and with it human understanding of the Qur'an. See
also n 89,629.


77 Ibid. (118).
necessary and permissible. Resulting laws must however, be based on and intra vires the Qur’an,\textsuperscript{78} in the light of the sunna.\textsuperscript{79}

Qur’anic commentators sometimes distinguish between Meccan and Medinan revelations. Meccan revelations which deal with the more ‘spiritual’ aspects and appeals to the ‘individual covenantal’ aspects of the faith, were ‘received’ at a time when Muslims were a small oppressed minority. They span a period of about 13 years, and thus constitutes the greater part of the prophethood. Medina revelation constitutes the more ‘communitarian’ aspects and spans a period of about ten years.

The Qur’an asserts that its obligations are clear and consistent,\textsuperscript{80} and are easily identifiable and practical over time.\textsuperscript{81} For the correct/proper discharge of collective obligations, these must be understood according to contemporary conditions and ipso facto must therefore be capable of reinterpretation across the centuries. ‘Innovation’ as such development is sometimes characterised is resisted by Islamists.\textsuperscript{82} For example, teaching religious knowledge, the use of military force or care for the sick are eternally binding obligations although the specific means by which these obligations are discharged are not prescribed and thus can and indeed must change over time.

Another example is performing the hadj or pilgrimage to Mecca in the month of Dhul Hidja is mandatory under the Covenant to those physically and financially capable of undertaking the journey. The Qur’an speaks of those arriving at the Hajj on ‘lean camels’.\textsuperscript{83} To interpret this in the light of contemporary circumstances the question becomes whether it would therefore be permissible for a person to travel to the pilgrimage say in a car, ship or aeroplane, rather than on a camel which has become

\textsuperscript{78} The Qur’an states in 25:33 that Qur’an is its own best guide (ahsana tafsir).
\textsuperscript{79} Qur’an 10:59; Qur’an 42:21.
\textsuperscript{80} Qur’an 4:26; Qur’an 24:1; Taha Jabir Al-Alwani, Towards a Fiqh for Minorities (2003), xiii.
\textsuperscript{81} For example, the obligation to pray five times per day, fasting in the lunar month of Ramadan, the payment of the tithe (zakat), the obligation to perform the pilgrimage to Mecca and the obligation to avoid the major carnal sins, murder, theft etc.
\textsuperscript{82} See discussion on Wahhabis and Neo-Salafis in Appendix 1.
\textsuperscript{83} Qur’an 22:27, that is, camels that have travelled a great distance to get to their destination.
Appendix 2 — 629

emaciated due to its long journey, a question almost universally resolved in
the affirmative and on which there is a solid consensus.

Pre-requisites for Interpretation of the Qur’ān

The unique position and timelessness of the Qur’ān brings with it some
special considerations regarding interpretation. The Muslim Covenant was
established over 1,400 years ago and is in Arabic. Two key issues relevant
to interpretation are:

(1) the integrity of the Covenant and
(2) access to the language of the Covenant.

These are now very briefly addressed.

A preliminary requirement is that all Muslims shall enter into the
same Covenant.84 Individual performance is fairly judged85 according to
equivalent objective and, where appropriate, subjective86 criteria, and
arguably presupposes two further conditions. First, Islam must maintain
the single and clear Covenant for all times and, because it is wholly
contained in the Qur’ān, the integrity of the Qur’ān must also be
maintained. To this end, the Qur’ān states that God undertakes to protect
the contents of the Qur’ān, unaltered in its literal form.87 To this day, 1429
(in 2010AD) years later, there have been no successful challenges to the
integrity or authenticity of the Qur’ān.88 This does not mean however that
there is consensus over the interpretation of all aspects of the Qur’ān.

In fact the Qur’ān alludes to the established and allegorical verses89
but advises Muslims not to become trapped in controversy, to avoid

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84 See reference to the shahada in Chapter 2.
85 According to the Qur’an 58:1 and note, a just outcome for every individual is
guaranteed by God.
86 For example each individual has a fixed (unknown) lifespan in which he or she will
have the opportunity to discharge their obligations. However, everyone will be tested
within this life: Qur’an 29:2. Those who are ‘good’ (i.e. those possessed of birr and
taqwa) will be given higher spiritual tests to purge what is ‘impure’ in their human
breasts: Qur’an 3:154 which in turn will lead to greater spiritual rewards in both this
world and in the hereafter. The Qur’an guarantees that no one will be tried or tested
beyond their individual capability: Qur’an 2:286.
87 Qur’an 15:9.
88 See generally M M al-Azami, The History of the Qur’anic Text: From Revelation to
Compilation (2003), 149.
89 As spelt out in the Qur’an 3:7, the muhkam verses (محکمات) contain established meaning
and the mutashabih verses (متشابهات) as disused contain allegory:
He it is Who has sent down to thee the Book: in it are verses basic or
fundamental (of established meaning); they are the foundation of the
seeking 'hidden meanings' and to eschew what el-Fadl refers to as the 'abuse of the text'. Central to this thesis, Gwynne alleges that bin Laden ignores explicit rules of reading the Qur'an which arguably affects bin Laden's final conclusions and if sustained would adversely affect Bin Laden's (and other comparable legal) interpretations.

Secondly, the language of the Covenant/Qur'an must also survive, be useable and comprehensible over time. To this end, the language of the Qur'an, which is the Qureishi dialect of Arabic, is still in wide use today as it has been since the lifetime of the Prophet. It is also an official UN language. Further, the Qur'an's claim of eternal validity subsumes the onus of being comprehensible and ipso facto dispenses with the need to address inter-temporality issues and negates a general necessity to allow for the diachronic nature of language.

However, as a cautionary note on the interpretation of Arabic language sources – as with any translation - is that one must take care in highlighting the subtle complexities of Qur'anic tafsir (or commentary). Khaled Abou El-Fadl, Speaking in God's Name: Islamic Law, Authority and Women (2001), 199.

In the following table, reproduced from a standard edition of Yusuf Ali (the translation is quite rough), the general point made by Gwynne, that even the literal meaning of Qur'anic text can be altered by the incorrect reading, and notwithstanding her reference to the punctuation contained in this table, still stands.

<table>
<thead>
<tr>
<th>Stopping is essential</th>
<th>علامات الازم الوقف</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stopping is forbidden</td>
<td>علامات الوقف الممنع</td>
</tr>
<tr>
<td>One may stop or proceed - Indifferent</td>
<td>علامات الوقف الجائز عوارضاًً مساوياً للطرفين</td>
</tr>
<tr>
<td>Stopping is permitted but continuing is preferable.</td>
<td>الوقف الجائز مع كون الوصل أولى علامات</td>
</tr>
<tr>
<td>Stopping is not required but is preferred</td>
<td>الوقف لوقفة الجائز مع كون الوقف أولي علامات</td>
</tr>
</tbody>
</table>

The specific rules referred to by Gwynne are the guide to stops in reading the Qur'an (وُفَّى). She did not reproduce the following table, here reproduced from a standard edition of Yusuf Ali (the translation is quite rough):

90 Rosalind Gwynne, *Al-Qa'ida and al-Qur'an: The "Tafsir" of Usamah bin Laden* (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004. The specific rules referred to by Gwynne are the guide to stops in reading the Qur'an (وُفَّى). She did not reproduce the following table, here reproduced from a standard edition of Yusuf Ali (the translation is quite rough):

cognisance of allusion, simile etc.\textsuperscript{94} Writings and legal opinions/decisions of jurists being separate from the Qur'an are treated quite differently and are subject to the demands of inter-temporality. In giving meaning to the substance of the law, there is broad consensus among jurists that the Qur'an and/or sunna must be the notional starting point.\textsuperscript{95}

Specifically however, the interpretation of criminal law is always vexed\textsuperscript{96} because it affects the rights of individuals. Qur'anic hadd and quisas criminal provisions can also provide for severe penalties. Islamic law provides for legal protections against serious charges, such as the use of exact and strict rules of evidence,\textsuperscript{97} coupled with the Prophetic practice of construing criminal provisions narrowly and in favour of the accused, a notion known to the law generally, including to the common-law.\textsuperscript{98} However, Islamic law takes on the added imperative to do justice as between people when a party is wronged.\textsuperscript{99}

\textsuperscript{94} For example the elliptic reference in “the Prophetic injunction to kill the wine drinker on the fourth offence” is not taken at its literal or face value and is only intended to constitute a warning or instil fear (\textit{li 'l-tarhib wa 'l-tahdhir}): Norman Calder, \textit{Studies in Early Muslim Jurisprudence} (1993), 225. Another example of Arabic metaphor was a case where a Muslim severely and abusively criticised the Prophet in a publicly recited poem for giving him – in his view – an inadequate share of the spoils of war. The Prophet said to his companions ‘Go to him and cut off his tongue for me.’ The companions went to the man and negotiated a share which satisfied the person: Ali Muhammad As-Sallaabee, \textit{The Biography of Abu Bakr As-Siddeeq} (2007), 143.


\textsuperscript{97} Khaled Abou El-Fadl, \textit{Speaking in God’s Name: Islamic Law, Authority and Women} (2001), 62.

\textsuperscript{98} For shari'a authority please see above. His Honour Gibbs J, concedes that under Australian law, this presumption has become one of last resort. \textit{Beckwith v The Queen} (1976) 135 CLR 569, 576 per Gibbs J.

Centrality of the Qur'an to Islamic Law

The centrality of the Qur'an to Islamic law is demonstrated by examining its raison d'etre.\textsuperscript{100} The Qur'an states that its object and purpose includes: (a) explaining the reason for creation\textsuperscript{101}; (b) guiding the righteous\textsuperscript{102} to the 'right path'\textsuperscript{103}; (c) and regulating society.\textsuperscript{104} These purposes are now briefly examined from the broader vantage of the 'spirit' of the shari'a and will help contextualise serious crimes.

(a) To explain the reason for Creation

The Qur'an states that free-willed beings were created for worship.\textsuperscript{105} Worship in Islam is a very broad term, specific discussion of which is outside the scope of this work.\textsuperscript{106} To this end the Qur'an invites humanity freely,\textsuperscript{107} and wholeheartedly\textsuperscript{108} to enter into a binding Covenant\textsuperscript{109} which when performed with the right intention, discharges their 'free-will' obligations.\textsuperscript{110} The shari'a guides and aids Muslims to this end. In return for sincere fulfilment of the Covenant, the Qur'an promises a reward beyond human imagination.\textsuperscript{111}

\textsuperscript{100} Wael B Hallaq, Law and Legal Theory in Classical and Medieval Islam (1994), XI 85., the view adopted by the overwhelming majority of Muslims is of the supremacy of the Qur'an over the Sunna.

\textsuperscript{101} Qur'an 29:64.

\textsuperscript{102} This appears to be prima facie problematic as one may reasonably state that it is the 'unrighteous' that need guidance. In this context 'righteousness' appears to be defined as those who innately or intuitively believe in God and who sincerely (and not necessarily within a religious context) ask God to guide them to the solutions to the perplexing questions of life. See however, the Qur'anic definition of 'righteousness' below n 121, 633.

\textsuperscript{103} Qur'an 1:5. According to Muhammad Iqbal, The Reconstruction of Religious Thought in Islam (1996), 15:

\begin{quote}
The main purpose of the Qur'an is to awaken in man the higher consciousness of his manifold relations with God and the universe.
\end{quote}

\textsuperscript{104} In Qur'an 25:1 describing the Qur'an as 'the criterion' by which action must be measured clearly regards it as a regulatory framework.

\textsuperscript{105} Qur'an 51:56: The Qur'an 2:30 also states that human beings are created and that they will be (future tense) God's representatives (khalifa) on earth.

\textsuperscript{106} In addition to what is commonly regarded as prayer and worship in a formal sense, Muslim worship includes performing good acts ('amal hasanaat) and avoiding sinful acts or transgressions (khaati'a).

\textsuperscript{107} Qur'an 2:286.

\textsuperscript{108} Qur'an 2:208.

\textsuperscript{109} Qur'an 16:91. The Covenant contains the obligations which when discharged satisfy the obligation of 'free-will', a notion which in its Islamic context is discussed in Chapter 2.

\textsuperscript{110} Qur'an 36:61. For a discussion of the scope and reason for these obligations see text accompanying n 129, 634.

\textsuperscript{111} For example Qur'an 36:55.
Appendix 2 — 633

The shari'a identifies the elements of the Covenant and of the concomitant acts of worship, to ensure that Muslims are informed of their obligations, in order to enable them to discharge these obligations 'successfully'. It does this inter alia by providing for the optimal socio-political-legal environment that is conducive to the Muslim, by clearly identifying contemporary and evolving social obligations, such as (and of particular interest here) the scope of jihad and its associated evolving obligations and prohibitions, including the limits to the means that may be employed during an armed jihad.

(b) To guide to the 'right path'

Another key aim of the Qur'an, and thus the shari'a, is to guide humanity to the 'right path' and to right action. The Qur'an is 'The Criterion', making clear in plain (Arabic) language, right thought and action in all circumstances and for all time. This guidance explicitly identifies the nature and legal content of all acts, and of interest here, crimes.

The Qur'an is a guide for all those, paradoxically, who (already) possess the quality of (taqwa) righteousness. The Qur'an describes the people of taqwa as those possessing attributes and performing acts beyond...
what is usually and superficially passed off as righteousness (birr)\textsuperscript{122} and elaborates in the following terms:\textsuperscript{123}

It is not righteousness [\textit{مَتَاب}] that ye turn your faces toward East or West,\textsuperscript{124} but it is righteousness to believe in God and the Last Day and the Angels\textsuperscript{125} and the Book and the Messengers; to spend of your substance out of love for Him for your kin for orphans for the needy for the wayfarer for those who ask and for the ransom of slaves; to be steadfast in prayer and practice regular charity; to fulfil the contracts which you have made; and to be firm and patient in pain (or suffering) and adversity and throughout all periods of panic. Such are the people of truth, the people possessing taqwa.

(c) To Regulate Society According to Qur'anic Criteria
The Qur'an states that humanity is God's vicegerent on earth\textsuperscript{126} and is the framework by which this vicegerent shall regulate society.\textsuperscript{127} An ideal society according to the Qur'an inter alia is one which enables all people to hear the message of the Prophet, and to receive the invitation to enter into the Covenant, but each individual must be allowed to do so (or reject the Covenant) freely.\textsuperscript{128} However, it reminds humanity of its voluntary acceptance of free-will,\textsuperscript{129} and that humanity will be judged accordingly.

Although there is not an explicit Qur'anic or sunnaic command to this effect - (political) control over a territory (however defined) should be used to make it easy\textsuperscript{130} for those who follow Islam to discharge their

\textsuperscript{122} E W Lane, \textit{Arabic English Lexicon} vol 1 (1984). describes those possessing birr as those who are good, kind, gentle obedient and as well as obedient to their creator\textsuperscript{123}.

\textsuperscript{123} Qur'an 2:177.

\textsuperscript{124} That is, facing Mecca from whichever direction, an allusion to the Muslim direction of prayer in canonical worship.

\textsuperscript{125} Belief in the Angels is common to all the surviving Abrahamic faiths. In the Islamic tradition angels (الملکة) are not possessed of free-will. Note that Satan in Islam is a \textit{djinn} and not a fallen angel.

\textsuperscript{126} Qur'an 2:30.

\textsuperscript{127} Qur'an 25:1 and see above, n 104.

\textsuperscript{128} Qur'an 2:256 (\textit{la ikruhah fil deen}) which is translated as 'there is no compulsion in religion'. The reason for calling people to faith is not so much that they will follow, because none can save from Satan's misguidance but God; Qur'an 2:36, but that those who are punished in the end are only the most obdurate; Qur'an 23:99-100, who will claim that, if they were warned, they would have believed. Qur'an 23:99-107.


\textsuperscript{130} According to Mohammad Hashim Kamali, \textit{Equity and Fairness in Islam} (2005), 24. the Prophet instructed the rulers in the following terms:
individual shari'a obligations and to allow others to hear the Prophet's message freely. Muslims should live as best they can within and in accordance with the Covenant. Breach\textsuperscript{131} or repudiation\textsuperscript{132} of Covenant responsibilities may have repercussions in this world but certainly in the next.\textsuperscript{133} For 'others', i.e. those who have rejected or not entered into a Covenant, Muslims are to say only, 'to you your way of life and to me, mine',\textsuperscript{134} but otherwise should not in any way interfere with their private lives. Muslims may, and indeed should, invite them to Islam but this must be done in the best and most gracious manner.\textsuperscript{135} There must be no coercion in matters of faith\textsuperscript{136} and the sacred objects of non-Muslims should not be reviled.\textsuperscript{137} Those who enter Islam should do so wholeheartedly,\textsuperscript{138} and, do so cognisant of the laws on apostasy,\textsuperscript{139} as unless conversion was under duress,\textsuperscript{140} they are eternally bound.\textsuperscript{141} However, God who is severe in punishment,\textsuperscript{142} is also most merciful,\textsuperscript{143} beneficent,\textsuperscript{144} and forgiving.\textsuperscript{145}

\textsuperscript{131} Qur'an 2:27.
\textsuperscript{132} Qur'an 5:21; Qur'an 5:54; Qur'an 2:217: oppression is worse than slaughter; ‘if you turn back from religion ...
\textsuperscript{133} Qur'an 2:27; Qur'an 33:15; Qur'an 13:25 (those who break their Covenant are cursed). See also Apostasy in Chapter 2. However, forgiveness is a strong theme in Islam and is available to those who seek it sincerely: see n 145, 635.
\textsuperscript{134} Qur'an 109:6.
\textsuperscript{135} Qur'an 16:125.
\textsuperscript{136} Qur'an 2:256.
\textsuperscript{137} Qur'an 6:108.
\textsuperscript{138} Qur'an 2:208.
\textsuperscript{140} Qur'an 16:106; Taha Jabir al-Alwani, Ijtihad (1993), 12.
\textsuperscript{142} Qur'an 59:4.
\textsuperscript{143} The Arabic word (الرحمن) Al-Rahman (the Merciful, which is a synonym for God, as (الرحيم) Al-Rahim, which in its root form ra hi ma is the word for womb, a protective and safe environment for a wholly dependent and helpless soul. Al-Rahman is therefore an all encompassing protective mercy which is a term that exclusively is used for God.
\textsuperscript{144} The Arabic word (الرحيم) Al-Raheem (the Beneficent, which is a synonym for God) appears 95 times in the Qur'an
\textsuperscript{145} The Arabic word (الرحيم) Al-Ghafour (the Forgiving, which is a synonym for God) appears 91 times in the Qur'an, 71 times in the nominative and 20 times in the accusative.
and has promised that mercy shall prevail,\textsuperscript{146} and further, reserves the absolute right to forgive anyone who may fall short of the discharge of their obligations.\textsuperscript{147}

\textbf{The Sunna}

The \textit{sunna} comprises the acts and sayings of the Prophet. The Prophet was the ideal Muslim. His acts as a Prophet\textsuperscript{148} which contextualise the Qur'an are normative custom\textsuperscript{149} and are captured in text that has been transmitted down the ages.\textsuperscript{150} The term \textit{sunna} was used in a legal context, by the Prophet and the early caliphs.\textsuperscript{151} The Qur'an states that ‘whoever obeys the apostle obeys God’.\textsuperscript{152} However, the Prophet’s power was not arbitrary but was itself circumscribed by the Qur’an. Thus as the Prophet is bound, \textit{a fortiori} the \textit{shari'a} is binding on all Muslims, ruler and subject alike, and is the strongest legal basis for the notion of the rule of law under the \textit{shari'a} and also provides a legal basis for the binding nature of the \textit{sunna}.

Further, the Qur’an instructs the Prophet to judge between disputing people\textsuperscript{153} and gives binding legal effect to his judgments.\textsuperscript{154} However, on

\begin{flushleft}

\textsuperscript{147} Izzeddin Ibrahim and Denys Johnson-Davies, \textit{Forty Hadith Qudsi} (1991), 122.; Khaled Abou El-Fadl, ‘Islam and the Challenge of Democratic Commitment’ (2003) 27 \textit{Fordham International Law Journal} 4, 51. where it was noted however, that transgressions against (other) people must be resolved as between themselves, and thus qualifies God’s forgiveness.

\textsuperscript{148} Some Muslims further distinguish his acts depending upon the capacity in which the Prophet was acting: See generally Jasser Auda, \textit{Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach} (2008), 81.


\textsuperscript{150} Taha Jabir al-Alwani, \textit{Source Methodology in Islamic jurisprudence} (2003), 5.

\textsuperscript{151} M M al-Azami, \textit{Studies in Early Hadith Literature With a Critical Edition of Some Early Texts} (1978), 249 esp. n 7. The authenticity of individual \textit{hadith} is a major issue in the study of the \textit{shari'a} although the discussion of this particular problem is beyond the scope of this thesis.


\textsuperscript{153} Qur’an 4:105:

\begin{quote}
We have sent down to you the Book in truth so that you might judge between the people according to what God has taught you.
\end{quote}

See also Qur’an 2:213, Qur’an 5:48.
the other hand, Al-Shafi'i refers to the phrase to 'al-kitaab wa al-hikma' rather than Qur'an 4:80 in his substantiation of sunna as a binding source of law.156

There is some divergence on what actually constitutes the sunna.157 or example, al-Shafi'i considered the acts of the Prophet only as the sunna, and authoritative traditions only were binding,159 while Malik bin Anas considered that the actions of the Prophet's early Companions formed part of the sunna.161 The Djaafari School includes the acts and sayings of the Prophet and the pronouncements and actions of the twelve Shi'i imams.163 Please note that while some statements are attributed for example, to the eponyms of the Schools, or that the authorship of books is attributed to the eponyms, this does not necessarily mean that the books were in fact written by the eponyms. Many of the books attributed to the eponyms were notes taken in seminars which were later written up by students (and whose content was then confirmed by the eponyms) and therefore arguably selectively reflect issues subjectively important to the student (author).164 Zubaida rightly states that:165

154 Qur'an 24:54.
155 The phrase translates into the Book and the wisdom' and occurs in the Qur'an: Qur'an 2:129; Qur'an 2:231; Qur'an 2:151; Qur'an 3:164; Qur'an 4:113; Qur'an 62:2; Al-kitaab (الكتاب) literally the book in Arabic) is a word used in the Qur'an inter alia to describe the Qur'an. The word al-hikma (الحكمة) literally 'wisdom' in Arabic) is according to Shafi'i the wisdom given to humanity in the practice of the Prophet; Muhammad ibn Idris al-Shafi'i, Treatise on the Foundations of Islamic Jurisprudence (2nd ed, 1961), 75.
156 J R Wegner, above n 152.
160 Khaled Abou El-Fadl, Rebellion & Violence in Islamic Law (2001), 34. The term Companions is used to describe those closest to the Prophet. The Biblical analogy would be to compare these Companions to the Disciples of Jesus.
165 Ibid, 29.
Appendix 2 – 638

In reality hadith is the primary canonical source of fiqh. Rules contained in the Qur’an, however few or many, cover a limited area of social and economic life. Sunna, and particularly hadith, are considered decisive sources in interpreting and generalizing Qur’anic rules.

There is a further special category of hadith, called hadith qudsi. In explaining the difference between hadith and hadith qudsi, Graham observes that the ‘dichotomy between the ‘divine word’166 and the ‘prophetic word’167 breaks down since the hadith qudsi commences with the words ‘God said [...]’.168 The hadith qudsi constitute a special category which is not examined further, being treated as a class of sunna.

There are several collections or compendiums of hadith or sunna.169 The word sahih, literally sound or truthful, attaches to some Sunni collections.170 However, Shi’i schools may not recognise the authenticity in toto of Sunni collections of hadith and vice versa.171 The use of hadith as a source of law has not always been uncontentious172 although it is at present a settled matter.173

Often practising Muslims emulate the acts of the Prophet in a superficial sense by adopting dress and mannerisms attributed to him, and in a deeper sense in emulating his good acts such as his mode of prayer, his compassion or love for humanity. The intent of the sunna however, is not to raise the Prophet to superhuman status. It requires a simple faith-based

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166 Ie the Qur’an.
167 Ie the sunna; and W Graham, Divine Word and Prophetic Word in Early Islam (1977), 4. refers to the traditions of the Prophet only, that is, is not inclusive of the imams, it is used here in the Sunni Muslim meaning of the term. This narrower definition does not however, detract from the accuracy of description of hadith qudsi.
168 Ibid. (168)
170 See Encyclopaedia of Islam (EI) for sahih.; EI states: Traditional collections entitled al-Djami al-sahih are the canonical collections by al-Bukhari (d 256/870), Muslim b. al-Hadjdjadj (d 261/875) and al-Tirmidhi (d 279/892 [q.v.]). Those of al-Bukhari and Muslim are, furthermore, generally referred to as “the two sahihs”.
173 There are, broadly speaking several categories of hadith including: (1) sound (sahih) (2) weak (daif) (3) strange (gharib) and (4) fabricated (mawdu’.) (5) isolated (khabar wahid)
acceptance that the Prophet strove to please God in every way possible and, therefore, the majority, but not all,\textsuperscript{174} of his acts are ipso facto pleasing to God and in emulating the good acts that one would also please God.\textsuperscript{175}

Abu Hanifa was ‘criticised because he did not pay attention to the [Prophet’s] traditions’.\textsuperscript{176} Hanbalis give deference to hadith over other sources,\textsuperscript{177} and although generally ambiguous towards ‘classical’ juristic tradition,\textsuperscript{178} nevertheless consider the consensus of the Orthodox Caliphs (al-khulafa al-rashidun) as binding.\textsuperscript{179} Therefore, including the acts of the orthodox caliphs within the ambit of ‘sunna’ provides a meaning of sunna particularly acceptable to Sunni Muslims such as those most associated with al-Qa'eda and with Salafism.\textsuperscript{181} Note however although a majority of

\begin{itemize}
  \item Qur'an 80:1-6.
  \item Qur'an 3:31:
    Say (O Prophet): "If ye do love God follow me: God will love you and forgive you your sins for God is Oft-Forgiving Most Merciful."
  \item Muhammed ibn al-Hasan al-Shaybani, \textit{The Islamic Law of Nations Shaybani’s Siyar} (1966), 50.
  \item The Hanbalis are sometimes considered more a school of hadith than of law: Michael Cook, \textit{Commanding Right and Forbidding Wrong in Islamic Thought} (2001), 87 esp. n 1. which Cook as notes: \textit{ibid.} characterises the Hanbalites as zahara min al-ulum (those who accept only sciences that can be understood literally). The Hanbali School is followed in Saudi Arabia (from where Bin Laden hails and is considered authoritative by the Wahhabi Sect). Awad M Awad, 'The Rights of the Accused Under Islamic Criminal Procedure' in C Bussuoni (ed) \textit{The Islamic Criminal Justice System}, (1982) 103. Note: Wahhabism ( \textit{Wahhabism, Wahabbism} ) is a Sunni movement, named after Muhammad ibn Abd al Wahhab (1703–1792). It is the dominant form of Islam in Saudi Arabia and Qatar. [http://en.wikipedia.org/wiki/Wahhabi] [18 May 2006].
  \item What is meant by the term ‘classical’ is a reference to the accretion of jurisprudence since the time of the Prophet to the present. Sometimes, reference is limited only to the works of the first three generations [the ashab, the tabi’i’un and the taba’ tabi’i’un].
  \item Khaled Abou El-Fadl, \textit{Speaking in God’s Name: Islamic Law, Authority and Women} (2001), 174.
  \item Bernard K Freamon, ‘Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History’ (2003) 27 \textit{Fordham International Law Journal} 299, 366. dates the complete separation of the Judiciary from the Executive sometime between the time of the Caliphate of Yazid (the son of Mu’awiya, c 680 AD) to particularly the massacre of Imam Husain’s slaying at Karabala, (which occurred on 10 October 680; John Bagot Glubb, \textit{A Short History of the Arab Peoples} (1978), 82.). Further, in the view of Bernard G Weiss, ‘Interpretation in Islamic Law: The Theory of ijihad’ (1978) 26 \textit{American Journal of Comparative Law} 199, 202. ‘the State in principle has no legislative power’.
  \item Di Martin, 'Tackling Indonesian terror' in Background Briefing ABC, 23 September 2007. reports that Nasir bin Abas a former top JI commander confirms the practical pre-eminent position of sunna :
    Abas says “[... ] it is almost impossible to argue the Qur'an with a jihadist, there are so many different interpretations of its verses and other religious texts, [sic].” So instead he focuses on the largely undisputed life story of the Prophet Muhammad to find a crack in jihadist doctrine.
\end{itemize}
the Saudis are Hanbalis. Bin Laden (a Saudi) and Ayman Zawahiri (an Egyptian) are both followers of Egyptian Sayyid Qutb, a *shafi’ite*.\(^{182}\)

For the purposes of this thesis however, *sunna* is defined as the practice of the Prophet and the four orthodox caliphs, and is the definition which is normative in *Sunni* Islam,\(^{183}\) the sect most favoured by al-Qa’eda.

**The Dependent sources**

There are several dependent sources, descriptively described as the disputed sources,\(^{184}\) and the Schools rank them differently.\(^{185}\) The dependent sources used in this thesis are *idjma’* (informed consensus but hereinafter consensus) and *quiryas* (analogy), which are broadly recognised, and because of their particular relevance to this thesis, *darura* (necessity), *maslahah* (public good or interest),\(^{186}\) *sadd al-dhari’ah* (pre-emptive prevention) and ‘*urf* (custom) which are less widely accepted.

While this reference does not appear to be used in the texts, the Qur’an 16:44 arguably provides a strong legal basis for the development of the *sunna*.\(^{187}\) Generally as jurists encountered novel legal problems, they adapted existing *shari’a* solutions or simply adopted solutions that had crystallised into local non-Muslim custom of conquered peoples but which

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\(^{187}\) Qur’an 16:44 (emphasis added):

We have revealed to you [O Prophet] the Qur’an

So that you *may make clear* to the people what has been revealed to them,

And that they *may reflect*.

That is the Prophet interpreted the Qur’an and showed Muslims how they might go about addressing issues or problems not explicitly dealt with in the Qur’an but the principles of which apply.
were not explicitly contrary to the shari'a. Omar I was the first caliph to rule over non-nomadic Arabs and used public interest (maslahah) to address novel legal issues such as those dealing with land and water in an agrarian society. Adaptations sometimes went further, impinging upon shari'a norms. Zubaida gives examples of how the judiciary devised and/or adopted practical means for the circumvention of for example the prohibition on usury. Generally Muslims adopted existing shari'a-compatible customary solutions. In practice the effort was not to 'Islamise' as such, but to declare or recast existing shari'a-compliant custom in shari'a terms, a practice endorsed and adopted in this thesis.

The relevant dependent sources are now very briefly examined in turn.

**Idjma' (Consensus)**

Idjma' became a generally accepted source of law, or perhaps more accurately a methodology for validating law - and did so paradoxically through a process of idjma'. Al-Shafi'i is attributed as saying that idjma's validity was based in the Qur'an. Shi'i Islam is 'ambiguous' on the use of idjma, and 'accepts idjma' only if the imam takes part in it', as only the imam has final legal authority. Hassan notes that the use of the term idjma 'gained momentum in its technical form, emerging as an

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189 Sami Zubaida, *Law and Power in the Islamic World* (2003), 107. Some of these circumventions were based on precedents, such as for example 'arrajal contracts (contracts which were usurious, (or based on riba, (interest) and which is otherwise prohibited): Wael B Hallaq, *A History of Islamic Legal Theories* (1997), 168.


191 Qur'an 4:115. While the majority of the scholars note that this view was attributed to al-Shafi'i well after his death (Ahmad Hassan, *The Doctrine of Ijma' in Islam: A Study of the Juridical Principle of Consensus* (2002), 40.) they did not go on to dispute the assertion that idjma's validity was rooted in the Qur'an.


193 Majid Khadduri, *War and Peace in the Law of Islam* (1955), 41. This Shi'i interpretation of idjma (although more specific because of the coincidence of the opinion of the imam) nonetheless, still falls within the general definition of idjma'.

194 The Shi'i Muslims schools refer to the 12th (hidden) imam's occultation (sair) or disappearance (ghaibah): H A R Gibb and J H Kramers (eds), *Concise Encyclopaedia of Islam* (4th ed, 2001), 166. In this thesis, this disappearance is taken here to mean that the religious opinion of a taqlid-e-marji' can possibly validly substitute for the hidden imam (please refer to *The Doctrine of Taqlid (Imitation)*, 668. It is noted that this matter is not settled.
authoritative force, with the emergence of disagreement in Islam in around the 9th century. Although not characterised as such, it appears that *iddma* from the perspective of the believing Muslim, is a divine mechanism for preventing the *umma* from ever endorsing that which is wrong or unjust, thus perpetually guaranteeing a voice against injustice.

A contemporary issue for *iddma* is to identify the interpretative community from which consensus is sought. *Idjma* of the Muslims appears to be the most obvious meaning. However, disagreement (*ikhtilaaf*) is not prohibited except on certain fundamental matters (*usu/l*) i.e. where the Qur'an or the *sunna* are clear or where legal provisions are based on evidence that is 'certain'. The Prophet also said: 'Difference of opinion is a boon to my community', actively encouraging a diversity of views. A practical manifestation of this acceptance of difference (although perhaps not entirely harmonious), is the simultaneous participation of the various Schools at the *hadj* pilgrimage in Mecca. Another example is the coexistence of orthodoxy, the exact meaning of which changed over time, and some heterodoxies of the time.

Ascertaining the actual collective view of Muslims in practice is very difficult. Consultation (shura) is not equated with popular suffrage, and mere acquiescence cannot therefore be equated with consensus. Establishing a 'consensus' is further complicated by the existence of

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196 This delay in the development of *iddma* as a recognised source is arguably the reason Shafi'i did not use *sunna* as the legal basis for *iddma* and rooted the source back in the Qur'an.
200 See n 19, 615.
Muslim *djinn*. Therefore, a methodology for the practical application of *idjma’* in its broadest sense remains elusive. Generally, *idjma’* has initially been established among a smaller ‘community’, for example, *idjma’* among the jurists, *idjma’* of the people of Medina or some other locality and then gradually expanded to form a larger consensus. Traditionally, however, classical jurists have been reluctant to accept the *idjma’* of scholars, particularly those on a State’s payroll, as they are susceptible to the influence of power. Al-Shafi’i ‘did not validate the consensus of, and almost rejected the *idjma’* of scholars, arguably for the same reason, but later settled on the position that the *idjma’* of the masses was preferable.

However, the lack of representative governments in many Muslim majority States means that is it is likely that the *idjma’* of the governments is limited to and thus reflects the *idjma’* of those in power and the State’s *ulema* (religious scholars) only. However, *idjma’* that develops over a long period of time, such as the Qur’anic prohibition on grape-wine which through consensus became a general prohibition on narcotics, all alcoholic drinks and stupefying substances generally are now normative rules which are widely and one could even say unanimously accepted as law even though consensus emerged developed and crystallised during a historical period in which transport and communication technologies were

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203 Qur’an 114:7.
204 This process of crystallisation of consensus is perhaps similar to the development of law in one Australian or US jurisdiction and then if useful and practical being ‘copied’ by other jurisdictions, eventually extending its reach by being adopted by the broader common law community.
205 Ahmad Hassan, *The Doctrine of *ijma*a in Islam: A Study of the Juridical Principle of Consensus* (2002), 28.; According to Mamdouh Habib (with Julia Collingwood), *My Story: the tale of a terrorist who wasn’t* (2008), 20. Imams employed in Australian mosques ‘[...] often had little education and were ignorant’. The imams in a large number of Western mosques are trained in Saudi Arabia and therefore inculcated in the *Wahhabi* School, and are paid by the Saudi government, which therefore can exert some influence within the émigré Muslim communities, where they arguably have greater ‘traction’.
somewhat less sophisticated. In general, the tendency has been for a 'local' or smaller group consensus, either to crystallise as a legal norm by wider acceptance or to fall into abeyance. The hadj served as an annual convention for spreading and disseminating ideas, particularly in the past when communications remained limited.

Today, idjma' formation is facilitated through the availability of cheap and widely accessible technologies which are difficult to censor. Nevertheless, the problem of how one assesses the existence of idjma' remains. In practice, the absence of idjma' or the emergence of dissent is easier to ascertain. In the long term, however, the emergence (or the absence) of idjma' is clearly useful in identifying the crystallisation of valid law. Perhaps incidentally, the process of debate inherent in the process of consensus formation, in a free atmosphere acts as a pressure valve, thus reducing the need for the use of force in order to be heard. It is posited that at least some of the violence in Muslim communities has its genesis in the absence of the freedom of expression.

Another important form of consensus is its tacit form (idjma' sukuuti). Weiss succinctly describes this form of consensus in the formula 'I know of no one who disagreed with so-and-so' or 'I do not know of any text which disagreement (sic) with such-and-such is recorded'.

In two useful and practical tests for identifying the existence of or promoting the crystallisation of idjma', the Prophet said that (a) the umma will never (unanimously) agree on something that is wrong (b) but, if in doubt, Muslims should side with the overwhelming majority. There is no definition however, of what constitutes an overwhelming majority. Technically this type of consensus is called jumhuur.


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Islamic maxims is a matter of faith rather than of law. However, the Prophet's words reflect an acknowledgement that, while reasonable people may differ, it is extremely unlikely that consensus will emerge on what is manifestly wrong. On the other hand, and cognisant of the problematic nature of these subjective determinations, on issues not 'clearly wrong', those ignorant of the legal issues are encouraged to side with the overwhelming majority.\textsuperscript{215} Therefore, and despite their best efforts, while the 'right answers' may elude individuals, God, according to Islam, guarantees the collective decisions of the community through \textit{idjma'}. These faith-based positions can be discounted if proven invalid in practice. On the other hand, the Prophet's clarifying statements provide a practical solution to complex and otherwise intractable problems. Therefore, for example, if the overwhelming majority of Muslims find the killing of innocent bystanders unjust, as they do and therefore ipso facto unlawful, then even those subjectively who believe such killings are 'right' must, if they accept the words of the Prophet, defer to the opinion of the overwhelming majority or prove the majority wrong through debate and argument, thus enabling a new consensus to emerge around a \textit{shari'a}-based legal opinion.

\textit{Idjma' }becomes useful on socially-evolving threshold questions particularly when the Qur'an and \textit{sunna} are silent on an issue. If there is a dispute in the interpretation, the Qur'an instructs deference to the Prophet.\textsuperscript{216} In the absence of the Prophet, the Prophet said, the scholars were 'his inheritors'.\textsuperscript{217} Together with the scholars therefore, Muslims have the institution of (consensus) \textit{idjma' }to help them to crystallise valid legal norms. The consensus formation process must happen cognisant of

\textsuperscript{215} The meaning of 'overwhelming majority' has not been judicially determined; it must however mean that it excludes a simple majority, and perhaps an overwhelming majority of the Muslims as opposed to the overwhelming majority of a School. The existence of multiple Schools bears out this assertion. However, as in the process of \textit{idjma' }formation an overwhelming majority of a locality may be an acceptable understanding of a matter that applies in that locality.

\textsuperscript{216} Qur'an 4:59:

O ye who believe! (1) obey God and (2) obey the Apostle and (3) those charged with authority among you. If ye differ in anything among yourselves refer it to (1) God and (2) His Apostle if ye do believe in God and the Last Day: that is best and most suitable for final determination.

\textsuperscript{217} Javad Nurbakhsh, \textit{Traditions of the Prophet} (1981), 50.
al-Shafi’i’s reasonable reservations with respect to consensus of the scholars, particularly in contemporary Muslim societies with a high levels of corruption in the Executive and Judiciary,\(^{218}\) where scholars can be corrupted. The Prophet’s statement therefore must be read down to mean consensus of independent or ‘free’ scholars together with the consensus (\textit{idjma’}) of the masses. If there is no consensus on an issue, those who are uncertain should either examine their interpretations in greater detail, seek further independent advice\(^{219}\) or side with the overwhelming majority, if that is present. Note however, the binding effect operates only on those who were party to the consensus but for practicality must mean both active and tacit consensus.

\textbf{Quiyas (Analogy)}

\textit{Quiyas} is the Islamic legal term for analogical reasoning,\(^{220}\) and as with \textit{idjma’}, it is more a methodology than a ‘source’. \textit{Quiyas} is arguably similar to reasoning by analogy in the common law. \textit{Quiyas} is recognised by the four surviving Sunni schools\(^{221}\) although historically the Hanbali School did so reluctantly,\(^{222}\) and was rejected as a source of law by the Zahiri School.\(^{223}\) In time however, the Zahiri School became extinct and the later followers of the Hanbali School ‘were to ignore their eponym’s dislike for quiyas’.\(^{224}\) The Djafiri or \textit{ithna ‘ashari} Shi’i schools also did not recognise the validity of \textit{quiyas},\(^{225}\) replacing it with \textit{ra’y} (personal opinion)\(^{226}\) and rational


\(^{219}\) While there are several sources of \textit{fitua\={u}s} (legal opinions), the conflicting and inconsistent nature of these opinions and their varying legal quality have been a source of confusion.


\(^{222}\) Wael B Hallaq, \textit{Law and Legal Theory in Classical and Medieval Islam} (1994), VII 597. One of the Qur’anic reasons for the reluctance by Muslims to accept quiyas stems from the Qur’an itself where, when God asked Iblis (i.e. Satan, a \textit{djinn} who at the time was not yet ‘fallen’) to bow to Adam, Satan responded ‘I am better than he, You created me from fire and him from clay’ (Qur’an 2:34; Qur’an 7:11), thus arguably using analogy to arrive at a decision which in effect gave Satan a plausible reason for disobeying God’s command. A problem here however, is the basic assumption / rationale (‘\textit{illa X}’) that fire is ‘better’ than earth, reminding the proponents of \textit{quiyas} to be careful of the assumptions on which \textit{quiyas} is based.


\(^{225}\) See generally C G Weeramantry, \textit{Islamic Jurisprudence: An International Perspective} (1988), 42. For example the difference between the Shi’i and Sunni sects on the issue of quiyas particularly the differences of opinion on ‘shutting and reopening the doors of \textit{ijtihaad}’. \textit{Ibid}, 186 defines \textit{ijtihaad} as ‘the general process ofendeavour to comprehend
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intuition ('aql).\textsuperscript{227} Rational intuition or reason was also accepted by the orthodox Caliphs as a source of law.\textsuperscript{228} Abu Hanifa, a student of the eponym of the Djafari School,\textsuperscript{229} recognised the validity of both ra'\textsuperscript{y} and quiyas\textsuperscript{230} and the Hanafi were described as the school of quiyas.\textsuperscript{231}

According to Mansour:\textsuperscript{232}

The Maliki school, whenever possible, continued to refrain from using ra'\textsuperscript{y} and quiyas and preferred the Qur'an, hadith [...] and idjma'' as basic roots of law although the Hanafi concept of human reason ra'\textsuperscript{y} was developed into the doctrine of quiyas, (analogy), and [later] accepted by all\textsuperscript{233} the schools ...

The methodology of quiyas\textsuperscript{234} is now illustrated by the way in which the absolute prohibition of grape wine (khamr) in the Qur'an\textsuperscript{235} was extended to other alcoholic drinks.\textsuperscript{236} The first legal issue is to identify the feature of grape wine that initially justified the prohibition ('illa, ratio legis). The reason given in the Qur'an is that its intoxicating nature, 'befuddles the mind',\textsuperscript{237} and on balance is regarded as more detrimental than the benefits that accrue from its use.\textsuperscript{238} The ratio legis that wine is prohibited because of its intoxicating effect is equally applicable to date-wine ('arak) or to whisky, a spirit distilled from malted (barley or) rye.\textsuperscript{239} The Hanafi School holds

\begin{itemize}
  \item divine law'. Hunt Janin and Andre Kahlmeyer, Islamic Law: The Sharia from Muhammad's Time to the Present (2007), 67. discuss the difference in Shi'i and Sunni Muslim views on ijtihaad.
  \item ra'\textsuperscript{y} or personal opinion was adopted as a source of law by all four orthodox Caliphs: Majid Khadduri, War and Peace in the Law of Islam (1955), 28. In time however, hadith of the Prophet emerged as more authoritative over ra'\textsuperscript{y} alone: Sami Zubaida, Law and Power in the Islamic World (2003), 21.
  \item Majid Khadduri, War and Peace in the Law of Islam (1955), 28.
  \item Ibid. (50).
  \item Mansour H Mansour, The Maliki School of Law: Spread and Domination in North and West Africa 8th to 14th Centuries CE (1995), 4.
  \item The reference to 'all' the schools here is to all (surviving) Sunni schools only.
  \item For the elements and examples of the application of and the elements of quiyas see Wael B Hallaq, A History of Islamic Legal Theories (1997), 83.
  \item Qur'an 2:219; It is posited that this approach is correct as it fits in with the Prophet's own use of analogy with respect to this Qur'anic verse: Muhammad Al-Mughirah al-Bukhari, The Translations of the Meaning of Sahih al-Bukhari vol 7 (1976), 343.
  \item Ibid. (341).
  \item Qur'an 4:43: 'approach not prayers with a mind befogged until ye can understand all that ye say.
  \item Qur'an 2:219.
  \item Wael B Hallaq, A History of Islamic Legal Theories (1997), 83.
\end{itemize}
however that the punishment for consuming *khamr* (grape wine) only applies to a person intoxicated by *khamr* and not analogised intoxicants\(^{240}\) and is the better view in keeping ‘God’s punishments’ separate, fixed and from not extending *hudud* or *quiyas* punishments to *taz’ir* punishments created by the Executive or by jurists.

The *shari’a* also recognises an *a fortiori* argument that if X is so then it follows even more strongly that Y is also the case where ‘the ratio is causally connected with its rule (*hukm*) in a less explicit manner’.\(^{241}\) Hallaq gives the example of the Qur’anic verse (referring to one’s duty of kindness to parents): ‘Whether one or both of them attain old age in thy life say not to them a word of contempt\(^{242}\) nor repel them but address them in terms of honour’.\(^{243}\) Hallaq’s reasonable proposition is that if the mere utterance of ‘*uff*’ is prohibited then *a fortiori* striking one’s parents must also be prohibited. Similarly, if consensual sexual intercourse between non-married partners is not permitted then the non-consensual sexual intercourse of any sort (rape), while not codified as such, is also *a fortiori* not permitted under the *shari’a*.

The Rome Statute codifies customary international law on the use of analogy and Article 22(2) provides that ‘The definition of a crime shall be strictly construed and shall not be extended by analogy. […]’. A question for *shari’a* law application is whether this use of *quiyas* (analogy) is likely to be problematic vis-à-vis ICL. Cassese explains that civil law countries avoid the use of analogy, the reason being the principle of non-retrospectivity.\(^{244}\) However, specific *shari’a* laws are not retroactive.\(^{245}\) Therefore, while a *shari’a* rule may be created through analogy, the


\(^{242}\) The Qur’anic description of contempt is (fie or ‘*uff* کَفَأ’): Qur’an 17:23.

\(^{243}\) Qur’an 17:23.

\(^{244}\) Antonio Cassese, *International Criminal Law* (2003), 153. (‘*nulla poena sine lege*’).

resulting rule is subject to the rule on non-retrospective application. That is, the resultant rule only applies prospectively and therefore, *quiyas* should not prove problematic for retroactivity.

**Minor Sources**

**Darura (Necessity)**
The doctrine of necessity can be characterised as a temporary suspension of relevant laws for the duration of an exigency. There is however, a fundamental question whether necessity is a general source of law under Islamic law or whether it should be characterised as ‘special dispensation’ in extenuating circumstances. For convenience, however, it is considered along with the other minor sources of law.

The principle that necessity provides a general temporary exception is explicitly sanctioned by the Qur’an, as long as there is no *intention* wilfully to disobey God. The use of necessity by *individuals* in trying circumstances is uncontentious. The use of the doctrine generally by governments and their instrumentalities (or this context by non-state groups such as al-Qa’eda), for more pragmatic reasons is contentious. In practice however, rulers through the ages have used necessity to create

246 Qur’an 4:23; Cherif Bassiouni, ‘Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System’ in C Bassiouni (ed) *The Islamic Criminal Justice System*, (1982) 23. Professor Anwarullah, *The Criminal Law of Islam* (2002), 3. Another example is that if a person accepts Islam at say age 60 or 18 for that matter, s/he is not liable for all the prayers, fasting poor rate etc that were ‘missed’, obligations are (prospectively) due from the time of acceptance of the Covenant: A. Q Oudah Shaheed, *Criminal Law of Islam vol 1* (2000), 130.


248 Qur’an 2:173: [...] but if one is forced by necessity without wilful disobedience nor transgressing due limits then is he guiltless. For God is Oft-Forgiving Most Merciful.”


If a man cannot achieve absolute knowledge of God’s commandments, he may rely on his own learned judgment regarding what God requires. Accordingly, Sunni jurisprudence affirms the principle that considered opinion is binding in matters of law: *al-zannu waqib lilitthai‘ fi’l-shar*.

In fact, the correct and timely use of concessions of all forms, including those concessions available through necessity in the practice of faith by an individual is lauded: Ali Muhammad As-Sallaaee, *The Biography of Abu Bakr As-Siddiq* (2007), 165. The reason for considering this meritorious behaviour is because it shows the modesty of the human in acknowledging his/her frailty.
exceptions, although objectively ascertaining the intention for necessity generally is likely to prove difficult in these circumstances.

The early caliphs used the principle of *darura* but described it using various phrases such as ‘*al-khair li-jama’at al-muslimeen*’ (for the benefit of Muslims) or ‘utility for the general public’ to describe its use. For example, Omar I, whose precedent is binding among Sunni Muslims, temporarily suspended the application of certain Qur’anic punishments (including *hadd* punishments) for necessity and used the phrase ‘for the benefit of Muslims’ and not the term ‘public interest’ (*maslahah*) or *darura* to describe the legal basis for his actions. The Iranian supreme leader Ayatollah Khomeini, confirmed that, as an Islamic government has the prerogative of prophethood it could suspend the application of the *shari’a* in the public interest when necessary (and has done so). Shari’a rules such as the absolute prohibition on the (intentional or careless) killing of women, children, priests and other non-combatants during armed conflict have arguably been circumvented by Al-Qa’eda using *darura*. What is problematical from a *shari’a* perspective is that they have done so inter alia by adopting arguably Western concepts such as ‘collateral damage’ without first grounding these legal exceptions in the *shari’a*. This is examined in chapter 3.

Sometimes necessity (*darura*) and public interest (*maslaha*) were combined to extend the law. The Encyclopaedia of Islam states that ‘in the case of *darura*, al-Ghazali argues, no dependence on a textual reference is

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252 See text accompanying n 183.,


254 Wan Azhar Wan Ahmad, *Public Interests (Al-Masalih Al-Mursalah) In Islamic Jurisprudence: An Analysis of the Concept in the Shafi’i School* (2003), 24. See also Public Interest or *maslahah al-mursalah* (*maslahah*), 657 below.


needed', a view that has stood since the 12th century and perhaps favours al-Qa'eda's position. However, al-Ghazali's position cannot be so open-ended that it breaches what is just and right and promotes or leads to fitna or fasad (corruption) or wanton killing. This thesis posits that there must be some limit to what otherwise appears to be unlimited permissiveness. In practice, the instrumental use of law by Muslim jurists is neither new nor uncommon.

Al-Qa'eda has arguably developed the concept of extending legal principles for (necessity) darura, here absent a firm textual positive law basis explicitly to deny them that option. As both criminal and siyar laws have been neglected under the shari'a Islamists including al-Qa'eda are forced into this position as represented by al-Ghazali, and arguably for similar reasons as articulated by al-Ghazali. The contention in this thesis with Islamists is not that they have invoked necessity but that they have emulated Western practices without rooting the legal bases of their acts in the shari'a, and further that they prima facie appear to be acting contrary to the Qur'an, the sunna of the Prophet and the Companions in a wanton manner while attributing such acts to the shari'a.

The view of Ibn Taymiyyah's is that 'dijihad is better (afdal) than the hadj'. That is, that participating in dijihad is religiously more meritorious
than the pilgrimage based upon Qur'an 9:19-20, and al-Qa'eda has further extended this concept as is now considered. Ibn Taymiyyah's opinion was proffered following the invasion and devastation of Iran and Iraq by the Mongols. Peters states that 'all scholars agree' that \textit{djihad} is better than the \textit{hadj}, the \textit{umra} and \textit{voluntary} prayer and \textit{voluntary} fasting, though importantly this agreement does not extend to the (other) compulsory obligations. According to Gwynne, bin Laden goes much further to state that \textit{djihad} as a duty is second only to the most fundamental 'pillar' of Islam, \textit{iman} (belief in God and the Prophet), the inescapable consequence being that armed struggle is necessarily every Muslim's highest priority, after belief in God and the Prophet. This is a remarkable development even viewed from Ibn Taymiyyah's position and Al-Qa'eda's position is one that enjoys little support. Even if al-Qa'eda's view on the status of \textit{djihad} within the Muslim hierarchy of religious obligations is correct, a position not supported here, the limits, laws and prohibitions on

\begin{itemize}
\item \textbf{261} Rosalind Gwynne, \textit{Al-Qa'ida and al-Qur'an: The "Tafsir" of Usamah bin Ladin} (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004. quoting Ibn Taymiyyah's \textit{Majmu' al fatawa} Vol. 35, 160, where Ibn Taymiyyah explained the Qur'anic phrase 'giving food and drinks to pilgrims etc and guarding the sacred mosque [...]': Qur'an 9:19. A different characterisation of the concept is given for example by Hasan Al-Banna, founder of the Muslim Brotherhood in Egypt, who 'extolled the virtues of the aggressive \textit{jihad}': Bernard K Freamon, \textit{Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History} (2003) 27 Fordham International Law Journal 299, 349. \textit{Djihad} is sometimes characterised as the 6th 'pillar' of Islam, although \textit{kamikaze} actions are neither mentioned nor recommended [ibid. 350]. It is noted that the orthodoxy is to admit to 5 pillars only: these are the belief in One God, the five times Prayer, fasting in \textit{Ramadan}, payment of \textit{zakat} (the poor rate) and the performance of the \textit{hadj} (pilgrimage to Mecca). Ibn Taymiyyah (b 1263 AD - d 1328 AD) was a renowned scholar of the Hanbali School and is often quoted by Usama bin Laden.

\item \textbf{262} John Bagot Glubb, \textit{A Short History of the Arab Peoples} (1978), 194.

\item \textbf{263} Rudolph Peters, \textit{jihad in Classical and Modern Islam} (1996), 47. By way of explanation it is noted that in addition to the mandatory prayer, fasting, poor-rate etc as stipulated in the Covenant, a Muslim may of his/her own accord undertake to perform supererogatory acts of devotion (prayer, fasting or charity) which while considered laudable is purely up to the individual and the abandonment of which draws no criticism or penalty under the Covenant.

\item \textbf{264} That is, the only mandatory individual obligation (\textit{fard 'ayn}) included in the list is the \textit{hadj} pilgrimage to Mecca. All other duties listed are \textit{nawafil} or supererogatory acts of worship.

\item \textbf{265} Rosalind Gwynne, \textit{Al-Qa'ida and al-Qur'an: The "Tafsir" of Usamah bin Ladin} (2001) <web.utk.edu/~warda/bin_ladin_and_quran.htm> at 6 December 2004. JI in Indonesia appear to have a position not entirely dissimilar to that of Bin Laden. That is, that \textit{djihad} is next to faith (iman) but that the obligation for armed \textit{djihad} is equal to that of prayer: Di Martin, 'Tackling Indonesian terror' in Background Briefing ABC, 23 September 2007. (emphasis added).

\item \textbf{266} Fiqh as \textit{sunnah} Fiqh 1.77 B (From Alim software) – get a better reference

Abdullah ibn Shari al-'Aqeely narrated that: "The companions of Muhammad, peace be upon him, did not consider the abandonment of any act, with the exception of prayer, as being disbelief." (Related by at-Tirmidhi and al-Hakim.)
the means that may legitimately be employed in *djihad* still apply and form an important underlying premise of this thesis.

Neither al-Qa'eda's slogans, purporting to be blanket declarations of *djihad* nor its implied use of necessity appear to be legally justified under the *shari'a*. It is an example of an instrumental goal-oriented use of the *shari'a*. However, this is not an uncommon phenomenon in the contemporary world. Many Americans will recall McCarthyistic slogans such as 'Every Communist is Moscow's Spy', and while such statements are not an 'American view', it did get some traction within their society. Bin Laden's slogans are perhaps not dissimilar in their effect on Muslims.

Notwithstanding the historical 'leap' in al-Qa'eda's position, that is, bin Laden's extension of Ibn Taymiyyah's hierarchical position of *djihad* among a Muslim's religious obligations, which is novel, far reaching and fundamental, it enjoys some limited, qualified and indirect support. Such support is found in the writings of Faraj and Qutb who attempted to bring the Sunni view of military *djihad* closer to that of Shi'i Islam as *necessary* for the contemporary situation of the umma. Bin Laden's opinion preceded the carnage in Iraq, Pakistan and Afghanistan, all to which al-Qa'eda has made a significant contribution. Further, as events such as kamikaze attacks in Iraq, Pakistan, Afghanistan, Israel, the USA, Kenya and many other places have shown, Sunni doctrine has been appropriated by al-Qa'eda with little or insufficient debate. Hamas' view

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269 Bernard K Freamon, 'Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History' (2003) 27 *Fordham International Law Journal* 299, 351. Harmonisation of laws between Schools is however, much less important than establishing legality or otherwise (i) in principle and (ii) in that particular fact situation.

270 Mark Silva and Jill Zuckman, 'Agent's assertions revive torture debate', *Chicago Tribune* (Chicago), 11 December 2007. Retired CIA agent John Kiriakou admitted to using water-boarding on al-Qa'eda leader Abu Zubaydah to provide critical information after he had held out for weeks. During the interrogations Abu Zubaydah had stated that the 11 September 2001 attacks were not meant to be other than a 'wake up call' to the USA and he had not intended the carnage, destruction of the buildings and angst which had in effect backfired on al-Qa'eda.
supporting al-Qaeda’s position albeit in some limited circumstances is now considered.271

Hamas provides support for some aspects of Bin Laden’s relaxation of the limits on *djihad*. Hamas’s Sheikh Yassin, while not altering the status of *djihad* (with respect to other mandatory individual obligations as did bin Laden) has nonetheless defended *kamikaze* attacks in the Occupied Territories stating that: ‘This is the only way to free Palestine. Unfortunately, without blood we can achieve nothing’.272 Hamas’ various decisions to carry out273 or to suspend274 such attacks have been essentially political rather than directly religious in nature, justified under prevailing military circumstances. Hamas’s claim to ‘being Islamic’275 however appears to imply that its acts will necessarily be intra vires the *shari’a*.

Nevertheless, and although Hamas’s enabling *fatwa*276 did not explicitly invoke (Qur’anic) necessity, it is possible to make a case that because Muslims have been ‘expelled from their homes’277 that ‘permission to fight has been granted’.278 If this argument is correct and fighting is

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271 The presumption of continuity is called *istishaab*. For a discussion of the issue in some detail and on the various forms of *istishaab* please see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence (Revised and Enlarged)* (3rd ed, 2006), 387.

272 Zaki Chehab, *Inside Hamas: The Untold Story of Militants, Martyrs and Spies* (2007), 121. On the other hand, this statement of Sheikh Yassin, although not explicit, arguably implies ‘necessity’, the word ‘unfortunately’ implying the unavailability of alternatives, arguably a question of fact that must be established by admissible evidence.

273 Ibid. (114).

274 Ibid. (116).

275 The Acronym HAMAS (站点) is from the Arabic حركة المقاومة الإسلامية *Harakat al-Muqäwamat al-Islämiyyah* which is translated as, meaning Islamic Resistance Movement.

276 A *fatwa* is a legal opinion which in Islamic law means that the jurist “holds an opinion [that] considers a thing to be probable, though not certain”: Bernard G Weiss, ‘Interpretation in Islamic Law: The Theory of *Ijtihad*’ (1978) 26 *American Journal of Comparative Law* 199, 203. A *fatwa* an opinion of an individual or group of scholars, cannot by definition be considered certain until the consensus surrounding that opinion is so overwhelmingly crystallised that there is little dissent. An example of this ‘certainty’ is the opinion that wine is prohibited based on an extension by analogy of the prohibition on grape wine.

277 Qur’an 22:40.


Still, it is noteworthy that the framers of the Geneva Conventions - acting in 1949, with the experience of World War II fresh in their minds – were not disposed to alleviate the conditions of lawful combattancy even in the case of resistance movements.
legitimate under the shari'a then the question that remains is whether the means used by Hamas in fighting (or in international law terms resistance), are intra vires. Sheikh Yassin's subjective view that kamikaze attacks are the 'only way' to 'fight back' arguably arises because of the overwhelming disparity in military power between the Israeli Defence Forces (IDF) and Hamas. It appears that Sheikh Yassin was (indirectly) invoking Qur'anic necessity in arriving at his legal opinion on kamikaze attacks in the Occupied Territories. He did not cite any textual basis in line with his School, although his reliance on the factual issue of the relative strength of the protagonists appears to be valid. The key problem with Sheikh Yassin's decisions, which he has not justified in any legal detail is the taking of one's own life, which is absolutely, clearly and unambiguously prohibited in Islam. He does not address this specific vital issue which is further examined in chapter 4. In terms of the capacity to order a djihad, Sunni and Shi'i theories are 'very similar' and the prerogative rests with the ruler although a crucial difference for the Twelver Shi'i Muslims is that djihad can only be waged under the leadership of the rightful imam.

An important question in this context of a lawful armed conflict is: who finally has the authority to determine the existence and content of what constitutes 'necessity' in a particular djihad? A commander can ask soldiers to carry out an attack in a particular way including for necessity. These decisions will be subject to review if appropriate, by both jurists and interested Muslims. From an individual Muslim perspective, each person should make up his or her mind on the issue as they alone are responsible for their actions in God's eyes. As discussed in chapter 2, obedience to the leader is not necessary in cases of an unlawful command. Note however that this individual opinion must be based on knowledge, is not arbitrary.

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279 Sheikh Yassin was a Shafi'ite and has therefore likely followed al-Ghazali's opinion on this issue. See text accompanying n 257, 651.
282 Ibid.
283 There appears to be consensus, that obedience is due only to what is good or just (ma'ruf). Khaled Abou El-Fadl, 'Islam and the Challenge of Democratic Commitment' (2003) 27 Fordham International Law Journal 4, 26.
and is subject to the process of \textit{ittiba'}\textsuperscript{284} In a \textit{shari'a} trial, the matter would be a relevant issue, and in this context a final decision to be made cognisant of Islamic law.

Other key legal issues for resolution are (a) to establish or set some legal limits to necessity and (b) to define some parameters or criteria on where necessity can provide a defence (full or partial) or excuse.\textsuperscript{285} The question of when similar acts in an armed conflict can both be characterised as (i) legitimate (eg fighting enemy soldiers) and (ii) illegitimate (eg unnecessarily involving/attacking children\textsuperscript{286}) is also an issue that must be resolved from the perspective of \textit{quisas/diya} liability.

\textbf{Necessity under International Law as compared with \textit{shari'a} necessity (\textit{darura}).}

The doctrine of necessity is clearly a part of international law.\textsuperscript{287} International law allows necessity under strict conditions.\textsuperscript{288} Cassese P. notes in his dissenting opinion in the \textit{Er demonic Case} that these special conditions encompass duress but that duress is often termed 'necessity' although necessity is broader in its scope.\textsuperscript{289} Cassese J spells out the four strict conditions for duress to meet the conditions for defence.\textsuperscript{290} The broader implicit principle is that limits of necessity must nonetheless be circumscribed. The same appears to be true in the case of the \textit{shari'a}.

However, since the \textit{shari'a} prohibitions appear to be more explicit, as in the case of the use of fire and the killing of civilians, the \textit{shari'a} has not yet evolved a coherent set of exceptions. This area of law under the \textit{shari'a} is in need of urgent and serious reform.

\textsuperscript{284} See discussion at \textit{ittiba'}, 672.
\textsuperscript{285} According to Joseph Marguilies, \textit{Guantanamo and The Abuse of Presidential Power} (2006), 73. some in the US military justified the use of torture inter alia on the basis of military necessity, although there were always strong dissenting voices within the various administrations and in the military.
\textsuperscript{286} The question of negligence, recklessness and or criminal negligence also complicates this question and is arguably best left to the tribunal with some broad legislative guidance.
\textsuperscript{287} Although the scope and extent to which necessity may be invoked remain, the fundamental principle itself is uncontroversial: Théodore Christakis, 'Nécessité n'a pas de loi? La nécessité en droit international' (Paper presented at the Colloque en Grenoble: la nécessité en droit international, Grenoble 2007).
\textsuperscript{288} Antonio Cassese, \textit{International Criminal Law} (2nd ed, 2008), 281.
\textsuperscript{290} Ibid, para. 16.
There is no consensus however, that kamikaze attacks are legitimate for necessity in a shari'a sense. It will be shown that the vast majority of Muslim opinion appears to be against random and wanton kamikaze attacks and the presumption is therefore that such attacks are generally not lawful. Even if al-Qa'eda’s position on djihad is valid, it can only be applicable in extreme and extenuating circumstances of necessity and the burden of proof lies with those asserting the opinion to establish its validity against the prevailing presumptions.

Public Interest or maslahah al-mursalah ('maslahah')

Maslahah is the shari'a doctrine of public interest or welfare,\(^{291}\) and is sometimes considered as part of quiyas.\(^{292}\) Al-Ghazali (d. 1085AD), as quoted by al-Shatibi (d. 1388AD), recognised maslahah as a source of law but limited the definition of interest as ‘[being] similar to the interests recognised by the Lawgiver’.\(^{293}\) The Hanbali jurist Tufi (d. 716AD) considered maslahah as the best source of law\(^{294}\) but did not explain how it could legitimately trump the Qur'an or the sunna, although it appears to be based on the general Islamic view that the Qur’an and the sunna are sent for the benefit of humanity and therefore that there must be congruence between these sources. A further explanation is that an Omnipotent God by definition can want for nothing and therefore that the well-being of humanity can take precedence above all else. However, in its albeit limited

\(^{291}\) Maslahah (singular); masalih (plural); maslahah al-mursalah is translated as public interest. The term public interest while commonly used is arguably not an accurate description of the term. Imran Ahsan Khan Nyazee, *The Methodology of Ijtihad* (2002), 10. translates maslahah as “an interest that is not supported by an individual text but is upheld by the texts considered collectively”.


\(^{293}\) Ahmad al-Raysuni, *Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law* (2005), 46:

> It is noted here however that al-Shatibi definition of al-masalih al mursalah, includes public interests as those “[…] not explicitly identified by any text in the Qur'an and sunna but which are generally agreed upon based on circumstances which arise in human society”, (ibid., 423) which arguably means that “interests” are those recognised by jurists or the community by consensus, but not explicitly identified in the text of the Qur’an or sunna.

Appendix 2 — 658

use over the past 1000 years, *maslahah* was developed and used most extensively in the Maliki School.\textsuperscript{295}

*Maslahah*, traditionally used only sparingly, has recently been expanded by utilitarians,\textsuperscript{296} and even opportunistically by the neo-Salafis.\textsuperscript{297} While its general application would prove particularly attractive to our contemporary anthropocentric mores, the broad and general use of *maslahah* is not methodologically uncontentious. Hallaq states that its beginnings in the 11\textsuperscript{th} century are ‘obscure’\textsuperscript{298} although Zubaida notes that while *maslahah* was a pragmatic source, it was not arbitrary.\textsuperscript{299} Further, Al-Shatibi (a Maliki), links the use of *maslahah* back to Umar I, the Second Orthodox Caliph,\textsuperscript{300} which if correct would enhance the legitimacy of its use in developing law. The Encyclopaedia of Islam notes that:\textsuperscript{301}

> [Maslahah was] ably defended by some of its adherents, like the Maliki jurist Al-Shatibi (d. 790/1388) and others, found no great supporters in an age in which *ijtihad* was discouraged and *taqlid* prevailed, mainly because it stressed dependence on evidence that cannot be clearly identified by *qiyas* or other derivative sources.

Cognisant of the pitfalls, however, the concept of ‘public good’ is a legitimate source of law when its use remains within the strict bounds of the methodology of the *shari’a* and the purposes of the *shari’a* (*makasid al-shari’a*). One has to be mindful, therefore, that the minor sources can and have been used to develop law outside the *shari’a* framework, methodologies and precedents, and that some of this development has taken place in a purely instrumental manner. This has happened both in


\textsuperscript{296} Wael B Hallaq, *A History of Islamic Legal Theories* (1997), 134.

\textsuperscript{297} Khaled Abou El-Fadl, *Speaking in God’s Name: Islamic Law, Authority and Women* (2001), 191.


\textsuperscript{300} According to Ahmad al-Raysuni, *Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law* (2005), 40. al-Shatibi attributed the opinions of the Maliki School not so much to Malik, but to Caliph Omar I.

\textsuperscript{301} The Encyclopaedia of Islam notes under *maslahah* that: by al-Ghazali’s time, *maslahah* had become a definite concept of law on the basis of which jurists could make legal decisions. Other jurists called legal reasoning *istislah* (the act of reasoning on the basis of *maslahah*) was developed as a source of law by Maliki school: Majid Khaddouri, ‘Nature and Sources of Islamic Law’ in I Edge (ed) *Islamic Law and Legal Theory*, (1996) 98.). Al-Ghazali rejected *istislah* stating that if such a method is needed, *qiyas* can adequately provide it: at, 98.
the distant past and particularly in the post-colonial recent past\textsuperscript{302} and jurists such as Ibn Taymiyyah have because of this possibility, ‘discounted’ *maslahah* as a source of law.

**Reform of Islamic Law through *maslahah***

In the modern era, reform was described as ‘reviving or establishing Islamic positive law, to make Islamic norms relevant once again to the judicial process with a truly Islamic polity’.\textsuperscript{303} This is a description of ‘reform’ that arguably holds true in contemporary society. Mohammed Abduh (d. 1905AD)\textsuperscript{304} and his student, Rashid Rida (d. 1935AD), reformers from the last century, encouraged the full use of *maslahah* to derive positive law.\textsuperscript{305} Rida considered *maslahah* as almost synonymous with *darura* (necessity),\textsuperscript{306} which if correct would give *maslaha* a strong Qur’anic basis (albeit, limited by the scope of necessity).

Hallaq observes that *maslahah* has become the backbone of the Islamic reform movement in recent times.\textsuperscript{307} The 20th century scholar Maudodi took a position on *maslahah* similar to that of Rida and postulated that it could be used to derive laws to address contemporary needs under a parliamentary system in Muslim States.\textsuperscript{308} There would therefore be a legal mechanism to abolish slavery,\textsuperscript{309} tax usufruct or minerals (*riqaz*), matters which are not explicitly or fully addressed in the Qur’an or *sunna*.\textsuperscript{310} On

\textsuperscript{302} See Chapter 3 ‘Some problems with contemporary Islamic Jurisprudence’.


\textsuperscript{307} Wael B Hallaq, *A History of Islamic Legal Theories* (1997), 216. The Encyclopaedia of Islam notes under *maslahah* that:

[...] In the modern age, however, under the impact of Western legal thought, the concept of *maslahah* has become the subject of an increasing interest among jurists who have sought legal reforms in order to meet the needs of the modern conditions of Islamic society.


\textsuperscript{310} There is binding precedent in *Sunni* Islam for declaring illegal something not explicitly prohibited by the Qur’an or *sunna*. Temporary marriage (*muda*) which was permitted during the lifetime of the Prophet was made illegal in the lifetime of Omar I (the Second Orthodox Caliph), a prohibition that has crystallised into a binding norm in *Sunni* Islam, but not in *Shi‘i* Islam where *muda* is still permitted: Edna Boyle-Lewicki,
the other hand, el-Fadl persuasively makes the case that much of the argument from the ‘reform’ movement is goal-oriented and with some exceptions lacks analytical depth. On a similar note Zubaida refers to the phenomenon of what he termed ‘Sunni realism’ where:

The ulama extended the concepts and vocabularies of the shari’a to accommodate the practices of the State, thus maintaining their own authority and competence in these areas.

Hallaq divides the reformers inter alia into:

(a) Utilitarians - who couch their theory chiefly in terms of maslahah. He argues persuasively that this ‘religious utilitarian’ use of maslahah amounts to a general licence and arbitrariness of legal theory, and

(b) The liberalists, some of whom he cites with approval.

One such example is the utilitarian use of maslahah to validate/legitimise ‘kamikaze operations’ simply, and notwithstanding shari’a prohibitions, by invoking maslahah, on the basis that such attacks put fear into the enemy’s heart. There are on the other hand Muslim organisations in countries where Muslims are a minority which denounce terrorism and kamikaze action. These decisions too may appear to lack legal rigour, which critics (albeit generally and arguably with an equal lack of rigour), appear to dismiss as politically expedient. The absence of legal argument and evidence on the part of Muslims gives some credence to the view that both support for ‘kamikaze operations’ and ‘denunciations of

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311 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 191.
314 Ibid, 214.
315 Ibid, 253.
terrorism' are politically expedient in their respective political and social communities.

Disingenuous, instrumental and/or expedient use of maslahah in particular is not new. The better view for the use of maslahah endorsed in this thesis for contemporary use is al-Shatibi’s principle. Al-Shatibi formulated a principle to prevent the arbitrary use of maslahah. It has stood the test of time and could be adopted by the jurists of this day. Al-Shatibi stated that:

> If the application of a principle in its most inclusive sense leads to that which is inconsistent with the Law or reason, then it may not be viewed as fully sound or consistent, and must no longer be applied unconditionally.

In the contemporary context therefore the two extremes of:

(a) unrestrained use of force against the USA-Coalition and its civilians or
(b) unconditional blanket condemnation, without qualification or highlighting any legal exceptions, by Western Muslims and pro-Western governments in Muslim States against all ‘terrorist’ attacks, would both appear to fail on al-Shatibi’s principle.

The better position would appear to fall somewhere between these extreme positions. The perspective presented here is that while arbitrary killing of civilians and destruction of property is ultra vires, nonetheless, and notwithstanding such loss of innocent life, in some instances a legal case can be made for the necessary use of lethal force, against those fighting Muslims. This case must be made explicitly however, and within the rules of the shari’a. The legal authority to do this on a case-by-case basis must be developed by shari’a jurists. As required then by the shari’a, these legal opinions must be put to other jurists for critique and also to the wider Muslim population for acceptance or rejection, and allowed to be debated until a consensus on the validity or otherwise of that opinion crystallises.

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318 Ahmad al-Raysuni, Imam al-Shatibi’s Theory of the Higher Objectives and Intents of Islamic Law (2005), 104.
Sadd al-Dhari'ah: The Blocking of a means of harm or Pre-emptive Prevention

Dhari'ah refers to a legal instrument that circumvents something that is otherwise prohibited; sadd is the prevention of such circumvention.\(^{320}\) It was introduced as a source of law by the Second orthodox caliph,\(^{321}\) and has again stood the test of time. The doctrine of sadd al-dhari'ah suggests that ‘it is appropriate to prevent harm before it actually materialises’,\(^ {322}\) i.e. arguably similar, although not always identical, to the contemporary notion of pre-emption, and is the converse of maslahah.\(^{323}\) There is also arguably some Qur'anic support for sadd al-dhari'ah,\(^{324}\) although this view is not universally accepted. Sadd al-dhari'ah is generally rejected as a source of law by the Hanafi and Shafi'i schools while the Maliki and Hanbali schools endorse the principle but with limitations.\(^ {325}\) As with maslahah, sadd al-dhari'ah has been used in an unprincipled fashion, particularly to promote politically expedient laws.\(^ {326}\) There is, arguably for this reason, a general reluctance by jurists to endorse sadd al-dhari'ah. The intent here however, is not to reject the principle which has survived since Omar I, but to ensure that it is employed transparently, in a defensible manner and within the shari'a context, subject to Muslim consensus (idjma').


\(^{321}\) Ibid. (43.

\(^{322}\) Khaled Abou El-Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (2001), 190.

\(^{323}\) Ibid. (191.

\(^{324}\) Qur'an 2:188:
And do not eat up your property among yourselves for vanities nor use it as bait for the judges with intent that ye may eat up wrongfully and knowingly a little of (other) people's property.

Or alternately translated in Ahmad al-Raysuni, *Imam al-Shatibi's Theory of the Higher Objectives and Intents of Islamic Law* (2005), 54. as:

And devour not one another's possessions wrongfully, and neither employ legal artifices with a view to devouring sinfully, and knowingly, anything that by right belongs to others.


\(^{326}\) For example, the use of laws in Saudi Arabia to prevent women from driving cars (the reason proffered is to stop (sadd) the means (i.e. driving legitimately) but because women may use their cars improperly to meet their lovers! This is contrary both to logic (because it does not prevent men from driving although they may conceivable use cars for the same purpose) and also contrary to explicit hadith permitting women to travel, ride camels etc: Khaled Abou El-Fadl, *Speaking in God's Name: Islamic Law,*
The word ‘urf appears in the Qur’an in the context of pre-existing obligation but not in the meaning of binding custom. On the other hand, in practice the shari’a has co-existed with the many customary laws of conquered peoples and ‘urf has always been a source of law under Islam.

The custom of Medina’s Arabs was clearly recognised as a dependent source of law in Islam and formed the legal and cultural foundation for Medina’s Muslim society. Peters explains that the aim of Malik bin Anas, eponym of the Maliki School, was ‘to codify and systematise the customary law of Medina’, and in this context Medinan custom was throughout the ages (and still) is used to some extent by all Muslims. It is noted here that in those early days the overwhelming majority of Muslims were culturally ‘Arab’. It is suggested that this statement really means that the early shari’a which evolved during the revelation of the Qur’an did not occur in a vacuum but that existing custom, and importantly, a customary system other than that of the Meccans, served as this existing foundation. That is, Medina’s acceptable legal and cultural practices not specifically prohibited in the Qur’an or the practice of the Prophet, continued uninterrupted in the (then) new and

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327 Qur’an 7:199: *Hold to forgiveness; command what is right; but turn away from the ignorant.*

The phrase (wa’amur bil ‘urf) to command what is right is used in a context different from ‘custom’ in the everyday contemporary legal meaning. In this context however ‘custom’ etymologically is *ipso facto* ‘right’ (as the words ma’rauf (good), arafa (to know) and ‘urf, share common triliterals) and provides a legal basis for retaining what is good and abrogating ‘bad custom’ ie custom that is explicitly contrary to prohibitions in the Qur’an and sunna.


emerging Islamic environment. There is clear evidence that similar transformations occurred in other Islamised societies.333

Some Schools refer to the general abrogation of (all) pre-Islamic laws and customs by the shari’a. In practice, however, abrogation was interpreted as the abrogation only of existing laws and customs that were inconsistent with the shari’a.334 With conquest, Muslims adapted laws of the Jews, Romans and Persians,335 neighbours of the early Arabs and shows an incorporation into the shari’a of non-Medinan, including non-Arab norms. This allowed the co-existence of customary laws that (in theory) were not inconsistent with, and in time became part of, the shari’a. Many scholars, including al-Shatibi and ibn ‘Aqil accepted custom as a source of Islamic law and confirmed and approved this practice.336

In a contemporary context the OIC referred to custom as ‘the human heritage of the umma’.337 That is, ‘urf in this context, is not entirely dissimilar to the recognition of legal custom under general international law,338 or the accretion of common law and it is proposed on this basis that contemporary (international) customary ICL and IHL can prima facie can serve as a legitimate base for developing shari’a criminal and humanitarian

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334 Maryam Kabeer Faye, Journey through Ten Thousand Veils (2009), 115. describes the co­ mingling of the legal traditions of the various prophets in the following terms:

That prophetic Message, that truth brought to humankind by all of the prophets is like a glass. At first the glass was empty. Then Prophet Adam put water in it. After that, every prophet continued to fill that glass [...] all the teachings brought by all the true messengers of God are now merged in the glass and cannot be removed or separated in any way from each other.

335 Muhammad Baqir As-Sadr, Lessons in Islamic Jurisprudence (2005), 2.; Wael B Hallaq, The Origins and Evolution of Islamic Law (2005), 4. contests the view that the borrowing was heavy, pointing to a vibrant pre-Islamic Arab legal culture, though this does not substantially affect the key factor that Islamic law drew upon custom.

336 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 35.


law. Custom however, continues to be an important source of law and is a rich, legitimate base upon which shari'a HL can draw.

An Overview of the Sources
Although some sources of Islamic law are identified here, for completeness the broader question of whether 'sources' are relevant at all must be examined. This is because some Muslims consider Islamic law as 'complete' in every sense and ipso facto needs no further development.

This idea of a complete law is arguably founded on a very literal reading of isolated provisions in the Qur'an. The Qur'an states 'today I have perfected your religion',\(^{339}\) a verse revealed to the Prophet shortly before the Prophet’s final pilgrimage to Mecca and is called the farewell pilgrimage (hadjat al-wida').\(^{340}\) In his speech at the hadjat al-wida’ the Prophet asked the people three times if he had delivered the message (and they responded affirmatively)\(^{341}\) after which revelation ceased. This gives rise to a question on the meaning of the term ‘perfection’. Does this mean that, at that point over 1,400 years ago, Islamic law was complete, determinate, fixed and frozen,\(^{342}\) unchangeable forever? This is the literalist view of some neo-salaf.\(^{343}\) The early Muslims, including the Companions and the eponyms, certainly did not take this view of a ‘fixed and complete’ law and is in reality a later innovation. Thus, while most Muslims will state that Islam is complete and a ‘complete way of life’,\(^{344}\) they will also concede that the jurists of every period developed Islamic law and the sources circumscribed the legitimate development of law and it is this very ability that makes it ‘complete’. Another possible view of completeness is that every ‘ordinary individual’ in every age is guaranteed that the shari’a they are faced with will be treated as the complete law for

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\(^{339}\) Qur'an 5:3.

\(^{340}\) Adil Salahi, Muhammad: Man and the Prophet (2002), 784.

\(^{341}\) Ibid, (at 784.


\(^{343}\) In contradistinction to this position, neither do the neo-Salafi accept taqlid (imitation) [discussed immediately below, which makes the neo-salafi position on taqlid quite tenuous at best or even untenable.

\(^{344}\) Some puritanical interpreters take this to mean that Islamic law has no need for further development, although this is a minority view. The majority view this statement ‘of completeness’ to as being no different from stating that Australian common law is a complete system of law in that it is a living, practical legal system. This 'completeness' does not preclude the possibility of creating new rules to fit emerging exigencies and no reasonable person would state this.
judgment, while jurists will have to explain their own failure by neglect to
keep the *shari'a* current. Even neo-*salaf* must concede that the Orthodox
Caliphs and eponyms legitimately did develop the law as most neo-*salaf*
considered the Companions of the Prophet or the followers (*tabi'un* تابعون) as righteous predecessors whose precedent is binding.\(^{345}\) The processes
through which change was effected are now examined.

*Idjtihad* (Renewal) and *Taqlid* (imitation)
Renewal or development of the *shari'a* was categorised as the doctrine of
*idjtihad*, while on the other hand the doctrine of *taqlid* (in one view) is the
concept of binding precedent.\(^{346}\) The concept of ‘binding precedent’ is not
unproblematic however. This is because the Qur'an is multifaceted,\(^{347}\) and
the Prophet stated that ‘there are as many ways to God as there are seekers
of truth’.\(^{348}\) While this view is liberating from a theological perspective,
from a legal perspective (and when carried out to the extreme) is prima
facie a recipe for extreme individualism and anarchy. Jurists of all times,
even those who favour *idjtihad* while always supporting legal plurality
have acknowledged that unchecked plurality causes ‘serious problems’.\(^{349}\)
There was, therefore, a point in the 10th century, well after the death of the
Prophet, his Companions and the *tabi'un*,\(^{350}\) where some *Sunni* jurists
alleged that the ‘gate of *idjtihad*’ had been closed.\(^{351}\) The historical problem
is not that *idjtihad* was systematised or curtailed in practice, but that it was
successful in ‘discrediting reason’ as a source of Islamic law.\(^{352}\) However,
El-Fadl confirmed that this ‘closure’ was:\(^{353}\)

nothing more than a rhetorical device to resist the chaotic
proliferation of new schools of thought and legal opinions.

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\(^{346}\) For a fuller discussion on this issue, see for example: Rudolph Peters, ‘*Idjtihad* and

\(^{347}\) Qur'an 5:8.


\(^{350}\) See text accompanying n 345, 666.

\(^{351}\) For a fuller *Sunni* perspective and discussion of this issue see: Wael B Hallaq, ‘Was the
Gate of *Ijtihad* Closed?’ (1984) 16 International Journal of Middle Eastern Studies.; For a
summary Shi'i perspective see Sayed Hassan Amin, *Islamic Law in the Contemporary


\(^{353}\) Khaled Abou El-Fadl, *Speaking in God's Name: Islamic Law, Authority and Women* (2001),
38 (emphasis added).
but noted that in practice:

\[
\text{it is doubtful that the dichotomy between taqlid and idjtihad was as clear or decisive as some contemporary scholarship has claimed. It was likely that taqlid was asserted as a legal presumption of continuity.}^{354} \text{ It effectively constituted a demand on jurists to explain or justify changes [...] however, jurists regularly introduced innovations and changes in the law while claiming that they were in fact adhering to precedent or the spirit of precedent.}
\]

Further, in instructing Muslims to receive the message, the Prophet noted that 'the receiver [of knowledge] may be more perceptive than the transmitter'\(^{355}\) thus clearly showing that knowledge, understanding and insight are not condemned to an ever-diminishing spiral. The question of whether the shari'a was ever legitimately 'frozen' in practice however, is clearly resolved in the negative and jurists have over the centuries re-interpreted, developed and re-formulated various aspects, creating new legal norms,\(^{356}\) while some norms have fallen into disuse, new norms have emerged and others have continued unchanged.\(^{357}\)

Development of the law is arguably a 'must' in the case of humanitarian or criminal law. As new weapons develop, a shari'a examination of their legitimacy or otherwise - and the limits and rules that govern their use - must also follow closely so that Muslims can work within Covenant limits as reinterpreted in the age. The acceptance through \text{idjma}' of adopted and adapted custom will in time help refine and crystallise a binding law for current era. This assessment is not and should not be a superficial process of 'rebadging' but must involve a genuine, careful and critical engagement with shari'a methodologies, which leads to renewal of Islamic law.

This sort of debate however is not unique or even a relic of the past. The debates in the Australian context, and there are parallel debates in other common law jurisdictions such as the USA and the UK, are noted but

\begin{footnotesize}

354 The presumption of continuity is called \text{istishaab} and is sometimes referred to as a minor/dependent source of law: Jasser Auda, \text{Maqasid al-Shariah as Philosophy of Islamic Law: A Systems Approach (2008), 77.}

355 Taha Jabir al-Alwani, \text{idjtihad (1993), 30.}

356 For example, the prohibition on the use of drugs for non-medical purposes.

357 Prayer, fasting, mandatory (purifying) poor rate/charity (zakat) and the pilgrimage to Mecca (hajj).
\end{footnotesize}
However, the proposition that Islamic law may continue to be developed, while not unproblematic for some, can nonetheless find support in the Qur'an, the practice of the Prophet and his Companions and countless jurists including the eponyms and the jurists of their various Schools. It is the position endorsed in this thesis. The two related doctrines of taqlid and idjtihad are now examined in turn.

The Doctrine of Taqlid (Imitation)
The doctrine of taqlid broadly holds that precedent as ‘determined’ by the eponym of a School is binding. Consequentially both a muqallid Muslim (one who follows taqlid) and muqallid jurist are bound by precedent and thus not permitted to interpret the Qur'an or the sunna de novo (at least) on any ‘settled’ point of law. Weiss rightly observes however, that taqlid is not ‘totally passive because it entails introspection and an exercise of conscience’. Taqlid has survived as a concept because the majority of Muslims are not expected to be proficient in shari'a and in Qur'anic Arabic.

Importantly, the neo-salaf do not accept taqlid as valid, which consequently means that there is a presumption that each neo-salafi is responsible for his/her own interpretation of the texts (idjtihad), thus

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359 This is because is the Qur'an claims to be a Criterion for all times: Qur'an 25:1.


361 Khaled Abou El-Fadl, Speaking in God's Name: Islamic Law, Authority and Women (2001), 37. particularly for the required qualifications before a jurist was generally considered capable of idjtihad. The Qur'an acknowledges that “not equal are those who know and those who do not know”: Qur'an 39:9; Professor Hallaq also refers to the 'worst form of taqlid' as practiced not by Muslims but by non-Muslim Orientalists who uncritically and blindly accept and follow better known Orientalists such as Professor Schacht: Wael B Hallaq, 'The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse' (2002) 2 UCLA Journal of Islamic and Near Eastern Law 1, 14. With reference to the 'gate of Ijtihad being shut” Professor Hallaq notes that in practice and with hindsight 'the gate that was shut was that of Orientalist idjtihad, not that of the shari'a': Wael B Hallaq, 'The Quest for Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse' (2002) 2 UCLA Journal of Islamic and Near Eastern Law 1, 16. In this context Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 54. documents the (arguably well known) claim that Bin Laden was not qualified to exercise idjtihad, a view supported in this thesis.

vitiating *taqlid* as a defence. Further, while neo-Salaf accept the concept of caliphate and *emirship* (or political leadership) and consequently agree to obey the leader to whom they have pledged their allegiance (*bay'a*) they still retain the autonomy to refuse what they subjectively consider unlawful. While the pledging of one's loyalty to a leader through *bay'a* is intra vires, some *salaf* such as Faraj appear to go beyond this demanding unquestioning obedience of Muslims on his premise that the Prophet demanded such obedience. Even if the assertion that Prophet demanded unquestioning obedience was true, which it explicitly is not, Faraj does not provide the legal basis on which he, or any other contemporary leader,

*On the other hand in practice some of the ‘failed suicide’ missions reveal that the bombers had very little knowledge of Islam. According to interviews conducted by Robert Baer, *The Delhi We Know: Dealing With the New Iranian Superpower* (2009), a Pachtoun boy, a failed suicide bomber, did not know anything about the Israeli-Palestinian conflict: at, 223, thought that the President of Pakistan was a Jew: at, 223, and had no idea where Iraq was located. If this is the situation in Pakistan, the situation in the UK is arguably worse. None of these bombers knew Arabic, or for that matter read (or more importantly understood) the Qur'an in Arabic: at, 227, or had not had any first hand experience of living in a wartime situation: at, 227, and believed that all innocent people killed in bombings went to heaven (and thus justified their killings): at, 230."

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363 On the other hand in practice some of the ‘failed suicide’ missions reveal that the bombers had very little knowledge of Islam. According to interviews conducted by Robert Baer, *The Delhi We Know: Dealing With the New Iranian Superpower* (2009), a Pachtoun boy, a failed suicide bomber, did not know anything about the Israeli-Palestinian conflict: at, 223, thought that the President of Pakistan was a Jew: at, 223, and had no idea where Iraq was located. If this is the situation in Pakistan, the situation in the UK is arguably worse. None of these bombers knew Arabic, or for that matter read (or more importantly understood) the Qur'an in Arabic: at, 227, or had not had any first hand experience of living in a wartime situation: at, 227, and believed that all innocent people killed in bombings went to heaven (and thus justified their killings): at, 230.

364 See n 387, 671.

365 Maudodi (/Maududi) interprets the Qur'an 17:80 as providing a legal basis for the use of political power for the continuing reform of society through law and *idjtihad*: Syed Abul 'Ala Maududi and Khurshid Ahmad, *Islamic law and the Constitution* (2nd ed, 1960), 5:

> That is, either grant me power on earth or make any ruling authority, any State my supporter, so that I may with the coercive powers of the state, establish virtue, eradicate evil, put an end to the surging tide of corruption, vulgarity and sin, set at right the disruption which has engulfed life and administer justice according to your revealed law.

Maudodi, whom Professor Bassioumi acknowledges as a great scholar: Cherif Bassioumi, *Sources of Islamic Law, and the Protection of Human Rights in the Islamic Criminal Justice System* in C Bassioumi (ed) *The Islamic Criminal Justice System, (1982)* 31.) does not however explain how Quranic verses:

> (Therefore do thou give admonition, for thou art one to admonish: Qur'an 4:80.)

and

> (Thou art not one to manage (men's) affairs, [nor are you their keeper]: Qur'an 88:21-22.),

impact on this his theory. Nor does he explain that while God could have directly compelled all humanity to believe and worship Him: Qur'an 10:99, but did not chose to do so, and therefore that in following the Maudodi interpretation on the exercise of Executive power, the ruler may go beyond maintaining peace and security thus interfering in an individual's life in order to 'eradicate vulgarity and sin', acts on the part of the ruler that appear ultra vires. Further, and negating some of Maudodi's views is the Qur'anic reminder to Muslims, that God is aware of the wrong doing of some but as is consistent will total moral free-will, permits them to do so without impediment: Qur'an 14: 42-43.

366 R L Euben and M Q Zaman (eds), *Princeton Readings in Islamic Thought* (2009), 334.

367 This view of the Prophet is not correct as is discussed in 'Obedience to Leaders' in Chapter 4, obedience to the Prophet was not unconditional.

368 Qur'an 60:12.
is entitled to such (unquestioning) obedience as he attributed to the prophethood.\textsuperscript{369} In his book, Faraj admits that individual Muslims stray because of exaggerated claims and extremism but does not put himself (or even argue as to why he does not fall) into this category.\textsuperscript{370} This is an extreme form of arrogance exhibited by some contemporary Muslims and Muslim leaders, apparent to all but themselves and their supporters.\textsuperscript{371}

Shi'i Muslims generally accept (\textit{taqlid}) and follow the religious opinions of pre-eminent scholars referred to as \textit{marji'}.\textsuperscript{372} Thus the concept of superior orders\textsuperscript{373} may, in some cases, apply to Shi'i Muslims who commit serious crimes based on their belief in \textit{taqlid}.\textsuperscript{374} Shi'i Muslims are required to follow a jurist (\textit{marji'}) but only during the jurist's lifetime. When the \textit{marji'} dies, the Muslim selects a new scholar (\textit{marji'}), thus exercising personal choice.\textsuperscript{375} In practice, Muslims may consider themselves bound by the School into they were born,\textsuperscript{376} or which a ruler adopts as the law of the land.

\textbf{A Short Critique of Taqlid}

The Qur'an states 'if you don't know, ask the people of remembrance (\textit{ahl al-dhikr}) or those who know'\textsuperscript{377} and is sometimes cited as a legal basis for \textit{taqlid}.\textsuperscript{378} However, 'ask' clearly implies an active role and requires asking a knowledgeable person,\textsuperscript{379} one who is still alive (as in the case of Shi'i

\begin{itemize}
\item \textsuperscript{369} R L Euben and M Q Zaman (eds), \textit{Princeton Readings in Islamic Thought} (2009), 334.
\item \textsuperscript{370} Ibid.
\item \textsuperscript{371} See text associated with n 77, 627.
\item \textsuperscript{372} Robert Baer, \textit{The Devil We Know: Dealing With the New Iranian Superpower} (2009), 219.
\item \textsuperscript{373} Article 28 \textit{Rome Statute of the International Criminal Court}, Came into force on 1 July 2002 (with the ratification of 60 States), U.N. Doc. A/CONF.183/9, (as corrected by the proces-verbaux of 10 November 1998 and 12 July 1999), 2187 UNTS 3.
\item \textsuperscript{374} For an example of Shi'i highjackers seeking explicit legal advice on the permissibility of killing hostages in the particular case for executing Kuwaiti citizens see Robert Baer, \textit{The Devil We Know: Dealing With the New Iranian Superpower} (2009), 218.
\item \textsuperscript{375} Jamal Sankari, \textit{Fadlallah: The Making of a Radical Shi'ite Leader} (2005), 58.
\item \textsuperscript{376} What is meant by this statement is that parents raise their children in their (parent's) faith and this faith includes the School which the parents follow.
\item \textsuperscript{377} Qur'an 21:7; According to Milton J Cowan (ed) \textit{The Hans Wehr Dictionary of Modern Written Arabic} (1980), 331. (\textit{\textsuperscript{الله }الله أراتي}) (\textit{\textsuperscript{الله }الله أراتي}) which derives from \textit{\textsuperscript{الله }الله أراتي}: which in its form (II), means to expound, to explain, to elucidate etc.
\item \textsuperscript{378} Rudolph Peters, \textit{'Idjihad and Taqlid in 18th and 19th Century Islam' (1980) 20 Die Welt des Islams, New Ser, 131, 140.
\item \textsuperscript{379} Taha Jabir al-Alwani, \textit{Ijtihad} (1993), 8.
\end{itemize}

\begin{itemize}
\item A person gave a legal opinion, an opinion when followed that led to the death of a sick person (and who had followed the dictates of what was quite a foolish opinion which involved asking a very sick person
Islam\(^{380}\) as opposed to following or ‘interrogating’ the texts of a long dead eponym. Further, acquisition of knowledge is mandatory (\textit{fard 'ayn}) on every Muslim man and woman,\(^{381}\) and the Qur'an requires Muslims to increase their knowledge\(^{382}\) which arguably qualifies the word ‘ask’ in the active role. Islam mandates absolute obedience only to God,\(^{383}\) and in practice these absolutely mandated individual obligations are classified as \textit{fard 'ayn} obligations only.\(^{384}\) There is therefore in practice a strong tension between taqlid, which has resolved itself as the Muslim being ‘obliged’ to follow a single School and the Qur'anic notion of individual responsibility and accountability.\(^{385}\) Doctrinally, however, only God may legitimately make something \textit{halal} (permitted) or \textit{haram} (prohibited).\(^{386}\) Therefore, while obedience is required to the ‘leader’,\(^{387}\) this obedience is always subject to the leader’s instruction itself being lawful,\(^{388}\) except perhaps for some

\(\text{to take a bath or shower in preparation for his canonical prayers while there is a clear dispensation for such situations). The Prophet condemned the actions of the opinion giver and accused him of being indirectly responsible for the person’s death.}\)

\(^{380}\) See text accompanying n 375, 670.

\(^{381}\) Javad Nurbakhsh, \textit{Traditions of the Prophet} (1981), 49. According to Abd al-Salam Faraj, ‘Al-Faridah al-Gha’ibah (The Neglected Duty)’ in R L Euben and M Q Zaman (eds), \textit{Princeton Readings in Islamic Thought}, (2009) 327, 333., the quest for knowledge is a collective duty (no authority cited. This view is clearly at odds with the statement of the Prophet cited above). Faraj further states that fighting is an individual duty (again at odds with the consensus that the armed \textit{djihad} is generally a collective duty). His reasoning is that fighting is prescribed for Muslims (Qur'an 2:216) and states that the obligation of fasting uses similar wording (Quran 2:183) Thus by analogy that fighting is as with fasting, individually binding. His reasoning is quite problematic but even if valid has not yet been accepted by consensus.

\(^{382}\) ‘The righteous are those who ask God to increase them in knowledge: (‘rabbi zid ni ilmann’ - God please increase me in my knowledge):’ Qur'an 20:114.

\(^{383}\) Qur'an 3:132.

\(^{384}\) See text accompanying n 19, 615.


\(^{386}\) Qur'an 5:87; Qur'an 6:114; Qur'an 10:59; see also Qur'an 6:148; Qur'an 7:32; Qur'an 16:35.

\(^{387}\) Qur'an 4:59. Note however that, the term ‘those in authority’ \textit{(أولي الأمر)} is qualified by ‘from among you’ \textit{(منكم)} i.e. Muslims) but may have a broader meaning than the ‘leaders of government’ to include independent scholars. However, it is sometimes argued by salafi and other groups that the present leadership of Muslim States is effectively held by non Muslim and that the leaders are therefore not from among you (the Muslims) and therefore, are not owed obedience under the Qur'an. This interpretation explains how Bin Laden (then a Saudi citizen and prior to his Saudi citizenship being stripped) gives his allegiance to the leader of the Taliban in preference to the King of Saudi Arabia.


During his acceptance speech, Abu Bakr [the first orthodox caliph] said: “Obey me as long as I obey God and his Messenger. And if I
limited temporary latitude through necessity when what is unlawful for example becomes tolerated for the period of the exigency. That is, in obeying a lawful command and disobeying a leader’s unlawful command one is actually obeying what God declared lawful and right.

Unquestioning obedience is problematic vis-à-vis the Qur’an. Individual accountability is absolute and, except in a few cases of duress or insanity, does not legitimately allow one to abdicate responsibility for one’s actions.389

To this end, the eponyms required their followers to understand and deliberately accept a ruling. Abu Hanifa made this a specific condition for those using his methodology, to generate further legal opinions.390 According to some Muslim scholars, there is an obligation on a muqallid Muslim to enquire whether a legal opinion ‘contains God’s decree or only human opinion’.391 In the latter case, the Muslim is obliged to consult another independent specialist.392 Specialist consultation (ittiba’) is not considered in any further detail here. In Islam, God recognises subjective accountability, arguably excusing individuals for exercising taqlid on complex matters beyond their personal knowledge and analytical ability.393 Objective accountability in this life on the other hand must not admit disobey God and his Messenger, then I have no right to your obedience.

389 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 26. Abdicating responsibility for one’s decisions will not be permitted in the Hereafter. According to Qur’an 33:66:

The Day that their faces will be turned upside down in the Fire they will say: "Woe to us! Would that we had obeyed God and obeyed the Apostle!" And they would say: "Our Lord! We obeyed our chiefs and our great ones and they misled us as to the (right) path ..."

390 Charles Adams, ‘Abu Hanifa’ in I Edge (ed) Islamic Law and Legal Theory, (1996) 381.; This requirement is compatible with individual responsibility and accountability because a decision to follow a particular School’s ruling on a matter is an individual decision. While reference was made above, to a person being ‘born into’ a School See, n 376, humans are specifically commanded not to blindly follow the faith of their ‘fathers’: Qur’an 43:22-25.

391 This enquiry is clearly only mandatory to the extent of the individual’s knowledge and ability. See for example Qur’an 2:33; Qur’an 2:286.


394 Qur’an 2:33; Qur’an 2:286:

God does not burden a soul beyond what it can bear.
ignorance of the law as a reasonable excuse, creating a tension within the shari'a when applied temporally.

Corruption among some scholars\textsuperscript{395} also poses a problem with respect to \textit{taqlid}, particularly if it leads to undue deference to the Executive. However, \textit{taqlid} has been supported by scholars\textsuperscript{396} although it is far from being a settled issue, except arguably among Shi'i Muslims.\textsuperscript{397} On the other hand, \textit{taqlid} has been rejected by ibn Taymiyyah\textsuperscript{398} 'strong and authoritative scholars' such as Shatibi\textsuperscript{399} and by others throughout the ages.\textsuperscript{400} Clearly the eponyms of all the Schools did not accept \textit{taqlid}. On the other hand, systematically building up jurisprudence requires some form of binding authority and strikes a chord with Oliver Wendell Holmes, who said that 'continuity with the past is not a duty but a necessity'.\textsuperscript{401}

In this context, \textit{taqlid} arguably is not dissimilar to the common law doctrine of stare decisis where judges of the lower courts are bound by precedent, 'a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision making'.\textsuperscript{402} El-Fadl characterises \textit{taqlid} as a legal presumption of continuity in Sunni methodology,\textsuperscript{403} a position supported in Shi'i methodology.\textsuperscript{404} \textit{Taqlid} as a rebuttable presumption is the meaning used in this thesis.

\begin{footnotesize}
\begin{itemize}
\item[396] Khaled Abou El-Fadl, \textit{Speaking in God's Name: Islamic Law, Authority and Women} (2001), 36.
\item[397] Jamal Sankari, \textit{Fadlallah: The Making of a Radical Shi'ite Leader} (2005), 58.
\item[398] Khaled Abou El-Fadl, \textit{Rebellion & Violence in Islamic Law} (2001), 64.
\item[400] For a contemporary and historical analysis, see Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16 International Journal of Middle Eastern Studies.
\item[401] Michael Coper, 'The Path of the Law: A Tribute to Holmes' (2003) 54 Alabama Law Review 1077, 1081. The concept of \textit{taqlid} bears some similarity to the common law doctrine of legal precedent: see Telstra Corporation v Treloar (2000) 102 FCR 595, 602. The doctrine of stare decisis which takes its name from the Latin phrase \textit{stare decisis non quiesat movere} translates as 'stand by the thing decided and do not disturb the calm'.
\item[403] Khaled Abou El-Fadl, \textit{Speaking in God's Name: Islamic Law, Authority and Women} (2001), 38.
\item[404] Ayatollah M B al-Sadr, \textit{Principles of Islamic Jurisprudence According to Shi'i Law} (2003), 123.
\end{itemize}
\end{footnotesize}
The Doctrine of *Idjtihad* (Renewal)

As opposed to a relatively static 'taqlid' view of law is the notion of *tajdid* (to renew) which gives rise to the doctrine of *idjtihad* (renewal). The word *idjtihad* comes from the same root word as *djihad* although in this morphological construct it refers to striving to discover 'meaning' in the Signs of God. Bassiouni and Badr succinctly and accurately characterise *idjtihad* as 'unprecedented doctrinal development'. Islamic tradition holds that the learned Muslim is the inheritor of the prophethood which provides a legal justification for the permissibility of *idjtihad* by jurists and scholars, or even learned Muslims, whatever this might mean subjectively. On the other hand, traditional scholars have required a sound knowledge of Arabic language, grammar and rhetoric as a prerequisite for a *mujtahid* or one competent to practise *idjtihad*.

However, one is only expected to try one's best to discover and understand the law. The Prophet explained the value of an individual's *idjtihad* as follows: 'Even failure to ascertain the 'right answer' through genuine enquiry is rewarded once, while a correct determination and understanding is rewarded twice, by God'. *Idjtihad*, as in the common law, is not speculative and must only address issues of actual concern.

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405 Note that the word *ayat* (א) means a 'verse' of the Qur'an and also the 'signs' of nature. Both meanings apply in this context.


Even strong advocates of *taqlid* such as Usmani\(^{413}\) concede the validity of the Prophet's statement that 'mujtahids will be rewarded for their endeavour, exercised with skill and care, even if they are wrong'.\(^{414}\) Further, those responsible for 'closing the gate of *idjtihad*',\(^{415}\) ironically were themselves engaged in *idjtihad* in deciding to create this 'new' legal rule.

On the other hand, considering every issue *de novo* is impractical and creates uncertainty in the law. This thesis, therefore, supports and adopts a limited version of *taqlid* to the effect that continuity of law constitutes a rebuttable presumption. This is a practical position that is legitimate within *shari'a* methodology. In principle this continuity must extend to intra vires customs of non-Muslims.

Consequently, unless a previous decision was shown to be wrong (in law or fact), absurd or unless the situation is novel e.g. the question of the permissibility of xenotransplantation, there should arguably be a presumption of the validity of existing custom and law. Taha criticises this position as '[...] applying old and outdated judgments to contemporary situations, which often resulted in absurd and ludicrous proposals',\(^{416}\) although on the formulation of *taqlid* adopted above,\(^{417}\) the absurdities that would result would clearly rebut the presumption of continuity. Bassiouni and Badr's view of *idjtihad* as unprecedented doctrinal development\(^{418}\) confirms that their formulation of *idjtihad* as a valid mechanism for the progressive development of the law - as long as it is employed by competent and recognised jurists - does not prevent acceptance of the

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*Do not ask about something that has never happened, for I heard [my father] 'Umar ibn al-Khattab curse the one who asked about something which had not occurred.*

This hadith is also cited by Wali Allah Shah, *Shah Wali Allah's Treatises on Islamic Law* (2010), 6. Not that *shari'a* jurists have decried debating hypothetical problems of doubtful importance. An example is provided by discussions of the diminishing value of a slave as his master progressively cut off various limbs: Chibli Mallat, 'From Islamic to Middle Eastern Law: A Restatement of the Field (pt II)' (2003) 51 American Journal of Comparative Law 699, 737.  

415 See n 13, 617.  
417 See text following n 404, 673.  
418 See n 12, 616.
rebuttable presumption of continuity of law. This leads to an issue of what
‘continuity’ means, which is now considered.

Some Problems with Contemporary Islamic Law and Jurisprudence

There has been a substantial accretion of Islamic legal material from the
past 1400 years. Indeed the 20th century alone was responsible for the
production of a huge volume of such material.\textsuperscript{419} Tottoli however
categorises 20th century literature as evidencing:\textsuperscript{420}

\[\ldots]\ a rather marked homogeneity. From many points of view the
break with the medieval learned tradition is its most apparent
characteristic. In the face of the challenges of modernity and
scientific developments, in the confrontation with the West and with
the criticism of the Orientalists, the Muslim rejection of the legends
and traditions on the Biblical prophets handed down through the
literature and also widespread in popular culture and imagination is
almost total.

There is also an emerging consensus that some of this later material
is quite instrumental and self-serving,\textsuperscript{421} and can be ‘unabashedly result-
oriented and disingenuously selective’.\textsuperscript{422} This general statement
accurately reflects the neo-salafi view that Islamic jurisprudence must
somehow be purified by being free of all ‘extraneous influences’.\textsuperscript{423}
Expunging ‘extraneous influences’ gives little guidance about what is
acceptable, and the mechanisms used to ‘achieve’ this end are problematic.
In practice, in the military arena anyway, they appear to be employing the
latest non-Muslim military hardware available to their budgets with little

\textsuperscript{419} Wael B Hallaq, A History of Islamic Legal Theories (1997), 174.
\textsuperscript{420} Roberto Tottoli, Biblical Prophets in the Qur’an and Muslim Literature (2002), 182.
\textsuperscript{421} Wael B Hallaq, A History of Islamic Legal Theories (1997); 174.; Khaled Abou El-Fadl, The
Great Theft: Wrestling Islam from the Extremists (2005), 26; Khaled Abou El-Fadl, Speaking in
God’s Name: Islamic Law, Authority and Women (2001), 17; Michael Mumisa, Islamic
Law: Theory and Interpretation (2002), 51; Anne Elizabeth Mayer, ‘Islam and the State’
(1991) 12 Cardozo Law Review 1015, 1025.; The terms ‘instrumental use of law is used in
the sense – and while not endorsing his general views on terrorism and their causes -
as characterised in Michael Ignatieff, The Lesser Evil Political Ethics in the Age of Terror
(2004), 123:

\[\ldots]\ adjusting religious doctrine to rationalize the terrorist goal, rather
than subjecting it to the genuine interrogation of true faith.

\textsuperscript{422} Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001),
172.

\textsuperscript{423} Orientalism and Wahhabism while at two ends of the spectrum (and while there are
some exceptions to this observation) appear to have a similar approach in that they
seem to be goal oriented views of text and history: See Wael B Hallaq, The Quest for
Origins or Doctrine? Islamic Legal Studies as Colonialist Discourse (2002) 2 UCLA
journal of Islamic and Near Eastern Law 1. Professor Hallaq refers to among several other
orientalist’s work, for example to the ‘distorted evidence and twisted reasoning’ (ibid, 9)
and shallow analysis of Professor Crone’s work and is (ibid, 18) also critical of
Professor Schacht’s work.
or no reliance on the law that governs the use of (inadequate as may be) even these very imperfect laws.

According to el-Fadl, 'authoritarian hermeneutics have become rampant in Muslim societies' with the result that the methodology of this authoritarianism 'usurps and subjugates the mechanisms of producing meaning from the text 'producing instead 'a highly subjective and selective reading'. In his view 'the selective subjectivity of the authoritarian hermeneutics involves equating between authorial intent and the reader's intent, and renders the textual intent and autonomy at best, marginal'. This trend of purging Islamic law cannot totally be attributed to reaction to colonial influence, as noted by reference to earlier well-known scholars such as Ibn Taymiyyah and Ibn Kathir. However, what the different eras have in common is that leaders have used the shari'a to consolidate their own power and legitimise their rule and have done so in an instrumental or 'goal-oriented' manner.

El-Fadl describes this process as the 'death of traditional Islamic law', although perhaps the better view is that 'Islamic Jurisprudence which was once rich, subtle and complex has barely survived the impact of colonialism' but has nonetheless survived. On the other hand, Islamic law has also been influenced by broader more inclusive scholars in the earlier part of the 20th century and Tottoli refers in this vein to the works of Muhammad Abduh and Rashid Rida. Many scholars through the ages, even at the risk of great personal harm, have defied this homogenising

424 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 5.
425 Ibid.
426 Roberto Tottoli, Biblical Prophets in the Qur’an and Muslim Literature (2002), 170.
427 Rudolph Peters, Jihad in Classical and Modern Islam (1996), 112. A current example is Saudi Arabia which espouses a puritanical version of Islam and funds its propagation, including in support of armed struggles in the Occupied Territories, Chechnya, Kashmir, Afghanistan and elsewhere. Asad Abukhalil, The Battle for Saudi Arabia (2004), 140. At the same time its own hereditary leadership is according to some scholars given to excess funded through its own forms of crony ('assabiyah) capitalism: Daryl Champion, The Paradoxical Kingdom: Saudi Arabia and the Momentum of Reform (2003), 10; Tim Niblock, Saudi Arabia: Power, Legitimacy and Survival (2006), 118.
428 Khaled Abou El-Fadl, Speaking in God’s Name: Islamic Law, Authority and Women (2001), 172. Notwithstanding this statement, it is clear from Professor el-Fadl’s work generally that he does not believe that traditional Islamic law is 'dead' or even that it is a lost cause.
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trend which suppressed pluralism and promoted a 'one right answer' perspective. 'Inclusive' scholars who support the notion of plurality have done this by calling Muslims to the more faithful interpretation of the words of the primary texts in their plain and ordinary meanings and have sought to highlight and discredit, but not prevent the publication, discussion or disseminating of even most instrumental interpretations. Consequently, honest scholars have sometimes suffered terribly at the hands of the political leadership and 'their' jurists, a situation that continues not uncommonly in the contemporary Muslim world. It is arguably for this reason that many great contemporary shari'a scholars live and work in the secular West, because of the greater freedom of enquiry they enjoy. The call for the development of the shari'a in the West is therefore not to suggest that scholars resident in Muslim majority States are incapable, but simply a recognition that independent scholarship is more likely to emerge from independent institutions.

The reaction of some Western governments to the attacks of 11 September however, has in some cases arguably and worryingly, reduced this degree of freedom of enquiry and debate as demonstrated in the Benbrika Case in Victoria. Ruffles writes about the Benbrika Case that

430 Roberto Tottoli, Biblical Prophets in the Qur'an and Muslim Literature (2002), 175.
431 One of these forms of interpretation is called hilyal or tricks which allows Muslims to circumvent prohibitions: Asad Abukhalil, The Battle for Saudi Arabia (2004), 61.
432 The fact that Muslim States have on occasion made academic enquiry difficult to promote is illustrated by the example of Nasr Abu Zaid, an Egyptian Qur'anic scholar who was declared an apostate by an Egyptian High Court inter alia for calling for a 'different' interpretation of some Qur'anic verses. <http://www.britannica.com/eb/topic-711003/Nasr-Hamid-Abu-Zayd> [26 December 2006]. According to Judith Miller, Cod Has Ninety-Nine Names: Reporting from a Militant Middle-East (1997), 12. Sudanese Islamic scholar Mahmoud Taha was executed for 'apostasy', a charge he denied, but who had called the Sudanese interpretation of the shari'a cruel. Miller states that Taha was killed not (ibid. 13) 'for his lack of religious convictions but because of them'.
434 Western Governments have also begun this process of co-opting 'moderate' religious scholars and funding matters such dialogue and discussions of interfaith activity. Example is the (Australian Government's Department of Foreign Affairs and Trade (DFAT), DFAT Regional Interfaith Conference where young 'moderate' leaders are promoted. <http://www.dfat.gov.au/asean/rid_declaration_0910_perth.pdf>. This is not problematic from a religious perspective per se, although there are discussions of the constitutionality of issues around funding religious matters, which are issues well outside the scope of this work. What is problematic is when other 'voices' are stilled as is discussed in the Benbrika Case.
435 Michael Ruffles, 'Convictions in, jury out on terrorism laws', The Canberra Times (Canberra), 7 February 2009, B3.
Still many find the laws themselves to be abhorrent and unjust, a symptom of [then Prime Minister] Howard’s politics and a criminalisation of mere talk rather than stemming from a genuine need to protect Australians from home grown terrorists.

Some of these crimes, some which have already been attributed to the ‘terrorists’ in a political sense are now examined in their legal context.
APPENDIX 3

GENOCIDE: ICL V THE SHARI'A, A COMPARISON

The thesis examines the serious international crimes of genocide, ‘crimes against humanity’ and ‘war crimes’ as best fitting within the scope of the thesis’s subject matter. This is because these crimes are well established in the recent history of international law, and inter alia as codified in the Genocide Convention, the Statutes of the ICTY & ICTR, the Statute of Rome, as established in customary international law and as is demonstrated throughout this thesis, the acti rei which are prima facie prohibited by the shari'a. What is required then is to establish this as the correct position with respect to the relevant mental elements and then (as a separate exercise) to use this law as a suitable base to create equivalent crimes and legal processes that can be used in a shari'a prosecution.

In dualist systems, such as shari'a or the common law, and notwithstanding the international legal obligations on the State, in practice, and absent domestic legislation, States may not give legal effect to even a ius cogens crime such as genocide. The erga omnes obligations of the Genocide Convention nonetheless bind all Muslim States (and their subjects) on the international plane. However, the absence of a prosecutable form of a crime in domestic jurisdictions can create problems,

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1 Egon Schwelb, 'Crimes against Humanity ' (1946) 23 British Yearbook of International Law 178, 180.
4 See n 265, (and also the text accompanying that note), 729.
5 Article VI Genocide Convention. Note also that according to Art. 27 Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331, 27 January 1980,:
   A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.
6 Larry May, Crimes Against Humanity A Normative Account (2004), 24. See also discussion below of some Australian Cases on genocide, 729.
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as seen in the common law examples below. Muslims (and others) have binding treaty obligations to be performed in good faith under international law to create such prosecutable crimes, and for Muslims, a shari’a obligation to honour treaty obligations. As discussed, there is a further shari’a obligation to prosecute Muslim criminals under the shari’a. For reasons of equity, and until shari’a standards are established in law, trials must be made compatible only with international standards.

Further, and as a fundamental principle of dealing with people, the Prophet ordered the Muslims to speak to people in a language they understand. A legal implication of this prophetic command is for accommodation of the different ‘voices’, and means that Muslims who must co-exist and engage with the broader human community should also have a common legal language which is both authentically ‘Islamic’ and through which to communicate with an international legal community. It is posited that this must mean inter alia that Muslims can speak of equivalent and common areas of concern and hence, are permitted to create crimes in harmony with the broader international community. Muslim States have in cases done so by creating crimes covering a range of terrorism, financial and other ‘new’ transgressions.

What is essentially absent, from the Muslim perspective - and as alleged by people such as bin Laden - is arguably the evidence that Muslim nations have created such crimes in law, for example in response to binding Security Council resolutions, were done in conformity with shari’a methodology. While Muslim countries may speak of the ‘shari’a as law’ on the international plane, absence of the crimes in a prosecutable form supports bin Laden’s views, highlighting a ‘gap’ between Muslim leaders’ theory and practice. Creating such serious crimes under a shari’a methodology, in a form that can be used for prosecution on the

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8 See discussion below of some Australian Cases on genocide, 729.
9 Art. 1 Genocide Convention; Art. 26 Vienna Convention.
10 Qur'an 5:47.
international plane is therefore, on this analysis, essential. Such
development is a relevant issue and an analogous common law situation
will be examined with Australian cases. An international application of
the principles discussed will arguably provide an impetus to move these
‘international’ crimes and processes into the domestic jurisdiction of
Muslim States, or at least until Muslim States which object to the present
norms attempt actively and very explicitly to object persistently as required
under international law. The first step in this long process however, is
the need to fill this ‘gap’ in the practice of the shari’a, or at minimum a
recognition that there exists such a need. This is posited in this thesis.

13 See discussion below of some Australian Cases on genocide, 729.
14 It is acknowledged that some Muslim States, particularly francophone states, have civil
law traditions and thus the parallels drawn may not appear to be universal. However,
at this level of abstraction the specific legal systems are, it is argued, not so relevant
and the principle applies equally.
15 Anglo-Norwegian Fisheries Case (1951) ICJ Reports 161. On the other hand the issue of
whether a party can object to what may well be ius cogens obligations under
international law. Art. 53 of the Vienna Convention on the law of treaties, which
invalidated treaties that attempt to detract from ius cogens obligations is also an issue
as examined below in Australian case law.
Case Study on Genocide

This thesis does not seek to favour a 'Western' based international law as such. It simply acknowledges that through the UN system, this is the most widely accepted custom and given the relative populations in the world, perhaps rightly. Western civilisation is also Qur'ānically recognised as one based on the laws and values of the 'People of the Book'. It is likely, therefore, to be the more acceptable and thus more appropriate customary base upon which to develop the *shari'a* for this period. This is a matter of temporal reality. If a hundred years into the future Chinese or Confucian law is in the ascendancy then the *shari'a* of the day must seek to 'speak to the people' of the world inter alia through that 'legal language'.

For an individual jurist, the starting point for the development of law may subjectively depend upon his/her perspective on the 'state' of the current law. The onus of proof will rest on each person who departs from the general consensus to establish either that (a) there is not a consensus among Muslims as to the state of the current IHL/ICL as described here or (b) why his or her opinion is the better starting point for the development of the *shari'a*.

However, the more fundamental question of whether, 'But for the Statute of Rome, would the Muslims have created such crimes?' is not addressed in detail, as the intent here is not to examine or critique the merits of the creation of such crimes on the international plane but one of harmonising the laws between the two systems. The brief answer to this question is that some jurists may reasonably respond that the current *quisas* law on homicide adequately covers the serious international crimes and

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16 There is a view among some Muslims that Muslims will once again dominate the global power structure and that the *shari'a* will then be the *loi de préférence*. If this ever happens then Muslims should keep good their word made in times of disempowerment, to ensure that legal and religious plurality flourishes as is required in the texts and scriptures. As with the past however, Muslim ascendency does not necessarily mean a guaranteed place for the *shari'a* in its entirety as was seen in the past where the *siyar* (Islamic international law) and criminal laws were not used to their full effect. The present state of domestic laws in Muslim-majority nations also supports the point being made here - that for most part Muslim leadership does not as a group favour the application of the *shari'a* or other rule of law regimes.
that the creation of narrower, more specific crimes will allow some perpetrators to escape justice.\textsuperscript{17}

It is reiterated however, that the Qur'anic view is that no one escapes God's justice\textsuperscript{18} and this 'fear' alone should not be an impediment to creating new shari'a compatible ta'zir crimes that reflect current international custom. This is not to say that Muslims, or other civilisations for that matter, should not actively engage in the reform of IHL/ICL. They should!

The feasibility of using a shari'a methodology to help create equivalence in crimes between the two systems is now examined. This is done by first examining the crime of genocide in some detail. If this is successful, this thesis proposes that it is likely that in principle, the current body of law and custom on ICL/IHL can then be used as the 'base custom' on which to develop shari'a CL/HL, on the legal basis of custom or tacit consensus. Together with the example of genocide now examined, the shari'a analysis in chapters 3 and 4, in examining war crimes, will show generally that there should not be an in-principle difficulty for so doing. While crimes against humanity are not examined in detail for space, there should in principle be no substantial additional difference to that of criminalising genocide or war crimes.

Genocide
For convenience and for reasons of space, this section will consider the crime of genocide as the means by which the application of shari'a to a contemporary crime can be examined and tested. The aim is to establish that in principle, equating the crime of genocide between the systems should find no insurmountable legal impediment. The analysis of the crime of genocide will highlight some of the key principles of comparative methodology being proposed as well as exposing some problematic areas.

\textsuperscript{17} According to Antonio Cassese, \textit{International Criminal Law} (2nd ed, 2008), 142. in the 
Jelisić Case for example the Tribunal did not bring down a guilty verdict on the charge of genocide, absent the specific intention. The fact that he had actually committed homicide by killing several people (all of the same faith) 'for a disturbed personality' but with the requisite intention to kill could have drawn a charge of murder which was likely to have been made out on the admissible evidence. A discussion, or a critique of the policy reasons for creating such specific crimes however is outside the scope of this thesis.

\textsuperscript{18} Qur'an 4:120-121
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under the *shari’a*. This is not a comprehensive examination of genocide per se but one, it is proposed, that is sufficient to highlight the feasibility of comparative methodology and to some degree highlight the fallacy of some key objections to the use of the *shari’a*. One such an objection is the exaggerated effect of the contemporary ‘legal backwardness’\(^{19}\) of the Muslim world (which is sometimes uncritically perhaps wholly attributed to the *shari’a* rather than economics, politics or a combination of factors) and further, arguments as to its impracticality for its ancient origins.

**Development of the Crime of Genocide**

The term genocide was arguably coined by Lemkin in c. 1944.\(^{20}\) The Genocide Convention, the ICJ held, codified existing customary law.\(^{21}\) The Court held that ‘[the Genocide Convention reflected] the underlying principles […] recognised by civilised nations even without conventional obligation [and which] was *unanimously* adopted [in 1948…]’.\(^{22}\) The ICJ held that the underlying principles of the Genocide Convention binds all States.\(^{23}\) To avoid any ambiguity, this includes all Muslim States. Further, tacit consensus\(^{24}\) binds Muslims\(^{25}\) through their governments’ treaty obligations and, of interest here, to the larger part of the body of IHL/ICL.

The term ‘genocide’ was first used by the Security Council\(^{26}\) with respect to Rwanda,\(^{27}\) albeit in a political sense as opposed to a legal finding of genocide. The phrase ‘acts of genocide’ has also been used by the

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\(^{21}\) According to Antonio Cassese, *International Criminal Law* (2nd ed, 2008), 132. the Security Council, the ICTY and ICTR have echoed this view on the customary nature of the crime of genocide.


\(^{24}\) See text accompanying n 211, 644, on tacit consensus under the *shari’a*.

\(^{25}\) James Crawford, ’Democracy and International Law’ (1994) 64 *British Yearbook of International Law* 113, 118.


\(^{27}\) S.C. Res S/RES/925 Adopted by the Security Council at its 3388th meeting, 8 June,
UNGA.\textsuperscript{28} Article 6 of the Rome Statute and its associated procedures define genocide in a form that is useful in prosecution on the international plane. It reflects the definition contained in the Genocide Convention,\textsuperscript{29} as well as the Statutes of both the ICTY\textsuperscript{30} and the ICTR.\textsuperscript{31} The first successful prosecution for genocide was at the ICTR.\textsuperscript{32}

The term for genocide in Arabic, as referred to in common usage, is 
\textit{ibadat al-jama’aiya} (killing a group\textsuperscript{33}/clan)\textsuperscript{34} or (killing a group of Adam and Eve’s decedents).\textsuperscript{35} The Genocide Convention and Statute of Rome Arabic versions use the term \textit{al ibadat al-jama’aiya} (killing a group/clan)\textsuperscript{36} for genocide and is considered further in the discussion of its actus reus.\textsuperscript{37} The term \textit{ibadat al-jama’aiya} does not (in this formulation) find expression in the Qur’an or sunna. The concept of genocide in the meaning of the Genocide Convention clearly exists in the Qur’an in the form of Cain’s culpability in slaying Abel without valid legal cause.\textsuperscript{38}

\textbf{Muslim Objections}

Some Muslim objections to creating a \textit{shari’a} crime of genocide, and which in principle are also likely to apply to the creation of \textit{shari’a} equivalents of crimes against humanity and war crimes, are considered under two broad heads (a) policy objections and (b) possible \textit{shari’a} impediments.

\textbf{Policy Objections to Creating the Crime of Genocide – General Considerations}

A general policy objection to the wording in the Rome Statute and which also has a broader, more general application, is that provisions such as

\textsuperscript{29} 78 UNTS 277 (Genocide Convention).
\textsuperscript{30} 32 ILM 1159 (ICTY Statute).
\textsuperscript{31} 33 ILM 1598 (ICTR Statute).
\textsuperscript{32} \textit{The Prosecutor v} Jean-Paul Akayesu (1998) Case No ICTR-96-4-T ICTR.
\textsuperscript{33} Note that the word \textit{jamaaiyat} (الجماعة) literally is the plural form of the word \textit{jama‘a} (جماعة) which is a cooperative, collective etc: Munir Ba’albaki (ed) \textit{Al-Mawrid A Modern Arabic - English Dictionary} (18th ed, 2004), 430.
\textsuperscript{34} Munir Ba’albaki (ed) \textit{Al-Mawrid A Modern English - Arabic Dictionary} (2005), 384.
\textsuperscript{35} N. S. Doniach (ed) \textit{The Oxford English-Arabic Dictionary of Current Usage} (1972), 490., literally, killing a group of people from the decedents of Adam.
\textsuperscript{36} Article 6 Rome Statute: Genocide Convention Arabic Version.
\textsuperscript{37} See below, Identifying acts that can be Criminalised under the \textit{shari’a}, 696.
\textsuperscript{38} See text accompanying n 107, 701.
Article 9 exclude jurists as a class, as a matter of right, from providing input to the law reform process. As mentioned Islam is a 'jurist's law' and for self-evident reasons this is an area where Muslims could agitate for change. It is envisaged therefore, that a shari'a compliant version of the Rome Statute would include an active law reform role for jurists and a mechanism for monitoring Muslim consensus on specific legal issues.

The key policy objection on genocide is likely to be that God did not elect explicitly to create such a serious crime. That is, that the term genocide in the meaning of the Genocide Convention does not appear prima facie to be a crime explicitly and wholly falling within the meaning of a hadd or Qisas crime ('Qur'anic crime'). It is not as if the concept or the act of genocide is new in practice. On the other hand, this is not to state that every category of serious shari'a crime is 'closed', or that an age-old crime which was addressed and punished differently over the ages cannot as a matter of principle find new expression.

In the past, homicide, however characterised, was punished by death and thus in practice, creating a separate crime of genocide would not have been necessary. In a period where a substantial part of the international community eschews the death penalty, creating crimes along a spectrum of culpability makes more sense. This and similar issues are however, likely to be a source of continuing tension between the systems.

What is relevant here is that if genocide is not a Qur'anic crime, it should not, as argued in this thesis, carry a Qur'anic punishment. Further, as a non-retrospective ta'zir crime, created by analogy, it should where possible carry a lower penalty than would be imposed for Qur'anic crimes


40 See fuller analysis of Qur'anic crimes in the discussion of the next section, Some shari'a Objections to Creating the Crime of Genocide, 689.

41 Le Chapeau, Genocide Convention

42 See n 246, 649.

43 See n 240, 648.
but, if practical, under the international regime, commensurate with the *quisas* aspects of the crime.\(^{44}\) Such an option may provide closure and justice for victims of crime, but for policy reasons should be avoided because capital punishment is unlikely to be endorsed for use in the international plane.

**Some shari‘a Objections to Creating the Crime of Genocide**

A key problem could arise, if genocide was in content and meaning already a Qur‘anic crime in all but name. In that case, simply re-badging an existing Qur‘anic crime as ‘genocide’, using internationally-agreed elements, standards, terminology and rules of evidence, is rightly likely to be seen as an instrumental use of the law which in the reasoning of this thesis, is quite problematic and thus should fail as a matter of principle.

The two questions that arise in the *shari‘a* context in this respect are:

(i) if the *acti rei* of the genocide provisions generally are prohibited under the *shari‘a*, then framing a *shari‘a* crime with these physical elements is prima facie permissible by appropriately framing the mens rea element.

(ii) if the *acti rei* in the genocide provisions are (a) lawful or (b) not prohibited under the *shari‘a*, then creating a *shari‘a* crime is prima facie possible only if the offending sections are severed in the *shari‘a* formulation. If this is not possible, then criminalisation under the *shari‘a* must fail.

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\(^{44}\) What is meant here is that if possible *diya* should become payable as should granting forgiveness become an option for the victims. Neither a strict eye-for-an-eye talion nor the death penalty is likely to find favour in the contemporary international environment and alternatives such as significant gaol sentences may be considered as a substitute. Further, Qur’an 5:32 provides for the death penalty for murder and *fasad fil ard* (corrupting the Earth), a charge that can carry a maximum of the death penalty. As it is mentioned with murder is, it is argued here, that it is likely to be the penalty only if *fasad* results in death. The concept of *fasad* is discussed below: Spreading Corruption on Earth (*fasad fil ard*), 693. The history of the verse (and the *ashab al nuzul* or the reason for revelation briefly mentioned now) however does not prescribe death as a punishment for other than where a person’s life has been taken. According to Abu’Abdellah Mohammed Al-Ansari al-Qurtubi, *Al fami‘li Ahkaam al Qur’an* vol 2 (pt 3 & pt 4) (1987), 97.

جَمَعَهُمْ لَا حُکَمَ الْقُرآنَ; this verse was revealed after the following incident. Some men from the tribe of Oraina (عَرَبِيَة) or Okla (عَلَى) were sick and asked the Prophet for help. The Prophet gave them some camels and medicine together with a young shepherd boy to help tend the camels. When the men recovered they, killed the shepherd by driving thorns in his eyes and cutting off his limbs, and stole the camels and some property loaned/entrusted to them, broke their Covenant with the Prophet ie engaged in *fasad* and which led to death of the young shepherd. The shepherd had died by the time the Prophet was notified. Some Companions gave chase and apprehended the men before they entered their own tribal lands (where they would have been safe). This verse which was revealed during that incident prescribed death for *fasad* is thus informed by these circumstances. The prohibition on mutilation of human bodies (dead or alive) was also revealed around this time: see n 71, 695.
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(i) Examining Acts Criminalised by the Shari’a

Is genocide a hadd crime?
The hudud crimes as discussed above are at most, five or six in number. The hudud crimes of apostasy, theft, adultery, slander, armed robbery and arguably drinking grape-wine do have some common elements with genocide, but clearly, separately do not coincide in their entirety or even substantially.

The hadd crime of transgression (baghi, rebellion) does share some of the elements of genocide but clearly is not identical, and is examined in chapter 5. However, baghi in an armed conflict context, is better treated as an armed rebellion against the ruling authority. While genocide can be carried out during a rebellion or internal conflict, it is clearly a different crime. Further, the English the word ‘rebellion’ can have other connotations such as rebelling in a social sense. Broadly speaking however, it appears that the most direct and strong equivalent in this context is a quisas crime.

Is genocide a quisas crime?
With respect to quisas crimes, the most appropriate analogy to genocide is that of homicide. This is because ‘ordinary’ homicide is in any event likened under the shari’a to the killing of all humanity. Every unlawful homicide arguably therefore, is akin to genocide in the meaning of the Rome Statute.

On the other hand, even multiple homicides carried out with homicidal intent, cannot be considered a ‘new’ serious crime such as genocide purely based on the Qur’anic allusion to a ‘genocidal actus reus’ that appears to be inherent in the concept of Cain’s liability, although here the killer still lacks the explicit dolus specialis mental element of genocide, a point that will become evident. The intention of the killer in a homicide is, prima facie, an intent to kill a particular individual or individuals. In prosecuting a homicide generally it is the intention to carry out that act that is ascertained and not the killer’s genocidal intent, the dolus specialis

45 The Prosecutor v Jean-Paul Akayesu (1998) Case No ICTR-96-4-T ICTR.
46 Qur’an 5:32; See also the discussion below on the actus reus of genocide, 700.
required to ‘destroy in whole or in part, a national, ethnical, racial or religious group as such’, of which the victim was a member, nor is this a necessary element of homicide. Therefore creating a separate shari’a crime of genocide in order that Muslims can ‘speak’ a language similar to that of ICL is not unreasonable. It does not in any way do violence to the spirit of the shari’a which is to bring substantial justice to the victims. There will however, be a tension between a shari’a crime of homicide drawing the possibility of capital punishment in some Muslim jurisdictions, while the shari’a equivalent of genocide on the international plane carries at most a prison sentence. While this disparity is stark, it is not unusual to find a gap between domestic and international standards for punishment. It is reiterated that for this practical reason shari’a punishments are excluded from the proposals made in this thesis.

Take for example the terrorist attacks in New York on 9/11. The unlawful killing of a single soul satisfies the physical elements (actus reus) of genocide. Further al-Qa’eda’s leaders for example have authorised the killing of all Americans, in a context arguably which does not fall within the meaning of killing in a legitimate armed conflict, at least for the

47 Article II, Genocide Convention.
48 Art. 6 of the Rome Statute.
49 Paul Williams, The Day of Islam: The Annihilation of America and the Western World (2007), 13.; According to Sally Neighbour, In the Shadow of Swords: On the Trail of Terrorism from Afghanistan to Australia (2004), 176. Mohammed Nasir bin Abas, former leader of mantiqi 3: at, 135, ie, II Region 3 (the Philippines) (emphasis added):

   I heard that there was a decree brought down by Hanbali that was passed onto him by Abu Bakar Bashir. The decree was allegedly from Osama, urging them to defend themselves from the Americans. The Americans had persecuted Muslims all over the world and had even killed Muslims. The decree said it was alright to kill Americans even though they were not armed. We were also told that we could kill women and children and other civilians. The decree was given to all Mantiquis.

Neighbour: at, 177, continues that:

   Hanbali’s fatwa, issued with Bashir’s approval, was the source of great consternation within JI. While everyone agreed that armed struggle was an essential element of jihad, the killing of innocent civilians was another thing. […] I personally read a photocopy of the decree and felt something was not right and could not accept such a decree’ said Mohammed Nasir. ‘That is why I did not read the decree to my followers. I asked myself why we should attack the innocent when it is the American leadership we are after. The other reason is that the civilians could be Muslims’.

50 The US Administration under President George W. Bush had de facto declared war on al-Qa’eda when it attacked its bases in Afghanistan. While there may have been a state of war between the two entities, from a shari’a perspective shari’a prohibitions on the killing of non-combatants, civilians etc would nonetheless be unilaterally binding on
killing of American civilians and those who are not and have not been fighting against Muslims. Further, if Americans are considered ‘a national, ethnical or racial group’, then, through the shari’a requirement for ittiba’, al-Qa’eda’s intention imputed to the attackers will clearly satisfy even the narrowest reading of the dolus specialis as required by the Rome Statute. On the other hand, the mere existence of a shari’a genocide crime in a war situation allows al-Qa’eda, or others involved in genocidal activity, to escape censure by their own constituency and within the Muslim legal community for the absence of a positive crime reflecting the seriousness of their acts. This argument may however appear shallow or disingenuous to a believing Muslim, who could argue that even the taking of a single life unjustly is ‘genocidal’. The legal argument however remains that a positive law applying prospectively must exist for serious crime to be prosecuted.

The shortcoming of this analysis is the selective use of the physical and mental elements of the shari’a and the Rome Statute and one which must be avoided as unjust and instrumental. It is however, a shortcoming that can be remedied by the creation of a new, non-retrospective taz’ir crime, with the appropriate elements composed of acts prohibited under the shari’a together with a corresponding mens rea element. As it stands however, it appears difficult to make a direct and strong case for the quisas crime of homicide to be identified with genocide and therefore, for equivalence arguably, there is a need for a new shari’a crime to reflect this unlawful act.

Identifying a legal basis for creating a crime of genocide as a ta’zir crime

A broad area of unlawful activity condemned by the Qur’an and sunna and which prima facie provides the physical elements for creating a ta’zir crime is fasad fil ard (fasad) or causing corruption on the Earth (corruption). Fasad can be characterised here as political or siyasa sub-category of ta’zir crimes.

al-Qa’eda. They would have had to show necessity if they wanted to broaden the scope of their targets. Al-Qa’eda did not appear to make such a case do so. Muslims have raised these issues as is evident in the n 49 above.

51 Art. II Genocide Convention. Qur’an 5:32; see also the discussion on the actus reus of genocide, 700.
52 See ittiba’, 672.
53 The crime could be construed as applying prospectively if the Genocide Convention is in force in the defendant’s State of citizenship or nationality.
as it can go beyond private wrongs. *Siyasa* crimes can involve the State although this characterisation is not crucial and is only mentioned for completeness. The terminology of *ta'zir* crimes will be used for convenience. Corruption (*fasad*) is mentioned in several places in the Qur'an, but is not criminalised as a positive law. *Fasad* can involve homicide and therefore provide a legal basis upon which to build the crime of genocide under the *shari'a* and is discussed below.

**Spreading Corruption on Earth (*fasad fil ard*)**

The following analysis of *fasad* might not be totally compatible with the general theological analysis which often uses the term *fasad*. The related concept of *fitna* is sometimes, but not always, used interchangeably with *fasad* and both concepts carry negative connotations. *Fitna* in one of its grammatical constructs means 'to test' but it is a test that can lead to a right decision as for example pointed to in the Qur'an in the story of David. The Qur'an states that God will try people once or twice a year through *fitna*, or through life's challenges generally. Humanity, having received the Wise Criterion, is asked to choose freely between the two

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54 Quran 2:11, Quran 2:27; Quran 2:251; Quran 5:32 (etc and is mentioned 30 times or more in its various grammatical constructs).

55 Qur'an 2:191: See discussion in Chapter 5, for a more 'mainstream' analysis of *fitna*.

56 For example Qur'an 57:14:

you caused yourselves to fall into trial. (*fatantum anfusakum*)

E W Lane, *Arabic English Lexicon vol 2* (1984), 2335. summarises some of the other Qur'anic meanings of words derived from the trilateral *فَتَنَّ* according to various scholars (not quoted here) as meaning slaughter, sedition, (forming) factions, war, dissenstion, difference of opinion, temptation, lust, pomp, show, and (greed for) wealth and children. Most of these meaning in the proper context could reasonably convey the meaning of causing corruption on the Earth.

57 In this Qur'anic story which is very briefly reproduced here two brothers came to King David and asked him to settle a dispute. The two brothers had 100 ewes between them. One owned 99 while the other owned one. The brother with the 99 demanded that the brother with the one ewe give his only ewe over to him, with the threat of using force. David (who at the time had only heard the one side of the story) said '

*Your brother* has certainly wronged thee by demanding that thy ewe be added to his ewes! Thus behold do many kinsmen wrong one another -*[all] save those who believe and do righteous deeds; but how few are they.*' Then suddenly David understood the import of the situation, that God had tried him, that he had failed and that David had condemned himself with his own words. David then turns to God in repentance:

Qur'an 38:24.

The use of the term *fitna* here is of trial which can lead to a good outcome (here a good outcome in David realising his fault). The background to this story from the Bible is that David (who at the time had 700 wives) fell in love with Bathsheba who was married to Uriah (II Samuel xi), one of David's generals. King David sent Uriah off to a unwinnable war where he was killed as David had hoped, in order that David could then marry Bathsheba, which David does on Uriah's death.


paths of right and wrong. The term used to indicate the two clear paths is the Arabic dual construct of najdain. A deliberate and calculated election of the ‘wrong’ choice (see example cited in the footnote), could lead to murder and conspiracy to provide false testimony. The combination of these attributes and acts describes fasad.

Fasad (corruption) is very broadly defined and covers a range of unlawful behaviour including wickedness, usurping rights or property, kindling war and hatred, giving short measure, cutting ties of kinship, breaking covenants, polluting the land and sea, corrupting the Earth.

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60 Qur’an 91:8. The terms used a fujur (ٌفُجُر) which is immorality: Milton J Cowan (ed) The Hans Wehr Dictionary of Modern Written Arabic (1980), 697. and taqwa (تَقْوَا) or God consciousness as discussed.

61 Qur’an 9110. The word najdain (النجدين) indicates the highland path conspicuous and unmistakable (which stands out clearly as opposed to a desert path which is not conspicuous): Ibid. (943).

62 In this Qur’anic story the protagonists of the Prophet Salih were 9 men given to depravity. They had conspired collectively to murder the Prophet at night and then to provide alibis and testimony on behalf of each other as to their own innocence, as they were to be tried for killing a sacred she camel: Qur’an 27:48. The background to this story, according to Abu Abdellah Mohammed Al-Ansari al-Qurtubi, Al jami‘li Ahkaam al Qur’an vol 4 (pt 7 & pt 8) (1987), 152. refers to a further hadith and related Qur’anic verse: Quran 7:74, where the Prophet Salih has instructed his people to share their water with a large she camel that was so productive that it gave them all, particularly the poor, sufficient milk. The quid quo pro was that the she camel drank a large share of water that the wealthy farmers wanted for irrigation. Further, 2 (of the ‘depraved’) men had also taken secret lovers from among the retinue of the ruler. These women had conspired with their lovers and allies, misled their community and, together, they all killed the she camel. The fasad here is depriving the community milk, killing the she camel for no good reason, disobeying the Prophet and conspiring to kill him: Qur’an 27:48, (and risking the threat of drawing a greater punishment) in order to satisfy their greed for water, their carnal desires, and includes a kind of selfish wickedness with no care for the rights of the animal or the needs of the poor in their community. It is a ‘concentrated’ form of fasad which is a combination of legal, moral and social wrongs, attempted murder, intrigue, providing false testimony and greed.

63 Qur’an 2:60; Qur’an 7:74; Qur’an 26:183. Both Qur’anic verses 2:60 and 7:74 carry a common phrase dealing with fasad fil ard. According to Abu Abdellah Mohammed Al-Ansari al-Qurtubi, Al jami‘li Ahkaam al Qur’an vol 1 (pt 1 & pt 2) (1987), 284 (الجِمْعُ لا حَكَامُ الْقُرْآنَ) refers to a further hadith and related Qur’anic verse: Quran 7:74, where the Prophet Salih has instructed his people to share their water with a large she camel that was so productive that it gave them all, particularly the poor, sufficient milk. The quid quo pro was that the she camel drank a large share of water that the wealthy farmers wanted for irrigation. Further, 2 (of the ‘depraved’) men had also taken secret lovers from among the retinue of the ruler. These women had conspired with their lovers and allies, misled their community and, together, they all killed the she camel. The fasad here is depriving the community milk, killing the she camel for no good reason, disobeying the Prophet and conspiring to kill him: Qur’an 27:48, (and risking the threat of drawing a greater punishment) in order to satisfy their greed for water, their carnal desires, and includes a kind of selfish wickedness with no care for the rights of the animal or the needs of the poor in their community. It is a ‘concentrated’ form of fasad which is a combination of legal, moral and social wrongs, attempted murder, intrigue, providing false testimony and greed.

64 Qur’an 7:85; Qur’an 26:183; Qur’an 11:81. Abu Abdellah Mohammed Al-Ansari al-Qurtubi, Al jami‘li Ahkaam al Qur’an vol 7 (pt 13 & pt 14) (1987), 90. refers to the fasad that can result from people giving short weights and causing difficulties, usurping peoples’ belongings and using trickery and power. It includes leaders and those below them generally acting wickedly.

65 Qur’an 5:64.

66 Qur’an 11:81; Qur’an 11:85.


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after God made it well ordered⁷⁰ and looting.⁷¹ It is distinguished from theft (sariqa), a hadd crime. Fasad is also characterised as acts more likely to appeal to those given to depravity,⁷³ those who do not believe in Judgment,⁷⁴ those who are oblivious of God,⁷⁵ characterise their evil acts as good⁷⁶ and are given to excess.⁷⁷ Conversely, fasad does not appeal to those who do not exalt themselves⁷⁸ or who are God-conscious.⁷⁹ Balancing power between peoples and keeping civilisations in check through maintaining a self-defence capacity helps to prevent fasad,⁸⁰ and the general import of the verse does not preclude the fasad being done by ‘Muslims’,⁸¹ but urges Muslims to be allied as non-Muslims are allied and warns that a failure to do this will lead to oppression and fasad.⁸² Doing good to people is the opposite of fasad⁸³ and speaking out against fasad is virtuous.⁸⁴ Fasad

Covenant which in al-Qurtubi’s opinion results in people making up their own rules and judgments based on their own desires (shahawaat ^جورُت و and which leads to biased rules favouring some over the others.

69 Qur’an 30:41.
70 Qur’an 7:56.
71 Qur’an 12:73; According to Bernard Lewis (ed) Islam from the Prophet Muhammad to the Capture of Constantinople: Politics and War (1974), 212., the Prophet said ‘Looting is no more lawful than carrion. He who loots is not one of us. (God) had forbidden looting and mutilation’.

72 Looting is distinguished from theft in shari’a as in the common-law. The shari’a elements of sariqa a hadd crime, (emphasis added), are: (i) surreptitiously taking away (ii) moveable property with a defined minimum value (iii) the object is not partially owned by the perpetrator (iv) the object was not entrusted to him/her and (v) was taken from a place that was locked or guarded (hirz): Rudolph Peters, Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-first Century (2005), 56.

73 Qur’an 27:48.
74 Qur’an 29:36.
75 Qur’an 38:28.
76 Qur’an 2:11.
77 Qur’an 26:152.
78 Qur’an 28:83.
79 Qur’an 38:28.
80 Qur’an 2:251.
81 Qur’an 2:251. This verse clearly recognises the problematic nature of untrammelled power. That is, on its plain meaning, unchecked power by any group or civilisation (Muslims not exempted) leads to fasad. According to Abu Abdellah Mohammed Al-Ansari al-Qurtubi, Al jami’li Ahkaam al Qur’an vol 2 (pt 3 & pt 4) (1987), 167. ^this reference is not so much to two groups of people keeping each other in check but of a favoured group called the abdal who use their goodness to prevent fasad and oppression. This is a spiritual rather than a legal construct but is mentioned here because freedom fighters can claim to be abdal in trying to push out oppressors from their lands and hence gain valuable moral and financial support from those who would believe and follow them. The noble qualities of the abdal are listed (ibid.) and documented and the onus of proof lies with one asserting the claim.

82 Qur’an 8:73.
83 Qur’an 28:77.
84 Qur’an 11:116.
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has a subjective element, however. An oppressive Pharaoh, who had enslaved the Children of Israel, characterised the Jewish worship of one God as leading to fasad (perhaps because it prevented the Jews from worshiping the Pharaoh, which was the custom of the Egyptians).\textsuperscript{85}

Unlawful fighting and killing or wickedness committed during times of peace or war can encompass acts that can include physical elements that are common to the serious crimes which are unjust, oppressive and broadly are ‘wicked’ within the meaning of fasad. It is not denied however that the guise of eliminating fasad has been used to entrench rule and silence opponents in many Muslim States.\textsuperscript{86} This analysis, though brief, clearly shows that criminalising some specific aspects of fasad prima facie are intra vires the Qur’an and sunna. What must be evident is that genocide, crimes against humanity or war crimes, the other crimes in question, are wicked human activities, which can legitimately be criminalised under the shari’a by appropriately articulating the physical and mental elements. The specific physical and mental elements of genocide are now examined from a shari’a perspective.

Identifying acts that can be Criminalised under the shari’a

Not all proscribed activity or behaviour in Islam has been criminalised under the shari’a. This is partly as discussed, due to the neglect of shari’a criminal law. Other reasons include the avoidance of shari’a prohibitions by rulers for practical and pragmatic reasons as in the example on the strict prohibition on the use of fire in war. However, rulers have in the past exercised the ‘right’ to criminalise acts as they deemed necessary and it appears that the jurists have acquiesced, although improbable, it is also possible that jurists’ resistance or opposition were either not recorded or that records have not survived.

While the broader question of identifying legal authority to criminalise acts and behaviour not previously criminalised remains, and

\textsuperscript{85} Qur’an 7:127; Qur’an 38:28.
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must be addressed on an ongoing basis, the question is less important in the context of this thesis. This is because there is consensus that wrongful acts other than hadd and quisas crimes may be criminalised. If this assertion is not correct, there certainly is at least tacit consensus under treaty, and thus to criminality under the shari’á, on the serious crimes of genocide, crimes against humanity and war crimes. While there is no doubt that this statement on tacit consensus can stand up to shari’a scrutiny, in the alternative a more detailed examination of the legal basis for criminalisation of the prohibited acts of genocide is needed with a view to ‘root’ or identify appropriate shari’a legal bases.

Acts that Cannot be Criminalised under the Shari’a

Any act permitted and lawful under the shari’a could ipso facto not be criminalised under the shari’a although there is no recognised concomitant right under international law. Further, an act that is not explicitly prohibited must be presumed to be lawful. Consider the issue, broadly speaking, of cultural genocide. This is an example of where it would be difficult to create a shari’a crime unless conversion was forced or caused under duress. For example, when conversion is effected, this impacts culturally on indigenous societies. Islam is assimilationist and hegemonistic and has in the past Arabised societies over time. While indigenous cultures have not been entirely obliterated, many of these cultures have been significantly and permanently altered. Islamic North Africa, Iraq and Syria are examples of once non-Arabic cultures which now consider themselves Arab. Much of this cultural change occurred over centuries, largely peacefully and voluntarily. Nor is it suggested that all ‘Arab’ societies are ‘identical’ or ‘uniform’ in cultural respects other than in their common written language.

Arabs or Muslims are not unique in this respect. The parallel analogy in Oceania is perhaps the expansion of English and French civilisations into Australia, New Zealand, Tahiti and New Caledonia where traditional cultures have now largely assimilated the English or French civilisations. However, since ‘cultural genocide’ is not at any rate a crime

87 See discussion on Custom (‘urf) above, 663.
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under ICL,\textsuperscript{88} a detailed discussion of the issue becomes unnecessary. The principle highlighted however, is that there are some areas, where criminalising under the shari‘a might be problematic to the majority of jurists. Notwithstanding these problems, and for the serious crimes under consideration, either or both treaty and tacit consent\textsuperscript{89} currently bind Muslim States and individuals through the Rome Statute and other international obligations. Any change of this status quo must be effected through the normal diplomatic and legal channels.

On the other hand, adducing evidence of the destruction of cultural property as evidence of genocidal intent\textsuperscript{90} is not likely to be controversial under the shari‘a which explicitly prohibits Muslims from reviling cultural and religious symbols even if these symbols are antithetical to Islam.\textsuperscript{91} Involuntary and forced destruction of indigenous cultures, could be criminalised under the shari‘a, if conversion to Islam was effected by coercion.\textsuperscript{92}

\textbf{Jurisdiction and the ‘sufficient gravity’ requirement}

A possible problem area with respect to jurisdiction in the shari‘a version of a crime is that the ICC is only likely to found jurisdiction when the accused’s crime is of ‘sufficient gravity’.\textsuperscript{93} The ‘gravity’ of a crime is not an element or jurisdictional requirement under universal jurisdiction,\textsuperscript{94} or the shari‘a. The setting of a ‘sufficient gravity’ threshold is a practical recognition of the practical inability to prosecute all but a select number of crimes and a select number of individuals on the international plane. An unfortunate doubt in the minds of some Muslims is that some crimes - in


\textsuperscript{89} See discussion on tacit consent (idjma‘ sukuuti), 644.


\textsuperscript{91} Qur’an 6:108.

\textsuperscript{92} Qur’an 2:256.


Art. 17(1) Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(d) The case is not of \textit{sufficient gravity} to justify further action by the Court.

\textsuperscript{94} Ibid.
this case genocide, crimes against humanity and war crimes - are being 'elevated' above the most serious shari'a crime, principally for the benefit of the 'West', an issue examined briefly, below.

Genocide for example, has been called the 'crime of crimes', although what this means is not entirely clear and at any rate may not be a characterisation that is shared in the shari'a. Broadly speaking the most serious shari'a crime is that of shirk which is (the deliberate reversion to) polytheism after the individual has consciously worshiped the One God. Shirk is a shari'a crime which unless openly declared by the individual, is known with certainty only to God but at any rate punishable by God alone. That is, notwithstanding its gravity, shirk does not find temporal jurisdiction. Further, shirk does not pass the double criminality test a precondition referred above. This point is mentioned for completeness only, and also to illustrate the point that the notion of 'sufficient gravity' under Islam and the secular systems is not easily transferable.

On the other hand, both systems consider the act of unjustified homicide, whether or not characterised as genocide, as a serious crime with a temporal remedy. Therefore, from a jurisdictional perspective, and notwithstanding the issues surrounding shirk mentioned above, there should not be a problem with setting a practical threshold as a criterion for prosecution on the international plane.

A further problem for shari'a law is that under international law it is (mainly) States that have legal personality and in the main that can

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95 The Islamic concept of shirk is discussed in the next paragraph.
96 See for example Bin Laden's criticism that the UN is a Western instrument: Bruce Lawrence (ed) Messages to the World: The Statements of Osama Bin Laden (2005), 67.
98 Qur'an 4:116.
99 The crime of shirk is not identical to apostasy although the actus reus of each crime may in cases be co-incidental. Discussion of the theological aspects of these differences is outside the scope of this thesis and nothing of consequence to this thesis turns on these differences.
100 In 2009 the Security Council referred the case of the President of The Sudan Omar al-Bashir (inter alia for his treatment of rebels in the Darfur region). However, the veto in the Security Council ensures that none of the P5 or their close allies will be referred to the ICC by the Security Council, as was the case with the request to investigate torture allegations by UK soldiers in Iraq: Ewen MacAskill, 'UK should face court for crimes in Iraq, say jurists', The Guardian (London), Wednesday 21 January 2004.
prosecute (or initiate the process of prosecuting) rebels, but not vice versa. Limiting competence to initiate prosecution to those named in Part 5 of the Rome Statute excludes the rights under the shari'a of rebels to do this. Clearly for pragmatic and practical reasons, IHL/ICL does not have the additional caveat or condition of a 'just ruler' imposed on cases brought to the Court.\textsuperscript{101} However, challenging States' monopoly on power and legal personality on the international plane, by recognising rebels' right to initiate an action is certain to be strongly politically opposed by the vast majority of States. This is an issue that must be negotiated by shari'a jurists and the international community as a matter of importance for the special shari'a position given to principled rebels fighting against oppressive rule and as discussed in chapter 5.

**Physical Elements of Genocide**

The Genocide Convention's chapeau, Articles II and III articulate the acti rei of the crime of genocide. For convenience in this section, Article II of the Genocide Convention, Article 6 of the Rome Statute and the equivalent provisions in the Statutes of the ICTY and ICTR ('provision') which refer to the physical elements of the crime of genocide, are used interchangeably as necessary:\textsuperscript{102}

Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

This provision has remained substantially unchanged over time and the following analysis is applied equally to it, largely independent of its

\textsuperscript{101} Art. 9(2)(a) Rome Statute.

\textsuperscript{102} Article II Genocide Convention (hereinafter Art. II); Article 6 Rome Statute; Article 2(2) of the Statute of the ICTR; Article 4(2) of the Statute of the ICTY (emphasis added).
present incarnation.103 The Genocide Convention, broadly speaking, creates an international crime in both war and peace104 and also criminalises conspiracy105 and public incitement to attempt or actually to destroy a group or part of a group, through killing, causing grievous bodily harm (GBH) or other means listed in Art. II. The Rome Statute, and its associated infrastructure and processes, now makes it possible to prosecute the crime at the ICC. In this context, *ius ad bellum* and *ius in bello*, and their separation (which is arguably the distinguishing ‘line’ between a state of war and ‘peace’) are generally discussed in chapter 4.

The phrase *ibadat al-jama'iya* the Arabic term for genocide, does not find expression in the Qur’an or the *sunna*. However, the concept of killing ‘all of humanity’ or ‘killing all of someone’s decedents’ finds expression in the Qur’an when in its words, Cain killed Abel while Abel was innocent of any crime that would require legal forfeiture of his life. As a result, again in Qur’anic terminology, each wrongful killing in God’s eyes was likened to killing all humanity (‘Cain culpability’).107 This is probably why Saudi Arabia’s proposal on the Genocide Convention in 1946 used the word ‘killing’,108 which fits in with the Qur’anic crime and encompasses, captures and comprehends some of the nuances of the English and French terms *genocide*/*le génocide*.

Nevertheless, in general, and in line with *khabar*, the *shari’a* interpretative tool endorsed in chapter 2,109 it is most likely that it is the jurisprudence of international courts that would arguably best help give meaning to a *shari’a*

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103 This methodology may reasonably be critiqued. On the other hand, it is suggested that because the formulation of this provision has not changed in the various manifestations: see n 102, above, that the framers of each successor instrument must have intended that the intentions of the original framers be continued to be reflected in the latter instruments.

104 *Le Chapeau* Genocide Convention.

105 See discussion on the validity of the common law notion of ‘conspiracy’ under international law, 725.

106 Article 6 Rome Statute; Genocide Convention. (Arabic Versions).

107 Qur’an 5:32.


109 *Khabar* is ‘the apparent meaning according to contemporary usage’: Ayatollah M B al-Sadr, *Principles of Islamic Jurisprudence According to Shi’i Law* (2003), 30.
formulation of genocide and the other serious crimes in question. The opening paragraph of the provision is now discussed, followed by an examination of each of its five limbs or sub-paragraphs.

In the provision, the word ‘group’ is qualified by its context as a ‘national, ethnical, racial or religious group, as such’, which survives from Article II. Robinson states that a group consists of individuals, here with common individual characteristics specified in the provision. Some of the differences between antagonistic ‘groups’, say the Hutu and Tutsi, may not easily be apparent to outsiders or even to themselves, but cognisant that distinguishing between ‘groups’ for the purposes of prosecution has subjective element but for a court is essentially a question of fact.

Issues surrounding identity are usually complex. Nevertheless, the question of identity is central to the definition of a ‘group’ and is a useful rallying point for those seeking to promote their own cause or ideology through what is sometimes referred to as ‘identity politics’. However, specific examination of this issue, lies outside the scope of this thesis.

On the other hand, the Qur’an states that its classification of peoples into ‘nations and tribes’ has only one broad legitimate purpose, and that is to enable people to ‘recognise one another [and not despise one another]’. The term ‘nations and tribes’ arguably captures the

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112 See text accompanying n 111, above.
113 For a brief *vox populi* of the complexities of Muslim identity within the Australian émigré Muslim community listen to or check the transcript by: Hagar Cohen, ‘Australian Muslim youth’ in Background Briefing ABC Radio National, 24 January 2010.
114 See for example of the difficulties Hutus and Tutsis had distinguishing the ‘other’ without resorting to identity cards: see text accompanying n 111, 702. Note also how people like bin Laden while speaking of defending Islam and Muslims yet appear to kill Muslims (who were not ideologically and racially aligned to his group) with some degree of impunity, or declare them disbelievers (against established norms) when it suits. A similar situation lies in the USA where although (then) President Bush called for the protection of Americans; Arabs, Sikhs, Muslims etc Americans were marginalised in the process implying that the ‘true’ American was somehow a person who belonged to the popular stereotype of a White Caucasian person of English or European extraction (but excluding the First Nations’ peoples).
qualifications of ‘national, ethnical and racial differences’. The Qur’an adds that the sole ‘reason’ for this difference is for ‘recognition’.\footnote{117}

However, neither the Qur’an nor the sunna elaborate on how this ‘recognition’ must occur and does not make the interpretation of what constitutes ‘a nation’ or ‘a tribe’ any easier than the corresponding terms under ICL. While there are no doubt real differences in human culture, the absence of purely objective criteria in separating groups\footnote{118} highlights the futility of sometimes artificial differences constructed by neighbouring groups to fit in with the ‘dividing lines’ drawn on maps often by Colonial masters many thousands of miles away. However, what is evident is that if despising people on these grounds is not permitted then, \textit{a fortiori}, the prohibited act of killing one or more individuals, or genocide that involves a ‘group’ must also be ultra vires.

It is stated without further analysis that, in situations of armed conflict, giving meaning to words importing identity can in instances be fraught with danger. Cassese describes the resolution of this problem as, ‘the definition of these four classes of group is an intricate problem that requires serious interpretative efforts’,\footnote{119} presumably a task best left to the judges to decide based on the facts of each case.

In his examination of the \textit{travaux préparatoires} on Article II, Schabas notes that in recognition of the problems that may arise by introducing a motive element, the words ‘as such’ as suggested by the Lebanon\footnote{120} were substituted.\footnote{121} Cassese was of the view that future interpretation efforts would give meaning to these words.\footnote{122} Interpretative efforts by the judiciary on this issue to date however do not appear to be that helpful.

\footnote{117}{See text accompanying n 119, above.}
\footnote{118}{For example ‘Hispanic’ people in the USA are generally distinct from ‘White’ people whereas in Cuba or in Latin America they are classified as ‘White’. Similarly ‘Blacks’ in Australia are less identified by their colour than by their own identification with being ‘culturally Black’.}
\footnote{119}{Antonio Cassese, \textit{International Criminal Law} (2nd ed, 2008), 133.}
\footnote{120}{UN Doc. E/AC.25/SR.10,13.}
\footnote{121}{William A Schabas, \textit{Genocide in International Law: The Crime of Crimes} (2nd ed, 2009), 298.}
\footnote{122}{See above n119.}
Schabas critiqued the ICJ’s explanation of the words ‘as such’ as ‘emphasis[ing] the intent to destroy a protected group’,¹²³ as ‘banal’.¹²⁴

Recall that motive is a crucial aspect of a Muslim’s actions but is not justiciable in a temporal setting as such. A shari’a formulation of the crime would, reflecting the practice of the travaux préparatoires of the Genocide Convention, also carefully avoid a motive element as problematic.¹²⁵ This is because Muslim defendants could perhaps use a motive of ‘sincerely believing’ that they had understood the religious law and were thus, in carrying out their atrocities, motivated by pleasing God,¹²⁶ according to their subjective understanding. These untested claims are not uncommon among modern ‘terrorists’, their minders or spokespeople.¹²⁷ While a defendant’s claim of sincerity of motive may in cases well be genuinely held and subjectively true, it should not be a relevant consideration as far as the elements of crime are concerned but may, as is the custom, be taken into consideration at the sentencing stage.¹²⁸

The Appeals Chamber in the Niyitegeka Case recognised the controversial debates over the words ‘as such’ in the travaux préparatoires and went on to confirm that the Trial Chamber was correct ‘in interpreting the words ‘as such’ to mean that the proscribed acts were committed against the victims because of their membership’.¹²⁹ Consequently, and as an alternative to the issues of motive in Islam, the shari’a crime could emphasise the causal element of ‘as such’ as ‘because’, which is arguably in line with ICL jurisprudence. The Appeals Chamber in Niyitegeka Case clarified that genocide was carried out ‘because’¹³⁰ but ‘not solely because of such membership’.¹³¹ Muslims are allowed to fight and kill in
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circumstances when they are wronged, i.e. in self defence. That is, Muslims may fight legitimately fight combatants from a recognised category in self defence, but may not do so only because someone belonged [to a...] national, ethnical, racial or national group'.

Resolution of this issue appears to require a ‘dominant purpose’-type test. However, the shari‘a position is that prohibited acts of genocide may be made out even in cases when self-defence was the dominant but not sole reason for engaging in armed combat. The shari‘a interpretation of this qualifier is likely to require a further test to determine on the facts whether self-defence was the ‘sole purpose’ of an armed conflict. If fighting was for the ‘dominant purpose’ of self-defence then alternately then the subsidiary question must be posed. This is, whether there was a secondary unlawful reason, and in this case, within the meaning of the prohibited acts of the provision, for the killing of their enemy because, say ‘they’ were ‘polytheists’. For example, because it becomes evident that the Muslims and People of the Book among the enemy were spared for no other reason than because of their faith while others (such as polytheists) were killed. While the qualifier ‘because’ appears to limit the scope of causation, it is unlikely that such limits would exclude shari‘a prohibitions, but nonetheless secondary shari‘a tests must be made clear and explicit.

Further, the provision refers to the killing of the ‘whole or in part’ of the groups in question. This formulation also survives from Article II. This qualification however, is less important in a shari‘a formulation for the Qur‘anic allusion to Cain culpability which is Qur‘anic, and therefore needs no further authority under the shari‘a.

On the other hand, Cassese posits that Krstic Case stands for the proposition that the phrase ‘part of’ was satisfied in the plan to kill all

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132 Quran 42:41-43:

But indeed if any do help and defend themselves after a wrong (done) to them against such there is no cause of blame. The blame is only against those who oppress men with wrong-doing and insolently transgress beyond bounds through the land defying right and justice: for such there will be a Penalty grievous. But indeed if any show patience and forgive that would truly be an exercise of courageous will and resolution in the conduct of affairs.

133 Article 6(a)(3) Elements of Crimes to the Rome Statute, 09 September 2002

134 See Cain & Abel Story at text accompanying n 107, 701.
military-aged Bosnian Muslim men in Srebrenica. In itself, fighting the enemy may not amount to a crime under the *shari'a*, which permits Muslims (and others) to fight those who fight them as mentioned, ‘all together’. However, notwithstanding the fact that some of the Bosniak men of fighting age were civilians, many were unarmed, not able to fight and were not engaged in hostilities; and ‘removed’ with the intention of making *Republika Sprska* ethnically ‘pure’ means it is likely that *shari'a* jurists would concur with the decision of the Trial Chamber in *Krstić*, and distinguish the Qur’anic permission for Muslims to fight the enemy ‘all together’ as read down to permit fighting only enemy soldiers (who were fighting against Muslims).

Further, an equivalent *shari'a* genocide crime’s *acti rei* are likely also to require some planning to establish the requisite intention for characterisation of a crime as genocide. This is to enable the ordinary killing or GBH of the enemy soldier at war (as distinguished from targeting protected persons) and because they were fighting Muslims. This formulation fits in with the notion of an army confronting an enemy army under international law. Nothing in this analysis however, would suggest that the prohibited acts of genocide in the meaning of international law were legitimate under the *shari'a*.

Finally, the incitement element to genocide must be public. The words ‘or in private’ were deleted from Article 3(c) of the Genocide

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136 Qur'an 9:36.
137 The ICJ the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (2007) para. 197. approved the finding of the Trial Chamber in the *Krstić Case* at, [197], that:

In that case the Trial Chamber was “ultimately satisfied that murders and infliction of serious bodily or mental harm were committed with the intent to kill all the Bosnian Muslim men of military age at Srebrenica” (IT-98-33, Judgment, 2 August 2001, para. 546). Those men were systematically targeted whether they were civilians or soldiers.

140 This issue of ‘planning’ acts of genocide is discussed below, see: The Planning Aspects of a Genocide, 724.
141 See discussion in chapter 3 (Part 3).
142 Qur'an 9:36.
143 Article 3(c) Genocide Convention; Article 25(3)(e) Rome Statute; Article 4(3)(c) Statute of the ICTY; Article 2(3)(c) Statute of the ICTR.
Convention on the recommendation of the Belgian delegation and was supported by Iran.\textsuperscript{144} The meaning of 'public incitement' as reflected in international jurisprudence cites French law to give the phrase the meaning of 'that which is spoken aloud in a place that is by definition public'.\textsuperscript{145} Public incitement includes what is said through the mass media, for example through technological means such as radio and television.\textsuperscript{146} The international community has expressly rejected private incitement,\textsuperscript{147} and the USA was rightly concerned about the effect of such provisions on the freedom of speech.\textsuperscript{148} Iran, in support of the USA, suggested that all reference to incitement should be omitted,\textsuperscript{149} although this support was not based on the \textit{shari'a} and can be put down to Iran's then political support for the USA. This explicit limitation to public incitement however, fits in with a \textit{shari'a} prohibition against spying (\textit{tajassus})\textsuperscript{150} interpreted in this context as surreptitiously collecting information on private conversations

\begin{footnotesize}
\textsuperscript{144} UN Doc. A/C.6/SR.84; 26 October 1948 (Sixth Committee of the General Assembly). Although Iran was, and is, a Muslim majority State it did not become an Islamic Republic till 1979 and therefore, it is unclear what influence \textit{shari'a} law had, if any, on this decision.


\textsuperscript{146} William A Schabas, \textit{Genocide in International Law: The Crime of Crimes} (2nd ed, 2009), 329. see fn 126 on Akayesu ; The Prosecutor v Jean-Paul Akayesu (1998) Case No ICTR-96-4-T ICTR para. 556. citing at footnote 126: 'The[...] Element of public incitement requires communicating the call for criminal action to a number of individuals in a public place or to members of the general public at large. Thus, an individual may communicate the call for criminal action in person in a public place or by technical means of mass communication, such as by radio or television.', Draft Code of Crimes Against the Peace and Security of Mankind, art. 2(3)(f); Report of the International Law Commission to the General Assembly, 51 U.N. ORGA Supp. (No. 10), at 26, U.N. Doc. A/51/10(1996)'.


\textsuperscript{149} Ibid.

\textsuperscript{150} Qur’an 49:12.
\end{footnotesize}
The issue of the admissibility of evidence collected by wiretapping and other surreptitious means is not a settled matter under the shari'a, particularly with respect to the serious crimes in question. The presumption is that evidence obtained surreptitiously is not admissible for the equivalent serious shari'a crimes. Therefore, from a shari'a perspective, what the defendant does in public is more persuasive and important, evidence that is less susceptible to manipulation and misrepresentation. Clearly, intention revealed during public speeches and meetings prima facie form admissible evidence on intent, a predisposition, or the evolution, development and formation of an intention to commit genocide, evidence however that can be subject to challenge and subjected to cross-examination. Obtaining publicly-available evidence in these circumstances does not constitute spying under the shari'a. The crime of terrorism however, even when privately planned, remains prosecutable in most jurisdictions and therefore has elements that are distinct, may require covertly obtained evidence and is an issue that must expressly be addressed by jurists.

Genocide under the shari'a is therefore, nonetheless likely to be prosecuted as an individual crime. The five enumerated sub-paragraphs of the provision are now considered in turn.

Sub-paragraph (a) Killing members of a group
Criminalising the unjustified killing by an individual in domestic legislation is uncontroversial. However, on the international plane, Hankel notes (and since his statement is general, arguably including Muslim States) that the specific discussions on the scope of this phrase 'Killing members of a group' had more to do with States attempting to avoid liability for the historical circumstances. Cassese concurs that '[...]' States

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151 For a judicial reference to 'a place public by nature', see n 145, 707.
152 Michael Cook, Commanding Right and Forbidding Wrong in Islamic Thought (2001), 103.
have consistently shied away from the notion that they – as such - might be held criminally accountable for genocide'.

Notwithstanding a reluctance to attribute genocidal behaviour to States, laying charges of genocide against individuals on the international plane is less problematic in both systems. It is noted in this context that the Kristić Case is authority for the proposition that an individual’s intention to destroy part of a group (in this case the Bosnian Muslim group), qualified as genocidal intent.

Every unjustified homicide is a quisas crime. However, if each unlawful homicide inheres Cain culpability, which satisfies this physical element of genocide, is it then lawful to create a separate ta’zir crime?

While there is much more that can be said about this, it is noted that while the physical element of genocide is constructed through interpretation of a single homicide as killing all of humanity, the requisite mental element for genocide in the meaning of sub-paragraph (a) is quite specific, which in effect creates an entirely separate crime from quisas homicide per se. The creation of a separate shari’a ta’zir crime of genocide is therefore prima facie well within both the letter and the spirit of the shari’a.

While it is conceded that nuclear and other mass destructive weapons can kill a large number of people, killing an entire (significant) group or removing every child from its parents/guardian, is not physically possible for individuals acting without the backing of a powerful State or group. For laws to be effective against an individual therefore, the crime must require that damage be inflicted against only a part of the group, albeit as part of a broader intention. It should be sufficient evidence to prosecute the crime. Thus the quantum of this number of deaths or children to be removed, should not in general be an element of the crime, and although it is a relevant factor, there should not be a stipulated

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157 See Genocide, 708.
159 See quisas crimes Appendix 1.
160 See Cain & Abel Story at text accompanying n 107, 701.
minimum threshold number of required deaths or removals for self-evident policy reasons.\textsuperscript{161} For this reason, in the \textit{shari'a} test, both the physical and mental elements of this provision should take cognisance of and explicitly cater for, physical human limitations. It should also explicitly incorporate the Qur'anic allusion to Cain culpability\textsuperscript{162} that attaches to every person guilty of every unjustified homicide, in this instance perhaps compounded by multiple unlawful killings.

Further, the Qur'an makes the point that in cases \textit{fitna} (tumult and oppression),\textsuperscript{163} and notwithstanding the issue of Cain culpability,\textsuperscript{164} is worse than killing,\textsuperscript{165} a concept known in English in the form of the expression 'a fate worse than death' or in French as '\textit{un destin pire que la morte}'. The legal concept of \textit{fitna} therefore, prima facie, provides a basis for creating \textit{ta'zir} crimes that reflect egregious aspects of \textit{fitna} leading to \textit{fasad},\textsuperscript{166} whether or not involving the death of one or more persons, and which at present are not explicitly criminalised under the \textit{shari'a} as such. The wisdom of creating such a \textit{ta'zir} crime (while the 'lesser' crime of homicide can carry the \textit{quisas} penalty that can encompass the death sentence in some domestic jurisdictions if the victim so chooses) may be questioned even though the existence of differentials in punishments between international law and domestic law is known in both civil law and common law. The issue with the \textit{shari'a} is that it claims universal jurisdiction over all Muslims. The discrepancy is acknowledged. From a functional point of view however, it is re-iterated that this exercise is about harmonising laws on the international plane where the \textit{quisas} death penalty will not lawfully be carried out, independent of and notwithstanding the victims' preferences.

\textsuperscript{161} Refer to discussion associated with n 255, 727.
\textsuperscript{162} See Cain & Abel Story at text accompanying n 107, 701.
\textsuperscript{163} Qur'an 2:191.
\textsuperscript{164} See Cain & Abel Story at text accompanying n 107, 701.
\textsuperscript{165} Qur'an 2:191; See also the discussion of \textit{fitna} in Chapter 5.
\textsuperscript{166} See discussion below Spreading Corruption on Earth, 693.
However, since killing in its broadest sense is unlawful under the shari’a, ipso facto it must remain unlawful to kill a person of a protected group and a fortiori unlawful to kill more than one member only because of their membership of that group. Thus the criminalising sub-paragraph (a) under the shari’a as a ta’zir crime is unlikely to be contentious.

Sub-paragraph (b) Causing serious bodily or mental harm to members of the group;
The elements of this sub-paragraph are considered separately:

(i) Serious bodily harm
The principle of punishing serious acts of criminal violence falling short of actual killing is uncontentious under the shari’a and is a principle affirmed in ICL.167 Under international law, such harm does not have to be permanent.168 The ICTY Trial Chamber in Stakić said:169 “Causing serious bodily or mental harm” in sub-paragraph (b) is understood to mean, inter alia, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death, and harm that damages health or causes disfigurement or injury. The harm inflicted need not be permanent and irremediable.

Causing actual bodily harm is a physical element of a quisas offence and thus, a fortiori causing serious bodily harm.170 Therefore, this element of this sub-paragraph can prima facie lawfully to be criminalised. The issue of criminalising mental harm, which does not have appear to have precedent in the shari’a, is now considered.

(ii) Serious mental harm
The legal issue here is absent clear precedent, to identify a shari’a basis on which to criminalise intentional behaviour which causes mental harm. The fact that humans can suffer mental harm, anguish and consequently damage is a proposition that does not need authority. According to the Qur’an, the feeling of fear and panic inter alia are means by which humanity is ‘tested’ and this clearly means that the Qur’an acknowledges the fact and recognises that human beings can suffer externally imposed -

168 Ibid. (183.; see footnote n 169 below.
170 See quiyas (analogy), 646.
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in this case unintended - mental harm.\(^{171}\) A fortiori however, if causing harm unintentionally is proscribed, then intentionally causing mental harm must also be proscribed, and therefore, in cases criminalised.

The possibility of legitimately criminalising mental harm through analogy (quiṣaṣ),\(^{172}\) is now considered. It is settled that one person may not, generally and legitimately, inflict physical harm on another and the injured person is entitled to talion (quaṣaṣ).\(^{173}\) The principle or reason (ratio legis, 'īllā\(^{174}\)) for this prohibition is arguably because such physical harm causes suffering, which is prohibited. It also gives an injured party the right of talion, which may be exercised. Thus, for consistency, the principle of preventing unlawful harm by one person of another, by analogy must include preventing unlawful harm from all sources. That is, if the shari'ā criminalises physical harm to individuals then by analogy it must be possible to criminalise mental harm. As a crime created by analogy however, it must fall under the category of ta'zīr.

There is also some precedent in the contemporary jurisprudence of Muslim States for making mental harm a tort. These torts are however, derived from common law (or in cases with non-common law Muslim States, in the civil law) and do not appear directly to be rooted in or obtain their authority from shari'ā legal theory. The common law tradition is used in many British Commonwealth Muslim States, where assault is distinguished from battery. No actual bodily harm is required. This precedent is likely to constitute a 'tacit consensus'\(^{175}\) among the common

\(^{171}\) Qur'ān 2:177: 

[The righteous inter alia include those who are] firm and patient in pain (or suffering) and adversity and throughout all periods of panic.

Qur'ān 49:6 (emphasis added):

O ye who believe! if a wicked person comes to you with any news ascertain the truth lest ye harm people unwittingly and afterwards become full of repentance for what ye have done.

If hurting people unwittingly is to actively to be avoided, then a fortiori causing intentional harm must also be avoided. Here, bad news brings distress and mental or psychological harm, which according to the Qur'ānic verse must be verified so that unnecessary mental anguish does not result.

\(^{172}\) See Quiṣaṣ (Analogy), 646.

\(^{173}\) See quaṣaṣ or talion in Appendix 1.

\(^{174}\) See 'īla (ration legis), 647.

\(^{175}\) See text accompanying n 211, 644 , on tacit consensus under the shari'ā.
law Muslim States for making the causing of ‘mental harm’ unlawful as a broader principle of Islamic law. This issue is not likely to be considered a settled matter under the shari’a criminal law and is an illustration of what Windeyer J described as ‘law marching with medicine but in the rear and limping a little’176.

Mental harm can also be criminalised on the legal basis of maslahah (public good) or Sadd al-Dhari’ah (preventing harm),177 as an important aim [تَصَدَّق qasad (s) maqasid (pl)] of law is to prevent injury in any form to individuals. For reasons discussed above however,178 these legal bases are not considered ‘as sound’. In general though, the legal theory and basis for the criminalisation of mental harm under the shari’a is an area that needs development.

The issue of identifying what constitutes ‘mental harm’ in ICL jurisprudence is now examined. The question here is whether there is likely to be agreement between ICL and shari’a jurists.

The Trial Chamber in the Akayesu Case augmented the charge of physical damage that occurs during and after rape and sexual violence with a significant and ‘worse’ element of mental harm:179

Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. [Tutsi women] were subjected to the worst public humiliation, mutilated, and raped several times, often in public, [...] and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. [...].

Rape and sexual violence are clearly unlawful under the shari’a for inter alia the physical and spiritual harm that can result to all parties involved. Bassiouni has no doubt about the recognition under Islamic law of the adverse psychological effects (read here as being synonymous with

176 Mount Isa Mines Ltd v Pusey (1970) 125 CLR 383, para. 3 per Windeyer J.
177 See Public Interest or masalah al-Mursalah (‘maslahah’), 657; Sadd al-Dhari’ah: The Blocking of a means of harm or Pre-emptive Prevention, 662.
178 See Public Interest or masalah al-Mursalah (‘maslahah’), 657; Sadd al-Dhari’ah: The Blocking of a means of harm or Pre-emptive Prevention, 662.
mental harm) that can result from rape and sexual violation. His is a very persuasive voice and one strongly supported in this thesis. The majority of shari'a jurists are likely to agree with Bassiouni’s characterisation of mental harm and therefore, not oppose it being made an actionable injury under the shari'a. As mentioned, it has in practice been adopted in the domestic jurisdictions of Muslim States on a legal basis other than the shari'a. The distinction is made here not because would not be possible to criminalise acts causing mental harm under the shari'a, but that this issue, among others, has not been discussed and developed because of the overall stagnation of the shari'a.

On balance however, criminalising serious mental harm caused to an individual is not likely to be contentious under the shari'a and criminalising sub-paragraph (b) can lawfully be rooted in the shari'a.

Sub-paragraph (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

In characterising this ‘genocidal’ behaviour the Trial Chamber in the *Akayesu Case* held that:

> [in these cases] the perpetrator does not immediately kill the members of the group but [...] ultimately seeks their physical destruction.

The Trial Chamber further held that sub-paragraph (c) is made out if:

> the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction […]

Bassiouni points to a ‘precept of Islamic law’ that women who have had sexual relations outside marriage (including rape victims) are not marriageable:

> Despite targeting Muslim women for rape and sexual assault, in order to separate Bosnian Muslim women from Bosnian Muslim men, they are still often considered unmarrigeable under this precept.

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181 See Excluding the Criminal Law from the Shari’a, 618.
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In this vein, Bassiouni also refers to the mass rape of Bangladeshi women, presumably by Pakistani soldiers, both nations largely Muslim.\(^{185}\) The ‘precept’ of itself however appears to be exceedingly cruel as it doubly punishes a victim and Bassiouni, an Arab man of deep compassion, is no doubt citing (and clearly not endorsing) the unfortunate prevailing cultural view (in this case a Bosnian or Bangladeshi Muslim culture) where the requisite \textit{shari'a} mental elements are ignored in practice. The Qur’anic view is that the raped women should, absent the requisite mens rea of \textit{zina}, be blameless,\(^{186}\) and the rapists culpable. The attackers’ intentions, whether Bosnian Serb or Pakistani, are clearly reprehensible, and in the case of ‘Muslim’ perpetrators clearly contrary to the \textit{shari'a},\(^{187}\) perpetrating the physical elements of fornication coupled with the crime of violence against a non-combatant cognisant that it will deprive her of a future to found a family within her cultural community.\(^{188}\)

Recall that Saudi law is based on the \textit{shari'a}.\(^{189}\) The Saudi proposal on this sub-paragraph in 1946 therefore, arguably reflects a \textit{shari'a} view. Saudi Arabia said that this provision was aimed at criminalising the ‘intentional deprivation of elementary necessities for the perseverance of health and existence’.\(^{190}\) There has been little, if any, opposition to this position from Muslim States and therefore, arguably prima facie means that there is at least tacit consensus with the Saudi interpretation of this sub-paragraph.\(^{191}\) Although not cited in the their submission to the committee, and while not implying that they may have intended to do so, there is also independent Qur’anic authority supporting the Saudi position.\(^{192}\)

\(^{185}\) Ibid, 587.  
\(^{186}\) Qur’an 2:286.  
\(^{187}\) See text accompanying raison d’être, 632.  
\(^{188}\) See text accompanying n 195, 716.  
\(^{189}\) Daryl Champion, \textit{The Paradoxical Kingdom: Saudi Arabia and the Momentum of Reform} (2003), 55.  
\(^{190}\) UN Doc. A/C.6/86.  
\(^{191}\) See text accompanying n 211, 644, on tacit consensus under the \textit{shari'a}.  
\(^{192}\) Qur’an 7:85:  

\[\text{[The Prophet] Shu‘aib said: ‘[...] Give just measure and weight nor withhold from the people the things that are their due [...]}.\]  

Or,  

Qur’an 26:183:
Further, the physical elements of sub-paragraph (c) as described by the ICTR in its jurisprudence and by publicists also appears to fall within the meaning of fitna and fasad, particularly the aspects of fasad that broadly deal with wickedness and cruelty including withholding what rightfully belongs to others, usurping, oppressing and cheating people of their rightful due. It is therefore likely that criminalising sub-paragraph (c) can lawfully be rooted in the shari'a, and is not likely to be contentious.

Sub-paragraph (d): Imposing measures intended to prevent births within the group
The policy here is to protect a group against its destruction (in this instance destruction by preventing its replacement through new births). The Trial Chamber in the Akayesu Case said:

In patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

and further that:

measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

That is, destruction can be effected directly or indirectly inter alia through, sterilisation, rape or sexual violence, acts that can have the practical effect of preventing marriage and founding a family. This means of 'genocide' is particularly effective in societies that do not consider it legitimate to reproduce or to engage in sexual activity openly outside marriage.

In this context the shari'a provides a right, in fact creates a positive duty, on individuals to marry and found a family, a right recognised

"And withhold not things justly due to men nor do evil in the land working mischief".

See also Qur'an 3:180; Quran 11:85.

See discussion on Spreading Corruption on Earth (fasad fil ard), 693.


Ibid, para. 508.

Qur'an 24:32.
under international law. The *sunna* qualifies this proposition by stating that individuals who are financially able to do so, should marry. Marriage is considered a good deed in Islam; procreation and sexual activity outside marriage are prohibited. Therefore, placing impediments in the way of people getting married, or causing physical or psychological harm that prevents or is tantamount to preventing reproduction, arguably falls within the *shari'a* interpretation of sub-paragraph (d). Preventing good is *fasad,* and thus making reproduction practically impossible is in this instance *fasad* and negating this ‘genre’ of *fasad* is arguably a valid legal basis for criminalising sub-paragraph (d) under the *shari'a.*

In addition to preventing births by making marriage difficult or unlikely, there is also an issue of a person’s identity based on their biological origins. In identifying a *shari'a* parallel to the discussion above in the *Akayesu Case,* the Qur'an and the *sunna* require identifying children with their biological father. This is probably because the mother of a child is known with certainty by custom and her identity cannot be falsified as easily as that of the father. Acts therefore, on a population, similar to those carried out in *Akayesu,* are aimed at:

(i) effacing the victim’s genealogy, ancestry and patriarchal identity and

(ii) fraudulently ‘promoting’ that of the perpetrator.

These are actions prohibited by the Qur'an and may therefore legitimately be criminalised.

There are *shari'a* legal bases on which sub paragraph (d) can be criminalised. While some activity, such as rape and sexual violence, are already criminalised as serious *shari'a* crimes, characterising the crimes (as

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Marry those among you who are single or the virtuous ones among your slaves male or female:

197 Article XIX Universal Islamic Declaration of Human Rights, 19 September 1981,
199 Qur'an 4:127.
200 See discussion below Spreading Corruption on Earth, 693.
the Trial Chamber in *Akayesu* has done) may be controversial as a downgrading of a serious crime. Other aspects such as preventing births and obliterating genealogy while unlawful do not have a history of criminalisation as such, as the crimes were conflated with other serious crimes. Splitting existing crimes into specific, discrete and more focused crimes is a better outcome for justice as it separately recognises specific causes of harm although on the other hand it increases the complexity of the trial process and therefore the associated costs.

Further current case law provides some persuasive authority in support of the criminalisation of sub-paragraph (d). However, the strongest contemporary legal basis on which to criminalise this activity is on that of consent by Muslim nations to be bound by this provision. There does not appear to be any precedent which is likely make criminalisation of sub-paragraph (d) under the *shari'a*, contentious.

**Sub-paragraph (e) Forcibly transferring children of the group to another group.**

There does not appear to be much in the way of ICL jurisprudence on this sub-paragraph. The existence of rape as a crime does not in itself appear to establish this element. The ICJ said that:

> the Applicant [Bosnia] noted that in the *Kunarac case*, the ICTY Trial Chamber found that, after raping one of the witnesses, the accused had told her that “she would now carry a Serb baby and would not know who the father would be” (*Kunarac et al cases*, Nos. IT-96-23-T and IT-96-23/1-T, Judgment, 22 February 2001, para. 583). The Respondent [Serbia] points out that Muslim women who had been raped gave birth to their babies in Muslim territory and [were brought up] by Muslims. Therefore, in its view, it cannot be claimed that the children were transferred from one group to the other. The Court [does not find that...] there was any aim to transfer children of the protected group to another group ...

There are clearly instances in Australian history, broadly speaking where ‘Black’ children were forcibly removed to be raised by ‘White’ families in an effort to assimilate these children into an ‘Anglo-Australian’ culture. On the facts as admitted by the Court in the *Trevorrow Case*, both the actus reus and the mens rea elements of sub-paragraph (e) appear

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203 *Trevorrow v State of South Australia* (No 5) [2007] SASC 285, para. 396.
prima facie to be satisfied (and no doubt in the several hundred other potential instances that have not been able to be litigated, for many reasons)\textsuperscript{204} including for the Courts declining jurisdiction.\textsuperscript{205}

That is, notwithstanding the uncontested historical validity of this narrative, the issue of genocide has not been (able to be) fully litigated in Australian Courts.\textsuperscript{206} As discussed above, the main reason is that States are generally reluctant to admit to, or more importantly to accept liability for acts of genocide in history.\textsuperscript{207} It is unclear how sub-paragraph (e) differs from a voluntary transfer or adoption of children for necessity (say for adoption or foster care after natural disasters\textsuperscript{208}), and as distinguished from kidnapping or abduction, which are both criminalised in domestic law, made unlawful if abduction is between States party, under international law,\textsuperscript{209} although, arguably with no direct remedy on the international plane.

As with the other limbs of the acti rei of genocide, while the State, leadership group or State institutions may create the conditions necessary to effect the policy, it is most likely that, apart from organisations such as orphanages, individuals and families who are going to physically carry out and implement this policy of removal. To be an effective deterrent, the resultant laws must criminalise the act of removal of even a single child, as long as the broader purpose of these removals was evident, or should have reasonably been evident, as falling within the meaning of sub-paragraph (e). This issue is further discussed under the mental element (dolus specialis) associated with planning aspects of a genocide.\textsuperscript{210}

\textsuperscript{204} Sir Ronald Wilson and Mick Dodson, Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, (1997).

\textsuperscript{205} See Nulyarimma Case, 729.

\textsuperscript{206} See text accompanying n 264, 729.

\textsuperscript{207} See discussion on avoiding liability for the historical , 708. Further, When then Prime Minister made his historical apology to the Stolen Generations in Australia, he explicitly excluded an admission of legal liability for these past actions.

\textsuperscript{208} Mica Rosenberg and Joseph Guyler Delva, 'Haiti Questions Americans Over Child 'Kidnapping' Americans Had No Passports, Documents For The Children', Reuters (Port au Prince), 1 February 2010.


\textsuperscript{210} See discussion at Dolus Specialis (Special Intent), 727.
The prohibition in sub-paragraph (e) also appears to fit in broadly with the Qur’anic notion that God created people into nations and tribes so that they may recognise each other, and is therefore an established cultural norm that should not unnecessarily be tampered with through human intervention. ‘Adopting’ or being forced to adopt the identity of a different nation or tribe does not appear to make much sense from this shari'a worldview, as one cannot in fact change one’s tribe, colour or genealogy through an administrative act.

Further, under the shari'a a child must be identified by its biological parents. The Rights of the Child Convention defines a child as someone under the age of 18 years, although the Convention permits States to recognise adulthood at a younger age. A ‘child’ does not appear to be defined in the Genocide Convention or any other relevant ICL texts. The age of consent in Islam is quite variable. This issue of what age constitutes ‘childhood’ is not likely to be problematic however, because as Schabas rightly notes, ‘the genocidal act of transferring children only makes sense with relatively young children’.

Sub-paragraph (e) could therefore potentially be criminalised under the shari'a. The strongest legal basis on which to criminalise sub-paragraph (e) is on the basis of consent by Muslim nations to be bound by this provision. There does not appear to be any precedent in the shari'a which is likely make such criminalisation contentious.

Critique of the Analysis of the Physical Elements of Genocide
As with the translation of language, ‘translating’ crimes must be done with some caution. For example ‘ethnic cleansing’ during both peace and war is a crime under the shari'a, in practice if not in name, based on the prohibition of expelling people from their homes. The Syrian proposal to include a sixth limb (or sub-paragraph) criminalising ‘obliging members

212 See text accompanying n 201, 717.
of a group to abandon their homes', \textsuperscript{216} reflects a \textit{shari'a} norm, \textsuperscript{217} but was not adopted.

However, the Genocide Convention provision does not cover ethnic cleansing. \textsuperscript{218} Schabas analyses several ICTY cases including \textit{Stakić, Sikirica, Brdanin & Krnojelak}, and found that the attempt to create a \textit{Republika Sprska} as an ethnically pure Serbian entity through ethnic cleansing did not satisfy the elements of genocide. \textsuperscript{219} The ICJ concurred. \textsuperscript{220}

\textsuperscript{216} UN Doc. A/C6/234.
\textsuperscript{217} Qur’an 60:8.
\textsuperscript{218} Antonio Cassese, \textit{International Criminal Law} (2nd ed, 2008), 135.; According to the Joint Standing Committee on Foreign Affairs and Trade, Commonwealth of Australia, \textit{Bosnia Australia’s Response} (1996), 5:

Justice Marcus Einfeld noted that European nations, in accepting the Bosnian Serb argument that they had to have their own ethnically pure country, condoned a principle that racial or ethnic purity was a valid criterion for national organisation.

On the other hand, and acknowledging that these provisions may not be recognised as customary international law, Art. 85(4)(a) Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, provides that:

(a) the transfer by the occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention

and Art. 85(4)(c) Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, provides that:

(c) practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination.

Note that under the \textit{shari'a}, what is unlawful under the Qur’an can never ordinarily be made lawful, and generally remains unlawful for eternity except for contingencies such as for necessity.

\textsuperscript{220} The ICJ agreed with the ICTY on this point in the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (2007) para. 190 (emphasis added):

The term "ethnic cleansing" has frequently been employed to refer to the events in Bosnia and Herzegovina [...] General Assembly resolution 47/121 referred in its Preamble to "the abhorrent policy of 'ethnic cleansing', which is a form of genocide", as being carried on in Bosnia and Herzegovina. It will be convenient at this point to consider what legal significance the expression may have. It is in practice used, by reference to a specific region or area, to mean "rendering an area ethnically homogeneous by using force or intimidation to remove persons of given groups from the area" (S/35374 (1993), para. 55, Interim Report by the Commission of Experts). It does not appear in the Genocide Convention; indeed, a proposal during the drafting of the Convention to include in the definition "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment" was not accepted (A/C.6/234).
Many serious crimes will continue to remain outside the jurisdiction of the ICC for practicality, and a parallel situation is envisaged for prosecution under the *shari'a* on the international plane. What Muslim nations should do is to help develop ICL/IHL extend prosecutable, *shari'a* formulations of serious crimes including aggression, oppression and ethnic cleansing into the ranks of the most egregious crimes under IHL/ICL. The issue is not whether ‘ethnic cleansing’ is lawful under international law, it is not; but whether the international community considers it serious enough (as does the *shari'a*) to promote it into the ranks of the crimes prosecutable on the international plane.

As discussed in chapters 4 and 5, the *shari'a* permits the wartime killing of the enemy, as a group or a part of a group, in certain conditions. Although such fighting clearly does not fall within the ordinary understanding of ‘genocide’ all fighting between identifiably separate groups can in cases appear to satisfy the actus reus of genocide. The *chapeau* and Art. II explicitly prohibit genocidal *acti rei* in peace and war.\(^{221}\) IHL generally and the Rome Statute does not create an explicit wartime

It can only be a form of genocide within the meaning of the Convention, if it corresponds to or falls within one of the categories of acts prohibited by Article II of the Convention. Neither the intent, as a matter of policy, to render an area “ethnically homogeneous”, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: […] This is not to say that acts described as “ethnic cleansing” may never constitute genocide. […] As the ICTY has observed, while “there are obvious similarities between a genocidal policy and the policy commonly known as ‘ethnic cleansing’” (*Krstić*, IT-98-33-T, Trial Chamber Judgment, 2 August 2001, para. 562), yet “[a] clear distinction must be drawn between physical destruction and mere dissolution of a group. The expulsion of a group or part of a group does not in itself suffice for genocide.” (*Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, para. 519.) In other words, whether a particular operation described as “ethnic cleansing” amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term “ethnic cleansing” has no legal significance of its own. That said, it is clear that acts of “ethnic cleansing” may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.

The ICJ’s analysis appears to fall within Lemkin’s two part test for the physical elements of genocide: Gerd Hankel, *Crime of Genocide* (2008) [http://www.massviolence.org/Crime-of-Genocide,] at 6 January 2010. of ‘(i) destruction of the national pattern of the oppressed group and (ii) imposition of the national pattern of the oppressor’. The *shari'a* makes the acts described in both limbs of this test unlawful.
exception for such acts. According to Schabas’s analysis of the case law, he concludes that ‘acts of armed conflict committed without specific intent required by Art. II are not sufficient to constitute genocide per the Convention’. That is, de facto, IHL appears to permit the killing or the destroying of all or part of the enemy group. This is clearly not because ‘genocide’ is permissible in war but because the wording of the Rome Statute arguably is problematic for not explicitly distinguishing permitted wartime acts. The question is whether this issue is likely to be problematic in formulating an equivalent shari’a crime? The answer appears to be ‘no’ for the precedent established in international law.

**Mental Element**

Intention is a central and inseparable element of a cause of action under the shari’a. It is re-iterated however, that it is self evident that a guilty mens rea in a shari’a formulation of a crime can only apply to physical elements that are unlawful or prohibited under the shari’a.

The next question is then whether the Statute of Rome’s formulation of dolus specialis is compatible with intention to commit what prima facie appears to be a prohibited act under the shari’a? This step may not appear to be necessary, as having established intention as a mandatory aspect or element of a crime, the only question then becomes how the intention provision is worded so that what is prohibited in times of peace is distinguished from what is prohibited in war. The framers of the shari’a formulations of genocide must ensure that the wording of the element captures the context in the two relevant situations to legitimate fighting the enemy army ‘all together’ in a manner that does not satisfy the physical or mental elements of genocide. Explicitly distinguishing between the

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221 Genocide Convention.
223 Art. II Genocide Convention.
225 For safety however the issue is considered at *Dolus Specialis*, 727.
226 See n 222, 723 where Schabas concludes that armed activity is outside the scope of the Genocide Convention. It is noted, however, that neither the case law on which this statement is based, nor the writings of the publicists, constitute binding sources of law on the international plane: Art. 38(1)(d) *Statute of The International Court of Justice*,
situations of war and peace is necessary under the shari’a and is implicitly but not explicitly recognised in ICL/IHL.\textsuperscript{227}

The special nature of the crime of genocide and particularly the requisite intention element of the crime are widely recognised and accepted as demonstrated by the various incarnations of the provision.\textsuperscript{228} According to Schabas, the ILC reflected the \textit{Eichmann Case}\textsuperscript{229} Court’s view on genocide,\textsuperscript{230} and therefore, might encapsulate a particular expression of events\textsuperscript{231} and ‘evil’ behaviour stemming from the Holocaust. The sort of targeting of a group whether European Jews, Bosnians, ‘educated’ Cambodians, Hutus or Tutsis because they belong to that particular group, must in any event, be criminalised in both peace and war. This sort of targeting is clearly distinct from one group fighting a war against a another people bearing common characteristics. Further, it appears extremely unlikely that necessity would ever justify the actus reus and the requisite mental element of genocide.

\textbf{The Planning Aspects of a Genocide}

The ICTY Trial Chamber in \textit{Jelesić}\textsuperscript{232} said that: \textsuperscript{233}

\begin{quote}
premeditation was not selected as a legal ingredient of the crime of genocide after having been mentioned by the \textit{ad hoc} committee at the draft stage, on the grounds that it seemed superfluous given the special intention already required by the text.
\end{quote}

The ICTY also distinguished ‘arbitrary killing’ from a ‘clear intention to destroy a group’.\textsuperscript{234} Further, the Appeals Chamber in \textit{Jelesić} confirmed that a ‘plan or policy’ was not a legal element of the crime,\textsuperscript{235} but emphasised that the exclusion of the planning element was done in order to avoid

\begin{footnotes}
\item[228] See n 143, 706.
\item[229] (1962) 36 I.L.R 227.
\item[231] According to \textit{Eichmann} (1962) 36 ILR 227, 287, and although the meaning of the word is not limited to this, the Supreme Court held that ‘the crimes against the Jewish people’ was genocide.
\item[232] \textit{The Prosecutor of the Tribunal Against Goran Jelisić} (1999) Case No IT-95-10-T ICTY.
\item[233] Ibid. para. 100.
\item[234] Ibid. paras. 107 108.
\end{footnotes}
increasing the burden of proof.236 Notwithstanding this concession, the Appeals Chamber at the ICTR in the Musema Case approved the Trial Chamber’s decision on genocide,237 which inferred the requisite mental element inter alia from the widespread and systematic preparation for the attacks against Tutsi civilians and therefore that Mr Musema had formed the intention of eradicating the targeted group.240 Hankel reads in a requirement for some premeditation but again subsumes this requirement as part of the special intention required.241 Article 6(1) of the Statute of the ICTR also uses the words ‘planned, instigated, ordered, committed or otherwise aided and abetted’, and the Trial Chamber in the Akayesu Case said that ‘such planning is similar to the notion of complicity in civil law, or conspiracy under common law’.242

In the related aspect on ‘planning’, the Appeals Chamber in the Tadić Case considered the category of joint criminal enterprise (JCE), and held that:243

> The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill.

The Chamber went on to analyse the case law on the subject to conclude that:244

> Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.

Therefore, while preparation or planning are not legal elements of genocide as such, such actions can go to establishing a defendant’s state of

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236 The Prosecutor of the Tribunal Against Goran Jelisić (1999) Case No IT-95-10-T ICTY para. 100.
238 Ibid. para. 371.
244 Ibid. para. 196.
245 Ibid. para. 206.
mind and hence intention. For reasons similar to those discussed above on ‘spying', evidence of such acts of planning and preparation would for shari‘a purposes best be obtained from the public domain and from publicly available sources.\textsuperscript{246}

JCE & Recklessness

In addition to the pronouncements on recklessness by the Appeals Chamber in the \textit{Tadić Case},\textsuperscript{247} Schabas confirms that the \textit{Delalic Case}\textsuperscript{248} and the \textit{Akayesu Case}\textsuperscript{249} stand for the proposition that knowledge includes recklessness.\textsuperscript{250} The Canadian Supreme Court held that \textit{dolus eventualis}, recklessness and wilful blindness (i.e. ignoring the obvious) may in cases be sufficient to establish knowledge,\textsuperscript{251} a position that is likely to find support in the shari‘a methodology, particularly if the level of culpability on the defendant’s part is clear.

Generally however, this issue of recklessness, and the level of culpability that must be established with respect to serious crimes is not settled under the shari‘a and requires urgent clarification. It is conceded that this will not be an easy process and is likely to be contentious because of the reduction in the evidentiary standards and standard of proof. Constructive knowledge or the fact that a defendant 'should have known' or was grossly negligent is not likely to be sufficient to satisfy the ‘certain' criminal standard required at present, for the harsh shari‘a punishments tend to make judges hesitant to convict on other than near certainty. Lighter penalties, as is the custom at international tribunals, will permit

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{246}] See discussion on spying (\textit{tajassus}), 707
\item[\textsuperscript{247}] See n 245 above.
\item[\textsuperscript{248}] The Trial judges in \textit{The Prosecutor v Zejnil Delalic} (1998) Case No: IT-96-21-T para. 439. said:

\begin{quote}
[I]The Trial Chamber is in no doubt that the necessary intent, meaning \textit{mens rea}, required to establish the crimes of wilful killing and murder, as recognised in the Geneva Conventions, is present where there is demonstrated an intention on the part of the accused to kill, or inflict serious injury, in reckless disregard of human life.
\end{quote}

\item[\textsuperscript{249}] The Chamber in \textit{The Prosecutor v Jean-Paul Akayesu} (1998) Case No ICTR-96-4-T ICTR para. 520. said that:

\begin{quote}
The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.
\end{quote}

\item[\textsuperscript{250}] William A Schabas, \textit{Genocide in International Law: The Crime of Crimes} (2nd ed, 2009), 254 esp n 52.

\item[\textsuperscript{251}] \textit{R v Finta} (1994) 1 SCR 701, 878.
\end{enumerate}
\end{footnotesize}
creating laws and encourage the development of the jurisprudence that considers the admittance of a broader range of evidence. This development will allow shari'a judges to dispense with the standard of 'certain' in favour of the lower international criminal standard of proof of 'beyond a reasonable doubt' as a quid pro quo, while still maintaining basic protections.

Dolus Specialis (Special Intent)
The Rome Statute requires a dolus specialis for the successful prosecution of the crime of genocide. Cain culpability, while generally construed as 'genocide' under the shari'a, nonetheless does not satisfy the requisite dolus specialis in its legal sense. Genocide is a crime in both wartime and in peace.

Generally however, as discussed, in most instances a single individual cannot reasonably be expected to posses the capacity to wipe out an entire 'significant group'. What must inhere in the physical and mental elements of the shari'a equivalent of this crime when developed is the incorporation of the notion of Cain culpability as a relevant factor in establishing the existence of a dolus specialis. Cassese notes that the Trial Chamber of the ICTY in the Sikirica Case did not elaborate beyond the intent requirements as articulated in Article 4 of the Statute of the ICTY, the Genocide Convention or the relevant articles in the Rome Statute. As with ICL/IHL, leaving the determination of this intention element to the discretion of shari'a judges is acceptable, but requires that the presiding justices are imbued with the law and spirit of the operation of this legal element within the shari'a. From a shari'a perspective therefore, the issue

253 See Cain & Abel Story at text accompanying n 107, 701.
255 See discussion on why the crime must require that damage be inflicted against only a part of the group, 709.
with respect to mens rea, is that the crime as defined must also include the requisite ‘specific intent element’ but as compounded by Cain liability.

Further, the shari’a does not distinguish between the two situations of international and non-international armed conflicts. The absence of such a distinction has a practical effect on the drafting of shari’a instruments generally. While, for ease and convenience, it would, when necessary, be acceptable to have separate instruments to parallel or mirror the current international instruments it would not be reasonable to alter the shari’a law itself to introduce such distinctions. The de jure position under the shari’a and de facto position under IHL provide exceptions for wartime killing of a group or part of a group. The issue may prove difficult to negotiate. Therefore, a precise crafting of the physical elements to explicitly reflect the shari’a wartime exception of fighting a whole group (of combatants only), is perhaps the most appropriate solution to the problem of establishing the shari’a parameters.

This is likely to mean that the jurisprudence under each system (ie the present international system and the shari’a) may take on a distinctly different character even when cases are tried under ‘equivalent’ provisions. The real issue to be considered however, and as the concept of binding precedent is not applicable on the international plane, is not whether the jurisprudence is consistent but whether justice was done in each case. On the other hand, and as opposed to ICL/IHL jurisprudence, shari’a based decisions will on the basis of taqlid257 be persuasive and while not binding authority, be presumed to stand. However, the need for ‘live’ judicial decisions is vital in clarifying the law as is now highlighted by examining some related issues examined in the Australian Courts.

The Practical Difficulties of Establishing dolus specialis: Case Law on Genocide
Sir Robert Menzies, observed in the Australian Parliament that the destruction of the greater part of the population, languages and cultures of indigenous Australians did not constitute genocide in the meaning of the

257 See discussion and conclusion on (the presumption of continuity), Taqlid as a rebuttable presumption, 673.
Genocide Convention. Menzies’ conclusion is consistent with that of Bassiouni who reasoned that ‘specific intent’ for genocide is not made out with respect to the USA’s destruction of America’s First Nations’. This view is arguably at odds with the sociological views, where the word ‘genocide’ is taken to describe US or Australian treatment of their respective indigenous peoples’ quite accurately. Shaw’s sociological analysis and conclusions however differ from Menzies’ and Bassiouni’s legal analysis, as they are both jurists in their own right, and here arguably lies the crucial difference. Not being even-handed in recognising genocidal conduct is perhaps a significant weakness of the formulation of the crime under international law, which was historically informed by the Holocaust and the crimes in the (German) Occupied Territories as opposed to capturing the broader ‘genocidal behaviour’ of the many nations. Perhaps, at that time, this was the only practical and pragmatic compromise available, but all laws should evolve, and is a central submission of this thesis.

Guilfoyle notes that the Australian Government’s position had been that genocide could have been prosecuted under Australia’s domestic law. Australian courts on the other hand, however have been tentative in tackling this sensitive question. The Victorian Supreme Court held in 1999 that genocide was not a crime in Victoria. Further, Guilfoyle writes from his analysis of the decision of full bench of the Australian Federal Court in the Nulyarimma Case that the ‘Australia lack[ed] an offence of genocide’ but notes also that the case in his view ‘was wrongly

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259 Cherif Bassiouni, ‘Has the United States Committed Genocide Against the American Indian?’ (1979) 9 California Western International Law Journal 256, 274.
262 Douglas Guilfoyle, ‘Nulyarimma v Thompson: Is Genocide A Crime At Common Law In Australia?’ (2001) 29 Federal Law Review 1, 7. Guilfoyle (at, 7) notes also that this was in spite the advice to the contrary received by the Government from both the Attorney-General’s Department and Parliamentary Committees.
decided’. 266 Hankel rightly notes that States ‘display no interest in pursuing allegations [of genocide] on their own territories or within their sphere of influence’. 267 This reluctance is evident, notwithstanding a State’s international obligation to prosecute. 268 Australian Courts are nonetheless unable to adjudicate over the prosecution of a ‘crime’ that is not recognised as having domestic legal effect.

Many common law countries have thus enacted the necessary domestic legislation through the incorporation of the Rome Statute into domestic law. 269 This includes common law Muslim States, but on the other hand, shari’a based formulations of the crime of genocide still appear not to be forthcoming even in these States. The alternate means of incorporating law, ie as opposed to directly creating a shari’a based crime of genocide, is via the means of consensus or tacit consensus that results after the incorporation into ‘Islamic common law’ of the treaty based crime. This thesis however favours a more direct and deliberate means of incorporation. Further, it is proposed that the creation of shari’a versions of these laws on the international plane will result or promote explicit and deliberate domestic incorporation in Muslim States of the crime in its shari’a form. A crime whose formulation had its genesis in the shari’a sources is more likely to be acceptable to the majority of their peoples. This careful but deliberate process of the migration of shari’a law from the international plane to the domestic plane will also help migrate international rule of law processes and standards into domestic courts thus promoting a rule of law culture that appears wanting in many Muslim jurisdictions. This statement is contentious and is likely to be challenged by many Muslim majority States, although such contention alone does not negate the validity of the foregoing observations or analysis.

266 Ibid., 2.
269 Since the Australian incorporation of the Rome Statute, Australian Courts can now administer the prosecution of genocide. See International Criminal Court Act 2002 (Cth).
Excuses, Defences and Immunity to Prosecution under Islamic Law

This section is not exhaustive in its examination of the substantive law but seeks only to demonstrate the sometimes significant commonality between IHL/ICL and the shari'a. Harmonising the broader shari'a 'excuses' and defences for crimes when compared with IHL/ICL excuses and defences may not be as problematic, particularly when starting from a low 'base' that characterises the shari'a as an 'alien' legal system.

Vogel states, but absent a detailed analysis, that a court should 'reject any justification under Islamic Law for the September 11 attacks, including assertions that the attacks were to any degree excusable, legitimate or obligatory'. While this conclusion appears to be in line with the shari'a based analysis according to this thesis, as a starting point however, such a premise appears to be biased and unhelpful. Islam permits armed djihad and tolerates rebellion in certain oppressive situations as discussed in chapters 4 and 5. While this view is not uncommon in the West, to dismiss potential shari'a defences out of hand is patronising. It appears to reserve the notion of a society free of oppression, only for some nations, races or peoples and thus is too limiting for a global legal system that aims to reflect the diversity of our human civilisations. It puts a certain and exclusively Western cultural gloss on IHL/ICL which, should not be permitted. Thus the legitimate armed djihad must generally be viewed alongside, and with the mitigating effects of, say the armed struggle for liberation or self-determination under international law.

Defences and Excuses: A brief comparison between the shari'a and ICL

Insanity is a complete defence under the shari'a and is also a reason for excluding criminal responsibility under the Rome Statute. Self-induced intoxication is not a defence under Islamic law and is a separate hadd crime. The Rome Statute has a nuanced test for those who become

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271 Michael Inman, 'Put dictator in charge says Hawke', Canberra Times (Canberra), 6 February 2011, 18.
273 Article 31(1)(a) of the Rome Statute.
274 Alcohol or drug induced/affected acts, no matter how serious the intoxication, and particularly if voluntary or self-induced, is no defence under the shari'a as 'drinking
Appendix 3 —  732

voluntarily intoxicated indicating some divergence between the Rome Statute and the shari’a, signalling a general need to reconcile or manage these differences.

Under Islamic law, children attain majority at puberty and most Schools set the age at between 15 and 17 years but is an area that needs some consensus between the Schools. Doli incapax in the Rome Statute generally excludes criminal liability for those under 18, but the Rome Statute allows for the prosecution of under 15’s in some limited circumstances, and therefore should not be difficult to harmonise. Self-defence (when using lawful means) is a complete defence under the shari’a as it is under the Rome Statute. Duress is an excuse under the shari’a as it is under ICL. The important issues of necessity and superior orders are relevant factors under the shari’a and, as discussed in chapter 4, are also part of ICL.

wine' is a hadd crime. Therefore, while generally it is suggested that international tribunals should not have jurisdiction over hadd crimes, such voluntary acts cannot, within both the text and spirit, in any way be considered as mitigating under the shari’a.

‘Induced’ intoxication may be treated in a manner not dissimilar to that of its treatment under the Rome statute because it is ‘beyond the person’s control’: Article 31(1)(d) (ii) of the Rome Statute.

Article 26 of the Rome Statute.


Doli incapax is a defence under the shari’a, although the definition of what constitutes an adult under the shari’a is likely to need some negotiation, since Islam defines obligation for prayer or fasting etc by human physical changes such as the onset for example, of puberty: (Ibid.) and not by a fixed chronological physical age, such as on attaining a particular age: see Article 26 of the Rome Statute for 18 year-old people and Article 8(2)(e)(vii) of the Rome Statute for 15 year-old people. Anwarullah’s definitions, drawn from the various Schools, do not appear to differ substantially from the definitions of ICL. This issue of ‘the age of majority’ however, is not likely to be as uncontroversial as may appear from this short description.

Article 26 of the Rome Statute.

Article 8(2)(e)(vii) of the Rome Statute.

Qur’an 2:194 and particularly n 210. Note however, that self-defence is subject to other considerations such as proportionality and legitimate means. For example Professor Bassiouni, both an ICL and shari’a scholar, notes that defensive nature of the force used is not directly relevant a factor to crimes against humanity, and thus arguably a fortiori for genocide: Cherif Bassiouni, Crimes against Humanity in International Criminal Law (2 ed, 1999), 449.


Article 31(1)(d) of the Rome Statute.

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Immunities

While international law recognises sovereign immunity, the shari'a does not provide the imam, a Head of State or anyone else immunity from prosecution as an intrinsic 'right' attached to a social position or political office. The fundamental inconsistency in laws dealing with sovereign immunity between the shari'a and the general international law are unlikely to be reconciled on this issue, unless the meaning of say Article 7(2) of the Statute of the ICTY is considered binding by custom, which is not very likely at present, and if this is the case, for safety, the protections offered to Heads of State should apply retrospectively as a treaty obligation under the shari'a as it does under international law.

Conclusion on Genocide

Australian case law arguably shows that notwithstanding the existence of ius cogens obligations on the international plane, domestic common law courts are nonetheless reluctant to find the existence of such a crime unless explicitly incorporated into domestic legislation. This reluctance may be exacerbated in cases when one's forbearers behaviour, such as in Australia and in the USA, can be can reasonably be highlighted and 'but for the existence of a positive law criminalising such acts' pursued legally, because of the popular, recognition of the existence of 'genocidal' behaviour in the past, and in some cases the recent past.

In this sense, and notwithstanding the popular recognition of 'the banality of evil', as one would expect, Muslims are no different to

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285 Ibid. (265.
286 In this sense the shari'a position on individual criminal responsibility appears to be more akin to Article 7(2) of the Statute of the ICTY:

The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

As opposed to that of the position on individual criminal responsibility under the Rome Statute:

Article 25(2). A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

Article 25(4) . No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

287 See n 286, above.
Australians, Americans or others, as being reluctant collectively to consider themselves, their forbearers as evil génocidiers. In the contemporary context, this ‘protective’ urge appears to extend to allies and co-religionists whether Bosnian Muslim, Islamist, Terrorist, Serb Orthodox, German Calvinist, Jewish Settler, Buddhist Cambodian, Anglican/Episcopalian Unionist, Catholic Loyalist, Communist Soviet, Capitalist American or Catholic Hutu or Tutsi, as capable of executing or colluding in the perpetration of heinous crimes. Such negative attributes however, easily attach to the ‘other’.

Cassese quotes Sartre, living in the thick of European anti-Semitism, who identifies the Children of Israel (bani Israel) as: ‘le juif est un home que les autres homes tient pour juif’, while people of that faith may have a much more sophisticated test for membership of that group, but which as stated and as used in Europe is an external imposition and validation of a person’s identity. While this ‘definition’ includes an element of recognition, it went well beyond mere recognition, discrimination or social ostracism, by using ‘recognition’ to attempt utterly to destroy that people. The crime of genocide as formulated after World War II attempted to ensure that this act of wickedness was never to be repeated. The events in Rwanda and Yugoslavia and in many other places shows us that humanity is a long way from giving effect to this noble aim. It is posited that the failure to recognise the various legal traditions may be a contributing element to this failure.

Muslims in general – albeit with significant minority in dissent - appear to be content with conspiracy theory explanations or alternatively to hide their collective heads in the proverbial sand by deflecting responsibility for atrocities committed by Islamists acting in the name of Islam, by wholly blaming Israel, the West generally or others for the criminal or perhaps even genocidal killings in their name. While the situation is murky and far from clear, all sides involved in a conflict must share at least some of the blame for the present situation. The reality is that war, which is being pursued by both the West and by al-Qa’eda, each for its

own reasons, and which may not always coincide with its public protestations, is unlikely to bring about a lasting solution except through exhaustion, a prospect that does not even appear to be within sight at present.

Creating explicit and specific *shari'a* crimes and a forum to prosecute these crimes, and trying Muslim defendants under a law that she or he cannot easily disown, is likely to negate self-delusionary behaviour on the part of Islamists\(^\text{289}\) by sheeting home responsibility for criminal acts in a transparent and fair manner under law and that prevents abdication of responsibility by all but the most wilfully blind. A forum for such adjudication, not only for genocide as discussed here, but also potentially for the other serious crimes, is discussed in chapter 7. As a matter of principle however, there should be no difficulty in drafting a *taz'ir* crime to reflect the crime of genocide.

\(^{289}\) See notes accompanying n 392, 672 and n 393, 672 on the Muslim's duty of *ittiba*. 
Elements of Crimes

Elements Of Crimes as Referred in the Rome Statute and Related Documents

Eléments Of Crimes

ARTICLE 9

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

(a) Any State Party;

(b) The judges acting by an absolute majority;

(c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Areas of Concern Under the Shari'a

Article 9 as a whole is likely to be problematic because it appears to exclude 'jurists' as a class of people, as a source of law. This point is discussed the text accompanying n 89, 23. For a general discussion of the shari'a as a jurist's law see Appendix 1.

Art. 9(2)(a) see discussion at n 101, 700 on a shari'a requirement that rulers act justly. This prerequisite is difficult to administer but ideally would prevent the submission of oppressive amendments.

This element is not likely to be contentious.

Art. 9(2)(c) may be problematic generally as the prosecutor is not a disinterested, independent party and who in the view of some States can be susceptible to pressure from the P5 in the Security Council. See n 100, 699. This is not an unreasonable concern and entrenches the privilege of the P5.

This element is not likely to be contentious.

Art. 9(3) is likely to be read by Muslim States as also being compliant with the shari'a although as discussed generally in this thesis, this statement is much too broad to constitute a reservation.

Elements of Crime

ARTICLE 6(a)

GENOCIDE BY KILLING

Statute of the International Criminal Court, 17th day of July 1998,

Elements of Crimes to the Rome Statute, 09 September 2002
Appendix 3 — 737

Elements Of Crimes as Referred in the Rome Statute and Related Documents

1. The perpetrator killed one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

4. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

ARTICLE 6(b) GENOCIDE BY CAUSING SERIOUS BODILY OR MENTAL HARM

1. The perpetrator caused serious bodily or mental harm to one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

1. In effect this element does not appear to be problematic. However, the causing of mental harm is not a settled matter under the shari’a. [See discussion of: Sub-paragraph (b) Causing serious bodily or mental harm to members of the group; 711].

This element is similar to the elements of Article 6(a)(2).
### Appendix 3 — 738

**Elements Of Crimes as Referred in the Rome Statute and Related Documents**

<table>
<thead>
<tr>
<th>Element</th>
<th>Description</th>
</tr>
</thead>
</table>
| 3. | The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.<br>This element is similar to the elements of Article 6(a)(3).<br>4. | The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.<br>This element is similar to the elements of Article 6(a)(4).<br>ARTICLE 6(c) | GENOCIDE BY DELIBERATELY INFlicting CONDITIONS OF LIFE CALCulated TO BRING ABOUT PHYSICAL DESTRUCTION<br>Elements of Crimes | 1. The perpetrator inflicted certain conditions of life upon one or more persons.<br>This element does not appear to be problematic. [See discussion on: Spreading Corruption on Earth (fasad fil ard), 693 and Sub-paragraph (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part 714].<br>This element is similar to the elements of Article 6(a)(2).<br>2. | Such person or persons belonged to a particular national, ethnical, racial or religious group<br>This element is similar to the elements of Article 6(a)(3).<br>3. | The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.<br>4. | The conditions of life were calculated to bring about the physical destruction of that group, in whole or in part.<br>As genocide is a crime that can be sheeted home to an individual, cognisant of individual limitations the shari'a formulation must necessarily be able to be satisfied by the destruction of part, or even in cases a single individual. (See discussion of: why total elimination is not physically possible, 709).<br>This element is similar to the elements of Article 6(a)(4).<br>5. | The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct
Elements Of Crimes as Referred in the Rome Statute and Related Documents

that could itself effect such destruction.

**ARTICLE 6(d)**

1. The perpetrator imposed certain measures upon one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.

4. The measures imposed were intended to prevent births within that group.

5. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

**GENOCIDE BY IMPOSING MEASURES INTENDED TO PREVENT BIRTHS**

1. This element does not appear to be problematic. (See discussion of, Spreading Corruption on Earth (fasad fil ard), 693 and Sub-paragraph (d): Imposing measures intended to prevent births within the group, 716)

This element is similar to the elements of Article 6(a)(2).

This element is similar to the elements of Article 6(a)(3).

**ARTICLE 6(e)**

1. The perpetrator forcibly transferred one or more persons.

2. Such person or persons belonged to a particular national, ethnical, racial or religious group.

3. The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group.

**GENOCIDE BY FORCIBLY TRANSFERRING CHILDREN**

This element is likely to prove non-controversial. (See discussion of, (e) Forcibly transferring children of the group to another group, 718)

This element is similar to the elements of Article 6(a)(2).

This element is similar to the elements of Article 6(a)(3).
Elements Of Crimes as Referred in the Rome Statute and Related Documents

4. The transfer was from that group to another group. The *shari’a* is generally considered a paternalistic system and it is unlikely that this element will be problematic. (See discussion of, child must be identified by its biological parents, 720)

5. The person or persons were under the age of 18 years

6. The perpetrator knew, or should have known, that the person or persons were under the age of 18 years.

7. The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.

This element is not likely to prove problematic.

The age of majority under the *shari’a* can vary from the definition in the Convention on the Rights of the Child. (See discussion of the: age of consent, 720)

This element is similar to the elements of Article 6(a)(4).
### ARABIC TERMS

<table>
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<th>Arabic</th>
<th>Meaning</th>
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<td>'adl</td>
<td>جلد</td>
<td>Just (witness) also Justice</td>
</tr>
<tr>
<td>'afu</td>
<td>ذمة</td>
<td>Grace or pardon (criminal law)</td>
</tr>
<tr>
<td>'adids</td>
<td>الوديان</td>
<td>Descendants of Ali b. Abi Talib</td>
</tr>
<tr>
<td>'ibad Allah</td>
<td>عباد الله</td>
<td>God’s subjects</td>
</tr>
<tr>
<td>'hadites</td>
<td>عباد نزهان</td>
<td>Khawarij faction of Tahert (North Africa)</td>
</tr>
<tr>
<td>'iddah</td>
<td>إعدة</td>
<td>The waiting period of a widowed or divorced woman during which she may not re-marry. [see khul'a]</td>
</tr>
<tr>
<td>'illah</td>
<td>إله</td>
<td>Ratio legis “the element that triggers law into action”</td>
</tr>
<tr>
<td>'imani</td>
<td>علماني</td>
<td>Secular reformists</td>
</tr>
<tr>
<td>'aqaba</td>
<td>إعقبة (inept)</td>
<td>Punishment</td>
</tr>
<tr>
<td>'aqabat (pl)</td>
<td>إعقبات (inept)</td>
<td>Punishment</td>
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<td>'urf</td>
<td>عرف</td>
<td>Custom</td>
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<td>'uskr</td>
<td>عصر</td>
<td>Time</td>
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<td>'usul</td>
<td>أصول</td>
<td>Roots</td>
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<tr>
<td>'usul al-fiqh</td>
<td>أصول الفقه</td>
<td>Roots of legal knowledge</td>
</tr>
<tr>
<td>Aghlabids</td>
<td>الأغلب</td>
<td>North African Sunni dynasty.</td>
</tr>
<tr>
<td>ahl al-hadith</td>
<td>أهل الحديث</td>
<td>Traditionalist see: ahl al-ra’y</td>
</tr>
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<td>ahl al-kitaab</td>
<td>أهل الكتاب</td>
<td>People of the book, Scripturary</td>
</tr>
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<td>ahl al-ra’y</td>
<td>أهل الرأي</td>
<td>Rationalist see : ahl al-hadith</td>
</tr>
<tr>
<td>al-jamhour</td>
<td>الجمهور</td>
<td>[agreement among a] majority of jurists</td>
</tr>
<tr>
<td>al-mawjūdat</td>
<td>الموجودات</td>
<td>Existent beings</td>
</tr>
<tr>
<td>al-qāds al-aṣālim</td>
<td>القياس العلوي</td>
<td>Rational reasoning</td>
</tr>
<tr>
<td>al-qāds al-thabrani</td>
<td>القياس الورائي</td>
<td>Study of demonstrations</td>
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<tr>
<td>al-salaf al-salih</td>
<td>السلف الصالح</td>
<td>The righteous forbearers</td>
</tr>
<tr>
<td>Al-Sha‘ī’i Abu Abdullah Muhammad b. Idris</td>
<td>أبو عبدالله محمد بن ابراهيم الأيثري</td>
<td>Eponym of the Shaafi’i school. Born in Gaza (150AH/767 AD) the year of Abu Hanifa’s death. Died 204AH/820AD in Egypt.</td>
</tr>
<tr>
<td>al-sirat al-mustaqim</td>
<td>السر فالمستقيم</td>
<td>The straight path</td>
</tr>
<tr>
<td>al-tahkim</td>
<td>التحكيم</td>
<td>Arbitration</td>
</tr>
<tr>
<td>aman</td>
<td>امان</td>
<td>Safe conduct</td>
</tr>
<tr>
<td>must’amin (s); musta‘minun(pl)</td>
<td>مستأمن</td>
<td>Safe conduct</td>
</tr>
<tr>
<td>anwatan</td>
<td>عوة</td>
<td>Things acquired by force</td>
</tr>
<tr>
<td>Aqīd</td>
<td>عقيد</td>
<td>Contract</td>
</tr>
<tr>
<td>asir</td>
<td>أسير</td>
<td>Prisoner of war.</td>
</tr>
<tr>
<td>asra (pl)</td>
<td>أسر (pl)</td>
<td>Prisoner of war.</td>
</tr>
<tr>
<td>ayaṭ al-abkām</td>
<td>اياط الأحكام</td>
<td>Legal injunctions in the Qur’an</td>
</tr>
<tr>
<td>Badr</td>
<td>بدر</td>
<td>Battle of Badr 624 AD /2 AH</td>
</tr>
<tr>
<td>baghī</td>
<td>باغي</td>
<td>Dissension transgression, ( a Hadd Crime)</td>
</tr>
<tr>
<td>bugat pl</td>
<td>بعثة (pl)</td>
<td>Dissension transgression, ( a Hadd Crime)</td>
</tr>
<tr>
<td>bay’a</td>
<td>بياع</td>
<td>Homage or allegiance</td>
</tr>
<tr>
<td>bayān au balāgha</td>
<td>بيان أو بلالخ</td>
<td>Eloquence or good style</td>
</tr>
<tr>
<td>Term</td>
<td>Arabic</td>
<td>Meaning</td>
</tr>
<tr>
<td>----------------------</td>
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<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>bayyina</td>
<td>بَيْنَيْنَاء</td>
<td>Evidence - testimony of witnesses (shahada)</td>
</tr>
<tr>
<td>bila kayf</td>
<td>بِلَالَ كَيْفَ</td>
<td>Without modality</td>
</tr>
<tr>
<td>bil-husna</td>
<td>بِيْلَ-الْحُسْنَا</td>
<td>By peaceful means (conversion)</td>
</tr>
<tr>
<td>burhan</td>
<td>بُرْحَان</td>
<td>[Quranic context] proofs deriving from God.</td>
</tr>
<tr>
<td>caliph (khaiifa)</td>
<td>خَلِیْفَة</td>
<td>Successor to the prophet</td>
</tr>
<tr>
<td>dakhlah</td>
<td>دَخْلَة</td>
<td>Asylum</td>
</tr>
<tr>
<td>Dalil</td>
<td>دَلْیل</td>
<td>[see also khata] disbelief interpretation.</td>
</tr>
<tr>
<td>dar al habr</td>
<td>دَارُ الْحَابِر</td>
<td>Enemy territory</td>
</tr>
<tr>
<td>dar al-ahd</td>
<td>دَارٌ الْاَهْد</td>
<td>Territory in treaty relation with Islam see dar al-sulh</td>
</tr>
<tr>
<td>dar al-imarah</td>
<td>دَارُ الْإِمَارَة</td>
<td>Government house</td>
</tr>
<tr>
<td>dar al-Islam</td>
<td>دَارُ الْإِسْلَام</td>
<td>Muslim territory</td>
</tr>
<tr>
<td>dar al-sulh</td>
<td>دَارُ الْسَلَح</td>
<td>Territory at peace with Islam see dar al-ahd.</td>
</tr>
<tr>
<td>darura</td>
<td>ضَرُورَة</td>
<td>Necessity</td>
</tr>
<tr>
<td>daula</td>
<td>دَوْلَة</td>
<td>Regime, state (contemporary usage)</td>
</tr>
<tr>
<td>dhahmin</td>
<td>ظَلَمٌ</td>
<td>Speculative category [of Islamic Ruling] see muhkam</td>
</tr>
<tr>
<td>dhthar</td>
<td>ظِهْر</td>
<td>Divorce [men of women] by referring to the women as their mothers. This pre-Islamic Arabian practice is prohibited in Islam.</td>
</tr>
<tr>
<td>dhimmis</td>
<td>نِمَيْ (ب)</td>
<td>Non-Muslim citizens of Muslim lands see musta'min</td>
</tr>
<tr>
<td>ehsan</td>
<td>إِحسَان</td>
<td>Benevolence and excellence</td>
</tr>
<tr>
<td>falsafa</td>
<td>فَلِسْفَة</td>
<td>Philosophy</td>
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<td>faqih</td>
<td>فَقِیَہ</td>
<td>Jurist</td>
</tr>
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<td>farid</td>
<td>ظَرِيف</td>
<td>Obligatory, duty</td>
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<tr>
<td>far' ayn</td>
<td>فَرْضٌ عِن</td>
<td>Individual obligation</td>
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<td>farid kifaya</td>
<td>فَرْض کفاہیہ</td>
<td>Collective obligation</td>
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<td>fattwa</td>
<td>فَتْتَوَة</td>
<td>Legal opinion. Advisory opinion</td>
</tr>
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<td>fa'ay</td>
<td>قَهْوَة</td>
<td>Booty</td>
</tr>
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<td>fi sabil Allah</td>
<td>فِی سَبیل اللّه</td>
<td>In God’s path [conceptually acts to limit djihad]</td>
</tr>
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<td>fita</td>
<td>فیتاه</td>
<td>Rebellion, civil war</td>
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<td>furu'</td>
<td>فِروع</td>
<td>Branches</td>
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<td>fussaq au fussaqqa</td>
<td>فَسَاقٌ أو فِسقاَقَة</td>
<td>Iniquitous</td>
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<td>garima</td>
<td>جِرَمہ</td>
<td>Crime</td>
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<td>ghayba</td>
<td>غِیبہ</td>
<td>Absence of the imam</td>
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<td>hadith</td>
<td>حُدِیث</td>
<td>Tradition</td>
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<td>Hajj</td>
<td>حَجِّ</td>
<td>Pilgrimage to Mecca</td>
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<td>hakam</td>
<td>حِکَم</td>
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<td>حَرَام</td>
<td>Prohibited</td>
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<td>haraba</td>
<td>حَراَبہ</td>
<td>Highway robbery</td>
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<td>harb</td>
<td>حَرِب</td>
<td>War</td>
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<tr>
<td>harbii</td>
<td>حَرِبَی</td>
<td>Foreigner, one belonging to dar al-harb</td>
</tr>
<tr>
<td>hisbah</td>
<td>حِسَبَہ</td>
<td>public vigilance, an institution of the Islamic State enjoined to observe and facilitate the fulfilment of right norms of public behaviour. The hisbah consists of public vigilance as well as an opportunity for private individuals to seek redress.</td>
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<td>hiyyaad</td>
<td>حَیَّّیَاد</td>
<td>Neutrality</td>
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<td>hudud Allāh</td>
<td>حُدُودِ الْلّه</td>
<td>Class of punishment for crimes mandated by God</td>
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<td>hukm</td>
<td>حِکَم</td>
<td>Legal effect</td>
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<td>Hunayn</td>
<td>حُنَیْن</td>
<td>Battle of Hunayn 8 AH/ 630 AD</td>
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<td>i'tibār</td>
<td>إِتِّبَار</td>
<td>Reflection (on signs, aya)</td>
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<tr>
<td>'ijz</td>
<td>إِیْجْز</td>
<td>Inimitability of the discourse (of the Qur’an)</td>
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<td>ibadat</td>
<td>عِبَادَت</td>
<td>Faith and ritual religious norms see also mu'amalāt</td>
</tr>
<tr>
<td>Term</td>
<td>Arabic</td>
<td>Meaning</td>
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<td>أفرقيه</td>
<td>Africa</td>
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<tr>
<td>ifrīqiyah</td>
<td>إفرقيه</td>
<td>Acquisition from nature or original acquisition.</td>
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<td>Ijma’</td>
<td>إجماع</td>
<td>Consensus</td>
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<td>Ijtihād</td>
<td>إلتهاب</td>
<td>Independent reasoning</td>
</tr>
<tr>
<td>mujtahīd, (s)</td>
<td>معتهد (s)</td>
<td>One who exercises ijtihād</td>
</tr>
<tr>
<td>mujtahīdīn(pl)</td>
<td>معتهدون (pl)</td>
<td></td>
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<tr>
<td>ikhtilāf</td>
<td>إختلاف</td>
<td>Disagreement. Heterogeneous. Debatable matters</td>
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<tr>
<td>imām</td>
<td>الإمام</td>
<td>Leader of the people see also caliph</td>
</tr>
<tr>
<td>Imam Dājjāf as- Sādiq</td>
<td>إمام جعفر الصقلي</td>
<td>Eponym of the Dājari School. b. 80AH/699AD dies in Medina 148AH/756AD.</td>
</tr>
<tr>
<td>imamat</td>
<td>الإئمة</td>
<td>Male leadership.</td>
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<td>إقرار</td>
<td>Confession</td>
</tr>
<tr>
<td>isḥāra</td>
<td>إشارة</td>
<td>Imitation or allusion</td>
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<tr>
<td>Ḥajj</td>
<td>إحرام</td>
<td>Submission</td>
</tr>
<tr>
<td>Ḥukm</td>
<td>إحكام</td>
<td>Negation of God</td>
</tr>
<tr>
<td>Shīk</td>
<td>شرک</td>
<td>Polytheism</td>
</tr>
<tr>
<td>Kufr</td>
<td>كفر</td>
<td>Rejection (covering up of truth)</td>
</tr>
<tr>
<td>isnad</td>
<td>إسناد</td>
<td>Chain of narrators</td>
</tr>
<tr>
<td>asanid (pl)</td>
<td>أسانيد (pl)</td>
<td></td>
</tr>
<tr>
<td>istīsām</td>
<td>استحسان</td>
<td>Discretion or preference. The best outcome in a given case, equity, juristic preference</td>
</tr>
<tr>
<td>istiqrā’</td>
<td>استغير</td>
<td>Metaphor</td>
</tr>
<tr>
<td>istīnḥāb</td>
<td>استنباط</td>
<td>Inferring</td>
</tr>
<tr>
<td>jā’iz</td>
<td>حائز</td>
<td>Permitted</td>
</tr>
<tr>
<td>jāhiliyya</td>
<td>جاهلية</td>
<td>Pre-Islamic days, days of ignorance</td>
</tr>
<tr>
<td>jamā’ā</td>
<td>جماعة</td>
<td>Community, congregation</td>
</tr>
<tr>
<td>jāsūs</td>
<td>جاسوس</td>
<td>Spy</td>
</tr>
<tr>
<td>jāvūṣīs (pl)</td>
<td>جواسيس (pl)</td>
<td></td>
</tr>
<tr>
<td>jawāz</td>
<td>جواز</td>
<td>Permission</td>
</tr>
<tr>
<td>jihād</td>
<td>جهد</td>
<td>Just war, bellum justum</td>
</tr>
<tr>
<td>jizya or djizya</td>
<td>جيزه</td>
<td>Poll tax. Tax on non-Muslim residents of dār al Islam</td>
</tr>
<tr>
<td>jurm</td>
<td>جرم</td>
<td>Army, regiment</td>
</tr>
<tr>
<td>aṣnād (pl)</td>
<td>أسناد (pl)</td>
<td></td>
</tr>
<tr>
<td>jurm</td>
<td>جرم</td>
<td>Crime / offence</td>
</tr>
<tr>
<td>jarīmah</td>
<td>جريمة</td>
<td></td>
</tr>
<tr>
<td>jinayah</td>
<td>جناية</td>
<td></td>
</tr>
<tr>
<td>kāfir</td>
<td>كفار</td>
<td>Infidel, one who covers the truth</td>
</tr>
<tr>
<td>kuffār (pl)</td>
<td>كعفر (pl)</td>
<td></td>
</tr>
<tr>
<td>kalām</td>
<td>كلام</td>
<td>Theology</td>
</tr>
<tr>
<td>kalām [ilm al- kalām]</td>
<td>علم الكلام</td>
<td>Theologians</td>
</tr>
<tr>
<td>mutakallīmūn</td>
<td>متعلقون</td>
<td></td>
</tr>
<tr>
<td>Karr and farr</td>
<td>كار و فرح</td>
<td>Techniques of fighting employed by early Muslims.</td>
</tr>
<tr>
<td>khāraj</td>
<td>خراج</td>
<td>Land tax</td>
</tr>
<tr>
<td>khata’</td>
<td>خطط</td>
<td>[see also Dalal] mistake in individual interpretation.</td>
</tr>
<tr>
<td>Khawarij (seceders)</td>
<td>خوارج</td>
<td>A political movement which advocated such principles such as social and political equality particularly the right of any qualified Muslim to be elected to the position of caliph regardless of race.</td>
</tr>
<tr>
<td>khidmat</td>
<td>خدمه</td>
<td>Ancillaries to the Qur’an</td>
</tr>
<tr>
<td>khul’</td>
<td>خلع</td>
<td>Divorce obtained by a woman [see also iddhah]</td>
</tr>
<tr>
<td>Khuruj</td>
<td>خروج</td>
<td>‘Going out on an expedition’ but also an act of rebellion</td>
</tr>
<tr>
<td>Term</td>
<td>Arabic</td>
<td>Meaning</td>
</tr>
<tr>
<td>------</td>
<td>--------</td>
<td>---------</td>
</tr>
<tr>
<td>khuruj bil ta'wil</td>
<td>خروج بيت التأويل</td>
<td>Rebellion with knowledge or reason while enjoying power.</td>
</tr>
<tr>
<td>khutba</td>
<td>خطبة</td>
<td>Friday sermon</td>
</tr>
<tr>
<td>kitab</td>
<td>كتاب</td>
<td>Book</td>
</tr>
<tr>
<td>l'ain</td>
<td>لائن</td>
<td>Sworn allegation of adultery</td>
</tr>
<tr>
<td>ma'rif</td>
<td>معرف</td>
<td>Good act</td>
</tr>
<tr>
<td>madhhab</td>
<td>مذهب</td>
<td>School of law</td>
</tr>
<tr>
<td>makruh</td>
<td>مكره</td>
<td>Objectionable but not prohibited</td>
</tr>
<tr>
<td>Malik b. Anas</td>
<td>مالك بن أسن</td>
<td>Eponym of the maliki School. Born Medina between 90-97 AH died 179AH/796AD</td>
</tr>
<tr>
<td>mandib</td>
<td>مندون</td>
<td>Recommended</td>
</tr>
<tr>
<td>maqasid al-shari'a</td>
<td>مقاصد الشرع</td>
<td>The 'moral' of a story or the purposeful interpretation of a provision</td>
</tr>
<tr>
<td>maslaha</td>
<td>مصلحة</td>
<td>The common good.</td>
</tr>
<tr>
<td>maslah &amp; istislah</td>
<td>مصلح واستصلاح</td>
<td>Consideration of the public good</td>
</tr>
<tr>
<td>mawat</td>
<td>موات</td>
<td>Waste-land</td>
</tr>
<tr>
<td>mu'amalat</td>
<td>معاملات</td>
<td>Societal and individual interactions in society. See also ibadat</td>
</tr>
<tr>
<td>Mu'tazila and Ash'arie</td>
<td>معتزلية</td>
<td>Two early schools of Islamic theology (kalam).</td>
</tr>
<tr>
<td>mujahid, (djihadist)</td>
<td>مسجد</td>
<td>One who participates in djihad</td>
</tr>
<tr>
<td>mulk</td>
<td>ملك</td>
<td>Sovereignty</td>
</tr>
<tr>
<td>munkar</td>
<td>منكر</td>
<td>Reprehensible act</td>
</tr>
<tr>
<td>muqabala al-mithl</td>
<td>مقابلة المثل</td>
<td>Reciprocity</td>
</tr>
<tr>
<td>muqatila</td>
<td>مقاتلة</td>
<td>Warriors</td>
</tr>
<tr>
<td>muqta'as</td>
<td>موقط</td>
<td>Governor (Patriarch of Egypt)</td>
</tr>
<tr>
<td>muqallid</td>
<td>مقلد</td>
<td>Follower in practice</td>
</tr>
<tr>
<td>muqalla' (pt)</td>
<td>مقلدون (ج)</td>
<td></td>
</tr>
<tr>
<td>mutada' (see also ridda)</td>
<td>مترك</td>
<td>Apostate</td>
</tr>
<tr>
<td>musta'mins</td>
<td>مستعمنون</td>
<td>People temporarily in Muslim lands see also dhimmi</td>
</tr>
<tr>
<td>mutashabihat</td>
<td>متشابهات</td>
<td>Allegorical / parabolic verses.</td>
</tr>
<tr>
<td>mutatatwuri'a</td>
<td>متوطع</td>
<td>Volunteers</td>
</tr>
<tr>
<td>muwada'ah</td>
<td>معودة</td>
<td>An international treaty that can only be revoked with notice.</td>
</tr>
<tr>
<td>muwahhidun</td>
<td>موحدون</td>
<td>Unitarians</td>
</tr>
<tr>
<td>najal</td>
<td>نقل</td>
<td>See also tafl</td>
</tr>
<tr>
<td>Naql</td>
<td>نقل</td>
<td>Acquisition by transfer.</td>
</tr>
<tr>
<td>nisab</td>
<td>نصاب</td>
<td>minimum value above which had penalty for theft may be applied.</td>
</tr>
<tr>
<td>qa'idah</td>
<td>قاعدة</td>
<td>A principle or rule</td>
</tr>
<tr>
<td>qa'dh</td>
<td>قفز</td>
<td>Slander</td>
</tr>
<tr>
<td>qadi, cadi or kadi</td>
<td>قاضي</td>
<td>Judge</td>
</tr>
<tr>
<td>qānin</td>
<td>يكون</td>
<td>Statute [qānin name - statute book, Ordinances]</td>
</tr>
<tr>
<td>qar'īn</td>
<td>قارئ</td>
<td>Evidentiary presumptions.</td>
</tr>
<tr>
<td>qaum</td>
<td>قوم</td>
<td>People, group</td>
</tr>
<tr>
<td>qasf</td>
<td>قسف</td>
<td>Enforcement of hadd</td>
</tr>
<tr>
<td>qiyas</td>
<td>قياس</td>
<td>Analogy</td>
</tr>
<tr>
<td>quadih</td>
<td>قف</td>
<td>Husband who accuses his wife of adultery [see also zina]</td>
</tr>
<tr>
<td>Term</td>
<td>Arabic</td>
<td>Meaning</td>
</tr>
<tr>
<td>---------------------------</td>
<td>-------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Quesas Crime</td>
<td>قسأس</td>
<td>A category of crime in Islam.</td>
</tr>
<tr>
<td>Qesäs</td>
<td>قسأس</td>
<td></td>
</tr>
<tr>
<td>quisas amd</td>
<td>قسأس عد</td>
<td>Deliberate [see also quisas]</td>
</tr>
<tr>
<td>Maliki</td>
<td>مستحب</td>
<td>Maliks adopt the broadest of ‘deliberate’; ie homicide is intentional when ‘death [is] caused in any way whatever, even in play or chastisement, by some weapon or act intrinsically likely to kill [or when] directly resulting from any other unjustified assault ie not in play or legitimate chastisement, whether the weapon or means employed were likely to be fatal or not”.]</td>
</tr>
<tr>
<td>Hanafi</td>
<td>جر مجري الخطا</td>
<td>The Hanafi school includes intent. (Talion is permitted only for “deliberate” killings.)</td>
</tr>
<tr>
<td>jari majra al-khata'</td>
<td>بسب</td>
<td></td>
</tr>
<tr>
<td>bi sabab</td>
<td>ملء</td>
<td>Equivalent to accidental</td>
</tr>
<tr>
<td>quisas khata</td>
<td>قسأس الخطا</td>
<td>Indirect</td>
</tr>
<tr>
<td>ra'y</td>
<td>رأى</td>
<td>Personal opinion</td>
</tr>
<tr>
<td>rums or majāz</td>
<td>رمز أو مجاز</td>
<td>Symbolism or figurative</td>
</tr>
<tr>
<td>rasul</td>
<td>رسول</td>
<td>Apostle, emissary</td>
</tr>
<tr>
<td>Rusul [pl]</td>
<td>رسول (م) رسول (ج)</td>
<td></td>
</tr>
<tr>
<td>riba</td>
<td>لريا</td>
<td>Usury</td>
</tr>
<tr>
<td>ribāt</td>
<td>رباط</td>
<td>Defensive war.</td>
</tr>
<tr>
<td>ridda</td>
<td>رده</td>
<td>Session or apostasy.</td>
</tr>
<tr>
<td>sabi</td>
<td>مسبي</td>
<td>Women and children taken as spoil</td>
</tr>
<tr>
<td>saffr</td>
<td>سفير</td>
<td>Ambassador</td>
</tr>
<tr>
<td>sahīh</td>
<td>صحيح</td>
<td>Authentic</td>
</tr>
<tr>
<td>sayyid</td>
<td>شيد</td>
<td>Chief of a tribe (pre Islamic usage); descendent of the prophet (Islamic usage); 'Mr.' (contemporary usage)</td>
</tr>
<tr>
<td>shari'a</td>
<td>شريعة</td>
<td>Sacred law</td>
</tr>
<tr>
<td>shaykh</td>
<td>شيخ</td>
<td>Old man, tribal chief</td>
</tr>
<tr>
<td>shī'a</td>
<td>شغيمة</td>
<td>Sect in Islam</td>
</tr>
<tr>
<td>shrīk</td>
<td>شرك</td>
<td>Polytheism</td>
</tr>
<tr>
<td>shurb al-khamr</td>
<td>شرب الخمر</td>
<td>Drinking alcohol</td>
</tr>
<tr>
<td>shubha</td>
<td>شبه</td>
<td>Doubt (in evidence)</td>
</tr>
<tr>
<td>styar</td>
<td>سير</td>
<td>Originally used as an account of battles, later used in shari'a dealing with the conduct of state. External laws, laws of nations</td>
</tr>
<tr>
<td>suhūr</td>
<td>سحل</td>
<td>Peace</td>
</tr>
<tr>
<td>sunna</td>
<td>سننة</td>
<td>Traditions (hadith) relating back to the Prophet or his closest companions or family (through a chain of narrators).</td>
</tr>
<tr>
<td>Sumni</td>
<td>سني</td>
<td>Orthodox Muslim</td>
</tr>
<tr>
<td>Taʿwīl</td>
<td>تأويل</td>
<td>Allegorical interpretations</td>
</tr>
<tr>
<td>tāʿzīr offence</td>
<td>تعزير</td>
<td>Category of crime. Crimes that are not hadd or quisas (mandated crimes)</td>
</tr>
<tr>
<td>tafsīr</td>
<td>تفسير</td>
<td>Commentary on the Qur'an</td>
</tr>
<tr>
<td>tabāra</td>
<td>طهارة</td>
<td>Legal purity</td>
</tr>
<tr>
<td>talqīm</td>
<td>تلحيم</td>
<td>Arbitration</td>
</tr>
<tr>
<td>tajsim</td>
<td>تجسم</td>
<td>Anthropomorphic</td>
</tr>
<tr>
<td>tanfil</td>
<td>تنفل</td>
<td>Supererogation, nafil is the amount given in tanfil. Supererogation allows imam to use discretion and promise jihadist a different share (nafil) [from that decreed by the schools]. All schools agree on tanfil</td>
</tr>
</tbody>
</table>

Note: The terms are listed in a glossary format, with each term paired with its Arabic equivalent and a brief description of its meaning.
<table>
<thead>
<tr>
<th>Term</th>
<th>Arabic</th>
<th>Meaning</th>
</tr>
</thead>
<tbody>
<tr>
<td>taqfid</td>
<td>تقفيد</td>
<td>but disagreed on the source and quantity of the nafal.</td>
</tr>
<tr>
<td>taqfid al haqq</td>
<td>تقفيد الحق</td>
<td>Emulating</td>
</tr>
<tr>
<td>taqfid al-batil</td>
<td>تقفيد الباطل</td>
<td>Emulating falsehod</td>
</tr>
<tr>
<td>taqfiyya</td>
<td>تقفية</td>
<td>Dissimulation</td>
</tr>
<tr>
<td>ta’līh</td>
<td>تسليح</td>
<td>Allegorical. Simile</td>
</tr>
<tr>
<td>tha’r</td>
<td>ثار</td>
<td>Vendetta</td>
</tr>
<tr>
<td>theft</td>
<td>سرقة</td>
<td>Theft</td>
</tr>
<tr>
<td>tijāra</td>
<td>تجارة</td>
<td>Commerce</td>
</tr>
<tr>
<td>umma</td>
<td>أمة</td>
<td>People, nation (all Muslims)</td>
</tr>
<tr>
<td>usuliyyah</td>
<td>أصولية</td>
<td>Fundamentalists</td>
</tr>
<tr>
<td>waliyya</td>
<td>ولية</td>
<td>Allegiance to a shi’i imam</td>
</tr>
<tr>
<td>wālāya</td>
<td>ولاء</td>
<td>male guardianship of men over women.</td>
</tr>
<tr>
<td>yūbitin (verb)</td>
<td>يبطن</td>
<td>Secret belief (from batin)</td>
</tr>
<tr>
<td>zandaqah</td>
<td>زنده</td>
<td>Godlessness see also zandiq</td>
</tr>
<tr>
<td>zina</td>
<td>زنا</td>
<td>Fornication or adultery</td>
</tr>
<tr>
<td>zandiq</td>
<td>زنديق</td>
<td>Atheist see also zandaq</td>
</tr>
</tbody>
</table>
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