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Contemporary Religious Conflict and the Law of Armed Conflict

An Analysis of the Challenges Posed by ISIS and Other “Unconventional Armed Groups”



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Contemporary Religious Conflicts and the Law of Armed Conflict: An Analysis of the Challenges Posed by ISIS and Other “Unconventional Armed Groups”

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of the requirements of the
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Abstract

This thesis introduces and develops the idea of “contemporary religious conflict”. It proposes that international humanitarian law (IHL) should incorporate an understanding of religious approaches to the use of force in order to better address the shortfall of humanitarian protections that have become typical of conflicts involving “unconventional armed groups”. Due to this shortfall having a relationship with what may be termed the “war on terror”, the intention is to focus explicitly upon the capacity for religious ideology to influence how force is used, and how IHL should address this challenge.

Contemporary religious conflict is not introduced as a new category of armed conflict intended to supplement those already existing in IHL, but as a means of better balancing the use of force with humanitarian concerns by acknowledging the deterministic influence the adoption of religious features may have upon how an armed group uses force. A distinct framework for understanding conflicts with a religious component provides a more nuanced method for balancing state interests with humanitarian principles. This thesis accordingly sets out to determine how religious conflicts function differently from non-religious conflicts, and to what extent these differences challenge the assumptions concerning the use of force inherent in IHL. In order to determine how IHL may adapt to these stresses, this thesis will draw upon both historic and present-day approaches to religious conflict, as well as contemporary state practice in conflicts involving religious interest groups, with an overt focus upon key current examples such as ISIS.¹ Whilst IHL has conventionally been disinterested in the rationale behind armed conflicts, acknowledging that the adoption of religious ideology can have a causal relationship with how force is used permits shareholders in IHL to more effectively determine their role in limiting the adverse implications of armed conflict, and ensuring humanitarian principles are applied in an appropriate manner.

This study depends upon contemporary examples of religious conflict, necessitating a focus upon examples derived from the Islamic tradition, largely within the context of what is frequently termed the “war on terror”. Whilst this study explicitly focuses upon central examples such as ISIS, the intent is to propose a general basis for a differentiated understanding of religious conflict applicable in a wider range of instances.

¹ ISIS; an abbreviation standing for the “Islamic state of Iraq and Syria,” a high profile terrorist group, and briefly territorial pseudo state. Also known as ISIL, the Islamic state and Daesh. The term ISIS will be used to refer to the organisation through this thesis for the sake of clarity.

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i. Declaration

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the Faculty Ethics Committee in January 2017.

I declare that the Word Count of this Thesis is [88940] words

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Date:

ii. Acknowledgments

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1 Introduction

1.1 Introduction

International humanitarian law (IHL) suggests that wars or “armed conflicts” should be governed by a set of humanitarian principles, and sets out a system of laws and rules to ensure that this is the case.¹ The history of IHL and the previous “laws of war” indicate that a need often arises to restate existing laws, or generate new ones to ensure that these principles exist in new situations.² If the principles of IHL can be taken as axiomatic, then there is a need to see them applied effectively in all situations that can be described as armed conflict. This thesis will contend with the challenge of ensuring that IHL remains relevant and effective, with a specific focus upon contemporary situations in which IHL is seriously challenged.

For the past eighteen years, many of the world’s states have to some extent participated in what is often described as the “war on terror.”³ The international legal system has struggled to stay abreast of developments in this conflict as states, confronted by unconventional opponents, trial new weapons and strategies, often invoking novel legal arguments to support these innovations.⁴ The complexity of this exercise is compounded by the evolving nature of the threat, with the terrorist networks of the first act having now given way to jihadist armed groups and even what are termed proto-states,⁵ organisations that not only capable of conquering and holding

¹ For these principles see Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, 2011) 1-2.

² Amanda Alexander, ‘A Short History of International Humanitarian Law’ (2015) 26 *European Journal of International Law* 109, 124.

³ The use of this term is frequently criticised; Borhan Uddin Khan and Muhammad Mahbubur Rahman, “Combating Terrorism under Human Rights and Humanitarian Law Regime”, (2008) 12 *Mediterranean Journal of Human Rights* 379; regardless, it serves to denote an ongoing world-historical event that covers a number of tangible practices and operations, as well as referring to a set of distinctive assumptions and beliefs about the nature of conflict. See Richard Jackson, *Writing the War on Terrorism : Language, Politics, and Counter-Terrorism* (Manchester University Press 2005) 8.

⁴ Whilst states have recognised that they need new strategies and methods in relation to many modern conflicts the law has been slow to adapt, resulting in the laws of war being “disconnected” from the military realities of modern war. see generally, Ganesh Sitaraman, ‘Counterinsurgency, the War on Terror, and the Laws of War’ (2009) 95 *Virginia Law Review* 1745.

⁵ Audrey Kurth Cronin, ‘ISIS is not a terrorist group’ (2015) 94 *Foreign Affairs* 87, 98.

territory but administering and governing the places they capture.⁶ This threat is best exemplified at the current juncture by one organisation, the group known as ISIS.

When considering this problem, it is first vital to consider how to describe what exactly is happening, and how a group like ISIS are to be defined. Terms like “state” and “armed group” are important in this regard. They are not only descriptive but assist in determining what rules apply when armed conflict is taking place.⁷ Similarly, thresholds are applied “armed conflict” for the purpose of preserving it from being applied to situations not meriting its application,⁸ are critical. Unfortunately, as this thesis will set out, groups like ISIS⁹ straddle the boundaries that both international law and IHL has established for identifying organisations capable of engaging in an armed conflict, and for determining when they are doing so; this could translate into a difficulty determining what actions states are permitted to undertake. Whether by design or fortune, groups like al Qaeda and ISIS have fomented a challenge to international law, one that is in part responsible for the ongoing nature of the “war on terror.”

For instance, it is possible to consider the aforementioned ISIS. Developing from a terrorist organisation, the group was able to seize territory in two separate nation-states in a step that to some, changed the groups' fundamental nature.¹⁰ Since declaring the existence of a caliphate in 2014,¹¹ the group has frequently been misunderstood. Whilst some saw the groups' caliphate declaration as an assertion of statehood, this represents a failure to grasp the meaning of the term caliphate both in

⁶ Charles C. Caris and Samuel Reynolds, *ISIS Governance in Syria* (Middle East Security Report 2014) 4.

⁷ Specifically, the manner in which a group is classified can determine if a situation is an international or non-international armed conflict. Gary D. Solis, *The Law of Armed Conflict : International Humanitarian Law in War* (Cambridge University Press 2010) 150-152; this is important

⁸ Whilst this is intended to prevent IHL being applicable to low level disturbances and domestic criminally, It is possible to specify numerous “low intensity” situations that represent a profound humanitarian threat whilst not meeting the thresholds required for armed conflict to exist. See generally Robin Geiß, ‘Armed Violence in Fragile States: Low-intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties’ (2009) 91 *International Review of the Red Cross* 127.

⁹ ISIS also called ISIL, the Islamic State or Daesh.

¹⁰ Whilst there has yet been no authoritative assertion that ISIS represented a state, its real characteristics have been sufficient to merit examination. See Marco Longobardo, ‘The Self-Proclaimed Statehood of the Islamic State Between 2014 and 2017 and International Law’ (2017) 33 *Anuario Español de Derecho Internacional* 205.

¹¹ Abu Bakr al-Baghdadi, “A Message to the Mujahideen and the Muslim Umma in the Month of Ramadan” (1 July 2014) <<https://kyleorton1991.wordpress.com/2014/07/02/the-leader-of-the-islamic-state-explains-the-caliphates-vision/>> accessed 4/09/2019

classical Islam and as used by ISIS.¹² There is really no term available in international law that accurately describes an organisation like ISIS, with this gap indicative of the absence of any appropriate approach to address such organisations. This is important, as there are key decisions to be made in this regard; it is important that the scale of the threat the organisation presents be recognised, along with their capacity to wage armed conflict, this clearly being the case.¹³ On the other hand, in light of the organisation's genocidal conduct and rejection of international law,¹⁴ there is concurrently a need to ensure that the organisation is not legitimised, and such behaviours are not incentivised in the practice of future armed groups.

There is then the manner in which the organisation understands its' mandate to use force.¹⁵ This thesis will assert that religious war is different when compared to the type of wars states have customarily fought. The usage of the term Jihad by groups like ISIS is distinctive enough to challenge both Islamic jurists and international lawyers. Moreover, the meaning of the term jihad has evolved within the context of the war on terror, with groups responding to the axioms of their own ideology, as well as being driven by the requirement to deviate ever further from the conventional use of force.¹⁶ The net result of this process is the rejection of existing restrictions on the use of force in wartime, in which groups like ISIS explicitly target civilians, both as a strategy and an end in itself.¹⁷ This makes the problem all the more important to confront. Whilst states are constrained in their use of force, the situation suggests non-state groups are clearly incentivised to disregard international humanitarian law.

The ISIS conflict and the war on terror, in general, is indicative of the species of endless forever wars that that are likely to characterise much of human violent

¹² "Caliphate" has a meaning that is in many ways exclusive of "nation state" See Sanjeev Kumar, 'ISIS and the Sectarian Political Ontology: Radical Islam, Violent Jihadism and the Claims for Revival of the Caliphate' (2018) 74 *India Quarterly* 119.

¹³ Thomas Maurer, 'ISIS's Warfare Functions: A Systematized Review of a Proto-state's Conventional Conduct of Combat Operations' (2018) 29 *Small Wars & Insurgencies* 229, 238.

¹⁴ Isis crimes in this regard are well documented. See for instance UN Human Rights Council, "*They Came to Destroy*": *ISIS Crimes Against the Yazidis* (UNHRC 2016).

¹⁵ In order to produce an idealised utopian Islamic society, groups like ISIS have produced an ideology that not only permits the killing of non-Muslims, but professed Muslims also. See Mohamed Badar, Masaki Nagata and Tiphonie Tuani, 'The Radical Application of the Islamist Concept of Takfir' (2017) 31 *Arab Law Quarterly* 134; additionally, this ideology makes little distinction in terms of not killing civilians.

¹⁶ The factors that serve to incentivise armed groups inculcated with religious ideology to behave brutally and defect from international regulations will be explored in detail through this thesis.

¹⁷ ISIS specifically call for the killing of civilians. See Dabiq 15 (al-Hayat media 2015) 279-80; moreover, they have seemingly rediscovered that killing civilians can be a useful means of furthering a cause. See Benjamin Valentino, Paul Huth and Sarah Croco, 'Covenants without the Sword: International Law and the Protection of Civilians in Times of War' (2006) 58 *World Politics* 339.

interaction moving forward; conflicts that that may mutate and evolve, but never truly end.¹⁸ As this study will explore, IHL, whilst universal in its aspirations, is intimately bound to the archetype of interstate conflict, and is therefore in a poor position in relation understanding such threats. As understanding is a precursor to adapting the framework of regulations applicable in armed conflicts, this presents a problem.

1.2 The contention of this thesis

Ultimately, this thesis contends that both IHL and international law in general need to adapt in order to ensure conflicts involving what will be termed “unconventional armed groups” can be regulated effectively and in such a manner as to best preserve humanitarian interests. This is to be demonstrated by referring to the case of the war on terror and the instance of ISIS specifically; outlining adjustments that could be implemented in order to better address this particular threat and that may be beneficial for IHL more generally moving forward. This thesis, therefore, argues several essential points, the first of which requires considering the temporal scope of IHL, and the circumstances in which it developed. It will be contended that IHL is in theory equipped to adapt to the challenge posed by groups like ISIS, having accomplished changes that are no less drastic in the past. Yet due to IHL’s reliance on the model of interstate war, IHL is poorly disposed to accurately understand the differences between a group like ISIS and the more conventional armed groups encountered in the past. This itself is unsurprising. International law has developed primarily in situations in which states contended with one another. It can be suggested that this is no longer the case, though most situations of non-state international armed conflict have broadly conformed to the state archetype of armed conflict. Accordingly, IHL may be challenged should the parties involved or their approach to using force deviate radically from the state archetype.

The second part of this study is aimed at demonstrating the capacity for religious ideology and its underlying social structures to not only mobilise a population to exhibit the use of organised violence, but do so in a manner that challenges the capacity for international law to classify such movements, as well as IHL’s rationale for determining when armed conflict exists. This involves considering

¹⁸ Federico Sperotto, ‘The future of the American fight against terrorism’ (2014) 81 *Rivista di Studi Politici Internazionali* 221, 229-230.

some extra-legal bodies of knowledge that predate IHL. This generalised understanding of “religious conflict” or “Holy war” will then be related to the current challenge of ISIS; as ISIS and similar organisations are mobilised on a contemporary religious basis, they are organised in a manner that is atypical when compared to both states and more conventional non-state groups. Moreover, these groups use force in a distinctive manner. As groups like ISIS are different from more conventional non-state armed groups, they do not always align with the objective criteria set out in IHL, questioning the effectiveness of IHL in relation to such situations.

The final part of this study is concerned with modernising IHL in order to permit more rapid and comprehensive responses to unconventional armed groups. Using the example of ISIS and the understanding of contemporary religious conflict generated in the course of this thesis, the intention is to examine the solutions and proposed means of adapting IHL to the realities of fighting a group like ISIS. This study will, therefore, consider the potential approaches to classifying a group like ISIS in international public law. This is important, as it will determine the response states take. Following this, adaptations proposed to IHL in relation to ISIS will be examined, with the intention of understanding what approach might be most appropriate, in terms of ensuring the welfare of civilians as well as the aim of bringing such conflicts to a rapid and humane end.

A key assertion that will be made in this thesis is that IHL has been contrived to contend with state and state-like conflicts. Confronting groups like ISIS within such a framework of this nature is difficult, yet remains an important question to consider. This is because ISIS has demonstrated an effective model for mobilising a population and using force in a manner that is distinct from both states and previous non-state armed groups. If IHL is not reformulated to permit states to effectively address such threats, then the actions exemplified by ISIS are likely to be employed well into the future. Accordingly, a mandate exists to explore possible means of adapting IHL.

1.3 Research questions

On a basal level, the thesis hopes to offer insight into the following question:

How can IHL ensure that appropriate protections are applied to conflicts involving unconventional armed groups of the type exemplified by ISIS?

This problem may be subdivided into three questions:

- *What are unconventional armed groups? How are they different from the non-state armed groups discussed in relation to non-international armed conflict (NIAC)?*
- *Is the existence of transnational non-state armed groups of a religious character challenging to IHL? How so?*
- *What potential solutions have been identified as a possible means of resolving any shortfall of humanitarian protections in conflicts involving transnational non-state armed groups? Which are the most viable in relation to the case of ISIS?*

1.4 The wider context of this thesis and position in the field

To date, there have been many papers, books and theses engaging with the subject of ISIS and the challenges to IHL posed by aspects of the war on terror are again well covered in the scholarship. An article published prior to this thesis indicates the problem, titled *Beyond the Pale? Engaging the Islamic State on International Humanitarian Law*.¹⁹ This article is effective in addressing many of the challenges this group poses to IHL. Many of the problems are again reflected in *The Fight Against the Islamic State and Jus in Bello*.²⁰ This study is not unique in recognising the potential for using examples within the war on terror to illustrate many of the stresses facing international law.²¹ There have been many studies exploring the question of whether action needs to be taken to bring IHL into closer alignment with today's

¹⁹ A. Bellal, 'Beyond the Pale? Engaging the Islamic State on International Humanitarian Law' (2016) 18 Yearbook of International Humanitarian Law 123.

²⁰ Vaios Koutroulis, *The Fight Against the Islamic State and Jus in Bello* (2016) 29 Leiden Journal of International Law 827

²¹ Scharf (n 67) Michael P. Scharf, 'How the War Against ISIS Changed International Law' (2016) Paper 1638. Faculty Publications 1.

threats; both ISIS and the war on terror are often explicitly referenced in regard to this process.²²

This study distinguishes itself by its approach to the problem. Building upon an awareness of the causal relationship between ideology and how war is fought, this study seeks to determine why ISIS and similar organisations challenge IHL so radically. Much of this involves drawing upon key examples of ISIS publications, as well as the theological grounds established by the group's key theorists. In addition, there is a rich field of scholarship considering contemporary Islamic ideology, with *Salafi-Jihadism: The History of an Idea*²³ representing an influential example. This study devotes significant space to the task of incorporating an understanding of ideology and determining how the adoption of religious ideology has a deterministic influence on the use of force by unconventional armed groups.

The majority of scholars exploring ISIS in relation to IHL have connected the question to the issue of compliance; when considering state attitudes to IHL, they have largely sought to examine how both states and groups like ISIS can be induced to more closely adhere to the existing rules and principles contained in IHL. An additional tendency has been to think about ISIS within the same epistemological foundations as conventional war; when considering how ISIS is posing a challenge, their impact is often considered upon the basis of a single facet; for instance, in discussing ISIS as a “transnational armed group”. This study aims to start from a different position; arguing that groups like ISIS are foundationally distinct from both states and conventional armed groups, and present a multifaceted challenge to IHL in its application. The objective here is to indicate some of the mechanisms existing in IHL that make it prohibitively costly, or even impossible, for states to apply when contending with groups like ISIS. This will effectively serve to contribute to existing scholarship, by expanding the discussion of how and why groups like ISIS challenge IHL to consider the influence of contemporary religious ideology on armed groups as a means of charting the way IHL must take moving forward.

²² Marco Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’ (2006) 6 Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series 1.

²³ Shriaz Maher, *Salafi-Jihadism: The History of an Idea* (Hurst 2016).

2 IHL's capacity to adapt, and the challenge posed by ISIS and other unconventional armed groups to this process

2.1 Introduction

This thesis sets out with the aim of understanding if groups like ISIS represent a challenge to how armed conflict is understood, and if so, what changes are warranted in relation to the prevailing legal framework in order to effectively respond to this challenge. The basic definition of armed conflict expresses that one exists whenever there is a resort to armed force between states, between a state and an organised armed group, or between two or more organised armed groups.¹ Whilst this definition is remarkably simple, it is possible to suggest that some friction may emerge in attempting to identify the parties involved, or what features need to be present for an armed conflict to be taking place. In short, the laws of armed conflict (LOAC) or alternately international humanitarian law (IHL) has always depended upon objective features derived from a model of interstate war when determining the presence of an armed conflict, and to identify whether or not an armed group is of sufficient scale and character so as to be formally recognised as capable of contesting an armed conflict.² This system has fared well for much of its brief, modern history; the state approach to the use of force has happened to be the most effective and therefore has been manifested by states and non-state groups alike.³ Today, however, unconventional armed groups, ISIS being the central example,⁴ for instance overtly disdain the state approach to the use of force; this presents a challenge in that a system orientated

¹ ICRC, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' International Committee of the Red Cross (ICRC) Opinion Paper, March 2008, 1.

² As Sassòli describes, interstate war is the "Prototypical" form of war in international law. Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar 2019) 168.

³ As Beer notes, the modern system of international law has been so effective and so widely accepted as it reflects states' inclinations in regard to the use of force; as rational actors, states are not inclined to use force excessively, as this would be inefficient. See Yishai Beer, 'Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity' (2016) 26 *European Journal of International Law* 801; it is worth noting that many non-state groups conform with this principle of "economy of force" in addition to deferring to the broad principles of IHL consistent with their wish to become states themselves. See Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015) 9–10.

⁴ This study is far from the first to identify ISIS as a central challenge for both IHL and international law more broadly. See for examples Vaivos Koutroulis, *The Fight Against the Islamic State and Jus in Bello* (2016) 29 *Leiden Journal of International Law* 827; Michael P. Scharf, 'How the War Against ISIS Changed International Law' (2016) Paper 1638, Faculty Publications 1.

around interstate war may misunderstand the threat posed by such groups, failing to determine what rules should be applied. All is not lost, however; IHL has demonstrated a capacity to adapt in the past, with mechanisms existing to provide for changes in the nature and scope of warfare. One limitation, however, perhaps particularly apparent in relation to the threat posed by groups like ISIS, is the necessary precursor of understanding the nature and extent of the challenge before presuming to propose changes. This thesis proceeds with the grand aim of articulating how IHL is being challenged by religious armed groups and determining how the system should adapt. The aforementioned group ISIS will be serving as the key example of this challenge, and it is therefore important that the challenge arising from this group is understood. Before asserting that the laws governing armed conflict need revisions, it is important to first understand what these rules are, where they come from, and the process by which they are changed and adapted.

This chapter will first relate in brief the sources and history of the regulatory framework that is today identified as IHL. This will serve to demonstrate that at its inception, the laws governing warfare comprised a reciprocal arrangement between states engaging in military contests with this point of origin remaining an important consideration. It will be contended that whilst the system has demonstrated immense flexibility in adapting to different kinds of warfare and the different belligerents involved, it still defers to the model of interstate war when determining what rules should apply. This reliance is perhaps most evident in how armed conflict is identified, and the process and criteria used to determine if an organisation is considered capable of contesting one. This examination will demonstrate that the further a group deviates from the “interstate prototype”,⁵ the more problems they will pose in terms of classification and regulation. The intent of this thesis is to go on to explore in later chapters how contemporary religious ideology can instigate radical divergences from the model of interstate war,⁶ with the proliferation of such an approach serving as the

⁵ Sassòli (n 2).

⁶ This essential contention is naturally nothing new. Theorists have for instance noted that identity is playing an important role in how new conflicts are fought, with such wars often displaying higher civilian casualties. Simons notes this with reference to fourth generation war, though stresses the complicated nature of this issue, asserting that a new theoretical means of examining war is needed. Greg Simons, ‘Fourth Generation Warfare and The Clash of Civilizations’ (2010) 21 *Journal of Islamic Studies* 3, 391; this builds upon the long-held notion that war fought on the basis of religion or ideology often exerts more negative effects on those not directly involved in combat. See R. Jackson, ‘Doctrinal War: Religion and Ideology in International Conflict’ (2006) 89 *Monist* 274, 295.

motive for addressing the dependence of IHL upon interstate war as a means to understand and regulate armed conflict.

In contending that IHL can change, it is useful to demonstrate that this capacity not only exists in theory, but that IHL has in fact already adapted to changes and challenges in its history. The laws governing the conduct of armed conflicts have proved malleable enough to apply to a vast range of situations, and the conventional narrative of international law emphasises the capacity for international law to extend and adapt to the types of conflict taking place;⁷ this being most discernible in the extension of the system well beyond its initial application to interstate war to a range of situations, most notably non-state armed conflict.⁸ It is additionally possible to specify the apparent ease with which the IHL has adapted to new technologies and forms of warfare in the past.⁹ The claim that IHL is well equipped to respond to conflicts involving armed groups like ISIS and others is therefore perhaps well-founded.¹⁰ This thesis, however, adopts a contrary claim regarding the nature of IHL, and its capacity to incrementally adapt to new situations. Whilst IHL is in principle universal, its language and epistemology are still in many ways orientated around interstate war. This is to say that whilst it aspires to be universal, the manner in which the addition of non-state or internal armed conflict has been defined is linked to a number of assumptions concerning the nature of warfare that have prevailed broadly since the system's current inception in treaties, statute, and customs. In simple terms, the understanding of war that is imbued in the IHL is too narrow and too reliant upon the example of interstate war to be extended to many modern conflicts involving unconventional armed groups, as the case of ISIS and more broadly the "war on terror" confirm.

As already mentioned, a precursor to effectively adapting IHL is, however, an adequate understanding of the challenge. There are two barriers that perhaps prevent

⁷ Laurie Blank and Amos Guiora, 'Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare' (2010) 1 *Harvard National Security Journal* 45, 51–52.

⁸ Rogier Bartels, 'The Relationship between International Humanitarian Law and the Notion of State Sovereignty' (2018) 23 *Journal of Conflict and Security Law* 461, 461–462.

⁹ Louise Doswald-Beck, 'Confronting Complexity and New Technologies: A Need to Return to First Principles of International Law' (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 107.

¹⁰ Flexibility has been specified as one of the factors responsible for IHL's success. See Hannah Matthews, 'The Interaction Between International Human Rights Law and International Humanitarian Law: Seeking the Most Effective Protection for Civilians in Non-international Armed Conflicts' (2013) 17 *The International Journal of Human Rights* 633, 645.

IHL from adapting appropriately to the challenge posed by groups like ISIS. Firstly, there is the manner in which IHL defers to the state and interstate war as a means of understanding non-state armed groups. Secondly, there is the way in which IHL is conventionally disinterested in the motives behind war. The state-derived approach for understanding non-state armed groups has its benefits, in that many past armed groups have conformed to expectations established in this regard.¹¹ The situation is however changing. As groups like ISIS exemplify, many contemporary armed groups do not seek to mimic state conduct in the use of force.¹² Accordingly, they become difficult to classify. Just as worryingly, these groups understand the use of force differently, waging a war outside of conventional military bounds. This may call into question the capacity of the system to understand what types of restrictions are appropriate based upon the terms it has established.

This chapter sets out to first understand IHL, its purpose, and history. This will reveal a number of problems that need be considered when attempting to extend IHL beyond its foundations in governing interstate war. In particular, this chapter will contest that whilst IHL has proved remarkably flexible, it is yet to dispense with some of its foundational assumptions regarding the nature of armed conflict and the nature of the non-state groups which are understood as able to contest an armed conflict. Accordingly, this chapter contributes to the thesis by defining IHL, the circumstances of its origins, and its history. Moreover, this chapter sets out the rationale for conducting this thesis; namely that IHL, in its existing form, is difficult to apply in conflicts involving “unconventional armed groups”, particularly those motivated upon the basis of religious ideology. This chapter, therefore, fulfils a vital function in relation to the aims of this thesis and provides the basis for subsequent discussion of how contemporary religious violence and the types of organisations committing it fall outside of IHL’s understanding of warfare. Consistent with this aim, this chapter will first begin by relating where the law comes from, and how it has developed.

¹¹ Heike Krieger, ‘International Law and Governance by Armed Groups: Caught in the Legitimacy Trap?’ (2018) 12 *Journal of Intervention and Statebuilding* 563, 571.

¹² The globalised form of war fought by ISIS has been described as indicative of a different type of warfare, challenging state-centric approaches of the past. See Andreas Krieg and Jean-Marc Rickli, ‘Surrogate Warfare: The Art of War in the 21st Century?’ (2018) 18 *Defence Studies* 113, 113–114; see additionally David H. Ucko and Thomas A. Marks, ‘Violence in Context: Mapping the Strategies and Operational Art of Irregular Warfare’ (2018) 39 *Contemporary Security Policy* 206.

2.2 The evolving purpose behind the regulation of armed conflict

Before delving into the sources and history of IHL, it is perhaps worth noting that the laws governing armed conflict are a product of the sentiment that war should be regulated, and its adverse impacts should be managed.¹³ It is, naturally enough, possible to arrive at the conclusion that war should be regulated from a number of different foundations; religious or natural law-based arguments, rationality, or self-interest, and perhaps most recently, upon the basis of an ostensibly international shared morality, in which humanitarian interests are paramount. Whilst in one sense the purpose has remained relatively consistent, other aspects of its mandate have altered along with the attitudes guiding its interpretation. The early philosophical foundations of the laws of armed conflict may have made reference to religion and the interests of mankind, with thinkers like Grotius making sophisticated universal arguments rooted in natural law.¹⁴ These early arguments, whilst concluding that “civilised states” ought to show restraint in law, lacked any mechanism to compel them to do so. Recognising this limitation, when seeking to sway states to adopt a more principled approach to the use of force, early perspectives on regulating armed conflict were sure to advance pragmatic and interest-based arguments for doing so alongside more moralistic perspectives.¹⁵ Reciprocity represents one such interest-based approach. Reciprocity does not represent an appeal to morality, but suggests that nations should follow a shared code of laws based upon the benefits such a concession would result in for the nation’s own interests.¹⁶ Reciprocity, the principle that any limitation on wars should be reflected in both belligerents, is in evidence in past thinking on the subject of war.¹⁷ In the absence of any enforcement mechanism, it was deemed reasonable that states –

¹³ ICRC (n 1).

¹⁴ For instance, Hugo Grotius noted that certain actions undertaken in war violated both Christian religious principles and those of humanity itself. See Steven Forde, ‘Hugo Grotius on Ethics and War’ (1998) 92 *The American Political Science Review* 639, 645.

¹⁵ Theorists have concluded that in order to limit war, appeals are better made to the belligerent’s self-interests rather than morality. See James D. Fearon, ‘Rationalist Explanations for War’ (1995) 49 *International Organization* 379; Will H. Moore, ‘Action-Reaction or Rational Expectations? Reciprocity and the Domestic-International Conflict Nexus during the “Rhodesia Problem”’ (1995) 39 *The Journal of Conflict Resolution* 129.

¹⁶ The early proliferation of the laws of war and international law more generally is often connected with reciprocity and the beneficial nature of reciprocal arrangements governing warfare. See Sean Watts, ‘Reciprocity and the Law of War’ (2009) *Harvard International Law Journal* 365, 366.

¹⁷ See War Office, *Manual of Military Law* (HM Stationery Office 1914) 235.

or “civilised states”¹⁸ in the language of the era – only show restraint in wars against other such civilised states. This gave such states a compelling reason to follow shared customs limiting the use of force; their own civilians and soldiers would benefit from the restraints that they recognised and observed in relation to opponents. Reciprocity naturally means that states are not required to show restraint when contesting wars against states or other armed organisations that do not themselves recognise, or are not deemed capable of abiding by the shared customs and rules governing war.¹⁹ This limits any attempt to universally implement a shared system of regulations.

The limitations of a reciprocity based order were made apparent by the second world war; the impact of this event is often specified in relation to the subsequent “humanisation” of humanitarian law.²⁰ In many subsequent treaties, it was specified that rules should apply not on a reciprocal basis, but instead, that they were underpinned with reference to the interests of humanity;²¹ states and other parties being henceforth bound to observe restraint in war irrespective of their opponents’ disposition toward regulations in war. This permitted the proliferation of IHL into conflicts that would have formerly fallen outside of the shared regulatory framework, perhaps most notably in relation to non-state armed groups.²² The humanisation of humanitarian law argument is naturally not without its detractors, who note that reciprocity still plays an important role in how armed conflict is governed,²³ with, for instance, states citing the violations committed by non-state parties to justify their own breaches.²⁴ Yet, it is difficult to say with certainty to what extent reciprocity continues to influence the development of IHL.

The key point made here is that IHL in its current iteration ensures that humanitarian considerations are paramount. As the situation has changed from a reciprocity based order, however, it must be noted that the incentives that belligerents

¹⁸ See *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg (29 November/11 December 1868) (St. Petersburg Declaration) Preamble.

¹⁹ Watts (n 16) 367.

²⁰ Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *The American Journal of International Law* 239

²¹ *Ibid* 246

²² Annysa Bellal and Stuart Casey-Maslen, ‘Enhancing Compliance with International Law by Armed Non-state Actors’ (2011) 3 *Goettingen Journal of International Law* 175, 195.

²³ Whilst international lawyers may in cases accept that international law is no longer reciprocal in nature, many realist voices are more sceptical. See Robert O. Keohane, ‘Reciprocity in International Relations’ (1986) 40 *International Organization* 1.

²⁴ Bellal and Casey-Maslen (n 22)

are offered to apply IHL have also shifted.²⁵ For instance, when advocating for change, it is important to consider how any modifications to the more tangible aspects of IHL may serve or conflict with humanitarian principles. It is additionally worth noting that the fundamental purpose behind regulating conflict has in the past shifted. The prospect of further evolution is therefore perhaps worth considering.

2.3 Sources of international law and IHL

IHL in its current iteration did not emerge fully formed. As with international law more generally, IHL is a product of a variable law-making process comprising a number of sources and processes, with the laws governing the use of force being no exception to this trend. International law refers to the body of law contrived with the primary purpose of governing interactions between states.²⁶ As such, whilst compelling arguments can be made that the system reflects many earlier accords and arguments between different territorial entities,²⁷ its formal inception cannot be placed before the idea of the nation-state emerged, this being implemented no earlier than the seventeenth century.²⁸ Over time, the notion of the state has proliferated globally, and states have advanced laws and customs that govern actions across the spectrum of interactions in which states participate. International law accordingly encapsulates the conduct of hostilities between states, alongside its many other functions.²⁹

In considering the sources of IHL, many of which are consistent with the sources of international law more generally, it is clear IHL is not the product of a single treaty or declaration, and nor did it develop all at once. IHL is the product of a long process that is still very much ongoing. The sources of international law include

²⁵ Tanisha M. Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (Cornell University Press 2018) 38.

²⁶ L. Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *The American Journal of International Law* 313, 314.

²⁷ In this regard, aspersions are made to the ancient and medieval world. See J. L. Brierly, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (Andrew Clapham ed, 7th edn, Oxford University Press 2012) 1.

²⁸ Indeed, the Westphalia treaties of 1648 are often identified as the point of origin for the idea of the nation state, and by extension, international organisations like the United Nations, and contemporary international law. See generally Derek Croxton, 'The Peace of Westphalia of 1648 and the Origins of Sovereignty' (1999) 21 *The International History Review* 569; some theorists would however, stress the reductionist nature of such an approach. See Heinhard Steiger, 'From the International Law of Christianity to the International Law of the World Citizen' (2001) 3 *Journal of the History of International Law/Revue d'histoire du droit international* 180.

²⁹ For instance, diplomatic conventions between states, national boundaries, international trade, the law of the sea and human rights law, to name but a few of its functions.

treaties, customs of an international nature, the so-called general principles of law recognised by civilised nations, decisions made by national courts, and the opinions advanced by scholars.³⁰ In relation to the conduct of hostilities, there is customary law – the norms and rules states employ in practice, and are therefore understood to bind states generally. There is then treaty law; rules that states have expressed agreement with, though these only bind those states that have agreed.³¹

It can be stated that IHL comprises multiple sources, and therefore its interpretation is not always straightforward in nature. A good starting point for assessing the different forces involved in interpreting what international law might be in a situation is naturally the aforementioned statute of the International Court of Justice (ICJ); Article 38 of this document provides a survey of the main, or formal sources of international law.³² It is additionally worth noting that judicial discussions in addition to the opinions of the most qualified scholars can be regarded as supplementary to the formal sources specified in the ICJ statute.³³ The formal sources listed in the ICJ statute are listed in the earlier Statute of the Permanent Court of International Justice, a League of Nations project.³⁴ The items specified represent a good starting point for understanding the sources involved, though are not by any means exhaustive; indeed, the rising relevance importance of “soft law” provisions to some aspects of international law is perhaps an example of the manner in which informal sources of law can exert an influence on decisions.³⁵ It must additionally be

³⁰ Article 38 sets out these sources in the following language and order: “international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. See Statute of the International Court of Justice (18 April 1945) 1 UNTS 993.

³¹ Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 12–13.

³² “1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, [i.e. that only the parties bound by the decision in any particular case,] judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law”. See Statute of the International Court of Justice, art 38.

³³ *Ibid.*

³⁴ League of Nations, Statute of the Permanent Court of International Justice (16 December 1920), art 38.

³⁵ Soft law being defined as “non-legal norms” expressed through resolutions and declarations. Michael Bothe, ‘Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?’ (2009) 11 *Netherlands Yearbook of International Law* 65, 67–68; one example relevant to IHL is the role non-

stressed that although considered at the inception of the statute, the sources listed in the ICJ do not amount to a hierarchy based on the order in which the sources are stated.³⁶ With these limitations in mind, it is worth considering how the sources of international law interact in general, as well as their specific relevance to this inquiry.

2.3.1 Treaties and conventions

International conventions might more simply be defined just as easily as “treaties and conventions”.³⁷ Such documents are defined relatively comprehensively in the Vienna Convention on the Law of Treaties,³⁸ though debate in relation to what distinctions exist between different types of treaties continues.³⁹ In relation to the conduct of hostilities, the Hague and Geneva conventions are clear examples of relevant treaties.⁴⁰ Further to these more general treaties, it is possible to specify restrictions binding the use of specific types of weapons,⁴¹ treaties relevant to the status of neutral parties,⁴² and those protecting cultural property.⁴³ As with international law more generally, the conduct of hostilities is increasingly legalized, with a substantial body of treaty laws now existing where there once was none.⁴⁴ Whilst the treaty portion of international law is now significant, however, it is not exhaustive and there are still

state actors take in law-making. See Yahli Shereshevsky, ‘Back in the Game: International Humanitarian Lawmaking by States’ (2019) 37 *Berkeley Journal of International Law* 63, 76.

³⁶ Ian Brownlie (n 31).

³⁷ Andreas Zimmermann and others, *The Statute of the International Court of Justice: A Commentary* (2nd edn, Oxford University Press 2012) 738.

³⁸ Vienna Convention on the Law of Treaties (23 May 1969) art 2.

³⁹ For instance, between bilateral and multilateral treaties, and treaties in force and not in force. See Zimmermann and others (n 37) 738, 740–746.

⁴⁰ Convention (IV) respecting the Laws and Customs of War on Land and the Annex thereto: Regulations respecting the Laws and Customs of War on Land, The Hague (18 October 1907) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (8 June 1977) 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 U.N.T.S. 609.

⁴¹ In lieu of stating the list of treaties, which is extensive, the treaties and the relevant prohibitions are set out by the ICRC on a convenient web page. See ICRC, “weapons” (30 November 2011) <<https://icrc.org/en/document/weapons>> accessed 16 January 2020.

⁴² Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, (18 October 1907).

⁴³ Protection of Cultural Property in the Event of Armed Conflict (14 May 1954).

⁴⁴ Sandesh Sivakumaran, ‘Re-envisaging the International Law of Internal Armed Conflict’ (2011) 22 *European Journal of International Law* 219, 219–220.

eventualities not explicitly covered by such agreements. It must additionally be stressed that treaties are a product of an agreement between states; regarding new innovations in the field of armed conflict, the will on the part of states to create new treaties cannot be assumed, but instead depends on states deciding a new treaty is required.

2.3.2 Custom

The ICJ lists custom as one of the formal sources of international law.⁴⁵ In the absence of any treaty, it is custom that guides decisions.⁴⁶ Customary law, commonly defined, refers to a “general practice accepted as law”. This is generally determined through the presence of two elements, namely the general practice of states and what states understand to be the law.⁴⁷ The material elements required to assert customary law are numerous and diverse.⁴⁸ The *opinio juris* element, being the more cognitive of the two components, is based upon how a practice is understood by states. A customary law must demonstrate both elements.⁴⁹ The formula for determining customary law reflected in the ICJ statute is not, however, a commitment to a particular means of translating state practice into customary law.⁵⁰ Indeed, the process has been described as unconscious, in contrast to the more deliberate provenance of treaty law.⁵¹ Various requisite features in the production of customary law can be emphasised as important; the duration of a practice,⁵² its uniformity and general nature,⁵³ and evidence that the

⁴⁵ “international custom, as evidence of a general practice accepted as law”. See ICJ statute, art 38. b

⁴⁶ Lassa Oppenheim, *International Law. A Treatise*, vol 1 (2nd edn, Longmans, Green and Co. 1912) 5.

⁴⁷ Zimmermann and others (n 37) 749–750.

⁴⁸ The International Law Commission recorded treaties, decisions of national courts, decisions of international tribunals, national legislation, diplomatic correspondence, opinions of national legal advisors, and the practice of international organisations. See ILC, ‘Report of the International Law Commission to the General Assembly Part 2: Ways and Means of Making the Evidence of Customary International Law More Readily Available’ (1950) ILC Doc. A/1316.

⁴⁹ Antonio Cassese, *International Law* (2nd edn, Oxford: Oxford University Press 2005) 156.

⁵⁰ Zimmermann and others (n 37) 749.

⁵¹ Hans Kelsen, *Principles of International Law* (Lawbook Exchange 2003) 308–309.

⁵² The duration element, namely that a custom has been around for a while, to now often de-emphasised. It is sufficient to say that the prospect of custom arising instantaneously is considered undesirable, with a practice needing to have some temporal depth. See Diego Germán Mejía-Lemos, ‘Some Considerations Regarding “Instant’ International Customary Law”, fifty years later’ (2015) 55 *Indian Journal of International Law* 85, 107–108.

⁵³ Alternately, “Constant and uniform usage”. See *Asylum Case (Columbia/Peru)* (judgment) (20 November 1950) ICJ Rep 1950, 266. 277–278.

practice is understood to be obligatory.⁵⁴ The presence of these factors helps in determining if a practice is indicative of customary law. Regarding warfare, it must be stressed that customary law is important, this being evidenced by the central role that customary law has played since the Second World War, being particularly evident in military tribunals, driving the development of the International Committee for the Red Cross (ICRC), and initiating the production and development of the treaties considered central to the conduct of warfare.⁵⁵ The ICRC has long been understood to hold a special position in this regard, creating and expanding the list of customary laws relating to armed conflict.⁵⁶ As with customary law generally, state practice remains central,⁵⁷ with an immediate controversy being the capacity of states to behave appropriately, and signal their recognition of laws in an effective manner.⁵⁸

The manner in which customary law arises may be influenced by the progress of history, with different interpretive approaches emerging to reflect changes. For instance, in contrast to the historical norm in which custom arose gradually based upon the behaviour of states, it can be asserted that at the current juncture, custom is more often a result of a deductive process in which new custom emerges rapidly, with the authoritative statement of rules and obligations taking preference over the established practice of states,⁵⁹ with this being evidenced for instance in the Judgment of the Case Concerning Military and Paramilitary Activities in and Against Nicaragua.⁶⁰ Whilst it is possible to be critical of this shift, it must be conceded that the rapid generation of custom is perhaps justified based upon the novel situations that often arise from state interactions. Now there are extensive treaties in existence, much of what once would have been customary is now covered in the treaty portion of IHL.⁶¹ Customary law

⁵⁴ “...the need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitateis*”. See North Sea Continental Shelf Case (Federal Republic of Germany/Netherlands) (judgment) ICJ Rep 1969, 44.

⁵⁵ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume 1: Rules*, vol 1 (Cambridge University Press 2005) xxxi–xxxii.

⁵⁶ See Theodor Meron, ‘Revival of Customary Humanitarian Law’ (2005) 99 *The American Journal of International Law* 817.

⁵⁷ *Prosecutor v. Tadic* (judgment) IT-94-1-T (7 May 1997) [99]; see also ILC, ‘Draft Conclusions on Identification of Customary International Law, with Commentaries’ (2018) ILC Doc A/73/10, 132.

⁵⁸ John B. Bellinger and William J. Haynes, ‘A US government response to the International Committee of the Red Cross Study Customary International Humanitarian Law’ (2007) 89 *International Review of the Red Cross* 443, 444.

⁵⁹ Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law: A Reconciliation’ (2001) 95 *The American Journal of International Law* 757, 758.

⁶⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* (Judgment) (27 June 1986) ICJ Rep 89 [188–189].

⁶¹ *Ibid.*

maintains its relevance upon the boundaries of warfare, being particularly salient in relation to areas where there are limited treaty provisions, such as some aspects of war upon the high seas, as well as in relation to new technologies and approaches to the use of force.⁶² In relation to the actual process for determining the existence and nature of customary law, a number of additional factors assist in reaching a decision, though it is worth noting that scholars disagree as to the disposition of these sources and the methods that need to be utilised.⁶³ In relation to the conduct of hostilities, the notion that a shared international morality, or “elementary considerations of humanity”⁶⁴ can be used to guide judgments and decisions is of particular importance.

Regarding customary law, generally, it only applies to states, though IHL is also applicable to certain non-state groups.⁶⁵ The role that non-state groups take in the extension of customary law is, at the current juncture, far from certain.⁶⁶ As an unconscious process, it can be contended that customary law is already being generated in relation to the changing character of non-state armed groups.⁶⁷ Customary law, unlike the more concrete treaty portion, could provide for a more reflexive and rapid approach to addressing emerging problems. When a treaty refers to customary law, the provisions set out are to be considered binding on all states, whether they ratify the treaty or not,⁶⁸ the exception being if they have dissented from the start of a given custom.⁶⁹ The process for making such judgments is aided by other judgments and decisions. As with treaties in general, they bind only the parties involved.⁷⁰ The

⁶²“The high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders. Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”. This clause, subsequently known as Martens Clause, has guided the development of new rules. See Hague Convention (IV) respecting the laws and customs of war on land, Preamble.

⁶³ Niels Petersen, ‘Customary Law without Custom – Rules, Principles, and the Role of State Practice in International Norm Creation’ (2007) *American University International Law Review* 275, 276–277.

⁶⁴ Considerations of humanity, specified in The Hague Convention 1907; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. U.S.)* (Judgment) (27 June 1986) ICJ Rep 1986, 14, [218].

⁶⁵ Should the existence of an armed group be adequately demonstrated? See UN, ‘Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General’, UN Doc no. S/2005/60, [172].

⁶⁶ Whilst non-state armed groups may be subject to customary laws under IHL, the role that they play in its production is a matter for contention.

⁶⁷ Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press 2013).

⁶⁸ Brownlie, *Principles* (n 31) 14–15.

⁶⁹ Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2014) 91.

⁷⁰ Brownlie, *Principles* (n 31) 13.

states involved may, through reservations, alter how aspects of the treaty are interpreted and applied in relation to their state. Treaties are an important source of IHL, and additionally can be used to chart the development of IHL over time, indicating that the system possesses the capacity to adapt. Treaties can likewise become customary law, extending their applicability beyond the states that may have formally ratified such agreements. It is, for instance, agreed that the initial Hague and Geneva conventions of 1949 have become customary in nature, and therefore apply universally to all states.⁷¹

2.3.3 General principles of law

General principles as specified as a source of international law encapsulate both the general principles of international law and the general principles found in domestic legal systems, amounting to a “universal” public opinion.⁷² It has been described as a means of “filling the gaps”⁷³ that might otherwise exist in international public law. Regarding armed conflict, general principles have been recognised as existing by the ICJ.⁷⁴ Where discussed, the general principles of IHL are connected to key treaties as well as the “elementary considerations of humanity” specified therein.⁷⁵ Regarding innovations to rules of armed conflict, it would accordingly be important to ensure that changes are consistent with IHL and its existing customs and treaties, as well as with the general principles of international public law more broadly.

2.3.4 Judicial decisions and qualified publicists

As a secondary means of determining the law, the ICJ statute specifies “judicial decisions and the teachings of the most highly qualified publicists”.⁷⁶ Judicial

⁷¹ See Christopher J. Greenwood, ‘Historical Development and Legal Basis’ in D. Fleck and M. Bothe (eds), *The Handbook of International Humanitarian Law* (2008) 28.

⁷² M. Cherif Bassiouni, ‘A Functional Approach to “General Principles Of International Law”’ (1990) 11 *Michigan Journal of International Law* 818, 819.

⁷³ Michael Wood, ‘Customary International Law and the General Principles of Law Recognized by Civilized Nations’ (2019) 21 *International Community Law Review* 307.

⁷⁴ *Nicaragua v. U.S.* (n 60) [218].

⁷⁵ Rosemary Abi-Saab, ‘The “General Principles” of Humanitarian Law According to the International Court of Justice’ (2010) 27 *International Review of the Red Cross* 367, 371.

⁷⁶ ICJ statute art 38.

decisions may be selected from both international and domestic courts, not in the same manner as primary sources, but as a means of better articulating the existence of laws. The ICJ has in the past referred to previous judgments in this manner.⁷⁷

The ICJ statute additionally specifies the supplementary role that qualified publicists play in the construction of sources. In relation to IHL, the experts in a position to comment as “highly qualified publicists” may include military lawyers and humanitarian professionals.⁷⁸ It is perhaps worth considering that today, there are substantially more such experts than at any point in the past.

Consideration of the sources of law relevant to the conduct of armed conflict reveals, in particular, a mandate for adapting IHL in the face of challenges arising from new forms of warfare and new types of armed conflict. Importantly, the suggestion that adjustments and modifications can be carried out in order to ensure the system is serving the interests of humanity may prove of use in relation to the contention of this thesis. Limitations in terms of the system’s capacity to adapt can already be indicated. Treaties, for instance, require significant will on the part of states. Any adaptations additionally require that the existence of a problem is recognised.

Moving forward, however, it is important to examine how IHL has adapted and changed over time, and what events, in the past, have been of sufficient impact to drive the development or evolution of the system.

2.4 The history of IHL

In order to support the thesis that IHL needs to adapt, it is first required that the reasoning behind the prevailing system is understood; perhaps most importantly, it must be understood that IHL in the past has recognised a need to change, and reacted accordingly. This can perhaps be best appreciated by examining the history of the system. An awareness of history also allows for an understanding of how IHL’s various sources have interacted in the past, and therefore how they may be relevant in relation to current problems. To some extent, IHL represents a continuation of the longstanding sentiment that war is not the absence of a legal order, but a separate

⁷⁷ Mads Andenas and Johann Ruben Leiss, ‘The Systemic Relevance of “Judicial Decisions” in Article 38 of the ICJ Statute’ (2017) 77 *Heidelberg Journal of International Law* 907, 909–910.

⁷⁸ David Kennedy, *Of Law and War* (Princeton University Press 2006) 85.

one.⁷⁹ Whilst the laws governing armed conflict today are formally very young,⁸⁰ they are in some aspects related to the laws and customs established first in Europe following the construction of the state system.⁸¹ There is a tendency to connect the origins of current laws governing the conduct of warfare with distant and diverse histories, a provenance that would helpfully underpin assertions concerning IHL's universal nature.⁸² This lineage is however difficult to assert in any concrete manner and cannot transcend basic principles and motivations. If the language and framework comprising the current system have any discernible provenance, it is perhaps the early European laws of nations and scholarship on war and peace that emerged as a reaction to the European wars of religion.⁸³ Whilst texts such as Grotius's sought to define rules of conduct, practically speaking, their character was aspirational, with little reflection of the actual conduct of states of the time.⁸⁴ Whilst modern international law has naturally developed much since this period of history, this episode bears mention as much of the language and thought of this time continues to remain in use today.

A central early expression of the customs and norms constraining war was set out in the Lieber Code, a document circulated throughout the Union army in the American civil war under the auspices of general order. This order set out to regulate a war between a nation-state and an internal secessionist cause⁸⁵ has since remained a key touchstone for subsequent regulations and customs concerning warfare between states.⁸⁶ Warfare upon land saw a serious move towards formal regulation with the first Geneva Convention of 1864, the Convention for the Amelioration of the

⁷⁹ "A good definition must bring out... that war is a state or condition of affairs, not a mere series of acts of force". See Arnold D. McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals' (1925) 11 Transactions of the Grotius Society 29, 33.

⁸⁰ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 119.

⁸¹ "It may be a matter of some controversy among historians as to when one should date the beginning of the modern states-system... Less open to debate, however, is that somehow the idea of such a system is historically as well as conceptually linked with that of an international Rule of Law". See Martti Koskenniemi, 'The Politics of International Law' (1990) 1 European Journal of International Law 4, 4.

⁸² Brierly, *Brierly's Law* (n 27).

⁸³ Mark Weston Janis and others, 'Religion and International Law' (1988) 82 Proceedings of the Annual Meeting (American Society of International Law) 195.

⁸⁴ See Hugo Grotius, *The Rights of War and Peace* (A.C. Campbell tr, Walter Dunne 1901) XIV; see additionally S. Forde, 'Hugo Grotius on Ethics and War' (1998) 92 The American Political Science Review 639.

⁸⁵ Francis Lieber, *Instructions for the Government of Armies of the United States, In the Field* (1869) <<https://archive.org/details/governarmies00unitrich/page/n5>> accessed 12 December 2018.

⁸⁶ Hew Strachan, Sibylle Scheipers and Provider Oxford Leverhulme Programme on the Changing Character of War Content, *The Changing Character of War* (Oxford: Oxford University Press 2011) 20.

Condition of the Wounded in Armies in the Field.⁸⁷ This realised the beginning of regulations protecting those outside of combat, a body subsequently referred to as Geneva law.⁸⁸ These rules proceeded upon a mandate derived from humanitarian concerns, rather than being directed at the interests of the nations involved. Unlike the Geneva branch of law, seeking primarily to protect those outside of combat, the St Petersburg Declaration of 1864 contended with the actual practice of war.⁸⁹ The preamble of this treaty set out how states should behave towards one another in war, and additionally presumed to define why states should abide by restrictions:

*That the progress of civilization should have the effect of alleviating as much as possible the calamities of war; That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity.*⁹⁰

This statement presumes upon the civilised natures of states, inferring that they should target only the military capability of the enemy, and not utilise force in an excessive or gratuitous manner. Importantly, this is framed not only as a humanitarian issue but also as a matter of efficiency. This principle of military necessity is also considered, as is the case subsequently, to be something that states and their agents intrinsically understand and are able to apply. This is presumed based upon the parties' civilised nature in this instance, though has alternately been articulated as an exercise in

⁸⁷ Whilst only ratified by 16 nations, this treaty represents an important starting point. ICRC, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 U.N.T.S. 31; the treaty was subsequently revised in 1906, 1929 and 1949.

⁸⁸ Initially, the laws of Geneva, focusing on the victims of armed conflict, and the laws of The Hague, concerning the employment of force in armed conflict, were considered distinct. This bifurcation is no longer considered to be useful. See Richard John Erickson, 'Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict' (1978) *Virginia Journal of International Law* 557.

⁸⁹ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 11 December 1864. <<https://ihl-databases.icrc.org/ihl/full/declaration1864>> accessed 24 November 2019.

⁹⁰ *Ibid.*

common sense.⁹¹ It is additionally worth noting that at this early juncture, non-state parties had not yet merited any consideration.

Following the St Petersburg declaration, a number of failed attempts to expand the LOAC emerged in the Brussels Declaration of 1874 and Oxford Manual of 1880.⁹² These projects perhaps captured the desire on behalf of the growing international community to further regulate armed conflict, and though neither entered into force, they did perhaps influence future, more successful efforts. Hague Declarations of 1899 and Hague Conventions 1907,⁹³ however, did have a binding impact, establishing the body then known as the law of The Hague concerning how armed conflicts are conducted. An important additional detail to note alongside this progress is the growing scope of international law in general, which opened up numerous avenues for generating compliance with the regulations applied to armed conflict.⁹⁴

The Hague Conventions represented a formalisation of many of the established norms that European states had by this time recognised when using force between one another.⁹⁵ Accordingly, the Hague Conventions can be understood as relating to the methods used in warfare, the conduct of hostilities, and occupation. Even before being codified, many of the regulations decided upon had already been exhibited by states representing mutually reciprocal norms of behaviour in war.⁹⁶ Moreover, these laws reflected the contemporary military approach taken by states regarding efficiency and expediency in war. For instance, in seeking to strike a balance between military necessity and proportionality, the Hague conventions reflected the military science principle of economy of force; the manner in which states are inclined to use force in the most efficient manner possible.⁹⁷ It is additionally not without significance that the

⁹¹ David Éric, *Principes de droit des conflits armés* (3rd edn, Bruylant 2002) 921–922.

⁹² *Project of an International Declaration Concerning the Laws and Customs of War*. Brussels, 27 August 1874; *The Laws of War on Land*. Oxford, 9 September 1880.

⁹³ *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907; *Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*, 18 October 1907.

⁹⁴ In this sense, failure to abide by the restrictions in warfare could have a number of consequences for a state's inclusion within the wider framework of international law, as well as damaging their status as "civilised". This can be observed in relation to states on the fringes of Europe and indicates that even within the absence of an effective framework for punishment, consequences existed. See Henry Wheaton, *Elements of International Law* (3rd edn, rev. and cor. edn, Lea and Blanchard 1846) 17–18.

⁹⁵ As Johnson notes, The Hague conventions alluded to an existing, historical body of "consensus and practice". See James Turner Johnson, 'The Great War and International Law on War' (2018) 101 *Soundings: An Interdisciplinary Journal* 255, 269.

⁹⁶ Watts, 'Reciprocity' (n 16) 366–367.

⁹⁷ Beer, 'Humanity Considerations' (n 3)

Hague conventions recognised a reciprocal character to the regulations comprising the convention; states that were unwilling or unable to apply such rules when using force could not expect to benefit from the restraint of their opponents.⁹⁸ In this sense, the huge laws made exclusion a possible price of noncompliance, incentivising compliance. Additionally, the Hague convention only contended with interstate conflicts,⁹⁹ leaving states with the option of dispensing with non-state groups, which then not only comprised internal rebellions but “uncivilised peoples” not recognised as peers within a system of international law.¹⁰⁰ As such, the Hague conventions recognised clear boundaries limiting their application strictly to nation states. These bounds did, however, prove inconsistent with the humanitarian spirit that would come to govern further efforts towards regulating armed conflict in future.¹⁰¹ The Hague conventions of 1907 contributed some remarkable innovations, for instance requiring that states instruct their armies (land forces) in the specifics of the new regulations.¹⁰² Even at this early stage, significant steps had been made to limit the adverse implications of armed conflict.

The inadequacies of the laws regulating the use of force were revealed by the experience of the first world war.¹⁰³ The Geneva conventions of 1929 updated key elements of the law, particularly regarding the treatment of prisoners of war and civilians.¹⁰⁴ Likewise, the Second World War spurred additional revisions and expansion, spurring developments to address the inhumane treatment of both those taking part in hostilities and those outside of combat.¹⁰⁵ Perhaps most importantly, the notion of war crimes and crimes against humanity emerged in the Nuremberg and

⁹⁸ Watts ‘Reciprocity’ (n 16).

⁹⁹ Tom Farer, ‘Humanitarian Law and Armed Conflicts: Toward the Definition of “International Armed Conflict”’ (1971) 71 *Columbia Law Review* 37, 60.

¹⁰⁰ Alexander Orakhelashvili, ‘The Idea of European International Law’ (2006) 17 *European Journal of International Law* 315, 327.

¹⁰¹ See, generally, Meron, ‘The Humanization of Humanitarian Law’ (n 20).

¹⁰² See annex.

¹⁰³ Jochen von Bernstorff, ‘The Use of Force in International Law Before World War I: On Imperial Ordering and the Ontology of the Nation-state’ (2018) 29 *European Journal of International Law* 233, 258.

¹⁰⁴ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12 August 1949) 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (12 August 1949) 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (12 August 1949) 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (12 August 1949) 75 U.N.T.S. 287.

¹⁰⁵ Francois Bugnion, ‘The Geneva Conventions of 12 August 1949: From the 1949 Diplomatic Conference to the Dawn of the New Millennium’ (2000) 76 *International Affairs* 41.

Tokyo trials following the Second World War.¹⁰⁶ The Geneva conventions of 1949 likewise revised many protections of civilians and those outside of combat based upon the experience of the Second World War. Both world wars can, therefore, be identified as the impetus behind the progressive development of both treaty and customary changes to IHL, as well as instigating more foundational changes; the aforementioned “humanisation” of humanitarian war,¹⁰⁷ the UN Charter, and even international institutions like the ICJ and ICC which can arguably be connected to the global experience of these incredibly costly and destructive interstate armed conflicts.

It is not without significance that previously, the laws of war only applied to inter-state conflict, leaving states a relatively free hand when dispensing with non-state adversaries.¹⁰⁸ The Geneva conventions of 1949 represent the first illustration of what can be termed Common Article 3, or armed conflicts of a non-international nature,¹⁰⁹ the first provisions for conflict not taking place between states. This represents a critical development, in that, the focus of the laws of armed conflict fell upon the conduct of states against one another. This is far from surprising, given the central nature of interstate war in the period in which IHL had existed, up to this point. The impact on the laws to regulate hostilities also requires that reference be made to the war crimes trials that followed the Second World War.

Following the Second World War, there was a remarkable change in the nature of the conflicts actually taking place, with the vast majority of wars appearing to be non-state in nature, with one or more of the belligerents not being a state.¹¹⁰ This surge in non-state armed groups is associated with the rise of anti-colonial movements in the context of decolonisation.¹¹¹ Whilst these national liberation movements were nothing new,¹¹² at this juncture of history, states and international society saw such armed

¹⁰⁶ See Christian Tomuschat, ‘The Legacy of Nuremberg’ (2006) 4 *Journal of International Criminal Justice* 830.

¹⁰⁷ Meron, ‘The Humanization of Humanitarian Law’ (n 20).

¹⁰⁸ Rogier Bartels, ‘Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-international Armed Conflicts’ (2009) 91 *International Review of the Red Cross* 35.

¹⁰⁹ Geneva Convention(s) (n 40) art 3.

¹¹⁰ Thomas Szayna and others, *Conflict Trends and Conflict Drivers: An Empirical Assessment of Historical Conflict Patterns and Future Conflict Projections* (RAND Corporation 2017).

¹¹¹ Jessica Whyte, ‘The “Dangerous Concept of the Just War”: Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions’ (2018) 9 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 313, 317.

¹¹² Noelle Higgins, ‘International Humanitarian Law and the Promotion Of Human Security: The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements’ (2009) 17 *Human Rights Brief* 12.

groups as legitimate, broadly speaking,¹¹³ with previous arrangements in international law that assisted in legitimising colonisation now rejected as illegitimate.¹¹⁴ Additional Protocols I and II¹¹⁵ updated and refined a great many aspects of armed conflict, dealing with international and non-international armed conflicts respectively. Additional Protocol I dealt with international armed conflicts codifying many existing customary rules.¹¹⁶ Critically, it extends the privileges of states partaking in wars to certain non-state entities in “exercise of their right of self-determination”.¹¹⁷ Additional Protocol II develops protections relevant to non-state armed conflict, expanding initial provisions found in the Geneva conventions.¹¹⁸ Whilst these protections did not initially equal those present in the event of international armed conflict, they did significantly enhance the protections available.

The additional protocols indicate a shift towards normalising and assisting the anti-colonial and independence movements in the wake of the Second World War. These movements were understood to be legitimate, yet were not initially well provisioned in IHL and international law more generally. The eventuality that the states and empires presiding over the territories would use unrestrained force against such movements – as may have been permitted in the past – was considered undesirable.¹¹⁹ Moreover, it is not without consequence that many sought to become states, taking their place within the family of nations.¹²⁰ The point to be made here is that IHL was enlisted to legitimise and protect the process of decolonisation, reflecting

¹¹³ Noelle Higgins, ‘The Application of International Humanitarian Law to Wars of National Liberation’ (2004) *Journal of Humanitarian Assistance* <<http://sites.tufts.edu/jha/files/2011/04/a132.pdf>> accessed 28 November 2019.

¹¹⁴ Thomas D. Grant, ‘Extending Decolonization: How the United Nations Might Have Addressed Kosovo’ (1999) *Georgia Journal of International and Comparative Law* 9, 49–50.

¹¹⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (12 December 1977) 1124 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (8 June 1977) 1125 U.N.T.S. 3.

¹¹⁶ This protocol went into significant detail regarding issues related to the methods and means used in warfare, as well as the notion of grave breaches. It refined the notion of “combatant”, as well as expanding the notion of combatant status. It afforded certain privileges and freedoms to those providing medical assistance in the context of armed conflict. See *ibid*.

¹¹⁷ See Additional Protocol I (n 115).

¹¹⁸ See Additional Protocol II (n 115).

¹¹⁹ Karma Nabulsi, *Traditions of War: Occupation, Resistance, and the Law* (Oxford University Press 1999) 14–15.

¹²⁰ UNGC, ‘Resolution on the Report of the Special Political and Decolonization Committee’ (Fourth Committee) (18 January 2006) A/60/472; the importance of participating in this family is significant; see generally Antony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) *Harvard International Law Journal* 1.

the UN Charter's position on the matter.¹²¹ There are naturally voices in scholarship that are in accord with this suggestion. Mastorodimos, for instance, presents a compelling argument that not only was the idea of a national liberation movement related to the period of decolonisation,¹²² but requires the convergence of a number of features that, whilst once prevalent in armed groups, are rarely if ever exhibited concurrently by armed groups today.¹²³ This may serve to technically confine the idea of non-state armed conflict to history.

The development of IHL has subsequently been driven by international courts and military tribunals, as well as state practice in warfare, which can be identified as another factor driving IHL forward. Yet, it is possible to suggest that IHL has not developed a clear and unambiguous response to react to modern permutations of warfare. This contention can be evidenced by examining how practice subsequent to the emergence of Common Article 3 (non-state armed conflicts) has served to define "armed groups" in a manner that fails to account for the way in which such groups can diverge from the state approach to the use of force. As this contention is vital to the progress of this thesis, it makes sense to examine these definitions in detail.

2.5 What are armed conflicts and armed groups, and how are they currently defined?

This chapter has so far set out how IHL is designed to adapt to changes in the nature of warfare, and moreover, through reference to history, how IHL has changed in the past. It has been suggested however, that there are aspects of IHL that are intransigent or defined in such a manner as to limit the capacity of the system to understand and therefore effectively regulate new situations. Based upon the reliance that IHL places on interstate war, these limitations are most apparent in how armed groups are defined, and the requirements placed upon such groups in relation to waging war. Based upon the sources of IHL, it is possible to suggest that whilst IHL was initially orientated around states, through the changing definition of armed conflict, it has expanded to encapsulate wars involving non-state entities. The circumstances in which this

¹²¹ See *Charter of the United Nations*, 24 October 1945, 1 UNTS 16, ch IX, art 55.

¹²² Mastorodimos Konstantinos, 'National Liberation Movements: Still a Valid Concept (With Special Reference to International Humanitarian Law)?' (2015) 17 *Oregon Review Of International Law* 71.

¹²³ *Ibid.*

expansion occurred, however, may be considered a basis to question the manner in which an armed group is defined, and the thresholds for asserting an armed conflict. This being the case, there may be a basis in the interests of humanity to revise IHL. Based on the sources and history of IHL it is possible to articulate with reasonable clarity a definition of armed conflict and armed group specifying what situations are included, and critically what types of situation are excluded. It is worth noting however that whilst armed conflict as a term is utilised with frequency, it is never really defined in the Geneva conventions or additional protocols, nor has it been clearly defined by the UN Security Council (UNSC), a fact that has subsequently been referenced in international tribunals.¹²⁴ Moreover, in situations where armed conflict has been recognised, relevant bodies do not set out the means used to reach this conclusion in precise terms.¹²⁵ It would be unfair, however, to suggest that the existence of an armed conflict is merely a matter of judgment or preference. Considering non-state armed conflicts, there exists a wealth of guidance that can be used to determine if an armed conflict is taking place.

Whilst non-international armed conflict is now covered, there is not much to go off of in terms of defining the groups involved.¹²⁶ Additional Protocol II makes reference to “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”.¹²⁷ Critically, this provision also stresses that IHL shall not apply in “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”.¹²⁸ These criteria indicate a number of preconceptions concerning the nature of non-state approaches to the use of force carried over from interstate war; the nature of the parties being a derivative of state militaries, for instance. This additionally initiates a complex line-drawing exercise, namely in defining what features a group must display in order to be considered capable of waging war.

¹²⁴ *The Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Trial Chamber 1, 2 September 1998 [606].

¹²⁵ *Ibid.*

¹²⁶ This was effectively stated by the 2016 ICRC commentary. See ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 Article 3: Conflicts not of an International Character [384].

¹²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 8 June 1977. Art 1.1.

¹²⁸ *Ibid.*, art 1.2.

The commentary of 1987 lays out the problems that IHL encounters in seeking to define “armed conflict” in situations involving non-state parties, or organised armed groups. Pragmatically, the commentary sets out how, in seeking to objectively define such situations, the drafters decided that it would be preferable to “select a number of concrete material elements so that, when these elements are present, the authorities concerned could no longer deny the existence of a conflict”.¹²⁹ These elements, as specified, relate to features such as the capacity for organisation and command, control of territory, the capability to conduct military operations, and perhaps critically the capacity to actually implement the Protocol.¹³⁰ These features are therefore perhaps understood to have a deterministic link with the capacity for an organisation to be involved in armed conflict: they are additionally a characteristic displayed by states, as well as more “conventional armed groups”, those movements that in the past, sought to create or wrest control of a state, and subsequently participate in international society.

Where IHL sources have elaborated upon these criteria, they have frequently done so by referring to the state approach to the use of force. In this regard two main criteria have guided the subsequent interpretation of Additional Protocol II; organisation and intensity.¹³¹ These criteria, which must be present in a non-state party in order for a non-state armed conflict to be taking place, have generally been expressed in a narrow manner that is specific to the state approach to the use of force. This was subsequently confirmed by the two ad hoc tribunals, namely, the International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) – with the *Tadić* and *Akayesu* trials both respectively suggesting that the hostilities needed to be organised in nature.¹³² Building on this foundation, the later *Boškoski* case went as far as to specify a number of features that were directly indicative of the requisite level of organisation to be considered “organised”, and therefore capable of waging armed conflict: an identifiable command structure, the capacity to carry out military operations, the capacity to maintain logistics and recruitment, basics of discipline and order, and the

¹²⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Commentary of 1987, Material Field of Application [4449–4450].

¹³⁰ Ibid [4459–4470].

¹³¹ ICRC (n 1) 5.

¹³² *Prosecutor v. Tadić* (judgment) IT-94-1-T (7 May 1997) [562]; *Prosecutor v. Akayesu* (judgment) ICTR-96-4-A (1 June 2001) [620].

capacity to speak with “one voice”.¹³³ The *Haradinaj* case likewise referred to, amongst other factors, the type and calibre of weapons used.¹³⁴

An examination of organisation as articulated by the international criminal tribunals serves to narrow the meaning of “armed group” considerably. The limitations set out in order to distinguish armed groups from criminal enterprises are however not perfect in relation to the purpose for which they were contrived. It is possible to conceive of or even identify organisations which, whilst capable of waging war, do not manifest the features specified in relation to organisation. This assertion may specifically be relevant in cases of vigilante action¹³⁵ or terrorism.¹³⁶ Such groups are differently organised, and may not follow a conventional military hierarchy, instead relying on less formal civil society mechanisms for decision-making, or as is the case with terrorist networks, flattening command structures in order to better adapt to their operating environment.

The second of the specified features is intensity, specifically the notion that armed conflict must reach a certain threshold or volume. Intensity, as with organisation, is equated with the state approach to using force; jurisprudence serves to suggest a supplementary means of identifying an armed group is present. The La Tablada incident before the Inter American Court of Human Rights was recognised as having reached the threshold required despite being fairly modest in scale, due in part to the “Hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of the violence attending the events in question”.¹³⁷ This decides that the determination of armed conflict is partly discernible based upon the reaction it provokes, for instance exceeding the capacity of

¹³³ *The Prosecutor v Boškoski* (Judgment) ICTY IT-04-82-T (10 July 2008) [194–204].

¹³⁴ The criterion of protracted armed violence has therefore been interpreted in practice, including by the Tadić Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the “intensity” criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict. See *Haradinaj et al v. Prosecutor*, (judgment) IT-04-84-T (7 May 1997) [49].

¹³⁵ Brian McQuinn and Fabio Oliva, ‘Analysing and Engaging Non-state Armed Groups in the Field’ (UNSSC 1014) 12.

¹³⁶ Rogier Bartels, ‘When Do Terrorist Organisations Qualify as “Parties to an Armed Conflict” Under International Humanitarian Law?’ (2018) 56 *Revue de Droit Militaire et de Droit de la Guerre/The Military Law and Law of War Review* 451.

¹³⁷ *Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-American Court of Human Rights, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997) [155].

police forces to contain.¹³⁸ The presence of soldiers in relation to a situation is an additional indicative factor that an armed conflict is taking place.¹³⁹

In relation to non-state armed conflicts, IHL had to contend with a challenge in relation to defining armed conflict in situations involving armed groups. It has undertaken the perhaps necessary step of setting out objective criteria relevant to this process, setting out “concrete material elements”¹⁴⁰ that can be used in the procedure. The expedience that such a concession provides is clear; there is undoubtedly a need for a clear process for differentiating armed groups from criminals and armed conflict from disorder and terrorism. The notion that an armed group is required to conform to the state archetype is broadly confirmed to be the case, with the criteria established for this purpose assessing organisation and intensity with reference to state competencies.¹⁴¹

The ICC has additionally confirmed the importance of the state model. The more recent *Lubanga* case likewise determined that at one point, the Iruri conflict could be defined as non-international armed conflict, describing the non-state party as having “quasi-state features”.¹⁴² The most comprehensive guidance for identifying if an organisation is an “armed group” is however to be found in the *Boškoski* case, which serves to identify many physical features that must be present for an organisation to be an armed group.¹⁴³ In terms of identifying these features, the requirement can be summarised that the armed group should mirror the state means of making war. This is compounded by the *Limaj* judgment, in which the defence assertion that the Kosovo army did not reach sufficient threshold for the organisation was rejected based upon the presence of conventional military features within the organisation.¹⁴⁴

In setting out concrete material elements to identify armed groups and armed conflict, IHL has set out recognisable objective features. In doing so, however, it has

¹³⁸ *Ajuri v IDF Commander* HCJ 7019/02; HCJ 7015/02 (3 September 2002), [1–4]; *The Prosecutor v Boškoski* (Judgment) ICTY IT-04-82-T (10 July 2008) [178].

¹³⁹ *The Prosecutor v Nyiramasuhuko et al.* (Judgment) ICTR-98-42-T (24 June 2001) 1 [6156–6157].

¹⁴⁰ ICRC, ‘Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Commentary of 1987 Material Field Of Application’ (1987) [4449–4450].

¹⁴¹ See *Tadic* Judgment [562]; *Prosecutor v. Mucic et al.* (Trial Judgment) IT-96-21-T (16 November 1998) [184]; *Limaj* Trial Judgement [84].

¹⁴² *The Prosecutor v. Lubanga Dyilo* (Pre-Trial Chamber I Decision) ICC601/04601/06 (29 January 2007) [200].

¹⁴³ *The Prosecutor v Boškoski* (Judgment) ICTY IT-04-82-T (10 July 2008) [194–204].

¹⁴⁴ *The Prosecutor v. Limaj et al.* (Judgment) IT-03-66-T (30 November 2005) [90].

overtly relied upon the state approach to warfare to establish these objective requirements. As this chapter will now go on to explore, this reliance complicates the capacity for the system to adapt, should the nature of conflict deviate drastically from the type of warfare described by statute and custom.

2.6 The changing nature of armed conflict

IHL has changed significantly in the past and maintains the capacity to adapt to new challenges moving forward. In order to do so, however, a prerequisite is recognising that a change is required. This is not always an easy task, and the further that the actual exhibition of armed conflict deviates from the interstate prototype, the more difficult it may become to even recognise that a war is taking place, let alone proscribe the behaviour of states. This challenge is perhaps best articulated by examining how a group like ISIS diverges from the interstate prototype whilst representing a threat comparable to organisations that do resemble states in situations of armed conflict.¹⁴⁵ The new approaches pioneered by ISIS and its precursors emphasise the signalling function of brutal and indiscriminate acts¹⁴⁶ and the utility of targeting civilians in preference to government and military targets,¹⁴⁷ adopting techniques that, whilst often effective in the short term, harm the group's long term prospects: utilising human shields,¹⁴⁸ taking hostages¹⁴⁹ and employing perfidious behaviour; for instance, hiding in culturally significant buildings,¹⁵⁰ and failing to distinguish one's combatants from civilians.¹⁵¹ Additionally, many modern conflicts do not follow the model of clear

¹⁴⁵ "These apparently different phenomena display deep common patterns that transcend their surface-level differences". See Michael Spagat, Neil F. Johnson and Stijn van Weezel, 'Fundamental Patterns and Predictions of Event Size Distributions in Modern Wars and Terrorist Campaigns' (2018) 13 PLoS One e0204639.

¹⁴⁶ See Greg Simons, 'Brand ISIS: Interactions of the Tangible and Intangible Environments' (2018) 17 4 Journal of Political Marketing, 322.

¹⁴⁷ Non-state groups have conventionally deferred to mimicking state capacities and means, not only because it is morally preferable to the use of terror but based upon a perception it can be faster and more effective. This is often no longer the case. See Yoweri Kaguta Museveni, 'The Strategy of Protracted People's War: Uganda' (2008) 88 Military Review 4, 7–8.

¹⁴⁸ Joe Inwood, 'Islamic State Group Using Human Shields in Mosul' (BBC, 3 April 2017) <<https://bbc.co.uk/news/av/world-middle-east-39475588/islamic-state-group-using-human-shields-in-mosul>> accessed 13 August 2019.

¹⁴⁹ Samuel Oyewole, 'Boko Haram: Insurgency and the War against Terrorism in the Lake Chad Region' (2015) 39 Strategic Analysis 428, 428–429.

¹⁵⁰ Chad Garland and Zubair Babakarkhail 'ISIS Fighters Display Less-than-stellar Leapfrogging, Martial Arts Skills in Seized Videos' (Stars and Stripes, 25 April 2018) <<https://stripes.com/news/isis-fighters-display-less-than-stellar-leapfrogging-martial-arts-skills-in-seized-videos-1.523904>> accessed 13 August 2019.

¹⁵¹ Afghanistan Independent Human Rights Commission (AIHRC) 'Insurgent Abuses against Afghan Civilians' (December 2008) 5.

military confrontations that in the past kept violence relatively segregated from civilian populations. Instead of a battlefield confrontation, the majority of killing may take place at roadblocks, or in homes.¹⁵² Improvised Explosive Devices (IEDs), mines, and other passive weapon systems may do the majority of the killing.¹⁵³ State forces may not put up much of a fight, either because they are ill-equipped or poorly motivated.¹⁵⁴ Wars may not be fought by professional soldiers, but by rank amateurs, who may lack any tactical aptitude, and therefore are not capable of the logistical expertise required to maintain the impetus needed for high tempo modern warfighting.¹⁵⁵ In 2014 the Islamic State was able to overrun Mosul, Iraq with a force that was both militarily and numerically inferior to the defending regime forces.¹⁵⁶ This was largely due to the fragmented military and civil infrastructure of the Iraqi regime;¹⁵⁷ Boko Haram, another unconventionally organised armed group, has been able to benefit from the endemic corruption plaguing the Nigerian military, scoring victories against state troops who are unable to fulfil their function.¹⁵⁸ The damage caused by many clandestine networks has additionally been sufficient for states to begin to consider if terrorist networks can engage in armed conflict.¹⁵⁹ These circumstances demonstrate that a non-state belligerent does not need to be particularly well equipped or organised. This becomes even more apparent when the non-state belligerent chooses not to focus their attention on removing state forces but directly attacks civilians; armed groups that focus on such “soft targets” only need to be marginally better equipped and organised than the civilians it targets.¹⁶⁰

¹⁵² Human Rights Watch, ‘US Checkpoints Continue to Kill’ (3 May 2005) <<https://hrw.org/news/2005/05/03/iraq-us-checkpoints-continue-kill>> accessed 13 August 2019.

¹⁵³ For instance, it has been reported to US congress that 45% of US casualties are now caused by Improvised Explosive Devices. See Congressional Research Service, ‘Recent Trends in Active-Duty Military Deaths’ (20 May 2019) <<https://fas.org/sgp/crs/natsec/IF10899.pdf>> accessed 15 August 2019.

¹⁵⁴ This is a marked tendency of “local forces” through much of the “war on terror”, with many proving ill-equipped or poorly motivated. See Daniel L. Byman, ‘Friends Like These: Counterinsurgency and the War on Terrorism’ (2006) 31 *International Security* 79.

¹⁵⁵ *Ibid* 91–92.

¹⁵⁶ Mosul, a city approaching a population of 2 million, defended by 30,000 soldiers and an equal number of federal police fell to around 1,500 ISIS fighters.

¹⁵⁷ Ranj Alaaldin, *Sectarianism, Governance, and Iraq's Future* (Brookings Analysis Paper 2018) 1.

¹⁵⁸ John Campbell, ‘Boko Haram Overruns Outgunned Nigerian Military Base’ (Council on Foreign Relations 2018) <<https://cfr.org/blog/boko-haram-overruns-outgunned-nigerian-military-base>> accessed 30 July 2019.

¹⁵⁹ Bartels (n 108).

¹⁶⁰ Joel Achenbach, ‘Experts: Terrorists Learning from One Another and Going After Soft Targets’ (Washington Post 2015) <<https://washingtonpost.com/gdpr-consent/?destination=%2fnational%2fhealth-science%2fexperts-terrorists-learning-from-one-another->

The type of conflicts taking place today poses just as much of a threat as the more conventional conflicts that took place in the past. Confusingly, however, the type of war fought by a group like ISIS is not a strict military contest of the variety IHL anticipates. The changing nature of war does not automatically translate into a need to alter IHL. Indeed, it can be contested that not there nothing “new” in the fundamental nature of conflicts identified as in this way, with the constituent themes associated with the term already well established by use.¹⁶¹ It is additionally possible to suggest that IHL is capable of adapting to the differences presented; indeed, it has already done so, addressing many of the new technologies and methods used by belligerents.¹⁶² Yet, the idea of new wars indicates that the nature of the challenge may run deeper than can be anticipated by states and international law. The nature of the fundamental difference in the case of new wars is often articulated vaguely; a shift from war’s “ideology to identity”,¹⁶³ a resurgence of doctrinal war,¹⁶⁴ or a shift from interstate war to “war amongst the people”.¹⁶⁵ These trends have led many scholars to conclude that there is a thematic break between the type of war that prevails today and wars of the past. Terms such as new wars, post-Clausewitzian war and fourth generation war have emerged alongside new wars as terms to describe this shift.¹⁶⁶ The understanding of such “new wars” is still very much in its infancy. As no approach has yet won out, there is still an absence of knowledge as to how states can go about conclusively ending such wars in a humane manner.

As this new form of war has unfolded, lawyers have begun to see problems emerging; for instance, the challenge of getting some non-state armed groups to comply with IHL.¹⁶⁷ New wars approaches have been referenced by scholars seeking

and-going-after-soft-targets%2f2015%2f11%2f15%2f68405564-8bb2-11e5-acff-673ae92ddd2b_story.html%3f&utm_term=.36e778b69304> accessed 1 August 2019.

¹⁶¹ Berta Jasiukenaite, ‘The Conception of the “New Wars”: A Question of Validity’ (2011) 9 Lithuanian Annual Strategic Review 25, 36.

¹⁶² It has, for instance, been expressed that IHL is sufficiently flexible to adapt to new challenges. See Eric Pomes, ‘Technological Innovations and International Humanitarian Law: Challenges and Tensions (International Relations)’ (2017) 46 Polish Political Science Yearbook 205.

¹⁶³ Mary Kaldor, ‘In Defence of New Wars’ (2013) 2 Stability: International Journal of Security and Development 1, 1–2.

¹⁶⁴ Robert Jackson, ‘Doctrinal War: Religion and Ideology in International Conflict’ (2006) 89 The Monist 274.

¹⁶⁵ David Kilcullen, *Blood Year: Islamic State and the Failures of the War on Terror* (C. Hurst and Co. Ltd 2016).

¹⁶⁶ Whilst these approaches all have their differences, they all note a change in the fundamental character of war. See Bart Schuurman, ‘Clausewitz and the “New Wars” Scholars’ (2010) 40 Parameters 89.

¹⁶⁷ See M. Cherif Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (2008) 98 The Journal of Criminal Law and Criminology, 711, 715.

to determine the direction that IHL should take in order to overcome the challenges presented by new unconventional opponents. The new wars thesis has been used to support innovations ranging from the instigation of a new category of armed conflict¹⁶⁸ through to more modest adjustments to specific aspects of IHL.¹⁶⁹ It is possible to suggest however that identifying the appropriate course of action in relation to new wars is difficult, due in part to the transitory and ephemeral way in which the new wars thesis is presented; whilst new wars approaches recognise that the characteristics of war have changed, this alone does not assist in defining an appropriate response as to how IHL should adapt.

To go into more detail, new wars can be summarised as armed conflicts that cannot be subjected to the rational calculus that generally prevails in relation to interstate conflict and many previous iterations of non-state armed conflict.¹⁷⁰ Many of the new wars' approaches emphasise the variable nature of the actors involved, as well as the influence of globalisation.¹⁷¹ A particular trend that can be identified is the aims pursued by armed groups in new wars; they do not seek to become states, taking their place in the "family of nations" in the manner of many liberation movements and rebel groups of the past. This naturally poses an issue concerning compliance but has some deeper implications in terms of how such groups are organised, what type of equipment and personnel they use, and what they consider represents loss and defeat. All these factors complicate conventional assessments as to the type of actions that are permissible for states to undertake.

There is naturally some more tangible evidence that IHL is not best serving the conduct of armed conflict, particularly in relation to situations of non-state armed conflict. The ICRC, though resistant to any major changes to IHL, has suggested that the character of war is changing, with this reflected by the increasing number of

¹⁶⁸ See Tamás Hoffmann, 'Squaring the Circle? – International Humanitarian Law and Transnational Armed Conflicts' in Michael J. Matheson and Djamchid Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts (Les Regles et Institutions du Droit International Humanitaire a l'Epreuve des Conflits Armes Recents)* (Martinus Nijhoff Publishers 2007).

¹⁶⁹ See Tilman Rodenhäuser, 'Armed Groups, Rebel Coalitions, and Transnational Groups: The Degree of Organization Required from Non-State Armed Groups to Become Party to a Non-International Armed Conflict' (2017) 19 Yearbook of International Humanitarian Law 2016 3–5.

¹⁷⁰ In the past "provisions of international law for the protection of civilians fitted well with the organizational rationality of the military apparatus". Herfried Münkler, *The New Wars* (Polity Press 2005) 83; see additionally Morrow, who suggests that the laws on war codify a shared understanding of warfare. James D. Morrow, 'The Laws of War, Common Conjectures, and Legal Systems in International Politics' (2002) 31 The Journal of Legal Studies S41, 49–50.

¹⁷¹ Kaldor, 'In Defence of New Wars' (n 163).

civilians harmed relative to the number of combatants killed.¹⁷² The decline in the overall volume of deaths in warfare is somewhat offset by the identity of the victims as civilians, with some reports suggesting that today the ratio may be as high as 9:1.¹⁷³ Based on the available evidence, scholars have suggested similar numbers,¹⁷⁴ and similarly, high figures have additionally appeared in UN publications,¹⁷⁵ with independent reports likewise stressing impacts on civilians.¹⁷⁶ Analysis of the conflict in Afghanistan conducted by the Human Rights Commission suggests that even in the context of an ongoing conflict, civilian casualties have risen in relation to combatant deaths, with non-government forces being the perpetrator in the majority of cases.¹⁷⁷ Many of these casualties may be considered indirect by the conventional rationale of military engagements, yet it is likely that the organisations perpetrating these killings in some way equate these killings with armed struggle. That said, there is evidence to suggest that the killing of civilians can be recognised as formally playing a direct role in hostilities, should a sufficient nexus between the act and the conflict exist.¹⁷⁸ Additionally, it can be stressed that killing civilians is not merely seen as collateral damage, but the result of explicit targeting, often to produce a media effect,¹⁷⁹ or alternately, such killing is justified by the aims an organisation pursues; in the case of ISIS, this may be in furtherance of their religiously articulated goals. It is, however, undoubtedly the case that the killing of civilians is being used by contemporary armed groups to produce strategic level advantages and bypass more conventional approaches to armed conflict.

¹⁷² ICRC, 'The Roots of Restraint in War' (18 June 2018) <<https://icrc.org/en/publication/roots-restraint-war>> accessed 30 July 2019.

¹⁷³ It has even been suggested that in WW1, in which one in ten victims was a civilian, this statistic has been inverted in relation to conflicts occurring today, with only one in ten casualties actually being a combatant. See Human Security Research Group, *Human Security Report 2009/2010* (Oxford University Press 2011) 160.

¹⁷⁴ Expressing that 90% of casualties are civilian. See Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn, Polity 2012) 100; a similar figure is reported by Sivard. Ruth Leger Sivard, *World Military and Social Expenditures, 1980* [Dearchived at request of PI 9/89]. *Version 1* (ICPSR – Interuniversity Consortium for Political and Social Research 1996).

¹⁷⁵ U.N. Doc A/51/150 (26 August 1996).

¹⁷⁶ Global Extremism Monitor, 'Violent Islamist Extremism in 2017' (September 2018) <<https://institute.global/sites/default/files/inline-files/Global%20Extremism%20Monitor%202017.pdf>> accessed 1 August 2019.

¹⁷⁷ Afghanistan Independent Human Rights Commission, 'Summary of the Report on Civilian Casualties in Armed Conflict in 1396' (April 2018) <<https://refworld.org/pdfid/5b1a7f7a4.pdf>> accessed 15 July 2019.

¹⁷⁸ *Prosecutor v. Sesay, Kallon and Gbao* (Trial Judgment) SCSL-04-15-T 2 (March 2009) [1450].

¹⁷⁹ ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' 32nd International Conference of the Red Cross and Red Crescent (31 October 2015).

The most critical argument for revising IHL is perhaps the need to unambiguously condemn and deter the types of behaviour that are currently manifesting in the strategies used by new, unconventional armed groups. As IHL is currently orientated around the goal of limiting the adverse impacts of war, it is worth considering how current trends in warfare may translate to a mandate to change IHL. Whilst this is an intuitive approach to take, it is important to consider how such a contention may be framed within the existing language and framework of IHL.

2.7 Can IHL adapt to groups like ISIS? What challenges exist?

It is possible to suggest that IHL is capable of change. This is unequivocally demonstrated by the sources of IHL, with treaties and custom having expanded and altered the disposition of the system over time. These sources, which are stated in the Statute of the International Court of Justice,¹⁸⁰ stress the changing nature of war and the capacity for the rules governing warfare to adapt. The history of IHL also bears testament to this capacity to change, so long as the international community is incentivised to produce the required laws and customs. The desire to improve the protection of humans in wars has, unfortunately often followed the illustration of the existing law's inadequacy to do so in dramatic fashion.¹⁸¹ There are however some changes, or transformations, that IHL is not capable of undertaking; or, at least, not without titanic effort. For instance, it would prove difficult to alter the principles that underpin the interpretation and development of the system.¹⁸² Additionally, IHL has adopted a clear trajectory regarding its approach to non-state armed conflict, in which the protections available draw ever closer to those available in interstate wars.¹⁸³ Reacting to the notion that unconventional armed groups not only fight and organise differently, but that this may merit different protections than those present in relation to more conventional non-state armed conflicts could foreseeably entail, pushes IHL beyond the concessions it is equipped to make in relation to the changing nature of war.

¹⁸⁰ Statute of the International Court of Justice (n 30).

¹⁸¹ Meron (n 20).

¹⁸² Indeed, these principles are to be considered "indivisible". See The Lancet, 'Examining Humanitarian Principles in Changing Warfare' (2018) 391 The Lancet 631.

¹⁸³ Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 48.

When asking what changes IHL could make in order to better address new wars, a question must first be posed: can IHL adapt to such threats within the same terms that it has applied to past changes? If not, what new forms of change might be required, and how might these changes be facilitated? These questions are naturally very complicated. This chapter suggests that the type of war and the understanding of force present in groups like ISIS inverts many of the assumptions IHL relies upon, particularly those derived from interstate war. The exact changes required to ensure that adequate humanitarian protections exist when such groups are fought, however, cannot be readily defined in the absence of an understanding of how such conflicts function. In short, determining the manner in which IHL needs to change – if indeed this is the case – requires an understanding of the manner in which current wars are different. Accordingly, it would be beneficial to gain a more complete understanding of groups like ISIS and how they fight before presuming to assert the changes needed to ensure that humanitarian protections exist when such groups are fought.

IHL has changed in the past and would be capable of changing again in the future. Should the precise changes necessary be determined, these changes would require that the will to alter IHL is present. For instance, the treaty portion of IHL has grown, with the volume of available statute having developed significantly since the inception of the system.¹⁸⁴ This growth has reflected a recognition on the part of states that a change was needed. This expanding statute has additionally extended the remit of situations covered, which, alongside an appreciation of the history of IHL, suggests that this transition has occurred in order to better realise humanitarian protections as war shifted from a state enterprise to one often fought between states and other kinds of armed actor.¹⁸⁵ Today, in contrast, problems with the implementation of IHL are more readily equated with a lack of enforcement, rather than the need for new laws.¹⁸⁶ This suggests that the will needed to undergo change may not be present, with state being content to proceed with the system as it stands.

Many of the changes that have been proposed to better adapt IHL to the type of conflict taking place today would require the support of a new treaty to effectively

¹⁸⁴ See Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 *Journal of Conflict & Security Law* 225, 225–226.

¹⁸⁵ Rogier Bartels, 'Timelines, Borderlines and Conflicts' (n 108).

¹⁸⁶ UNOCHA, "'We don't have to change the law, we have to enforce it' – UN Humanitarian Chief" (24 June 2019) <<https://unocha.org/story/we-don%E2%80%99t-have-change-law-we-have-enforce-it-un-humanitarian-chief>> accessed 10 January 2020.

accomplish.¹⁸⁷ Recognising this has taken place in the past, the generation of new statute or serious changes to the substance of existing treaties does however require serious will on behalf of a significant proportion of the international community.¹⁸⁸ These transitions have however resulted from the need to adapt being recognised, often after the need for revisions has been eloquently demonstrated by a sizable conflict. It is questionable if at the current juncture, sufficient will exists to generate new statute in relation to new types of conflict. Additionally, any universal or multilateral agreement on new types of warfare would almost surely represent a generational undertaking, taking time to draft and implement.¹⁸⁹ It may prove expedient to consider more timely approaches to adapting IHL.

The construction of new statute is not the sole option for changing IHL. The capacity to evolve is likewise borne out by the customary elements of IHL, which have expanded significantly, as well as clearly adapting to new technologies and types of war.¹⁹⁰ It can be contended that in relation to new types of armed group, customary international law is already undergoing a transition in relation to ISIS specifically.¹⁹¹ The customary approach is perhaps more viable than requiring new treaties, yet also has its limitations. States are just as confused as everybody else when it comes to the expedient use of force in new wars and can be expected to misinterpret their obligations in complex situations. Moreover, it is perhaps premature to suggest that states have arrived at any general practice or approach to current transnational and unconventional armed conflicts.¹⁹²

To summarise, IHL is in theory capable of adapting to new types of armed conflict, even those as divergent as those of ISIS. Theoretically, it is possible to issue new statute to bring IHL into line with the nature of modern conflict. Alternately, a coherent set of customs could arise from the concerted action of states against groups like ISIS, with these actions serving to extend the principles of IHL into such scenarios. However, these adaptations, whilst theoretically possible, require that not only is the changing nature of armed conflict understood, but that the will to recognise

¹⁸⁷ Marco Sassòli, 'Transnational Armed Groups and International Humanitarian Law' (2006) 6 Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series 1, 41.

¹⁸⁸ New treaties do not simply materialise but require a concerted effort on the part of states.

¹⁸⁹ Treaties often have an extensive drafting process.

¹⁹⁰ Bartels (n 136).

¹⁹¹ Michael P. Scharf, 'How the War Against ISIS Changed International Law' (2016) Paper 1638. Faculty Publications 1.

¹⁹² Sassòli (n 2).

and implement changes is present. Of these two barriers, it is perhaps more appropriate to commence with the first. Understanding what causes groups like ISIS to challenge IHL, as well as the nature of this challenge, is a necessary component of producing a solution. To relate this back to IHL, it is appropriate to specifically understand how an organisation like ISIS diverges from IHL's current means of defining an armed group, and how the type of war that states are required to fight against a group like ISIS may fall outside of the definition of armed conflict that IHL curates.

2.8 The interests of Humanity; a mandate for change?

Throughout this chapter, numerous allusions have been made to the importance of humanitarian principles, and their importance in the development of IHL in the modern era. When constructing an argument that change is required, it is perhaps advisable to determine that the system as it stands is not best disposed to ensure that adequate humanitarian protections exist, and why this is the case. To be more precise, amidst the general principles of international law, considerations of humanity may be extended in order to guide judgments and decisions, as well as serving as a mandate to change the rules,¹⁹³ the instigation of IHL itself perhaps being based upon this consideration,¹⁹⁴ with its subsequent change being guided somewhat by these values.¹⁹⁵ The Martens clause sets out the manner in which, in the absence of a clear and complete set of rules, it is possible to defer to humanitarian considerations and the public conscience in order to determine the most suitable course of action.¹⁹⁶ Any new rules governing warfare must conform with the general disposition of the international community,¹⁹⁷ and naturally, it is important that any such deference to the principles of humanity does not conflict with existing laws or customs.¹⁹⁸

¹⁹³ Brownlie, *Principles* (n 31) 27.

¹⁹⁴ See Council of the European Union 'Declaration by the Presidency on behalf of the European Union on the Occasion of the 150th Anniversary of the Battle of Solferino' (24 June 2009) 1.

¹⁹⁵ ICJ, *Nicaragua v. U.S.* (Decision of 27 June 1986) 14.

¹⁹⁶ See Preamble, 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land (n 40).

¹⁹⁷ A number of legal scholars have expressed the sentiment that deference to core rules or core values of the international community is vital in determining these considerations and identifying new customary laws. See Antonio Cassese, *Cassese's International Criminal Law* (Paola Gaeta and others eds, 3rd edn, rev. Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting (Oxford University Press 2013) 122; Meron (n 20).

¹⁹⁸ Georges Abi-Saab, 'The Specificities of Humanitarian Law' in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet* (ICRC 1984) 265.

International criminal law has specified state practice and *opinio juris* as important for determining new norms and customs,¹⁹⁹ this is arguably quite a fraught process, with different normative frameworks existing in relation to humanitarian values.²⁰⁰ Moreover, the possibility that such concerns may be distorted by especially powerful state may be considered.²⁰¹

In relation to the issues identified in this study, there is both the absence of any existing rules or customs relating to the problem and a clear mandate to respond to adverse trends in armed conflict; explicitly, the specific targeting of civilians. It is desirable that, in the interests of humanity, the framework applied to govern conflicts involving such groups is defined clearly, and that it is appropriate to the nature of the situation. At this juncture of the thesis, it is not possible to determine precisely what response is justified, or to what extent IHL needs to be revised. It is difficult to gauge what state practice may be towards groups like ISIS, or unconventional armed groups may be, or what the international community may consider being a justifiable response. A critical issue is the monolithic approach IHL maintains towards armed groups; this approach makes it difficult to articulate how armed groups, particularly religious armed groups, may merit a distinctive legal framework. This, moving forward, is a critical issue with which to engage.

2.9 Conclusion

Grotius, often considered one of the earlier founders of international law,²⁰² was not overly concerned with armed groups and non-state parties to armed conflict. Had he been, he may have wrestled with similar challenges to those faced by today's international lawyers in relation to organised armed groups; namely how to define them objectively and decide a standardised means for determining their presence. He

¹⁹⁹ *Rwamakuba v The Prosecutor* (Decision Joint Criminal Enterprise to the Crimes of Genocide) ICTR-98-44-AR72.4 (22 October 2004) [15]; see also Claus Kreß, 'War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice' (2001) 30 *Israel Yearbook on Human Rights* 5.

²⁰⁰ Bergit Schlütter, *Developments in Customary International Law: Theory and the Practice of the International Court of Justice and the International ad hoc Criminal Tribunals for Rwanda and Yugoslavia*, vol 62 (Martinus Nijhoff 2010) 45–46.

²⁰¹ M. John-Hopkins, *The Rule of Law in Crisis and Conflict Grey Zones: Regulating the Use of Force in a Global Information Environment* (Routledge 2017) 151.

²⁰² See generally, Anne Orford, Florian Hoffmann and Martine Julia Van Ittersum, *Hugo Grotius: The Making of a Founding Father of International Law* (Oxford University Press 2016).

would have undoubtedly included some of the descriptive elements that exist today; suggesting that such groups must have distinctive hierarchies and leaders, array themselves in uniforms, and be equipped to offer battle in a manner in accordance with the customs of the age. Regarding this last point, Grotius, being conversant in the military science of the age, may have specified the number of pike and horse an organisation must possess, or specified a requirement that they field muskets and cannon, this being the civilized approach to conflict at the time. He may, as is the case with modern IHL, additionally specified further features which would no doubt have assisted the princes and sovereigns of his age to differentiate armed groups from internal rebellions not meriting such regulations. A generation later, many of these credentials may have become useless as the face of warfare changed. Likewise, it is doubtful that any criteria Grotius may have hypothetically established would have been much use beyond the bounds of Europe, where warfare was fundamentally different. Subsequent international lawyers would have been faced with the challenge of separating the temporal and local factors identified by Grotius from those with more universal salience, as well as perhaps updating and expanding the definition of armed groups to reflect examples from their own era.

International law has committed itself to the same imprudence that has been unfairly attributed to Grotius above. In striving to establish a common and objective understanding of armed groups, extensive deference has been given to state approach to warfare. This is implied by the initial manifestation of the term in the Geneva conventions, carried through in the additional protocols, and confirmed by military tribunals and international justice. The current approach to conventional armed groups arose in response to a historical epoch in which armed groups reflected state practice, with additional conformity arising through the nature of “national liberation” movements. More egregiously, however, IHL additionally assumes that armed groups always reflect the state in their approach to force, and even pursue the same objectives. This chapter has briefly set out how these assumptions are currently subject to challenge, and, how these challenges may translate to a mandate to adjust IHL in order to better reflect the interests of humanity in conflicts involving armed groups that do not fit the material elements preserved in IHL.

Moving forward, the question of determining the nature of the challenge in precise terms remains. An understanding of unconventional armed groups can be used to better understand what appropriate adjustments might work. Based upon the

contention of this thesis that ISIS is the most successful and prolific example of an unconventional armed group, this study will move forward to understand contemporary religious ideology, and how it causes inculcated groups to exhibit erratic approaches to the use of force. These alterations translate to a challenge to regulating the use of force, and can, therefore, assist in later developing a possible way forward.

3 Identifying a General Definition of Religious Conflict

3.1 Introduction

In the previous chapter, it was implied that one of the key factors driving the changing nature of the contemporary conflict is religion. Specifically, it is often the case that a non-state group, upon adopting a religious identity, begins to display a proclivity for directly targeting civilians, and perhaps adopts a system of organisation and command in keeping with its ideological identity. Additionally, due to the manner in which such groups then understand the use of force, they may require the states contesting them to fight in a manner that likewise causes more adverse impacts to be directed towards civilians, with this in turn perhaps necessitating that IHL is examined. It has been additionally suggested that in order for IHL to appropriately adapt to this new reality in how force is used, a comprehensive understanding of such groups and how they diverge from more conventional armed groups is essential. As these trends clearly pose a threat to the welfare of both civilians and combatants, there is a basis to explore possible approaches to revising IHL. the immediate

Whilst a specific framework for differentiating religious approaches to the use of force is absent from international law, religious or holy war is a well-established concept. As a phenomenon, however, it is most commonly understood as historical in nature. Where it does emerge in the contemporary discussion, it is often rapidly suggested that it represents a fundamental misinterpretation of the faith in question.¹ Whilst war is not entirely the exclusive preserve of states, the contemporary understanding of warfare emphasises state involvement; states make war, and war makes states.² The relationship between war and statehood is inherent in international legal thought on the subject of both statehood and war.³ International criminal law has in past examples required “state like features” in order to find individuals in leadership

¹ Marc Sageman, *Understanding Terror Networks* (University Presses Marketing 2004) 1.

² Charles Tilly, ‘War Making and State Making as Organized Crime’ in Peter Evans, Dietrich Rueschemeyer and Theda Skocpol (eds), *Bringing the State Back In* (Cambridge University Press 1985) 169–191.

³ In the classical era, only states would have had the legal features required to be recognised as capable of waging war. Vassal state insurgents, where recognised, needed to express a range of state-like competencies in order to achieve even limited recognition in armed conflict. See generally Lassa Oppenheim, *International Law: A Treatise* (2018, 3rd edn, Longmans 1920).

positions guilty of war crimes.⁴ Any mechanisms for preventing and adjudicating the conduct of war are again tied to the notion of statehood; this being visible, in part from the lack of discernible means of getting some non-state groups to comply to any standards in armed conflict.⁵ As adopting a religious ideology can change how armed groups organise, it is worth considering if the alterations imposed challenge international law's state-centric means of knowing and regulating armed conflicts.

The focus International law places on state war is perhaps justifiable, given past trends. However, the omission of an understanding of the distinctive nature of religious warfare may have adverse consequences in terms of appropriately understanding contemporary conflicts. There is a basis to suggest that in relation to today's unconventional armed groups, a desire to resume a religious approach to violence is apparent.⁶ This trend may very well be connected with the shortfall in humanitarian protections that often occurs in contemporary conflicts. There is a reason to suggest the practice of waging a war when undertaken by some forms of interest groups, is different enough to challenge IHL's assumptions regarding the use of force.⁷ This somewhat questions the extant condition in which the capacity to exercise force is linked with legitimacy and statehood, a theme that will be explored in subsequent chapters. For the moment, it is possible to suggest that an understanding of religious war cannot be extracted from IHL.

The foremost intention of this chapter is to demonstrate the existence of two different frameworks, or institutions of organised violence. First, this chapter addresses the existence of the institution of war: the framework of state violence that has evolved from predominantly Judeo-Christian origins into a universal system of law and norms that govern when and how states may use violence.⁸ This form of warfare can be aligned with IHL's current understanding of armed conflict, specifically, the manner in which it understands interstate war. Second, this chapter

⁴ *Kadic v Karadžić* (USA, Opinion of 2nd Circuit re: Subject Matter Jurisdiction) Docket Nos 94-9035, -9069 (13 October 1995).

⁵ See M. Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98 *The Journal of Criminal Law and Criminology* (1973-) 711, 715.

⁶ Jeni Mitchell, 'The Contradictory Effects of Ideology on Jihadist War-Fighting: The Bosnia Precedent' (2008) 31 *Studies in Conflict & Terrorism* 808, 809–810.

⁷ Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 *Journal of Conflict & Security Law* 225, 247.

⁸ Harold J. Berman, 'Religious Foundations of Law in the West: An Historical Perspective' (1983) 1 *Journal of Law and Religion* 3, 3–4.

postulates a parallel institution of organised violence: the framework of “holy war”. This separate framework will subsequently serve as a means to understand unconventional armed groups of a religious character. The aim is to accordingly specify some typical or general features that differentiate this form of war from armed conflict as conventionally understood, with these factors subsequently explored in relation to contemporary conflict, and the challenges facing the application of appropriate humanitarian protections in such instances. Most notably, this chapter will establish that under some circumstances, religion can impose imperatives that override any generally recognised restrictions on the use of force, exacerbating the adverse impacts of organised violence. The notion that the two are fundamentally separate and that both may operate today, diverges from the prevailing consensus of both religious and legal scholarship; in contemporary discussion of the history of international law, the religion is often specified as the source of today’s laws and norms,⁹ with scholars connecting the IHL and its principles to religious values,¹⁰ which have ultimately developed and delivered today’s system of regulation. This chapter does not contest the contribution of religious thought to today’s international system of law. Today’s legal prohibitions on violence within a state on state context can be easily connected to earlier religious principles;¹¹ yet, the contribution that religious morality has made to restraining war is accompanied by a second approach, with religious war standing in contrast to the more mainstream, moderating influence attributed to faith-based approaches. The relevance of the more belligerent role that religion can play today is indicated by the manner in which religious ideology sometimes overrides both international law and national interest.¹² As such, religions contribution to warfare has a dual nature.

⁹ Yoram Dinstein, ‘International Law as a Primitive Legal System’ (1986) 19 *New York University Journal of International Law and Politics* 1, 17.

¹⁰ Whilst the origins of today’s prohibitions on conflict can be traced back to ancient Aristotelian ideas, evolution through the Christian experience ultimately generated the concept of *Bellum Justum* as the theoretical underpinning of international regulations on war. See Gregory M. Reichberg, ‘Just War Theory, History of’ in *International Encyclopedia of Ethics* (Blackwell Publishing Ltd 2013) <<http://dx.doi.org/10.1002/9781444367072.wbiee358>>.

¹¹ David M. Mednicoff, ‘Humane wars? International Law, Just War Theory and Contemporary Armed Humanitarian Intervention’ (2006) 2 *Law, Culture and the Humanities* 373, 379.

¹² This will be discussed with reference to each region specifically in the course of this chapter, and more generally thought this thesis with reference to the Islamic tradition. For the moment, it is sufficient to say that in the majority of cases, religion is far older than the nation and the international system at large, and accordingly can be articulated as a supranational form of organisation that under some circumstances supplants any state based allegiance.

In order to demonstrate the dualistic nature of war in religious thought, Christianity, Islam, and Judaism are to be surveyed,¹³ with the intention of proving the existence of a holy war in the theological evolution of each tradition. This examination is by no means exhaustive but simply seeks to articulate the existence of a system of organised violence in which the body of faith is required to exert itself fully in the pursuit of a soteriological goal or end state. This separate theological pillar of violence serves as an explanatory framework in later chapters, where contemporary religious violence is analysed on the basis of the characteristics identified here. Limited reference will also be made to the continuing relevance of holy war in all three traditions, in order to fully articulate the importance of understanding religion as a mobilising force today.

3.2 The institution of war; the role of religion

The use of violence today is subject to restrictions, both normative and explicit, that are considered concrete by states. The foundational assumption inherent in the international system is that war and peace represent distinct divisions, an approach that is maintained in contemporary international legal institutions,¹⁴ though this distinction is perhaps gradually dissolving.¹⁵ The United Nations charter restricts the institution of war severely; legitimate recourse to violence is restricted to a handful of situations.¹⁶ Violence, as observed by a number of different scholars, is gradually declining; the laws generated to restrict armed conflict are undoubtedly part of the reason for this decline.¹⁷ In order to explain the role of law in this decline and its continuing utility in today's relatively peaceful conditions,¹⁸ it must be recognised that war, as it is currently defined, does not represent the absolute negation of systems of

¹³ Judaism, Christianity and Islam; though explicit focus will be on Rabbinic Judaism, Catholicism, and Sunni Islam.

¹⁴ International Law Commission, 'Report of the Commission to the General Assembly on the Work of its Sixty-second Session' (2011) II Part Two Yearbook of the International Law Commission 170, 214–217.

¹⁵ Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press 2016) 33–34.

¹⁶ Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press 2005) 315.

¹⁷ Oona Hathaway and Scott Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Allen Lane 2017) 334–335.

¹⁸ Scholars generally agree that violence is declining, though this is heavily dependent on how precisely violence is defined and understood. See Dean Falk and Charles Hildebolt, 'Annual War Deaths in Small-Scale Versus State Societies Scale with Population Size Rather than Violence' (2017) 58 *Current Anthropology* 805.

law in favour of a condition of unrestricted chaos. This has long been the case, with conflict usually governed by laws, or at least norms of behaviour in some way, even if these only comprise the mutual norms of the respective combatants.¹⁹ Today, the regulatory environment is far more developed than in previous eras. Layers of regulation have made war exceptional, as it is prohibitively costly to engage in, from both tangible and normative perspectives.²⁰ For instance, IHL serves to govern how wars are conducted for humanitarian reasons, and from which the notion of war crimes has emerged.²¹ These may be discernible characteristics constraining the conduct of the war, or “armed conflict” as a regulated system, rather than simply the absence of peace.

First, it is necessary to posit that there is a relationship between religion and international law. Such a relationship is often obfuscated. Not only is religion out of favour, with more scientific approaches to law in ascendance,²² but the distinctly Christian provenance of the system is also considered a barrier to the “universalisation” of international law as it spreads to non-Christian regions. However, religion and its scriptures pervade everything, with the law being no exception. This can first be discerned through the prevalence of systems of religion in human society, which is sufficient for observers to conclude that religion is an instinctive feature of the human mind.²³ Historically, codes of law and conduct have been dependent on religious assertions; on this basis, it is possible to conclude that there exists a psychological value to religion.²⁴ The inseparability of religion and morality has translated into the evolution of codes of law.²⁵ Even western legal systems, now ostensibly disconnected from faith, were intimately associated with religion insofar as the connection was taken to be factual well into the twentieth century.²⁶ Whilst limitations on war and armed conflict exist across cultures and

¹⁹ Adam Roberts and Richard Guelff, *Documents on the Laws of War* (3rd edn, Oxford University Press 2000) 2.

²⁰ John J. Weltman, *World Politics and the Evolution of War* (Johns Hopkins University Press 1995) 201.

²¹ Antonio Cassese, *Cassese's International Criminal Law* (Paola Gaeta and others eds, 3rd edn revised by Antonio Cassese, Paola Gaeta, Laurel Baig, Mary Fan, Christopher Gosnell and Alex Whiting, Oxford University Press 2013) 63–66.

²² See Anne Orford, ‘Scientific Reason and the Discipline of International Law’ (2014) 25 *European Journal Of International Law* 369.

²³ Patrick Fairbairn, *The Typology of Scripture* (Kregel Publications 1854) 425–426.

²⁴ William N. Schoenfeld, *Religion and Human Behavior* (Authors Cooperative 1993) 129–134.

²⁵ Paul Lehmann, ‘The Metaphorical Reciprocity Between Theology and Law (Law, Metaphor, and Theology: A Frances Lewis Law Center Colloquium)’ (1985) 3 *The Journal of Law and Religion* 179.

²⁶ Berman (n 8) 3–4.

epochs, the foundation of war as a separate legal institution has a distinctly religious origin. In the contemporary era, however, Dinstein explains that despite these origins, modern-day international law is devoid of religious content.²⁷

A number of claims are made by different moral and intellectual traditions, each trying to prove that they are the origin of today's regulatory framework.²⁸ Whilst it is true that the essential pattern and morality of regulated armed conflict have been exhibited across a number of cultures at different times, the notion that these privileges extended beyond one's own religion, culture, or ethnic group are rarely present. Moreover, where moderation against an alien enemy is suggested, this moderation is often based on an economic or tactical imperative.²⁹ The universality of today's system for regulating hostility, therefore, separates it from many more limited systems that have existed in the past.

Partly because of these competing claims, the precise provenance of today's regulated form of warfare is difficult to assert comprehensively. A credible argument can, however, be made that the emergence of the current system of war can be traced back to the principles established by Grotius in the sixteenth century.³⁰ Basing the conduct of states on grounds not overly reliant upon faith, but on natural rights liberalism,³¹ this philosophy of conflict gave every state the right to use violence in defence of its interests and survival. The reciprocal articulation of rights that follows ascribes moral agency to the individual and permitted the evolution of sovereign states capable of recognising one another. This represented a distinctive approach at the time Grotius was operating.³² He did not, for instance, limit his code of law to Christians like himself, but allotted to all peoples the inherent right to address wrongs inflicted on them, irrespective of religious origin.³³ This ultimately translated to states taking on rational personalities, and they could accordingly be relied upon to produce

²⁷ Dinstein (n 9) 17.

²⁸ Hathaway and Shapiro (n 17).

²⁹ As Posner contends, "rules of war" are not so much rooted in morality as pragmatic limitations that benefit both sides. See E.A. Posner, 'Human Rights, the Laws of War, and Reciprocity' (2012) 6 *Law and Ethics of Human Rights* 147.

³⁰ Hedley Bull, 'Hugo Grotius and International Relations' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *The Importance of Grotius in the Study of International Relations* (Clarendon Press 1990) 76.

³¹ *Ibid* 79.

³² For discussion of Grotius as a founding quantity in international law see John D. Haskell, 'Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial' (2011) 25 *Emory International Law Review* 269.

³³ Hathaway and Shapiro (n 17) 22.

violence in their own defence. Each state therefore only had to examine their own interests to discern how another would react to provocation or attack. In his works, Grotius described how reciprocal arrangements between different belligerents had gradually solidified into a code of regulation.³⁴ Defection from the then prevailing customs of law by a belligerent was then further framed by consequences, not the least of which would be the loss of that belligerent's own privileges.³⁵ Whilst not yet comparable to today's widely-accepted body of international law, the foundational principle of the system described by Grotius – that of states recognising the reciprocal character of violent interaction and capable of comprehending each other on the basis of shared rationality – provided the basis for later elaborations and developments.

The aim of armed conflict may succinctly be summarised as the need to dominate one's opponent, often to expand one's own territory.³⁶ The essential right to do this was maintained well into the twentieth century.³⁷ Whilst the central utility of force was maintained, a system of customs and enforcement mechanisms solidified over time. For instance, by the twentieth century, Kelsen still saw fit to characterise international law as "primitive", though nevertheless well-placed to issue justice. Individual states could act unilaterally, to enforce what amounted to a shared order.³⁸ The need for what amounted to "equilibrium between the cruel necessities of war and humanitarian ideals"³⁹ was ultimately realised in both The Hague and Geneva Conventions, alongside the collective responsibility to ensure that the now-established customs of armed conflict be maintained.

Today, the notion of sovereign states being capable of interaction on equitable terms is largely taken as a fact; this, in turn, has permitted the accumulation of more restrictive customs in the domain of state armed conflict, and the formal solidification of these customs in a range of widely-accepted treaties. Once it is understood that states are the only entity permitted to engage in mass acts of violence, it may be

³⁴ See Hugo Grotius, *The Rights Of War And Peace* (A.C. Campbell trans., Walter Dunne 1901) XIV.

³⁵ Hathaway and Shapiro (n 17) 22.

³⁶ Carl von Clausewitz, *On War* (Beatrice Heuser, Michael Howard and Peter Paret eds, abridged edition/abridged with an introduction and notes by Beatrice Heuser, Oxford University Press 2008).

³⁷ For instance, as defined by Oppenheim; 'war is a contention between states for the purpose of overpowering one another [...]. As long as war exists, subjugation will be recognised.' In Oppenheim (n 3) 369.

³⁸ Hans Kelsen, *The Legal Process and International Order* (Hans Kelsen ed, Constable & Co. 1935) 11.

³⁹ Josef L. Kunz, 'The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision' (2017) 45 *American Journal of International Law* 37, 59.

possible to reduce incidences of violence by limiting the instances in which states may legitimately use force. As a result, war has become increasingly constrained. Whilst maintaining its original intent as a moral framework for violence, serious restrictions as to the use of force have served to curtail the utility of state violence in all but the most exceptional of circumstances.⁴⁰

There are, however, worrying trends that suggest that addressing states as unitary actors are not sufficient. Violence *en masse* is increasingly exhibited by non-state, terrorist, and illegitimate territorial authorities.⁴¹ This introduces an argument in favour of a deeper examination into the precise structure and purpose of prevailing restrictions on violence. It is possible to posit that, based upon prevailing conditions, religion plays an increasing role in both the initiation and conduct of armed hostility. This can be evidenced in the threat posed by the phenomenon of religious terrorism and violence.⁴² Additionally, religious justifications frequently emerge as pretexts for attacks on the world order,⁴³ emphasising the role of religion as a means for organisation and mobilisation.

It is possible to say that the regulations surrounding armed conflict have coalesced around a number of essential characteristics ascribed to belligerents. The subtraction of these characteristics represents a challenge to the application of the norms and rules that depend upon the presence of these features. Religious conflicts do not conform to many of the assumptions that are made in relation to armed conflict today; they are a product of different motives, are fought in a different manner than “state” warfare is, and are fought by organisations that coalesce around religious authority, rather than the state.⁴⁴ These variations are supremely relevant to contemporary patterns of violence.

Defining “holy war” has proved to be an immensely contentious task, historically at least. Historians have sought to demonstrate that religious justifications for combat serve only as an outward pretext for economic or geopolitical

⁴⁰ Hathaway and Shapiro (n 17) 334–335.

⁴¹ Falk and Hildebolt (n 18).

⁴² For example, UNSC has acknowledged the threat posed by religious orientate groups. See UNSC Statement 13172 (22 January 2018) UN doc SC/13172.

⁴³ Considering the broad spread of religious thought underpinning contemporary terrorism, it is possible to suggest that religion represents one of the central mobilising factors behind modern day violence. See Rogers Brubaker, ‘Religious Dimensions of Political Conflict and Violence’ (2015) 33 *Sociological Theory* 1.

⁴⁴ M. Van Creveld, *Transformation of War* (Free Press 2009) 130–135.

imperatives,⁴⁵ a suggestion that is prevalent today.⁴⁶ This may well be the case, but it is discernible that a war fought based on religious reasons demonstrates unique features that are seldom exhibited outside of a holy war. First, it subverts the interstate element of the post-Grotian international system; religions are seldom completely contiguous with state boundaries. Second, the war is not fought against a known quantity. In a state context, a war is fought against another state; its objectives and intentions are readily discernible, as, on a basic level, the belligerents reflect one another in their core needs. In a religious war, an adversary is, by necessity, unknowable; terms like heretic, heathen, or infidel are invoked to this effect. Finally, religion as motivation is absolute. It is difficult to advance peace when operating under a presumably divine imperative; surrender and defeat can be sins of a cardinal nature.

Based on the above features, it is possible to move away from the rudimentary definition of a holy war as simply a war fought for religious purposes.⁴⁷ The nature of religious war is distinctive, not only in terms of its purpose but also in terms of how it is fought. In western traditions, the existence of religious war was essential in generating the European state system, serving as an example of the type of conflict that needed to be avoided in future international interaction.⁴⁸ Religious warfare was supplanted by interstate conflict, which seemed, by comparison, the more reasonable alternative.⁴⁹ Subsequently, holy war as a framework for violence has become unpopular across cultures, due in part to the proliferation of the state system, and the largely ineffectual nature of holy war within this system.⁵⁰ As a result, there is not much in the way of the consideration of holy war as an independent institution of violence. However, since the mid-twentieth century, religion has once again begun to emerge as an influential factor, both within the state framework and as a transnational,

⁴⁵ Mark Konnert, *Early Modern Europe: The Age of Religious War, 1559–1715* (University of Toronto Press 2008) 12.

⁴⁶ Bart Schuurman, 'Clausewitz and the "New Wars" scholars (Carl von Clausewitz) (Essay)' (2010) 40 *Parameters* 89, 92.

⁴⁷ See "Holy War". Merriam Webster <www.merriam-webster.com/dictionary/holy%20war> accessed 15 March 2018.

⁴⁸ Referring to the treaties and agreements that emerged in the wake of the Thirty Years' War in 1648. See Aaron R. Petty, 'Religion, Conscience, and Belief in the European Court of Human Rights' (2016) 48 *The George Washington International Law Review* 807, 813.

⁴⁹ Jason Farr, 'Point: The Westphalia Legacy and the Modern Nation-state' (2005) 80 *International Social Science Review* 156.

⁵⁰ It is crucial to defer to international relations in order to explain this transition. Participation in the state system incentivises certain behaviours in relation to warfare. See Herfried Münkler, *The New Wars* (Polity Press 2005) 30.

cross-boundary phenomenon.⁵¹ Due to the relative absence of overtly religious conflict from contemporary violent interactions, it is crucial to go back some distance in order to understand the key differences that merit discussion. Yet, understanding the distinctive nature of religious conflict is crucial if modern permutations of this approach to violence are to be understood. Accordingly, this chapter will now seek out a basis for asserting a generalised means of understanding religious conflict, or holy war, by looking to scripture and history.

3.3 Early religious conflict

It is possible to omit more rudimentary understandings of religious violence from a serious analysis of the development of the holy war concept, which is arguably most relevant to monotheistic traditions.⁵² However, briefly discussing what war entailed prior to this gives some insight into the incentive for developing separate institutions of conflict, as well as indicating the capacity for the classification of warfare to alter over time. Whilst it would be beyond the scope of this thesis to comprehensively discuss the role of religion in ancient warfare, a brief, focused examination serves to reveal the drastically different understandings of violence during the period between 3300 BC and 50 AD and the inseparability of faith from organised conflict. As a second component, this examination reveals the irrationality inherent in this approach to warfare. It is naturally difficult to articulate the role of religion in early warfare when the evidence available is so limited. There are, however, some means accessible to construct a reasonable facsimile of the role religion played in ancient, pre-monotheistic warfare. First, we can examine the role of religion in the context most relevant to the development of later legal doctrines of conflict, namely the Middle and Near East. Not only is this geographical region relevant to the growth of monotheism, and ultimately the development of contemporary doctrines for religious conflict, but it is additionally the location of the earliest recorded conflicts of mankind.⁵³

As Cooper notes, it is possible to form an understanding of both war and peace based on royal inscriptions and other archaeological evidence that has been preserved

⁵¹ Jonathan Fox, 'Religion as an Overlooked Element of International Relations' (2001) 3 *International Studies Review* 53, 72–73.

⁵² Jonathan Fine, *Political Violence in Judaism, Christianity, and Islam: From Holy War to Modern Terror* (Rowman & Littlefield Publishers 2015) 66.

⁵³ John Gibson, *International Organizations, Constitutional Law, and Human Rights* (Praeger 1991) 6.

from this era.⁵⁴ For instance, the Annals of Thutmose III, dating from the fifteenth century BC, go into extensive detail as to how a battle in this period unfolded, and how leaders understood the role of warfare.⁵⁵ Relatively extensive Cuneiform texts detailing Babylonian events suggest that gods were understood as ordering their respective civilisations into battle.⁵⁶ Whilst these do not represent documents comparable to the religious literature or records of later civilisations, they are sufficient to indicate the general features of warfare during this period, and the central nature of religion to armed conflict through early history. The condition of conflict during this time period is succinctly summarised by Bradford,⁵⁷ whether Egyptian, Assyrian, or Sumerian, the cultures of the time all bore some similar general features in their disposition to warfare. They distinguished themselves on the basis of worship, took an organised approach to conflict, and had clear civil and military hierarchies.⁵⁸ They did not assimilate the people they conquered into their religion, and therefore only dominated any empire they may have created by force for as long as they had the power to do so.⁵⁹ Yet, even based on the available evidence, it would be erroneous to simply state religion as the root cause of violence in this period, however fearsome and warlike early religions may have seemed.⁶⁰ It is most likely that competition drove violence during this time, or at least represented an underlying cause of conflict.⁶¹ Yet, this created a need for the social communities of the time to develop rules and laws that encouraged the use of violence in order to ensure their survival. Given the absence of developed taxonomies of race or nationality during this period,⁶² as well as the eponymous role religion played, it can be suggested that it was faith that served this role. Naturally, discussing violence during this period requires generalisation and

⁵⁴ Jerrold Cooper, *International Law: International Law in the Third Millennium* (Brill 2003) 241.

⁵⁵ Richard A. Gabriel, *Thutmose III: The Military Biography of Egypt's Greatest Warrior King* (Potomac Books Inc 2011) 99–101.

⁵⁶ Vladimir Sazonov, 'Some Remarks Concerning the Development of the Theology of War in Ancient Mesopotamia' in Krzysztof Ulanowski (ed), *The Religious Aspects of War in the Ancient Near East, Greece, and Rome* (Brill 2016) 42.

⁵⁷ Alfred S. Bradford, *With Arrow, Sword, and Spear: A History of Warfare in the Ancient World* (Pamela M. Bradford ed, ABC-CLIO LLC 2001) 3–8.

⁵⁸ *Ibid* 3.

⁵⁹ *Ibid* 2; Mu-chou Poo, *Enemies of Civilization: Attitudes Toward Foreigners in Ancient Mesopotamia, Egypt, and China* (State University of New York Press 2005) 156.

⁶⁰ W.J. Hamblin, *Warfare in the Ancient Near East to 1600 BC: Holy Warriors at the Dawn of History* (2006) 21.

⁶¹ Zainab Bahrani, *Rituals of War: The Body and Violence in Mesopotamia* (New York Zone Books Cambridge) 17.

⁶² See Zainab Bahrani, 'Race and Ethnicity in Mesopotamian Antiquity' (2006) 38 *World Archaeology* 48, 48–49.

inference based upon extremely sparse written records. Additionally, the time period is expansive, numerous cultures came and went, and societies evolved dramatically; yet there is some basis to assert broad patterns in terms of the role religion played in war as being fairly stable for much of early human history based upon the information available.

Scholars drawing on available evidence have related a number of key themes to warfare in this period. The first theme is theocracy. In the absence of the modern idea of the state, all forms of allegiance were religious in nature. Institutions of kingship existed, and the role of an earthly leader invariably took on the position of a battle leader, as evidenced in Sumerian, Egyptian, and Assyrian cultures.⁶³ However, a king or chief was never the absolute ruler. The “apex” of such ancient communities was the national god, of whom the earthly ruler was merely a tenant; the god was the “source and soul of the body politic”.⁶⁴ Treaties were struck between gods, not kings; wars were declared against a god or the followers of a god.⁶⁵ Based on the role of religion in warfare, the conduct of the war had many supernatural connotations.⁶⁶ These early civilisations additionally subscribed to theomachy, the struggle between gods, which was aligned with earthly war, conquest, and political struggles in a number of cultures, including the cultures of the Hurrians, Babylonians, and Assyrians.⁶⁷ Gods, or their earthly proxies, decided when to go to war, with their human followers divining their courses of action through omens and superstitions.⁶⁸ Ancient religions did not assert that their god or pantheon was the only one in existence, only that theirs were the best.⁶⁹ This approach was articulated in many early cultures, for instance, Babylonian and Assyrian recorded history suggest this to be the case. As the armies of these early civilizations set forth to war, they envisioned that their gods were waging war above them, overcoming their deistic rivals.⁷⁰ The

⁶³ Garrett. G. Fagan and Matthew. F. Trundle, *New Perspectives on Ancient Warfare* (Brill 2010) 4.

⁶⁴ T. Fish, ‘War and Religion in Ancient Mesopotamia’ (1939) 23 *Bulletin of the John Rylands Library* 387, 391–292.

⁶⁵ *Ibid* 392.

⁶⁶ Bahrani (n 61) 222.

⁶⁷ Beate Pongratz-Leisten, *Religion and Ideology in Assyria* (De Gruyter 2015) 428–433.

⁶⁸ *Ibid*.

⁶⁹ Bahrani (n 61).

⁷⁰ See Martha H. Feldman, ‘Assyrian Representations of Booty and Tribute as a Self-Portrayal of Empire’ in Brad E. Kelle, Frank Ritzel Ames and Jacob L. Wright (eds), *Interpreting Exile: Displacement and Deportation in Biblical and Modern Contexts* (Society of Biblical Literature 2011) who notes that in Assyrian depictions of war, Assyrian deities were commonly depicted enslaving foreign gods alongside scenes of conquest.

presence of a god in an earthly sense was demonstrated not just by the presence of worshippers, but through cultural artefacts, idols, and temples. Desecration of these sites was an important aspect of any conflict. Destruction of a neighbour's sculpture or idol was sufficient to provoke war.⁷¹ These features suggest that a people's presence in an area, access to resources and the importance of a particular location or geography was often understood, at least in part through the presence of these religious artefacts, a primitive forerunner of today's understanding of territoriality.

Conflict prior to the development of monotheism was therefore highly ritualised, bore supernatural connotations, and was ultimately sacramental for the communities involved. The inclusion of religion meant that wars were not conducted in accordance with direct human agency; the army of a tribe or empire operated under a divine imperative, which not only permitted but frequently required that neighbouring tribes and religions be expunged. As a result of these features, the war was frequently irrational, fought for supernatural reasons that did not serve the long-term interests of any empire or group. This is evidenced in the repeated and rapid expansion and collapse of such societies throughout the period.

3.4 Judaism

Like many religious traditions, it is possible to observe Jewish scholars tracing the lineage of modern-day international prohibitions on war back to their primary scripture.⁷² Early tribal Israelites initially did not diverge much from other ancient cultures discussed in the prior section.⁷³ Over time, however, a distinctive Jewish approach to conflict did arise, ultimately dividing religious war from non-religious war within the tradition.⁷⁴ The acknowledgement that religion was not the driving force behind all conflicts represents an important distinction that is critical to both the Jewish faith and the further development of the Abrahamic tradition found in Christianity and Islam. In this manner, the depiction of armed conflict found in Jewish scripture is foundational for both the institution of war and the understanding of

⁷¹ Bahrani (n 59) 79–80.

⁷² Sarah Bohman, 'Laying Down One's Swords – Judaism's Just War' (2009) 3 University of St Thomas Journal of Law and Public Policy 99, 101–102.

⁷³ Fish (n 64) 392.

⁷⁴ Bohman (n 72).

religious war ensconced in other Abrahamic religions, which draw on the Jewish conception in order to produce their own rationales for religious violence.⁷⁵

In the Torah and Tanakh which together are both religious texts and written history,⁷⁶ a number of wars are recorded. The distinct military focus found in several books of the text is often connected to the Jewish experience of conflict during the time that the books were compiled.⁷⁷ Whilst it would be premature to declare the Old Testament, or Tanakh, as the first articulation of contemporary just war theory, it vaguely conforms to the approach in that it sets limitations on when to fight, and how to fight.⁷⁸ For example, rules constrain who is permitted not to fight. Cowards are excused on the basis that they would do more harm than good,⁷⁹ as are those who are occupied with new agricultural or construction projects. New families are also permitted to opt-out of any violent activity.⁸⁰ These rules have been interpreted either as the first moral safeguards that mitigate individual involvement in the war or alternatively, as a recognition of the need for the Israelites to secure an economic and demographic future.⁸¹ Regardless, the exceptions specified in Jewish scripture provide an initial foundation for later discussions of how wars should be fought.

Critically, the rules laid out in Deuteronomy suggest two different approaches to war. The first of these two approaches are considered relatively progressive for the era.⁸² In the first sense, an army of Israelites may offer peace in return for subjugation. Should this be refused, and should the enemy engage in battle, then all men are to be killed, but women, children, and property can be taken as spoils. This code applies to cities outside of the land selected for the Israelites by God.⁸³ As for other cases, a war within the sacred region of Israel was far more destructive. God would step in to either indicate enemy tribes for destruction, usually in order to take possession of the sacred

⁷⁵ Fine (n 52) 93.

⁷⁶ The Torah, confusingly, refers to a range of different objects and values. Literally meaning the “law”, in this context it is used to refer to the five books of Moses, replicated as part of the Old Testament of the Bible referred to in Christianity. Tanakh refers to the Hebrew bible, transliterated as the Old Testament. For the sake of consistency and clarity, the Christian Old Testament names for the different books of the Tanakh will be used throughout this chapter.

⁷⁷ Fine (n 52) 68.

⁷⁸ *Jus ad bellum, jus in bello*.

⁷⁹ Holy Bible, English Standard Version (Collins Anglicised ESV Bibles 2018) Deuteronomy 20:8.

⁸⁰ Deuteronomy 20:7.

⁸¹ Fine (n 52) 93.

⁸² Norman Solomon, ‘Judaism and the Ethics of War’ (2005) 87 *International Review of the Red Cross* 295.

⁸³ Deuteronomy 20:9–14.

land of Israel.⁸⁴ On the occasion that such a war was declared, the required response was the eradication of the target tribe – not just the people, but livestock and all property as well. Only precious metals could be taken as spoils, and even then only after ritual purification had been completed.⁸⁵ The destruction of these peoples is predicated on the notion that should they be allowed to exist, even as slaves, they may contaminate the Israelites with their foreign religious traditions, which was undesirable.⁸⁶ God indicated that seven tribes of Canaan were to be exterminated by the Israelites in this manner,⁸⁷ making this type of war far from exceptional in early Jewish history.

Wars that were not commanded by God and outside of Israel were additionally initiated during this period and were successful on at least one occasion.⁸⁸ On the occasion that war went against God's will, however, the Israelites were subject to divine punishment.⁸⁹ In the Old Testament, it is not the force of the Israelites that decided the outcome, but God who ultimately determined if a battle was won⁹⁰ or lost.⁹¹ Based on the text, non-religious wars – those during which looting was permitted – were rare as compared to those initiated by God.⁹² Critically, as Fine argues, there is little to suggest that the rules and moral codes of the Torah concerning warfare are binding upon the Jewish people in perpetuity, but only in the very specific temporal and situational context of the period.⁹³ Whilst this may well be the case, subsequent generations have drawn upon the text's depiction of war and produced variations of its content.

The early history of the Israelites was subject to extensive interpretation. Later generations of the Jewish faith generated key bodies of scholarship and secondary scripture, containing developments and expansions on the themes established in the Torah. The Talmud represents an authoritative interpretation that expands on the key themes of early Hebrew scripture, though it is perceived in Judaism as a “reference

⁸⁴ Van Creveld (n 42) 134–135.

⁸⁵ Deuteronomy 20:9–16.

⁸⁶ Deuteronomy 20:16

⁸⁷ Deuteronomy 7:1–2 and 20:16–18.

⁸⁸ Kings 2:10.

⁸⁹ Numbers 14–44.

⁹⁰ Exodus 17:8–15.

⁹¹ Deuteronomy 1:41–46.

⁹² J. Alberto Soggin, *Joshua: A Commentary* (Westminster Press 1972) 72.

⁹³ Fine (n 52) 69.

point” rather than an immutable statement.⁹⁴ By the time the Talmud was compiled, the Israelites no longer had a nation, detaching any further discussion from any civic reality. Accordingly, much of their consideration of warfare does not represent an operational code of law, but can instead be considered “messianic speculation”.⁹⁵

It is perhaps worth noting that when the Talmud was compiled, a number of “holy wars” had been started by the Israelites, with largely disastrous consequences.⁹⁶ The notion of a returning messiah that would bring holy conflict was present in Jewish discourse and was a powerful motivating factor for the ill-advised armed forays of the Jewish people throughout the first century AD.⁹⁷ There were several attempts made at the time to “hasten” this eventuality, with this in turn leading to a series of disastrous revolts against the imperial power of Rome.⁹⁸ Later reflections on these events can be understood as a powerful motivation for scholars to discourage the hastening of the Messiah’s return and invoking any religious wars; such wars having almost caused the eradication of the Jewish faith. Indeed, there is little discussion of the topic of war in any scripture or rabbinic discussion incorporated into the Jewish faith, possibly as a consequence of this history, and partly due to the lack of any armed Jewish nation during this period.⁹⁹

In this sparse body of scholarship, Maimonides’ discussion of the laws of war represents the pre-eminent classical Jewish text on the law of war.¹⁰⁰ In part of his multidisciplinary work, he devotes some discussion to conflict, and differentiates holy war from other forms of violence perpetrated by the state.¹⁰¹ The “Mitzvah war” is defined in Maimonides’ writing in relation to Jewish history, explicitly citing it in the context of the wars prescribed against the tribes of Canaan or the tribe of Amalek.¹⁰² This would be in line with the wider argument limiting holy war to its historical setting if he did not include the clause that to defend oneself against persecution also qualifies

⁹⁴ Solomon (n 82) 295.

⁹⁵ Ibid 297–298.

⁹⁶ Werner Eck, ‘The Bar Kokhba Revolt: The Roman Point of View’ (1999) 89 *The Journal of Roman Studies* 76.

⁹⁷ Reuven Firestone, ‘Holy War in Modern Judaism? “Mitzvah War” and the Problem of the “Three Vows”’ (2006) 74 *Journal of the American Academy of Religion* 954, 958.

⁹⁸ Mireille Hadas-Lebel, *Jerusalem Against Rome* (R. Fréchet tr, Peeters Publishers 2006) 431.

⁹⁹ Michael Walzer, ‘Commanded and Permitted Wars’ in *Law, Politics, and Morality in Judaism* (STU - Student edn, Princeton University Press 2006) 149.

¹⁰⁰ Josef Stern, ‘Maimonides on Wars and their Justification’ (2012) 11 *Journal of Military Ethics* 245, 246.

¹⁰¹ Maimonides, *Mishne Torah: Laws of Kings and Wars* (Reuven Brauner tr, Talmudic Books 2012) 13.

¹⁰² Ibid.

as Mitzvah.¹⁰³ This type of violence was strictly the only type that the king was supposed to engage in. Other elective wars may be fought, though spiritual approval must be gained prior to engaging in war. Such wars are considered discretionary.¹⁰⁴

In the Mitzvah war, Maimonides is explicit that no soul is to be left alive.¹⁰⁵ In a war of discretion, the population may be spared, though only if they submit to humiliating subjugation and pay tribute.¹⁰⁶ He further elucidates the circumstances under which individuals may be permitted to avoid war, though, again, these laws only apply to discretionary war.¹⁰⁷ Every man must fight in a Mitzvah war.¹⁰⁸ A cursory reading of Maimonides on *The Laws of Kings and Their Wars* suggests that two distinctive forms of warfare exist: the highly permissive Mitzvah war (a variation of the theme of holy war), and the restricted war of discretion, which is governed by emergent constraints, such as requiring council approval, not mobilising the entirety of the adult male population, and permitting the option of not eradicating the enemy. Both varieties of war covered by the book are not acceptable by contemporary standards, though of the two, the Mitzvah war is clearly the worst. Stern recognises an important mitigating factor in Maimonides' understanding of war by noting that all his depictions of warfare are heavily associated with Maimonides' vision of an idealised, messianic world state.¹⁰⁹ That is to say, he confined any discussion of war to a state existing after the emergence of the next Jewish messiah.¹¹⁰ Thus, the actual initiation of such a war was only possible, should prohibitively exclusive conditions be met.

Whilst the interpretation offered by Maimonides is perhaps the most influential, Nachmanides, another classical rabbinic scholar, opposes Maimonides on a key issue. He includes the conquest – or re-conquest – of Israel as a timeless, divine pronouncement.¹¹¹ The notion that re-conquering the land of Israel has a special status as a commanded Mitzvah war is of limited, though continuing influence,¹¹² and serves

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid 17.

¹⁰⁶ Ibid 16.

¹⁰⁷ Ibid 16.

¹⁰⁸ Ibid 20.

¹⁰⁹ Stern (n 85) 253.

¹¹⁰ Ibid 253.

¹¹¹ Fine (n 52).

¹¹² Robert Eisen, *Religious Zionism, Jewish Law, and the Morality of War: How Five Rabbis Confronted One of Modern Judaism's Greatest Challenges* (Oxford University Press 2017) 245.

to demonstrate the prospect of Mitzvah war in the modern era. In relation to contemporary trends, the importance of this perspective cannot be understated.

A historical reading of scripture suggests that the rules on warfare are related to a particular period of Jewish history, and therefore confined in application to the situation and time period known as the *Tanakh*. During this time, the instigation of a religious war was solely God's prerogative and was relatively specific in terms of when and where these wars were to be fought. This approach is apparent in much of the rabbinic discussion of war.¹¹³ Talmudic scholars generally recognised that rulers could not be restrained from fighting to enhance their power and prestige, and accordingly accommodated this eventuality.¹¹⁴ Yet, in relation to the less restricted Mitzvah war, as Firestone puts it, the institution of holy war in rabbinic discussions was defined in such a manner as to make it impossible to apply without God's reversal of their condition.¹¹⁵ In mainstream understandings of Jewish war, all religious pronouncements are therefore relegated to the far distant messianic condition.

By means of a postscript to classical Jewish discussion of war, the realisation of a Jewish state brings with it the possibility of Jewish holy warfare once again becoming incarnate. It is possible to argue that scripture, in particular, was invoked in the prologue of the Israeli state; aspects of its location naturally resonated with the stories and prophecies of the Jewish faith.¹¹⁶ Early fundamentalist movements associated with the foundation of the Israeli state included religious notions of war; for instance, equating the Palestinian inhabitants of the territory with the long-absent Amalekites, a tribe who bear an undissolved holy injunction.¹¹⁷ More generally, however, the influence of Jewish law on the Israeli state is more limited. Whilst Israel has adopted some of the laws established in rabbinic tradition, it ostensibly does not seek to embody the *Mishpat Ivri*, or traditional Jewish law, which is considered subordinate to the British civil tradition in Israeli public life.¹¹⁸ It is possible to posit a

¹¹³ Firestone (n 95) 959–960.

¹¹⁴ M. Walzer, 'The Ethics of Warfare in the Jewish Tradition' (2012) 40 *Philosophia* (United States) 633, 636.

¹¹⁵ Firestone (n 95) 958.

¹¹⁶ The area is roughly equitable with the variable borders covered in the Old Testament Genesis 15:1; Kings 8:65 2 Chronicles 7:8.

¹¹⁷ For instance, the now defunct fundamentalist party *Gush Emunim* sought to argue for many of the axioms of rabbinic Jewish law, including the imminent arrival of the Messianic age. Equating Palestinians with Amalekites would effectively make them permissible to kill. See I. Lustick, *For the Land and the Lord: Jewish Fundamentalism in Israel* (Council on Foreign Relations 1988) 131.

¹¹⁸ Ruth Levush, *Features – A Guide to the Israeli Legal System* (2018, LLRX 2001).

similar relationship between notions of war found in the rabbinic tradition and the written history of the Tanakh, and modern-day Israel's disposition to war.

To survey Israeli Defense Force (IDF) doctrine, tradition is clearly influential in modern-day armed conflict; yet, it is listed as subordinate in influence to both Israel's democratic principles and modern-day humanitarian concerns.¹¹⁹ Whilst the laws of the rabbinic period and the notion of holy war found in the Torah are not overtly applied by Israel, this history still wields influence over how modern-day Israel conducts its business.¹²⁰ The historical comparison has been cemented in the modern-day Israeli discourse, with the disposition and behaviour of neighbours aiding in constructing a comparison.¹²¹ Whilst it is possible to conclude that, in real terms, the Jewish Code of Law has been functionally eliminated,¹²² its proclivity to re-emerge in fringe nationalist activity and its soft, though profound influence on aspects of the contemporary Israeli image, is sufficient to add credence to Firestone's call for vigilance against a return of the historic Jewish norms of "Holy War".¹²³ Accordingly, in seeking out a typical description to affix to contemporary religious conflict, Jewish approaches are well worth consideration.

Some indication as to the contemporary relevance of Jewish holy war can be first determined by looking at the influence that religious imperatives have had in relation to the Israel-Palestine conflict. This is challenging, as it requires separating the more secular Zionist belief system from Jewish religious zealotry, distinct approaches that may converge on some key issues.¹²⁴ Yet not only is the existence of Israel rooted in a religious imperative,¹²⁵ but there have additionally been localised instances in which the allegiance of some Jewish Israelis to the Israeli state is

¹¹⁹ Noam Zion, *Purity of Arms: The Ethical Guide for the Israel Defense Forces* (Jewish News Syndicate 2016).

¹²⁰ *Ibid.*

¹²¹ For instance, the current Israeli PM invoked Old Testament passages in relation to Iranian foreign policy. See Washington Post Staff, 'The Complete Transcript of Netanyahu's Address to Congress' Washington Post (3 March 2015) (archived)

¹²² Firestone (n 95) 958.

¹²³ Reuven Firestone, 'Holy War: A Jewish Problem, Too' Jewish Learning <<https://myjewishlearning.com/article/holy-war-a-jewish-problem-too/>> accessed 16 March 2018.

¹²⁴ Zionism initially characterised the Jewish state; as time has passed, however, the secular aspects of this ideology have lost their resonance with much of the Israeli population. Jewish religious extremism has a very different perspective on the world at large and non-Jews when compared to Zionism. See Charles S. Liebman, 'Extremism as a Religious Norm' (1983) 22 *Journal for the Scientific Study of Religion* 75, 83.

¹²⁵ Mark Tessler, *A History of the Israeli-Palestinian Conflict* (Indiana University Press 2009) 14

superseded by the differing manner in which they interpret the axioms of their faith.¹²⁶ A notable example of this is the assassination of minister Yitzhak Rabin by an orthodox zealot for his role in the Oslo accords,¹²⁷ an event interpreted by some Israelis to be the surrender of divinely granted territory by the state.¹²⁸ This action was stated by some rabbinic authorities as having rendered Rabin subject to the “*din rodef*” and *din Moser*¹²⁹ in the eyes of some orthodox hard-liners- a term evoked to denote a traitor to the Jewish peoples, an individual slated for death.¹³⁰ This is consistent with what can be understood as a trend in contemporary religious extremism; resurrecting lapsed terms from previous permutations of religious law, and applying them permissively to modern situations. This event is also associated with a massacre of Muslims undertaken by an off duty IDF officer seeking to overturn the accords.¹³¹

The mandate of the Israeli state would, in the eyes of some, be abolished should it fail to appropriately curate the lands bestowed on the Jewish people by god. Accordingly, any normalisation of relations or concession made by the Israeli state to its neighbours or the Palestinian population is not only negotiation with foreign powers and cultural outsiders but between the Israeli state and the Jewish faith of its citizens as a supranational institution that can in some cases override the government’s mandate and authority.¹³² This process is difficult for a liberal state to engage in with any degree of success.

Within modern Jewish discussion, some modern permutations are seeking to equate the current condition of the Jewish people with historical instances in which permissive understandings of the use of force have been present are well underway.

¹²⁶ This approach is exhibited for instance by some settler communities. See Clive Jones, ‘ Israel’s Insurgent Citizens: Contesting the State – Demanding the Land’ in George Joffé (ed), *Radicalisation in Europe and the Middle East: Reassessing the Causes of Terrorism* (I. B. Tauris 2013) 200-213.

¹²⁷ Tessler (n 125) 782.

¹²⁸ JillAllison Weiner, ‘Israel, Palestine, and the Oslo Accords’ (1999) 23 *Fordham International Law Journal* 230, 230.

¹²⁹ The law of pursuit and the law of the informer respectively; these laws are occasionally invoked through the Jewish diaspora, and generally refer to a Jewish individual who steps outside rabbinical authority, and can be understood as a death sentence. See Michael J. Broyde, “Informing on Others for Violating American Law: A Jewish Law View” *Jewish Law Articles* (2002) <http://www.jlaw.com/Articles/mesiralaw2.html#1> accessed 09/09/2019.

¹³⁰ *Ibid.*

¹³¹ Harvey Kushner, *Encyclopedia of terrorism* (Sage 2003) 150.

¹³² Bergsmo discusses the continuing relevance of the divine mandate found in the Torah; in effect, the Jewish covenant with god precludes any treaty with “philistines/ Palestinians.” Bergsmo poses the question; what influences the situation in the west bank more, the ICC or Exodus? Morten Bergsmo “Integrity as Safeguard Against the Vicissitudes of Common Justice Institutions (audio)” (1 December 2018) [at 23:26] <https://www.cilrap.org/cilrap-film/181201-bergsmo/> accessed 07/09/2019.

The Kings Torah (Torat Hamelech)¹³³ a contentious modern interpretation of Jewish laws on warfare and represents an attempt to effectively roll back the restrictions placed on the conduct of war and the killing of non-Jews that emerged in the Talmudic period.¹³⁴ Likewise, there remains in the Israeli settlement movement a propensity to label neighbouring Arabs, Palestinians and anti- Semites as latter-day Amalekites.¹³⁵ These ideological perspectives provide modern-day Jewish terrorist and extremists with a means of justifying the use of extreme violence.

The Israeli state is mindful of its need to compete with other authorities and organisation in terms of Jewish legitimacy, for instance attempting to regain control of the Jewish discourse,¹³⁶ Unfortunately, due to both demographic realities and the often precarious position of the Jewish population in general,¹³⁷ it is unlikely that modern approaches to Jewish holy war will disappear anytime soon.

3.5 Christianity

Christian approaches to conflict are undoubtedly influenced by the Jewish tradition, though they also have classical influences.¹³⁸ Whilst the Christian tradition of violence is intimately linked with the development of just war and the modern state system,¹³⁹ it has additionally fostered distinct approaches to conflict that are rooted in the same theology and superstitions as the earlier Jewish approach. Unlike the Jewish tradition, the development of the many Christian approaches to war coincided with the existence of numerous Christian states and empires which were presided over by an external

¹³³ It is difficult to access the Kings Torah directly; it was printed in limited numbers, intended for Jewish scholars, not the lay population and certainly not non Jewish eyes. Regardless, the polarising impact that the book has had indicates a content that is permissive of killing non-Jewish men women and children. See Max Blumenthal, “How to kill gentiles and influence people: Israeli rabbis defend book’s shocking religious defense of killing non-Jews” (30 august 2010) War in Context <http://warincontext.org/2010/08/30/how-to-kill-gentiles-and-influence-people-israeli-rabbis-defend-books-shocking-religious-defense-of-killing-non-jews/> accessed 08/09/19.

¹³⁴ Ahmad Ashkar, ‘On the Relationship between Zionism and Judaism’ (2015) 20/21 Palestine - Israel Journal of Politics, Economics, and Culture 67.

¹³⁵ Steven Leonard Jacobs, ‘Rethinking Amalek in this 21st century’ (2017) 8 Religions 196, 202.

¹³⁶ Roger Griffin, *Terrorist's Creed: Fanatical Violence and the Human Need for Meaning* (Springer 2012) 111-136.

¹³⁷ Allan C. Brownfeld, ‘Israel's demand for allegiance to a "Jewish," "democratic" state belie open society claim.(Israel and Judaism)’ (2011) 30 Washington Report on Middle East Affairs 44, 44-45.

¹³⁸ Fine (n 50) 93.

¹³⁹ Cian O'Driscoll, ‘Keeping Tradition Alive: Just War and Historical Imagination’ (2018) 3 Journal of Global Security Studies 234, 234–235.

religious authority of immense power and influence. This provided a context that is significantly different from the Jewish example. The existence of multiple Christian political realities was perhaps more conducive to legislate upon the subject of armed violence; as Fine suggests, Christians expressed three distinctive approaches to the use of violence: pacifism, just war, and the crusade.¹⁴⁰

From a purely scriptural perspective, it is difficult to determine any disposition towards violence, as Christianity does not exhibit an overabundance of bellicose sentiments in its primary scripture. The tenor of the New Testament of the Bible is largely pacifistic; Christ's exhortations to love one's enemy provide an example of this disposition.¹⁴¹ Moreover, this tone serves to nullify much of the more bellicose Old Testament.¹⁴² Submission in the face of oppression is frequently emphasised.¹⁴³ In the gospels, the story of Jesus reflects a prophet who frequently chooses the more non-violent course of action, and additionally frequently exhorts his followers to behave in a nonviolent way. However, there are also instances of violence appearing in the New Testament,¹⁴⁴ though none of these examples really fit the definition of war.

The primary Jewish scripture, or the Old Testament (Torah), also features as a foundational, first component of the Christian Bible. The contrast between these texts is marked. As previously discussed, the Old Testament is distinctly martial, whilst the New Testament is quite the opposite, and today, there is still an extensive discussion as to how best to reconcile this difference.¹⁴⁵ On balance, however, the Bible constructs the central figure of the Christian faith as markedly benign, countermanding the warlike the prescription and edicts contained in the Old Testament. Constructing any recourse to violence within the Christian tradition is therefore challenging, though, as history demonstrates, not insurmountably so. The problem of reconciling a pacifist prophet with the temporal utility of violence is a key aspect of later discussion.

¹⁴⁰ Fine (n 52) 89; Ursula King, 'Seeds of Violence or Buds of Peace? Faith Resources for Creating a New Peace Consciousness' in Anne Hege Grung, Marianne Bjelland Kartzow and Anna Rebecca Solevag (eds), *Bodies, Borders, Believers: Ancient Texts and Present Conversations* (Pickwick Publications 2015) 380.

¹⁴¹ Matthew 5:44.

¹⁴² Matthew 5:17.

¹⁴³ Romans 13: 1–4.

¹⁴⁴ John 2:14.

¹⁴⁵ See Eric A. Seibert, 'Recent Research on Divine Violence in the Old Testament (with Special Attention to Christian Theological Perspectives)' (2016) 15 *Currents in Biblical Research* 8.

In line with Jesus' example, pacifism was widely exhibited by the early Christian community and served to shape the identity of Christians. This is evidenced in the pantheon of saints and martyrs that the early church accumulated, many of whom sought to emulate their prophet.¹⁴⁶ In accounts of the early Christians, they are commonly recorded as following Jesus' example in terms of his crucifixion, with numerous early Christians choosing to die – though not fight – for their faith.¹⁴⁷ This is additionally evidenced in discussions in the early Christian community. For instance, Irenaeus, an early Christian scholar, stressed the importance of not fighting in the Christian religion.¹⁴⁸ Hippolytus further presented that even a Christian soldier should not kill, as God alone has the prerogative to end a human life.¹⁴⁹ Prohibitions against violence are characteristic of early Christian records,¹⁵⁰ reflecting the self-image of the early Christian community.

As Hardon argues, however, pacifism was only really exhibited in small monastic communities and was not imposed on the wider lay community of Christians.¹⁵¹ Moreover, an assessment of events taking place in the early Christian community presents a population readily inclined to use violence in the furtherance of its aims. Nixey, for instance, indicates a different narrative alongside the orthodox depiction of Christian martyrs. Drawing on key events and statements by early Christian bishops and leaders, she suggests that the early Christian community rapidly developed an alternative approach that permitted the use of violence. Smashing idols and temples, killing pagans, and burning people alive characterised these early Christians' behaviour.¹⁵² To indicate an example of one such event, Nixey discusses the burning of Hypatia, a female scholar, by the early Christian community.¹⁵³ This violence is framed by the assumption that despite ostensibly being a nonviolent cult, the female scholar in question represented a supernatural threat to the wellbeing of the

¹⁴⁶ Candida R. Moss, *Ancient Christian Martyrdom – Diverse Practices, Theologies, and Traditions* (Yale University Press 2012) 14.

¹⁴⁷ *Ibid* 49–76.

¹⁴⁸ James R. Payton, *Irenaeus on The Christian Faith: A Condensation of Against Heresies* (James Clarke & Co 2012).

¹⁴⁹ Hippolytus, *Apostolic Tradition of Hippolytus* (Burton Scott Easton tr, Malloy Inc 1962) 42.

¹⁵⁰ David B. Kopel, *The Morality of Self-defense and Military Action: The Judeo-Christian Tradition* (Praeger 2017) 186.

¹⁵¹ John Hardon, *The Catholic Catechism: A Contemporary Catechism of the Teachings of the Catholic Church* (Doubleday Publishers 2011).

¹⁵² Catherine Nixey, *The Darkening Age* (Pan Macmillan UK 2017) 111.

¹⁵³ *Ibid*.

emergent Christian community.¹⁵⁴ The early experience of the Christian community, as understood by Nixey, suggests that spreading any religion to an audience that already has its own superstitions and faith without recourse to violence is naturally difficult. Whilst early Christian evangelists did experience some success with nonviolent methods,¹⁵⁵ the utility of violence is reflected early on in the destruction of pagan cultural property, immolation of non-Christian priests and collective violence against pagan holdouts within Roman society.¹⁵⁶ This was justified with reference to a distinctive moral framework that did not compromise the ostensible pacifism of the early Christian movement.¹⁵⁷ These first waves of Christian violence demonstrate a divine imperative; they were directly fighting the devil by destroying his icons and killing witches or pagans possessed with his spirit.¹⁵⁸ This afforded Christians a mechanism to concurrently maintain and overcome their pacifist stance.¹⁵⁹ Whilst these early struggles cannot be characterised as war, they indicate the foundation of the demonic other that would be invoked in the later “holy war” frame.¹⁶⁰

Just war theory can be considered the second approach to the violence generated within the Christian tradition,¹⁶¹ following upon the heels of pacifism. By the third century, Christians had all but abandoned pacifism as an approach completely, allying themselves with the Roman Empire.¹⁶² During this period, it is impossible to separate the Christian experience from the Roman imperial one. Christian society was therefore no longer simply a faith-based community. This conjoining is represented in further doctrines of conflict; just war theory is not a wholly Christian innovation, but has a classical Hellenic provenance, with discussions of just war appearing in the works of Aristotle much earlier.¹⁶³ Once classical approaches were incorporated into the Christian community, the resulting doctrine of just war theory created a coherent basis for Christian kings and emperors to utilise violence. This doctrine was the first soundly discussed alternative to pacifism within

¹⁵⁴ Ibid.

¹⁵⁵ Ibid.

¹⁵⁶ Jonathan Kirsch, *God Against the Gods: The History of the War Between Monotheism and Polytheism* (Penguin Compass 2005) 200–202.

¹⁵⁷ Nixey (n 152).

¹⁵⁸ Ibid 18.

¹⁵⁹ Ibid.

¹⁶⁰ King (n 140) 381.

¹⁶¹ Ibid 380.

¹⁶² Kopel (n 150) 173.

¹⁶³ Aristotle, *Nicomachean Ethics* (W.D. Ross tr, Batoche Books 1999) 174–173.

the Christian tradition. Around the same time during the fourth century, Christians were persecuting the last pagan holdouts on the Roman Empire; St. Ambrose effectively melded the Roman approach to duty in a war with the Christian tradition, arguing that it was positive to defend the empire against threats that would destroy Rome, and by extension, Christianity.¹⁶⁴ This justification for the use of violence was further developed by a range of church doctors.

Following St. Ambrose, in the fifth century, Augustine, who was heavily influenced by the Old Testament,¹⁶⁵ contended that it was just to punish transgressions as this was ultimately to the benefit of the transgressor. There were, therefore, definite situations when fighting was obeying the will of God.¹⁶⁶ Augustine further contended that there was no inherent sin in dispensing death, though a just soldier would hold himself above the potential sin associated with violence to instead fight with just intention.¹⁶⁷ Augustine's essential justification for war in the Christian tradition is accompanied by the essential definition of a just war, namely that a just war is one that avenges injuries.¹⁶⁸ As Russell explains, the precise reading of this phrase has been subject to multiple interpretations over time.¹⁶⁹ Fine suggests that the key value of Augustine's contribution to just war is to be found in his proscriptions regarding how war is to be conducted; in Augustinian thought, Christian proscriptions serve to limit the extent of violence to the minimum amount needed.¹⁷⁰

Aquinas further developed the notion of just war. Working much later in the thirteenth century, he was able to comment in detail and further refine the essential approach into the doctrine that is recognisable in the modern commentary on just war theory. In a passage of the *Summa Theologica*, Aquinas concisely summarises the requirements for a just war. It must possess the three elements of just authority, just cause, and right intention.¹⁷¹ Alternately, these proscriptions may be understood to mean that only princes (leaders) have the authority to decide when it is appropriate to fight the war, not the common man. The enemy must be deserving of violence, and

¹⁶⁴ Fine (n 52) 99.

¹⁶⁵ Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge UP 1977) 16.

¹⁶⁶ Augustinus, *Contra Faustum Manichaeum: Reply to Faustus the Manichæan* (M.A Rev. Richard Stohert tr, 2016) 415 [75].

¹⁶⁷ Jonathan Riley-Smith, *The Crusades, Christianity, and Islam* (Columbia University Press 2008) 13.

¹⁶⁸ Russell (n 149) 18.

¹⁶⁹ *Ibid* 20–21.

¹⁷⁰ Fine (n 52) 102.

¹⁷¹ Thomas Aquinas, *The Summa Theologica* (Fathers of the English Dominican Province tr, Benziger Bros. 1948) second part of the second part, on war.

the soldiers involved must be righteous in their intent and conduct.¹⁷² Many of these proscriptions remain recognisable today.

Through successive generations of Christian development, the essential Christian inclination towards peace found in the New Testament has been modified, not putting an end to war, but instead realising it as a separate moral condition, which requires careful justification. The just war theory to some extent maintains this inclination and represents a religiously orientated attempt to impose civility on war for the common good. This represented a progressive effort, with a number of different scholars applying extensive reasoning in order to develop the doctrine. Just war is a major conceptual contribution to later restrictions on war. In contrast, it is possible to illustrate the notion of the crusade as a third and final approach to conflict within the classical Christian approach to violence, namely that of the “crusade”. The theology behind crusade is most coherently expressed in the writing of St. Bernard. It is worth noting that unlike Aquinas and Augustine, St. Bernard, though lauded for his other contributions to theology,¹⁷³ is not recognised as a progenitor of modern approaches to armed conflict. Whilst Christians were not operating from a pacifist foundation during St. Bernard’s time, his articulation of Crusade bears some similar features to earlier justifications of violence in that it creates parity between the spiritual and earthly battle in a manner that the first Christian iconoclasts would recognise. Accordingly, it may be documented as a battle against what a King describes as the demonic other.¹⁷⁴ As it was described at the time:

YOU cannot but know that we live in a period of chastisement and ruin; the enemy of mankind has caused the breath of corruption to fly over all regions; we behold nothing but unpunished wickedness. The laws of men or the laws of religion have no longer sufficient power to check depravity of manners and the triumph of the wicked.

¹⁷² Fine (n 52) 106.

¹⁷³ Perhaps most famous as the founder of the Cistercian order and his writings on Christian mysticism, St Bernard’s contribution to the crusades is downplayed in discussion on his legacy. This is perhaps part of a wider trend of simplifying the often-complex world views of key religious figures. See Katherine Allen Smith, *War and the Making of Medieval Monastic Culture*, vol 37 (Woodbridge 2011) 199.

¹⁷⁴ King (n 124) 381.

*The demon of heresy has taken possession of the chair of truth, and
God has sent forth His malediction upon His sanctuary.*¹⁷⁵

St. Bernard's exhortation can be noted as violating the just cause element, undoing the moral restraint on war through an enthusiasm for quashing the restraints conventionally imposed during the period.¹⁷⁶ As Russell puts it, St. Bernard presumed that a righteous cause always produces a favourable result, irrespective of the method used in its pursuit.¹⁷⁷ St. Bernard's logic perhaps reflects the ultimate in consequentialist reasoning, abstracted far beyond the earthly reckoning of value to encapsulate the possibility of a supernaturally evil adversary. In the event of Crusade, Christians committed not killing, but *malicide*, the destruction of evil.¹⁷⁸

As St. Bernard explains, the Crusades were not waged against an earthly opponent, but instead represented an opportunity for Christians to continue the battle against the devil in the earthly realm, to strive against demonic influence threatening the existence of the Christian world.¹⁷⁹ Whilst this could easily be dismissed as hyperbole, the nature of the distinction was not lost on Christians of the period, with the spiritual nature of the conflict enhancing its appeal.¹⁸⁰ The law that bound conflict against earthly opponents was loosed; the responsibility to fight was incumbent on all of Christendom.¹⁸¹

Whilst today the Crusades represented an immensely powerful call to violence in the medieval Christian mind. Whilst the term 'the Crusades' explicitly refers to external campaigns between the eleventh and thirteenth centuries, more generally, the doctrine of crusade or holy war served to motivate a number of wars, both internal and external, across the next five centuries.¹⁸² Protestant nations began to emerge, defending and propagating the faith which increasingly involved waging war within

¹⁷⁵ Saint Bernard of Clairvaux, 'Why Another Crusade?' (1145) <<http://bartleby.com/268/7/4.html>> accessed 4 August 2018.

¹⁷⁶ Anthony Coates, 'Is the Independent Application of *jus in bello* the Way to Limit War?' in David Rodin and Henry Shue (eds), *Just and Unjust Warriors: The Moral and Legal Status of Soldiers* (Oxford University Press 2008) 189–190.

¹⁷⁷ Russell (n 168) 27.

¹⁷⁸ *Ibid* 37.

¹⁷⁹ Bernard of Clairvaux, *In Praise of the New Knighthood* (Conrad Greenia tr, Cistercian Publications 1977).

¹⁸⁰ Fine (n 32) 103.

¹⁸¹ Clairvaux (n 175).

¹⁸² See generally Christopher Tyerman, *God's War: A New History of the Crusades* (Penguin 2007).

Europe, bringing violence into close proximity with a religious bloc of equivalent power.¹⁸³ To summarise their historical impact, these wars rapidly became incredibly destructive. The proximity and similar capacities of belligerents led to long wars that not only disrupted normal state interactions but depleted populations and the economic capacities of the nations involved.¹⁸⁴ This effectively brings us to the emergence of the Grotian system of international relations and the Westphalian system of laws and norms. The treaties following the thirty years of war represent a fairly blunt confrontation between the notion of holy war in the Christian tradition and the emergent doctrine of universal natural law, with Grotius' vision gaining subsequent prominence.¹⁸⁵ Thereafter, the Christian tradition of organised violence aligned with the institution of war discussed earlier in this chapter.

The acknowledgement that Europe was not comprised of the two religious blocs, Roman and Protestant, but of multiple polities was foundational in removing the power of Christian religious authorities and thus ending religion as a motivation for violence.¹⁸⁶ The nature of the theological motivations that previously existed did not allow opposing sides to construct any mandate or basis for peace. The religions' imperative to maintain the faith required complete victory, namely the immolation or submission of the opposing country or group. If states and princes are sovereign and independent, then it is natural to presume that they are equal. It became natural to develop a doctrine of inalienable rights and duties to attribute to states.¹⁸⁷ As with the Jewish faith, it is possible to suggest that the Christian faith's approach to holy war became burdensome, causing it to be functionally eliminated.

Having focused upon the Catholic experience thus far, it is of interest to note the continuing influence of pacifism in the wider Christian tradition in relation to revivalists and schismatics that have emerged throughout Christian history. In such instances, it is possible to observe that, upon their inception, many Christian "heresies" or sects sought to reassert the prophetic example, adopting pacifism within their belief structure. This serves to illustrate the importance of pacifism to the Christian tradition,

¹⁸³ Konnert (n 45).

¹⁸⁴ Ibid.

¹⁸⁵ Hedley Bull, *Hugo Grotius and International Relations* (Hedley Bull, Benedict Kingsbury and Adam Roberts eds, Clarendon Press 1990).

¹⁸⁶ Stephane Beaulac, *Power of Language in the Making of International Law: The Word "Sovereignty" in Bodin and Vattel and the Myth of Westphalia* (Philip Allott ed, Brill Academic Publishers 2004) 83–85.

¹⁸⁷ Amos S. Hershey, 'History of International Law Since the Peace of Westphalia' (1912) 6 *The American Journal of International Law* 30, 33.

as well as the instability of the doctrine. Pacifist movements, could however easily be denounced as heretics, and crushed, which historically was the fate of such movements.¹⁸⁸ This essential disposition towards violent activity is visible in the reasoning of notable protestant reformers. For instance, Martin Luther was critical of the use of violence, particularly against other Christians.¹⁸⁹ As an interesting counterpoint to the doctrine of the crusade, Luther initially saw Islamic forces threatening the borders of Christendom as a divine scourge, come to destroy the unworthy,¹⁹⁰ and suggested that prayer alone would be enough to safeguard the true believer.¹⁹¹ The flaws of this doctrine in the context of medieval Europe, were, however, sufficiently apparent to the secular Protestant leaders of Europe, who saw that Protestantism rapidly evolved a comparable disposition to war to the Catholics. Luther was naturally critical of these developments, disparaging Protestants who fought back.¹⁹² It is possible to conclude that the pacifist inclinations ostensibly intrinsic to the Christian faith can only be expressed in a limited way under specific circumstances.

In summary, Christianity has had a complex and varied relationship with violence that is particularly evident in its distinct doctrine of Crusade; holy war or war fought for a religious purpose. Whilst initially pacifistic, Christian doctrine did not serve as a barrier to developing a framework for war waged from religious purposes that is relatively distinctive. The capacity to wield violence for the sake of religion was, however, effectively confiscated from Christian peoples by the proliferation of the state system.

There are however indications that the Christian approach to holy war could be resurrected in a more contemporary setting. Christianity is currently subject to profound suppression and persecution,¹⁹³ with this driving the mobilisation of many

¹⁸⁸ Brock draws this conclusion with relation to the Cathars; these nonviolent Gnostics were effectively stamped out by the Holy Inquisition by the fifteenth century. See Peter Brock, *Pacifism in Europe to 1914* (Princeton University Press 2015) 28–29.

¹⁸⁹ Martin Luther, ‘Secular Authority: To What Extent It Should Be Obeyed’ in *Works of Martin Luther*, vol 3 (A.J Holman Company 1915) <<http://onhewing.org/user/Luther%20-%20Extent%20of%20Secular%20Authority.pdf>> 235–239.

¹⁹⁰ George W. Forell, ‘Luther and the War Against the Turks’ (1945) 14 *Church History* 256, 257.

¹⁹¹ *Ibid* 259.

¹⁹² D. K. McKim, *The Cambridge Companion to Martin Luther* (Cambridge university Press 2003) 184–185.

¹⁹³ Pew research data suggests that Christianity is the most oppressed of the major world religions. See Katayoun Kishi, “Key findings on the global rise in religious restrictions” Pew research (21 June 2018) <https://www.pewresearch.org/fact-tank/2018/06/21/key-findings-on-the-global-rise-in-religious-restrictions/> accessed 08/09/19.

Christian minorities.¹⁹⁴ These militias, though often founded because the state has failed to protect Christian communities, ultimately compromise the states monopoly over the use of force.¹⁹⁵ Moreover, in some cases of protracted ethnoreligious conflict, Christian extremism, as with the more established Islamic extremism, has developed into terrorism.¹⁹⁶

In addition to factors that could drive a return to a more bellicose understanding of holy war by Christians in minority, there is the destabilising effect that globalisation is having on the populations of Christian majority countries.¹⁹⁷ There is a basis to suggest that the state system is not serving the native population of Christian west as well as it used to, particularly in contending with globalisation;¹⁹⁸ For instance this is observable in the rise of nationalism, that is often along Christian lines as well as ethnic, as the populations of such nations attempt to preserve their cultural distinctiveness.¹⁹⁹ Accordingly, it is not too untoward to suggest that the lapsed Christian understanding of holy war could be revived as part of a wider anti-globalist struggle.

3.6 Islam

Having analysed both Christianity and Judaism, it is now logical to assess the Islamic tradition to determine if a separate doctrine of holy war exists within this tradition. On the basis of the available evidence, it is possible to advance the notion that the Islamic faith is a potential source of violence. This is not to say that it espouses more violent axioms by nature than either Christianity or Judaism,²⁰⁰ only that Islam generates a very different understanding of how divine law applies to the world. As the Islamic

¹⁹⁴ Frederic Wehrey and Ariel I. Ahram, “*Taming The Militias: Building National Guards in Fractured Arab States*” Carnegie Endowment (15 may 2019) 5.

¹⁹⁵ Ibid.

¹⁹⁶ Azeem Ibrahim and Hikmet Karcic, “The Balkan Wars Created a Generation of Christian Terrorists” Foreign Policy (24 may 2019) <https://foreignpolicy.com/2019/05/24/the-balkan-wars-created-a-generation-of-christian-terrorists/> accessed 09/09/2019.

¹⁹⁷ Whilst religion is certainly part of globalisation, paradoxically as communities become marginalised, it can also be a source of backlash. See generally M. Herrington Luke, ‘Globalization and Religion in Historical Perspective: A Paradoxical Relationship’ (2013) 4 Religions 145.

¹⁹⁸ Mark. Juergensmeyer, ‘Religious Nationalism in a Global World’ (2019) 10 Religions 97.

¹⁹⁹ Robert M. Kunovich, ‘An Exploration of the Salience of Christianity for National Identity in Europe’ (2006) 49 Sociological Perspectives 435; Rogers Brubaker, ‘Between nationalism and civilizationism: the European populist moment in comparative perspective’ (2017) 40 Ethnic and Racial Studies 1191.

²⁰⁰ Timothy Renner ‘A Quantitative Look at Violence in Religious Texts’ (Timothy Renner, 2 December 2015) <<https://timothyrenner.github.io/datascience/2015/12/02/violence-in-religious-text.html>> accessed 4 December 2017.

faith is all-encapsulating, it is therefore perhaps more difficult to distinguish any approach to war completely devoid of religious motivation within the tradition.²⁰¹ On this basis, it may be thought of as resembling a more primordial approach to violent conduct. However, it is sufficiently distinct from both its progenitors and earlier religious notions to merit more detailed discussion. For one, there is a more diverse array of perspectives visible in the Islamic faith, with many different interpretations as to what religious war is, emerging within the tradition.²⁰² The persistence of the Islamic notion of war well into the modern age in both the imagination of state militaries²⁰³ and terrorist groups²⁰⁴ also calls for an investigation. Accordingly, it is appropriate to explore the origins of the approach to warfare contained in Islamic tradition, which diverged somewhat from the general understanding of tribal warfare found on the Arab peninsula during the seventh century.²⁰⁵ It is also worth mentioning that in its early history, the Islamic faith was seen as heretical by both Christians and Jews.²⁰⁶ This background is an important consideration in understanding the development of organised violence in the Islamic tradition.

The Quran, as the primary religious text, covers the early development of a doctrine of conflict in the Islamic tradition in addition to the central tenets of the Islamic faith. It is commonly divided into two periods of revelation: The Meccan and Medinan. The majority of the Quranic sources advocating the use of violence – the “sword verses” – fall later, which has consequences in terms of how they are interpreted.²⁰⁷ Calls for violence in the text are apparently directed against disbelievers and idolaters.²⁰⁸ However, there are also verses that place restrictions on warfare.²⁰⁹ A purely exoteric reading, however, does not necessarily reveal the correct reading of war in the Quran, with different forms and methods necessary for a correct

²⁰¹ Ahmed Al-Dawoody, *Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 2.

²⁰² Ibid.

²⁰³ Gen S.K. Malik, *Quranic Concept of War* (Adam Publishers & Distributors 1992) 95–96.

²⁰⁴ For instance, in a section titled “Why We Hate You and Why We Fight You” ISIS discusses the importance of waging war against anyone who opposes their message. See Dabiq 15 (Al Hiyat Media 2016)

²⁰⁵ As Armstrong notes, along with Christianity and Judaism, a great number of faiths populated the region. Karen Armstrong, *Islam: A Short History* (Random House Publishing Group 2007) 11.

²⁰⁶ The Islamic faith was initially framed in this manner, with writers from this period framing this perspective as prevalent amongst Jewish and Christian contemporaries. See Peter the Venerable, *Writings Against the Saracens* (Catholic University of America Press 2016) 46.

²⁰⁷ Yaser Ellethy, *Islam, Context, Pluralism and Democracy: Classical and Modern Interpretations* (Taylor & Francis 2015) 118.

²⁰⁸ The Qur'an (Oxford World's Classics) 2:191.

²⁰⁹ Quran 2:190, 2:191–195.

interpretation.²¹⁰ Whilst this the exoteric meaning is not the formally correct reading, it is of immense importance to both how the Quran is understood by Revivalist movements, and critically by external, non-Islamic observers.

Whilst jihad is used in different contexts in the Quran, it is possible to discern dual themes within the revelation, with the initial Mecca phase being more spiritual, whereas, in later Medinan revelations, the term encapsulates violence in addition to earlier meanings.²¹¹ As Firestone notes, the context of Islam is fairly violent; not only did the Arabian peninsula relatively have scarce resources, but it was also afflicted by intense clan-based violence.²¹² This formed the background for the subsequent raids and conquests undertaken by Muhammad, which are recorded in the Quran. Modern commentators are well apprised of the context and prevailing conditions in their interpretive framework.²¹³ As with the Jewish faith, this understanding of context could serve in restraining the use of religious violence. An argument that emerges from this acknowledgement is that Muhammad lived in a context so alien to the modern condition that it would, therefore, be unfair to examine him from a perspective informed by modern standards of civics and warfare.²¹⁴ However, critically, mainstream Islamic understanding does not confine the actions of Muhammad to a historical condition; instead, Muhammad is taken to represent an example of human infallibility. His actions are meant to inform the behaviour of Muslims indefinitely, and therefore cannot be muted in the same manner as secular figures. It can be determined however that Muhammad took radical steps in relation to internal warfare, forbidding the traditional *Ghazwahs*,²¹⁵ which the Arab tribes of the time were accustomed to embark upon. Muhammad turned their activities outwards, permitting raids to be conducted against non-Muslims, and on occasion leading such raids in person. Allegiance to God, or his prophet, effectively surpassed the previously binding notion of tribal allegiance. This rapidly allowed for the traditional notion of tribal

²¹⁰ The term Tafsīr is used to refer to the interpretation (exegesis) of the Quran. There are different approaches to this process.

²¹¹ Muhammad Said Al-Ashmawy, *Against Islamic Extremism: The Writings of Muhammad Said Al-Ashmawy* (University of Florida Press 2002) 113.

²¹² Reuven Firestone, *Jihad: The Origin of Holy War in Islam* (Oxford University Press 1999) 36.

²¹³ Ellethy (n 207) 119.

²¹⁴ Patrick Sookhdeo, *Global Jihad: The Future in the Face of Militant Islam* (BookBaby 2014) 210.

²¹⁵ Referring to tribal raids. See generally Peter A. Webb, 'Creating Arab Origins: Muslim Constructions of al-Jāhiliyya and Arab History' (SOAS, University of London 2014).

raiding to transform into what ultimately became a total declaration of war against all non-Muslims in defiance of any previously existing clan or familial bonds.²¹⁶

It is, to some extent, possible to account for the variable notions of religious violence by considering the context that was constructed around these events, a step reputedly grounded in the Quran itself.²¹⁷ This historiography commonly frames recourse to violence during the prophetic era as an uncomfortable necessity, the last resort in the face of abuses by polytheists and Jews.²¹⁸ The importance of context in relation to notions of violence has conventionally been attained in the formal, scholarly approach to the faith, by a distinct class of scholars (ulema), utilising a scientific approach to the Quran,²¹⁹ which to some extent has stabilised the manner in which the prophetic era is framed in the classical construction of *Jihad*. Problems do, however, begin to emerge when sects of the faith instead seek to present the prophetic era in an ahistorical manner.

Despite formalism being historically imposed in the way recourse to violence in the Islamic faith is understood, there have been recurrent arguments throughout Islamic history as to the meaning of the word jihad. Whilst it does not have a singular meaning, the use of the term in reference to violence in both the Quran and Hadith translated to the use of the term in relation to military endeavours throughout the classical period.²²⁰ Jihad is associated with struggle and is used to refer to conflicts between Muslims and Meccan polytheists.²²¹ In subsequent legal interpretations, jihad served as a means of uniting Muslims and mobilising them in order to solidify power.²²² Jihad is frequently understood to denote war fought against infidels,²²³ though this is not the word's only meaning.²²⁴ The discussion of holy war within the Islamic context is therefore reflected in the use of the word jihad, though this is not the word's exclusive meaning.

²¹⁶ Firestone (n 189) 18.

²¹⁷ Muhammad Abdel Haleem, "Qur'anic 'Jihād': A Linguistic and Contextual Analysis (2010) 12 *Journal of Qur'anic Studies* 147

²¹⁸ Muhammad Abdel Haleem, *Understanding the Qur'an: Themes and Style* (I.B Tauris 2010) 64–67.

²¹⁹ Patricia Crone and Martin Hinds, *God's Caliph: Religious Authority in the First Centuries of Islam* (Cambridge University Press 1986).

²²⁰ Referring to the first three centuries of Islam. Bernard Lewis, *The Political Language of Islam* (University of Chicago Press 1991) 72.

²²¹ Youssef H. Aboul-Enein and Sherifa Zuhur, *Islamic Rulings on Warfare* (U.S. Army War College 2004) 3.

²²² Rudolph Peters, *The Jihad in Classical and Modern Islam: A Reader* (Markus Wiener Publishers 2005) 5.

²²³ *Ibid.*

²²⁴ Fine (n 52) 114.

The Quran has given rise to a number of distinct approaches to warfare; different approaches are frequently criticised as being selective in terms of which verses or periods they emphasise.²²⁵ Additionally, the Hadith sources seem to support both peaceful and warlike interpretations.²²⁶ Speaking generally, Islam began in the context of violent expansion once the initial Islamic caliphate was consolidated. However, it became apparent that the domain of Islam would not experience seamless expansion. This necessitated the production of a doctrine that permitted stable relations with the non-Muslim world. Crafting this initial Islamic international legal system required the addition of reasoning to build upon the content of primary religious sources and cover emergent problems in the early Islamic community. Classical interpretations of Islamic warfare stress the essential division of the world into the house of war and the house of Islam.²²⁷ This distinction is stressed in the emergent system of Islamic international or imperial law. Within the house of war, further distinctions are drawn between the people of the book and the polytheists. The ultimate aim of the Islamic state is to dominate the house of war via jihad.²²⁸ Bernard Lewis estimates that the classical goal of jihad was to expand the domain of the Islamic state until it was accepted by the entire world. A temporary truce could be made if it benefited Muslims, though ultimately no permanent peace was possible prior to the achievement of this ultimate goal.²²⁹ The persistence of this goal would no doubt cause a condition of bad faith between the Islamic state and any external force they should encounter.

As this chapter has already stated, however, there are multiple constructions of warfare within the classical period. Al Farabi, for instance, discusses the use of war in an offensive sense, justified on the basis of bringing Islamic virtue to the disbeliever and thereby improving their personal existence. Violence is ultimately necessary, as not everyone is susceptible to reason, and therefore force must be utilised. War is essentially rooted in this limitation, as well as the need to compel a portion of the

²²⁵ Aboul-Enein and Zuhur (n 221) 6.

²²⁶ Marie-Luisa Frick and Andreas Muller (eds), *Islam and International Law: Engaging Self-Centrism from a Plurality of Perspectives: Brill's Arab and Islamic Laws Series*, vol 7 (Martinus Nijhoff 2013) 75.

²²⁷ Ahmad ibn Naqib al-Misri, *The Reliance of the Traveler* (Islamic Texts Society 1993) 994 [43].

²²⁸ Johannes Bork, 'Models of Coexistence: Approaches for Overcoming the Classical Legal Division Between the "Land of Islam" and the "Land of War" by Contemporary Islamic Scholars' (2017) 38 *Journal of Beliefs & Values* 247.

²²⁹ Bernard Lewis, *Islam and the West* (Oxford University Press 1993) 9–10.

population not susceptible to persuasion to obey the law by force.²³⁰ In at least one contemporary analysis, however, al Farabi is seen as diverging from the prevailing view of jihad. He dismisses the existence of absolute evil²³¹ and advances the notion that there are therefore no fit targets for jihad, as it is unthinkable that there would be an entire enemy city in which all individuals are morally derelict enough to justify such an extreme war.²³² Whatever the conclusion with relation to jihad, al Farabi sought to use the classical influence of Plato and Aristotle to reinterpret the core texts of Islam for the benefit of his society,²³³ introducing some classical influences.

Speaking generally, the prophet Muhammad could be construed as imposing restraint on warfare, discernable through his pronouncements and actions.²³⁴ Indeed, it is possible to suggest that violence is expressly forbidden in Islam, except in the case where the situation is morally elevated in the faiths estimation; expanding the Dar-al-Islam. In this case, scholars contended it was not only good to fight, but leaders should ensure that the community did so at least once a year.²³⁵ Al Shaybani built on this theme, suggesting in an initial articulation of international Islamic law that it is desirable, though not necessary, that disbelievers be offered a chance to convert prior to engaging in hostilities;²³⁶ this would, of course, relieve the need for conflict. The non-Muslim individual is induced to this condition in that should he surrender, he gets the protections to which Muslims are entitled; for instance, getting to keep his property.²³⁷ Non-Muslim subjugation is also an option, though on far less favourable terms.²³⁸ In addition to setting out terms for warfare against non-Muslims, al Shaybani offers some insight into the formation of a doctrine permitting the use of violence against other Muslims. A coherent legal basis for war between Muslims is difficult; unlike apostasy (if someone defects from the faith, it is permitted to kill them²³⁹), rebels accept the faith of Islam but are errant in their allegiance to the Islamic state in

²³⁰ Muhin Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy* (University of Chicago Press 2001) 139.

²³¹ Joshua Parens, *An Islamic Philosophy of Virtuous Religions: Introducing Alfarabi* (State University of New York Press 2006) 69.

²³² *Ibid* 71–72.

²³³ Daniel E. Burns, ‘Alfarabi and the Creation of an Islamic Political Science’ (2016) 78 *The Review of Politics* 365, 365–366.

²³⁴ Aboul-Enein and Zuhur (n 221) 8.

²³⁵ Peters, (n 222) 20.

²³⁶ Muhammad ibn al-Hasan al-Shaybani, *Kitab al-Siyar al-Saghir* (Mahmood Ahmad Ghazi tr, Islamic Research Group 1998) 48.

²³⁷ *Ibid* 55.

²³⁸ *Ibid* 58–59.

²³⁹ *Ibid* 67.

some way.²⁴⁰ Talking of the “people of rebellion”, al Shaybani sets out the situations in which it is permissible to kill them.²⁴¹ Rebels, whilst permissible to kill, get preferential treatment to that which must be expected by non-Muslims in relation to property rights. It is naturally necessary for rebels to be killed for their divisiveness; their status as errant Muslims is, however, superior to that of a non-Muslim or apostate. In the general discourse the meaning of rebel as well as the permissibility of fighting them is a matter of much greater complexity than the rather cut and dry approach of al Shaybani, however.²⁴² There is however no doubt that across various examples of Muslim imperial code recognition of the essential utility of collective violence to both expand the influence of Islam, and critically as a tool for maintaining order within the Islamic community. In almost every situation, a Muslim gains preferential treatment to that which a disbeliever might expect. In brief, it is possible to suggest that, as a rule, Muslims aren’t supposed to fight, unless it is in pursuit of Jihad. Coping with the need to fight within the Muslim community, therefore, became a central challenge for early Muslims. A solution was produced, though a normative boundary existed between those that expressed allegiance to Islam on the battlefield and those who didn’t. Having gained an understanding of the essential Islamic understanding of conflict, it is possible to set out how the application of conflict by the faith is limited. To briefly apply a frame of historical reference, the notion of a global Islamic leader in the Sunni tradition is relatively meaningful until the collapse of the Ottoman Empire; a last, largely ineffectual jihad was declared in the early twentieth century.²⁴³ Yet, the loss of a polar Islamic leader has far-reaching consequences in terms of invoking jihad in the meaning of holy war. There is a reasonable basis to assert, however, that the declaration of jihad is privileged in the same way as modern conventional war is, in that only the correct authority may declare it. Today the

²⁴⁰ Referring to Fitnah in the sense of a rebellion or revolution. See Abdelilah Belkeziz, *The State in Contemporary Islamic Thought* (I.B Tauris 2009).

²⁴¹ al-Shaybani (n 236) 67.

²⁴² It is of course in some situations permissible to rebel in the context of Islamic law, notably when governed by an unjust leader. Applying the principles of rebellion to the modern content is naturally challenging, however. See Mohamed Badar, Ahmed Al-Dawoody and Noelle Higgins, ‘The Origins and Evolution of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam* (Brill Nijhoff 2018) <<https://brill.com/view/book/edcoll/9789004388376/BP000021.xml>> accessed 09/09/19

²⁴³ Mustafa Aksakal, “‘Holy War Made in Germany’? Ottoman Origins of the 1914 Jihad’ (2011) 18 War in History 184.

consensus is that it is a state.²⁴⁴ Historically it would have been the Caliph.²⁴⁵ This serves as an eliminatory factor that would constrain the conduct of the holy war, given that the state system has proliferated globally. Second, the spiritual meaning of jihad has been emphasized in mainstream Islamic thought, over the more classical association with actual physical warfare, with an abject denial that it has ever carried violent connotations exhibited in a few fringe documents.²⁴⁶ Jihad, after all, has multiple meanings; increasingly, the more liberal notion of internal jihad has been highlighted in Islamic thought.²⁴⁷

More aggressive and permissive understandings of jihad are present throughout different periods of Islamic history, many of which have been replicated in the current era. Ibn Taymiyyah's *majmū' al-fatāwā* is frequently cited by ISIS,²⁴⁸ and the scholar has been held up as one of the most prominent influences on the philosophy of Salafi jihadism.²⁴⁹ Ibn Taymiyyah lived in a period where the Islamic world was faced with possible destruction at the hands of the Mongol empire; additionally, his lifetime was characterised by normalisation of relations between Muslim empires and Christians; Ibn Taymiyyah was extremely critical of those he saw as responsible for these trends.²⁵⁰ He sought a return of the Muslim world as a solution to the issues of his era, to its point of origin, and this provides a key touchstone for contemporary jihadi thought. The aforementioned fatwa he created was intended to make clear that despite professing to be Muslim, the Mongols (occasionally tartars) were not Muslim, and it was therefore imperative that they were killed.²⁵¹ Ibn Taymiyyah frequently experienced difficulties ranging from scholarly disagreements,

²⁴⁴ This is visibly contended by modern non-state violent groups emerging from the Islamic tradition. See Muhammad Munir, 'Who Can Declare Jihad?' (2012) 12 Research Papers, Human Rights Conflict Prevention Centre 1279, 1294.

²⁴⁵ Mohammad Abdus Salam Faraj, *The Absent Obligation* (Vision Printing 2000).

²⁴⁶ Mir Tamim Ansary, *Destiny Disrupted: A History of the World Through Islamic Eyes* (Perseus Running Distributor 2010) 47.

²⁴⁷ Michael David Bonner, *Jihad in Islamic History: Doctrines and Practice* (English edn, Princeton University Press 2006) 159–160.

²⁴⁸ Dabiq 6 (Al Hayat Media Center 2014) 40; Dabiq 7 (Al Hayat Media Center 2015) 21.

²⁴⁹ Shriaz Maher, *Salafi-Jihadism: The History of an Idea* (Hurst 2016) 84–85.

²⁵⁰ Niall Christie, *Muslims and Crusaders: Christianity's Wars in the Middle East, 1095–1382, from the Islamic Sources* (Taylor and Francis 2014) 108–109.

²⁵¹ Ibn Taymiyyah, *The Religious and Moral Doctrine of Jihad* (Maktabah Al Ansaar Publications 2001) 10.

through to censorship and imprisonment. Such events may be taken as indicative that his ideas did not meet with widespread support during his own lifetime.²⁵²

Ibn Taymiyyah set out a vision of what an Islamic polis should look like. He emphasises the importance of obedience to a strong central leadership as a key facet of any functioning society, Islamic or otherwise.²⁵³ Central to his thought was the revival of Islamic influence on government institutions; a phenomenon that had in his view diminished. He sought to reassert Islam as a source of legal and government functions. In his vision, the only proper government was one in which the Sharia reigned as the sole source of law. Failure to respect Sharia in this manner rendered an individual an infidel, and therefore removed the protections associated with the Ummah. Jihad, in Ibn Taymiyyah's thought, is said to advantage the individual in both life and death.²⁵⁴ As well as being unreservedly in favour of jihad, he sets out immensely permissive terms for when and how it may be used. For instance, he sets out that it is permissible to fight against a rebellious group, even if they are spiritually consistent with Islamic teachings.²⁵⁵ This, along with his aversion to non-Muslims, has been characterised as a key interpretation of Jihad of immense utility to modern terror groups.²⁵⁶

The emergence of more bellicose and permissive understandings of Jihad – of which Ibn Taymiyyah is by no means exceptional – may be partly understood in the flexibility of Islamic scripture; the Sunna is the subject of a number of distinct approaches, on the one hand, in the traditional Islamic “schools” progressively produced. A critical recognition is that Ibn Taymiyyah's line of thinking, whilst bearing many of the hallmarks of classical thinking, was considered to be heterodox even in his own time;²⁵⁷ he figured as an outsider to the traditional formal methods of analysis and interpretation employed by his contemporary theorists. The relevance of this detail is important to understanding how post-imperial Islamic thinking may echo his reasoning.

²⁵² Baber Johansen, ‘A Perfect Law in an Imperfect Society: Ibn Taymiyya's Concept of “Governance in the Name of the Sacred Law”’ in Peri Bearman, Bernard G. Weiss and Wolfhart Heinrichs (eds), *The Law Applied: Contextualizing the Islamic Shari'a* (I.B Tauris 2008) 261.

²⁵³ Ibn Taymiyyah, *The Political Shariyah on Reforming the Ruler and the Ruled (as-Siyasah ash-Shari'ah fi Islah ar-Ra'i war-Ra'iyah)* (Umar Farrukh tr, Dar ul Fiqh 2006) 7.

²⁵⁴ Taymiyyah, (n 251) 27.

²⁵⁵ Ibid 30–31.

²⁵⁶ Ekaterina Stepanova, *Terrorism in Asymmetrical Conflict: Ideological and Structural Aspects* (Oxford University Press 2008) 84–85.

²⁵⁷ Christie (250) 108–109.

It is worth mentioning, as with the Christian tradition, that many longstanding schisms have emerged through the religion's history. Shia tradition has to some extent diverged from the articulation of jihad by Sunni theorists. Shia Muslims have a similar though distinct understanding of religious violence. The most apparent is the relative absence of the term jihad from much of the discourse on warfare in the Shia tradition. Whilst the term itself is lesser-used in the Shia lexicon, some theorists would suggest that the understanding of religious violence found in Shia doctrines is extremely similar, particularly when used to refer to defensive jihad²⁵⁸ The evident meaning of jihad as a term as utilised in Shia discourse is linked with internal self-improvement, though in its practical, external meaning, Jihad, in the Shia understanding, is confined to the final war that will be carried out under the auspices of the Mahdi, who will re-emerge and wage a war to bring true justice to the world.²⁵⁹ This to some extent mimics the Jewish contemporary understanding of holy war, yet this claim of limiting jihad to a far-off messianic state is to some extent mitigated by the clear affinity for religious violence exhibited in the rhetoric of key Shia actors to this day.²⁶⁰ Accordingly, it is possible to conclude that whilst the linguistic use of the term jihad is absent from Shia language, the understanding of religious violence is extremely similar in the Shia tradition. Whilst this would logically suggest that "jihad" should be absent from modern Shia discussion, this is far from the case. The first indication of changing notions of Jihad was the Iran-Iraq war. Whilst, consistent with its defensive meaning permitted within Shia Islam, it was declared by the ayatollah to be a defensive jihad, as the tides of war shifted Iranian leadership quickly altered their understanding of jihad to cover aggressive action.²⁶¹ More recently the Iranian Shia authorities have demonstrated a propensity for invoking jihad on more apocalyptic grounds, invoking the return of the Mahdi and the coming end of the world.²⁶² as such, Jihad has been

²⁵⁸ Andrew Bostom, *The Legacy of Jihad: Islamic Holy War and the Fate of Non-Muslims* (Prometheus Books 2005) 28.

²⁵⁹ Assaf Moghadam, 'Mayhem, Myths, and Martyrdom: The Shi'a Conception of Jihad' (2007) 19 *Terrorism and Political Violence* 125, 131.

²⁶⁰ *Ibid.*

²⁶¹ Saskia Gieling, *Religion and War in Revolutionary Iran* (I.B. Tauris 1990), 41.

²⁶² Consistent with this prediction, Iranian religious scholars and leaders have drastically revised their understanding of Jihad. See generally Mehdi Khalaji, *Apocalyptic Politics: On the Rationality of Iranian Policy* (2008); this messianic perspective deemed "Mahdiism, is friendly used as a legitimacy tool by the Iranian regime. See Afshin Shahi, 'Paradoxes of Iranian messianic politics.' (2012) 21 *Digest of Middle East Studies* 108.

invoked by Iranian religious authorities on several occasions, demonstrating that an understanding of jihad in the Shia tradition is still relevant today.

The Muslim approach to organised violence is somewhat different from those found in Christianity and Judaism. Moreover, it has proved possible to survey only a narrow range of perspectives upon the term jihad, which itself is difficult to define in an ecumenical sense. The analysis conducted is sufficient to suggest that there are many different perspectives upon the use of force within the faith. A key perspective to introduce is the often radical difference between formal, scholarly approaches to the subject of warfare in the Islamic tradition and those arrived at by more radical thinkers, who often disregard the existence of context with regard to the prophetic example and the scripture of the faith. Authority has additionally played an important role in restricting the recourse to violence in Islamic history, with the monopoly of interpretation residing with a narrow literate class. These factors are worthy of consideration in relation to more contemporary iterations of religious warfare.

3.7 Holy war contrasted with “armed conflict”

To return to the initial assertion of this chapter, it was postulated that there are at least two separate institutions of war. Secular war, or the type that international lawyers have grown accustomed to regulating, and religious, or holy war. This study is therefore in a better position to diagnose why religious war may be challenging to regulate, in contrast to the state-orientated variety. First, religious war is not conventionally rational. In all of the traditions surveyed, human agency is disregarded in favor of divine imperatives. IHL, it has been speculated, is partly reliant upon the rationality of belligerents.²⁶³ Moreover, rational actor theory has proved an important approach in relation to adapting international law.²⁶⁴ Accordingly, this represents a foundational challenge to the common sense application of IHL. An additional difference worthy of noting is that in the traditions of Christianity and Judaism, wars

²⁶³ The ICRC recognises this in relation to the fundamental definition of IHL, which presupposes that the parties to an armed conflict have rational aims and that those aims as such do not contradict IHL. See ICRC, ‘Fundamentals of IHL: A Concept and Purpose of International Humanitarian Law’ (2019) <<https://casebook.icrc.org/law/fundamentals-ihl>> accessed 15 May 2019.

²⁶⁴ Some have speculated that the function of international law itself requires rational actors; Petersen surveys a number of these perspectives. See generally Niels Petersen, ‘How Rational is International Law?’ (2009) 20 *European Journal of International Law* 1247.

with a religious aim are less restrictive than those fought with non-religious aims in mind. Additionally, religious conflicts must be fought, even if fighting harms the direct interests of the religious community. In Islam, it is possible to suggest that the waging of jihad has additionally not always served the interests of the faithful. Another difference is that religious wars are not generally waged by states. The Jewish system is best described as a tribe in the most atavistic sense, in which people and religion are synonymous. In the Christian tradition, holy war has been presided over by supranational faith groupings, who had the authority to direct the various provinces, or later, feudal lords and kings of Christendom. The notion of a domain of Islam, or caliphate presiding over all Muslims is additionally a challenge to the modern state system.

Ultimately, warfare the service of religious ideology is more difficult to understand without constructing a cosmology of violence concerning the faith in question. Whilst this chapter hasn't gone into sufficient depth to accomplish such a feat, it is possible to discern some general trends that serve to question some of the "common sense" assumptions made by IHL.²⁶⁵ This makes the construction of rules and laws a far more difficult process. Naturally, all religions generally conform to a few similar features, in that they are disposed to survival and desire the maximization of their influence, though this concession to rationality is mitigated by the supernatural assumptions inherent in its theology.

It is appropriate to assert the relevance of the institution of these historical approaches to holy war onto modern-day conflict. It would appear that in all three traditions, steps were taken by scholars of each faith to restrain notions of religious violence. In the Jewish tradition, holy war was relegated to the messianic condition sometime in the future. Christians effectively outlawed it, placing the state above the church in matters of violence. In Islam, the loss of the caliphate means that there should be no authority capable of declaring a religious war; moreover, the reconstitution of jihad as a term contributes to the declining applicability of violent struggle in the maintenance of the faith. A close examination of history would no doubt suggest that religious war in each religion's classical conception of holy war is a relic

²⁶⁵ David Éric, *Principes de Droit des Conflits Armés* (3rd edn, Bruylant 2002) 921–922.

of the past. One feature that must be emphasized, however, is the threat of the re-emergence of religious conflict based upon revivalist or non-formal approaches.

As Reuven Firestone, a rabbi whose work has proved pivotal in this chapter states, in his own tradition such a re-emergence is not beyond possibility. As this chapter has shown, the prevailing rabbinic consensus is that the classical Jewish laws of war are confined to a far-off messianic future, and in real terms, modern-day Jews fight as a state (Israel), the cleverly preserved loophole created by Nachmanides ensuring that the possibility of a contemporary *milhemet mitzvah* exists.²⁶⁶ Contemporary western adventures in the Middle East are often framed as latter-day crusades by occidentalists such as Qutb, who would frame the entire experience of western imperialism as one long crusade.²⁶⁷ Yet, observers may note that if this is so, it is certainly an unenthusiastic one when the rhetoric of scholars like St. Bernard is considered. There is then the resurgence occurring within the Islamic tradition; it is possible to suggest that there are numerous voices calling for a confrontation between Islam and “the west”. There is a serious basis to assert that religious warfare is far from extinct, and there is therefore a basis to consider how to go about regulating conflicts with a religious character.

3.8 Conclusion

A brief examination into the distinct histories of the religious and secular conflict suggests that when war is fought on the basis of religion, it establishes a range of distinctive features that may serve to differentiate it from secular warfare. Religious warfare is divinely ordained, making it difficult to regulate. It is not a purely military contest but may target a group’s general presence in the area or even contest a group’s very existence, seeking the eradication of the targeted population. The participants in religious warfare are often affiliated in a manner that is difficult to equate with the states and non-state groups of today. This suggests that religious conflict – if a resurgence of such an approach today could be asserted clearly – might represent a multidirectional and complex challenge to international law in general and specifically IHL in application.

²⁶⁶ Firestone (n 123).

²⁶⁷ Sayed Qutb, *Milestones* (Islamic Book Service 2006) 303.

A key takeaway from this chapter is that whilst, in one sense *les extrêmes se touchent*, in that all religions have a history of “holy warfare” that can be resurrected by extremists today, the religions covered in this chapter have radically different histories and approaches to the use of force. This means that there is a possibility that organizations mobilized by extreme interpretations of Christianity or Judaism may be radically different from those mobilized by Islamic extremism, though it is probably the case that any of the three would pose a challenge to international law and the regulations comprising IHL. Indeed, it is possible to suggest that unconventional armed groups or for that matter states inculcated with religious ideology of any kind could be challenging from a legal perspective. Naturally, the challenge facing IHL is not however to regulate the many religious wars of the past. The utility in establishing characteristics typical of the holy wars of the past is the manner in which the characteristics correlate with many of the problems encountered in more contemporary situations. Accordingly, it is possible to ask: what aspects of religious conflict is the law capable of considering today? What aspects of historic religious wars may contemporary armed groups seek to emulate, if aiming to enhance their effectiveness and durability? How might these adaptations challenge IHL, given the assumptions inherent in its understanding of armed conflict?

An examination of religious conflict serves to frame the nature of the problem at hand; how the law understands armed conflict. IHL reflects a viable approach to regulating armed conflict, so long as a range of narrowly defined values are present. In order to address any resurgence of past religious approaches to warfare, IHL needs to account for the multiple variables that differentiate religious wars from the state archetype of warfare it has conventionally confronted. In this regard, it can be suggested that rapid and decisive revisions are called for; as direct state on state confrontations have declined, other forms of conflict have begun to make up the difference. Conflicts with an overt religious component are undoubtedly playing a prominent role in this change. Based upon prevalence alone, only the Islamic tradition would really merit examination in detail as a contemporary phenomenon. To confine the institution of a modern holy war solely to the Islamic tradition would, however, be an injustice. Not so long ago, the use of Islam as a doctrine of violence would have been considered unlikely in what appeared to be the rapidly secularizing region of the Middle East. Classical imaginings of jihad, by all rights, should be inaccessible to modern-day Islamist terrorists; only the legitimate head of the Islamic community

should have such power,²⁶⁸ and the prevailing consensus suggests religious war under the code of jihad should not be functionally possible. Yet, the Islamic view of warfare mutated under the colonial experience, evolving from the battle code of the caliphates to produce prescriptions that today serve modern terrorists.²⁶⁹ Contemporary actors have shown an extraordinary ability to modify and assemble a code of religious warfare that shows sufficient obedience to classical codes to gain appeal and is significantly pragmatic to be wielded by non-state terrorists and extremist groups.

The focus of this study is in accordance with the thesis title, is on modern permutations jihadism, particularly in reference to the Islamic derived approaches mobilizing unconventional armed groups in the context of the war on terror. Therefore, moving forward, the correct approach is therefore to focus on Jihad, understanding what exactly the term means when used by groups like al Qaeda and ISIS. This first requires an understanding of what the use of force in the Islamic content may have meant initially in more detail.

²⁶⁸ Niaz A. Shah, 'The Use of Force under Islamic Law' (2013) 24 *European Journal of International Law* 343, 343.

²⁶⁹ See Faraj (n 245).

4 Features of Islamic Authority

4.1 Introduction

In the previous chapter, three major world religions have been analysed to determine their respective dispositions to a peculiar form of violence: holy, or religious war. Historically, each of these major world religions had access to a doctrine of armed conflict that was independent of secular authorities and operated outside of conventional limitations or restrictions. In this chapter, the circumstances that make an understanding of religious conflict relevant to the application of International humanitarian law (IHL) today will be demonstrated. A range of factors have, however, arranged matters in such a way as to ensure, in the mainstream at least, that the type of “holy war” discussed in the last chapter is today largely theoretical, its decline coinciding with the emergence of the contemporary state system. Due to this absence, it is difficult to specify a distinctive approach to war with a religious content within IHL,¹ or international law more broadly. The United Nations (UN), for instance, has issued statements suggesting that religious conflicts are produced by other issues such as economic or geopolitical reasons, therefore not being a direct result of religion itself.² In this regard, religion can be seen as serving the same essential purpose today as in the past, namely justifying conflict.³ The current estimation of religious conflict in this regard does not concede that wars fought by religious interest groups, or based upon religious objectives, require different regulation. This is at odds with the manner in which religious interest groups have historically understood their wars to be governed; by different, distinctive sets of rules. This thesis, however, suggests that based upon the capacity for religion to modify the behaviour of armed groups, in particular, a more nuanced approach is merited.

¹ Naturally, IHL is disinterested in the reasons behind conflict, asserting that the same rules apply irrespective of cause. See ICRC, ‘War and International Humanitarian Law’ (ICRC, 29 October 2010) <www.icrc.org/eng/war-and-law/overview-war-and-law.htm> accessed 21 March 2019.

² In the UN’s estimation, a conflict may appear to be religious, though it is probably the case that religion is merely serving as a pretext for other sources of grievance. See UNSC, ‘Religious Conflicts Normally Product of Political or Geostategic Manipulation, Proxies for Other Antagonisms’ (25 June 2018) SG/SM/19104-SC/13393.

³ Robert Jackson, ‘Doctrinal War: Religion and Ideology in International Conflict’ (2006) 89 *The Monist* 274, 274.

Despite the practical limitations that serve to prevent faiths from going to war in the manner so prevalent in the past, there is a basis to suggest that today, a number of armed groups are mobilised by religion, with faith serving as part of the motive behind violent insurrection, revolution, and terrorism.⁴ Therefore, understanding the doctrines of religiously-justified war in relation to modern conflicts is critical.⁵ This assessment is compounded by the visibly Islamic characteristics displayed by groups such as Al Qaeda, ISIS and Boko Haram.⁶ Each group clearly takes on the identifiers of a traditionalist Islamic movement to the fullest extent pragmatic in the modern era.⁷ Whilst this does not suggest that religion is by necessity the underlying source of these groups and their violence, it is reasonable to assert that in assuming the Islamic identity, such groups will defer to established Islamic norms concerning warfare and organisation, or at the very least, seek to appear to do so. Accordingly, it makes sense to consider how recourse to violence upon religious grounds is understood today, with a particular need to emphasise the Islamic tradition.

This thesis has so far asserted that religious wars have some fundamental differences when compared to wars fought for secular purposes. This does not, however, mean that religious wars are the same today as they were previously. As this chapter will explore, the capacity to instigate and wage a religious war or jihad is not, as in the past, curated by definable Islamic leaders and religious authorities. It can be asserted

⁴ It must be stressed that the links between religion and violence are far from clear. See Mark Juergensmeyer, 'Does Religion Cause Terrorism?' in James R. Lewis (ed), *The Cambridge Companion to Religion and Terrorism* (Cambridge University Press 2017) <<https://cambridge.org/core/books/cambridge-companion-to-religion-and-terrorism/does-religion-cause-terrorism/66647499C9CEDCE3044230DDB89702E4>> accessed 3 April 2019; it is additionally possible to specify a range of other causes in relation to historical conflicts that are overtly religious. See generally, Kalevi J. Holsti, *Peace and War: Armed Conflicts and International Order 1648–1989* (Cambridge University Press 1991); it is also possible to suggest that religion can be a driver of violence under the correct circumstances. See Paul K. Davis and others, *Social Science for Counterterrorism: Putting the Pieces Together* (Rand Corp 2009).

⁵ Identifying the manner in which religion is influencing or driving conflict, for instance, opens up avenues for prevention. See Tom Mills and David Miller, 'Religion, Radicalization and the Causes of Terrorism' in James R. Lewis (ed), *The Cambridge Companion to Religion and Terrorism* (Cambridge University Press 2017) <<https://cambridge.org/core/books/cambridge-companion-to-religion-and-terrorism/religion-radicalization-and-the-causes-of-terrorism/672F630409C1268D6CF830087C579582>> accessed 4 April 2019.

⁶ These movements have all professed an Islamic motive as the driving force behind their violent activity. See 'Why We Hate You and Why We Fight You', Dabiq issue 15 (Al Hayat Media 2016) 30–33; Mallam Sanni Umaru [interim Boko Haram comd], 'Boko Haram Ressurects, Declares Total Jihad' *Vanguard* (August 2009) <<https://vanguardngr.com/2009/08/boko-haram-ressurects-declares-total-jihad/>> accessed 6 August 2018.

⁷ Contemporary jihadists' proto-states and terrorist groups have naturally adopted modern weapons. Whilst such a decision may seem natural, previous historical movements have derived authenticity from reliance upon the weapons and tactics used by the prophet of the faith. See Kim Searcy, *The Formation of the Sudanese Mahdist State: Ceremony and Symbols of Authority: 1882–1898* (Brill 2010) 57–58.

that traditional positions of Islamic leaders, jurists, and laity have lost much of the power they wielded in the past, or at least that their role has changed. Instead, the capacity to declare and wage a religious war on behalf of an imagined Islamic global community is often assumed by groups and individuals who, in formal terms, lack many of the credentials that have been previously required to do so, depending upon how the relevant scripture and jurisprudence is interpreted.⁸

This chapter moves forward to explore the historical importance of a range of generalised Islamic institutions and concepts. Much focus is to be placed upon Islamic leadership, the formal body of Islamic scholars, and the notion of the universal Islamic community. This is based upon a recognition that these organs were critical in sustaining the requisite formalism of Islamic law, as well as balancing and restraining the mechanisms created to dispense violence, internally and externally. Additionally, these institutions have been present in the majority of Islamic systems of governance to varying extents, in some cases maintaining relevance into the present.⁹ The decline of these institutions is, therefore, a key factor to be analysed in order to better situate the emergence of Islamic thought that now underpins modern-day neo-jihadist actors.

4.2 Classical Islamic authority and its relevance to contemporary unconventional armed groups

In relation to many contemporary unconventional armed groups, it is possible to observe an aspiration to assume the legitimacy gained by showing a commitment to classical Islamic institutions and principles.¹⁰ Indeed, adherence to the extremist interpretation of Islamic law and jurisprudence is an important aspect of competition between many of these groups, with the more successful groups generally demonstrating greater deference to these concepts.¹¹ In regard to organisations like

⁸ It naturally must be stressed that a range of scholars have set out to question the capacity for groups like ISIS to declare jihad. Many would see this ability confined to “legitimate” Islamic jurists, or even rulers of Islamic nation states. See Muhammad Munir, ‘Who Can Declare Jihad?’ (2012) Vol. XII. Research Papers, Human Rights Conflict Prevention Centre (HRCPC) 1279.

⁹ Referring to the Ulema or learned scholars, Umma the universal Islamic community, and the presence of a hierarchical leadership structure.

¹⁰ Marco Longobardo, ‘The Self-Proclaimed Statehood of the Islamic State between 2014 and 2017 and International Law’ (2017) 33 *Anuario Español de Derecho Internacional* 205, 212.

¹¹ Several scholars have suggested that groups demonstrating a more extreme commitment to the creation of an Islamic governance structure and the waging of global jihad often out-compete groups that entertain different ideologies, or do not demonstrate the same commitment. See Richard Sosis and Candace S. Alcorta, ‘Militants and Martyrs; Evolutionary Perspectives on Religion and Terrorism’ in Raphael Sagarin and Terrence Taylor (eds), *Natural Security: A Darwinian Approach to a Dangerous*

ISIS assuming the authority to instruct and command Muslims, they have explicitly specified the inability or unwillingness of contemporary permutations of Islamic institutions, as well as Islamic national leaders, to fulfil what they present as their essential functions.¹² This serves as a basis to advance arguments for assuming the authority ostensibly abandoned by more traditional institutions.

The appeal of unconventional armed groups utilising an Islamic identity is to an extent a product of the degeneration of traditional Islamic institutions, and their capacity to fulfil certain functions specified in classical Islamic law. These institutions historically served to maintain monopolies over the production and implementation of Islamic law, and just as importantly, adopted a formal methodological approach to Islamic sources and traditions when addressing new problems.¹³ This division of responsibility served to limit and constrain the instigation of jihad throughout the Islamic imperial age. Today, however, the diminishing influence of these establishments has allowed new thinkers to assume the authority of these foundations and imbue the shared language of Islamic law with new meanings. These new meanings profoundly alter how recourse to violence is understood in the contemporary context, which itself is predicated upon ahistorical articulations of how Islam as a total system should function.¹⁴

Ultimately, the understanding of Islamic law and governance in neo-jihadist thought can be asserted as a departure from classical Islamic reasoning, and situated within the existing framework of twentieth-century ideologies. This may be asserted upon the basis of history, the presence of similar ideas and maxims within the works of key theorists, and most particularly, the structural conformity of neo-jihadist thought with Marxism and fascism, most notably in its adoption of a dialectical

World (London University of California Press 2008) 105–108; see additionally Victor Asal and R. Karl Rethemeyer, ‘The Nature of the Beast: Organizational Structures and the Lethality of Terrorist Attacks’ (2008) 70 *The Journal of Politics* 437.

¹² ISIS is critical of Islamic governments and scholarly institutions, seeing them as “traitors”. See Rumiya, issue 3 (Al Hayat Media Centre 2017).

¹³ Muhammad Qasim Zaman, *The Ulama in Contemporary Islam – Custodians of Change* (Princeton University Press 2010) 19.

¹⁴ As Robert notes, much of what is termed in this study as “neo-jihadist” thinking is dependent upon the invention of new traditions by a range of thinkers. No Islamic state as such has ever existed, and the link between state and region has been contested many times. Accordingly, it has been necessary for modern thinkers to “invent” a religious state that serves their purposes rather than restore any historical examples of Islamic governance – a process undertaken readily by both states and terrorist groups. See Nicholas P. Roberts, *Political Islam and the Invention of Tradition* (New Academia Publishing LLC 2015) 166–167.

model.¹⁵ A secondary critical acknowledgement will be the maintenance of many of the symbols and terminology of both the Qur'anic period and the imperial law of Islam, invoked to add credence to this hybridised system. This chapter will consequently serve as a basis to later assert that the concept of jihad has been reinterpreted outside of the classical framework of Islamic jurisprudence, leading to a doctrine of contemporary religious conflict.

In the overall course of this thesis, it will be suggested that international law, and in particular IHL, needs to be mindful of the capacity for religious interest groups to not only engage in armed conflict, but to do so in a manner that challenges many assumptions concerning the nature of armed conflict as it is currently understood. There is therefore a need to understand the nature of these groups. This chapter seeks to contribute by generating a more comprehensive understanding of the need to adapt the law, specifically examining changes to how unconventional armed groups congregate, based upon an assumed religious authority. It is first important to understand the responsibilities vested in conventional Islamic institutions. This is important, as the perception that these institutions are no longer present, or competent in pursuing their essential mission, permits other less established actors to present themselves as alternatives.

4.2.1 Islamic international law; the divisions of the world

The first matter of importance is the alternative vision of the world that is often extracted from the Islamic faith and forms the assumption underpinning the practice of Islamic international law (Siyar), namely the division of the world into two parts, or abodes.¹⁶ The different abodes reflect the territory in which the Sharia as the sole source of law prevails, and that in which it does not; Dar al-Islam and Dar al-Harb.¹⁷ It may be understood to represent fundamentally a distinction between Muslim and non-Muslim peoples, and was rooted in the assumption that one day everyone would

¹⁵ The term "Islamofascism" has been coined to refer to this phenomenon. See generally Tamir Bar-On, 'Islamofascism': Four Competing Discourses on the Islamism-Fascism Comparison' (2018) 7 *Fascism* 241.

¹⁶ Mousa Abou Ramadan, 'Muslim Jurist's Criteria for the Division of the World into Dar al Harb and Dar al Islam' in Martti Koskeniemi, Paolo Amorosa and Mónica García-Salmones Rovira (eds), *International Law and Religion: Historical and Contemporary Perspectives* (Oxford University Press 2017) 220.

¹⁷ Shiraz Maher, *Salafi-Jihadism: The History of an Idea* (Oxford University Press 2016) 85.

be Muslim, and is, therefore, defined as a Muslim form of imperialism.¹⁸ In some articulations of Islamic law, the Muslim world, or Dar al-Islam, is permitted, and indeed required, to expand into the non-Muslim world.¹⁹ Naturally, this depiction of classic Islamic international law is contested today.²⁰

In contrast to many contemporary perspectives, in early Islam, it was believed that the territory of Islam would spread inexorably to consume the known world.²¹ As history progressed, however, Islamic scholars had to revise their disposition towards non-Muslim groups, and Muslim leaders came to recognise the difficulty involved in perpetually expanding their demesnes.²² It was therefore expedient to draw upon scriptural examples to mitigate the injunctions requiring consistent expansion. As Karsh notes with regard to early Islamic history, both Muhammad and his successors maintained an essential dichotomist world view of Muslims and disbelievers, which had not yet been subordinated to Islamic control, yet the prophet was capable of employing tactical pragmatism, occasionally aligning with non-Muslims when this would further his aims.²³ This same pragmatism towards non-Muslim peoples was subsequently adopted by the various Islamic empires and kingdoms of history,²⁴ who likewise recognised a need to compromise with a complex reality. As Badr puts it, the Islamic imperial age, or expansionist age, was characterised by the belief that Islam would eventually consume the entire world. The disposition of the Muslim world

¹⁸ Ramadan (n 16) 220.

¹⁹ Manoucher Parvin and Maurie Sommer, 'Dar al-Islam: The Evolution of Muslim Territoriality and its Implications for Conflict Resolution in the Middle East' (1980) 11 *International Journal of Middle East Studies* 1, 3–7.

²⁰ For instance, it has been asserted by Ahmad that the divisions of the world are represented as a statement of territoriality and an assertion of borders. Ahmad does however recognise that many temporal and special imperatives that should have applied strictly to the initial Muslim expansion across the Arabian Peninsula continued to feature in Islamic thought, lending the divisions of the world an expansionist character not intended to be present. See Muhammad Mushtaq Ahmad, 'The Notions of Dār al-Ḥarb and Dār al-Islām in Islamic Jurisprudence with Special Reference to the Ḥanafī School' (2008) 47 *Islamic Studies* 5.

²¹ This is ostensibly rooted in Islamic scripture. See Sahih Bukhari, Volume 1 Book 8 Hadith No. 387 <<https://muflihun.com/bukhari/8/387>> accessed 4 August 2018.

²² Ovamir Anjum, 'Governance in Classical Islamic Thought' *Oxford Research Encyclopaedia of Religion* (2017) <<https://oxfordre.com/religion/view/10.1093/acrefore/9780199340378.001.0001/acrefore-9780199340378-e-513>> accessed 20 May 2019.

²³ Ephraim Karsh, *Islamic Imperialism: A History* (2nd edn, Yale University Press 2013) 66.

²⁴ This is discussed in detail by Halperin, who notes historical examples in which professed exclusivist religions have been forced to coexist by circumstances. See Charles J. Halperin, 'The Ideology of Silence: Prejudice and Pragmatism on the Medieval Religious Frontier' (1984) 26 *Comparative Studies in Society and History* 442.

toward non-Muslims was, therefore, to make war until this goal had been realised.²⁵ Peace was to become an exceptional condition and could not, for instance, exceed ten years, in line with the prophetic example.²⁶ As subsequent Islamic scholarship came to recognise, the need for constant war against non-Muslim peoples could be mitigated by other passages and sayings that suggest nonviolent contact with the non-believer is to be a continuous reality. In pursuit of this conclusion, scripture emphasising peace²⁷ and trade²⁸ were emphasised in Islamic legal discourse. This, along with the worldly pragmatism of Islamic leaders, made the proposed constant conflict unviable.

Whilst it can be contested that scripture can serve to mollify any aggressive interpretation of Islamic duties, it is possible to specify periods and instances in which the injunction to expand was not constrained. Early articulations of Islamic imperial law draw a clear distinction between the Islamic world and the world beyond the reach of Islam, with this distinction based upon the territory in which the Sharia is maintained as the sole source of law.²⁹ Practically, however, over time this divide proved to be permeable, with the various non-Muslim enclaves present in the Islamic world³⁰ indicative of early pragmatism in approaching this division. It has since remained customary to understand the world as divided into these categories within the study of Islamic law, though the precise understanding of the nature of this division has changed. More practically, examples include where those from within the house of Islam collaborated with disbelievers against other Muslims, as well as periods in history where intra-Muslim animosity was sufficient to overwhelm unity, even in the face of Christian reconquests.³¹ The distinction of the house of war and house of Islam are critiqued by Faroqhi, who goes as far as to suggest that such a strict dichotomy is not useful in understanding historical Islamic conduct with non-Muslim states, with relationships being far more complex.³² Given the variation in how these terms have

²⁵ Gamal M. Badr, 'A Survey of Islamic International Law' (1982) 76 Proceedings of the Annual Meeting (American Society of International Law) 56, 56.

²⁶ Ibid 56–57.

²⁷ Timur Kuran, *The Long Divergence* (Princeton University Press 2012) 45.

²⁸ Daniel C. Dennett, 'Pirenne and Muhammad' (1948) 23 *Speculum* 165, 168.

²⁹ Muhammad ibn al-Hasan al-Shaybani, *Kitab al-Siyar al-Saghir* (Mahmood Ahmad Ghazi tr, Islamic Research Group 1998) 130.

³⁰ Referring to the Hanafi construction of these divisions, which permitted the use of Christian and druse governors within the "domain of Islam". See Ramadan (n 16) 225.

³¹ Carole Hillenbrand, *The Crusades: Islamic Perspectives* (Routledge 2000) 82.

³² Suraiya Faroqhi, *The Ottoman Empire and the World Around It* (I.B Tauris 2005) 3.

been understood in Islamic history, such a nuanced view is more appropriate than the strict definitions that each term might suggest.

As is often the case, and by no means exclusive to the Islamic world, any pragmatic moderation undertaken by authoritative scholars and leaders may be interpreted differently by extreme, or orthodox actors. For instance, any pragmatic arrangements may be derided as decadent, cowardly, or degenerate by more extreme voices.³³ As the rather bellicose understanding of the division of the world has fallen out of favour with Islamic leaders and scholars, some more heterodox and fringe groups have sought to attain legitimacy by undoing the fragmentation of the Dar al-Islam, and attacking the Dar al-Harb,³⁴ responsibilities that once aligned with Islamic leaders. Examining the contemporary use of this doctrine by modern jihadist extremists emphasises the reversion to the division of the world, with some variations upon the theme; it is possible to present the modern revival of the divisions of the world as a justification for violence, as well as to lend credence when addressing Islamic populations.³⁵ Whilst the understanding of the way these distinctions function has modified over time, groups like ISIS have developed a prohibitively high threshold for inclusion in the domain of Islam, which serves to exclude and permit violence against much of the global Muslim population in addition to non-Muslims. This depiction stands in contrast to the “mainstream” of contemporary Islamic thought³⁶ and is at odds with its articulation as presented for much of Muslim history.³⁷

It is important to remember that the divisions of the world still expressed today are fundamentally packaged with the understanding of Islamic law generated in the Islamic imperial age, and therefore represent a classical interpretation of the in-group preference that is clearly apparent in the Quran. Practically, the divisions of the world found in imperial Islamic law (siyar) may have been developed by lawmakers with reference to the basic tenets of Islam; it is significantly subject to both “historical circumstances” and “judicial speculation” in order to consider it flexible as a legal product,³⁸ unlike more intransigent areas of Islamic law that have been better insulated

³³ Maher, for instance notes the persistence of such arguments in relation to today’s Islamic nations. See Maher (n 17) 84–85.

³⁴ Ibid 85.

³⁵ Mohamed Badar and Masaki Nagata, ‘Modern Extremist Groups and the Division of the World: A Critique from Islamic Perspective’ (2017) 31 Arab Law Quarterly 305.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 118–119.

from the vagaries of history. In discussing contemporary attitudes towards the divisions of the world – a position which al-Dawoody laments that western commentary often does not account for³⁹ – it is possible to observe that a number of scholars have sought to realign the divisions of the world to an identity more in keeping with the prevailing system of international law. Munir goes as far as to suggest that international law is rooted to some extent in the imperial law of which the division of the world is central.⁴⁰ It is undoubtedly the case, however, that contemporary Islamists have sought to demonstrate a commitment to the most extreme interpretations of classical Islamic law possible. Whilst this commitment might be thought of as complex and multidimensional, it may be simplified by thinking of it as a wish to demonstrate adherence to Islamic international law, and to Islamic governance.

4.2.2 Islamic governance; rule by God

Contemporary Islamists are dismissive of modern national governments who “usurp God’s authority”,⁴¹ with this serving as the basis for offering up alternative political arrangements.⁴² Whilst ruling in accordance with religious proscriptions has long been a preoccupation of Islamic societies, the notion of divine sovereignty has additionally served as the basis for establishing a utopian construction of what an Islamic society should look like.⁴³ Such utopias are naturally unachievable, and the failure of modern states to achieve such conditions are specified by groups like ISIS as a basis for action.⁴⁴ In this regard, contemporary terrorist and armed groups present themselves as striving for tawhid, or rule by God.

Whilst the caliph, emirs, sultans, and kings of the classical era had an immensely important role, they did not, by virtue of their control of the population,

³⁹ Ahmed Al-Dawoody, *Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 98.

⁴⁰ Muhammad Munir, ‘Who Can Declare Jihad?’ (2012) 12 Research Papers, Human Rights Conflict Prevention Centre 1279, 1292–1293.

⁴¹ Syed Qutb, *Milestones* (Islamic Book Service 2006) 8.

⁴² Maher, for instance notes the importance of *Tawhid* in Salafi thought, in which doctrinal purity and the realisation of a reductive notion of “rule by god” are emphasised. See Maher (n 17) 145.

⁴³ Andrew F. March, ‘Genealogies of Sovereignty in Islamic Political Theology’ (2013) 80 Social Research 293, 235.

⁴⁴ See Samantha Mahood and Halim Rane, ‘Islamist Narratives in ISIS Recruitment Propaganda’ (2017) 23 The Journal of International Communication 15.

generate authority or have any inherent authority. God was to maintain his ultimate sovereignty over the Islamic community, or, as Hallaq puts it, “literally everything”.⁴⁵ An important distinction in classic divisions of Islamic government, the physical leader was the proxy of divine rule.⁴⁶ This distinction was not extraordinary, echoing the vicarious understanding leadership of many earlier cultures.⁴⁷ Through the enforcement of the Sharia, the leader was responsible for ensuring God’s rule was realised; making sure that all law-making passed through the revelation of the Quran and the example of the Sunna, to ensure that the Ummah was living according to God’s will.

*“At the head of Islamic community is God Himself, and His rule over His people is immediate and direct, without any intermediary. Even Muhammad is not the head of this community of equals. Islam is the direct government of Allah...”*⁴⁸

Put simply, it was, therefore, the responsibility of leaders at every level in the imperial system or state hierarchy to ensure that the Sharia was sufficiently incarnate to overwhelm any personal or manufactured considerations of law and justice. The notion of man’s rule over man has long troubled Islamic leadership. An alternative system of law that has been manufactured may be capable of producing a more prosperous, more comfortable, or more stable social reality. It would not, however, be the rule of God; this being grounds for the ends of such a state project. Should the caliph or another leader fail to ensure that law-making and legal decisions passed through the Sharia, this would be grounds for his supersession,⁴⁹ on the grounds he was permitting man to legislate above God’s revealed law.

Achieving Tawhid, or rule by God, is by no means a simple exercise. In the classical era, ensuring rule by God was heavily dependent upon the division of power, in that such a division made it difficult for individual leaders to enact their own will

⁴⁵ Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia University Press 2013) 50.

⁴⁶ Patricia Crone and Martin Hinds, *God’s Caliph: Religious Authority in the First Centuries of Islam* (Cambridge University Press 1986) 40–42.

⁴⁷ T. Fish, ‘War and Religion in Ancient Mesopotamia’ (1939) 23 *Bulletin of the John Rylands Library* 387, 391–292.

⁴⁸ A. Ezzati, *The Spread of Islam: The Contributing Factors* (4th edn, Islamic College for Advanced Studies Press 2002) 134.

⁴⁹ Vernie Liebl, ‘The Caliphate’ (2009) 45 *Middle Eastern Studies* 373, 374–378.

without deference to Islamic principles. It is therefore incumbent on such a leader to satisfy a critical majority of the Ummah and ulema that he is sufficiently capable of ensuring that God rules over man. When a leader falls short, the preferred mechanisms, historically speaking, have been an assassination, violent uprisings, schisms, and revolts.⁵⁰ Scholars considering what Islamic law prescribes in such situations are usually more circumspect, however, with discussion as to whether it is incumbent upon Muslims to rebel against an inadequate leader, considering amongst other dynamics, the chance of success.⁵¹ Rebellion and disobedience can prove costly and are not solutions to be taken lightly, with some scholars stressing that to live under the rule of a tyrant, rather than risk the chaos that may follow such acts, is preferable.⁵²

Being insufficiently Islamic has additionally acted as a cause in cases where Muslims have gone to war. One such example is Ibn Taymiyyah (1263–1328), famously using the failure of Mongol rulers to implement Sharia to galvanise Mamluk opinion against the Muslim-headed Golden Horde.⁵³ This indicates that being insufficiently Islamic may also serve as a pretext for inter-Muslim violence. Unsurprisingly, this line of reasoning is favoured by modern neo-jihadist thinkers.⁵⁴ The central nature of Sharia to achieving tawhid has given rise to some interesting examples of cultural dissonance; a key example would be the late Ottoman Tanzimat reforms that borrowed heavily from, amongst other sources, the French constitution. This inclusion of western ideas of democracy and constitutionalism in late Ottoman reforms was carefully packaged as the re-acquisition of Muslim knowledge that had been stolen from the Islamic world.⁵⁵ This serves to illustrate a need, as Lewis puts it, to ensure that any progress is veiled in the “sanctified past”.⁵⁶ It additionally illustrates

⁵⁰ A chronology of these events is included as an appendix in Karen Armstrong’s short history. See Karen Armstrong, *Islam: A Short History* (The Modern Library 2002).

⁵¹ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 317.

⁵² John L. Esposito and John Obert Voll, *Islam and Democracy* (Oxford University Press 1996) 42–43.

⁵³ Ibn Taymiyyah, *The Religious and Moral Doctrine of Jihad* (Maktabah Al Ansaar Publications 2001) 10.

⁵⁴ Bar-On (n 15) 248.

⁵⁵ Whilst the Tanzimat reforms are largely associated with dismissal of religious obscurantism and modernisation, it was still a necessity to engage with religious shareholders in such a manner. See Carter V. Findley, *Turkey, Islam, Nationalism, and Modernity: A History, 1789–2007* (Yale University Press 2010) 104–108; Abdelilah Belkeziz, *The State in Contemporary Islamic Thought* (I.B Tauris 2009) 20.

⁵⁶ ‘As so often happens, the first appearance of heterodox ideas in an authoritarian society is known only from refutations and condemnations; where positive responses appear, they are sporadic and furtive, and, in Islamic societies especially, assume traditional disguise of a return to the sanctified past’. See Bernard Lewis, *The Emergence of Modern Turkey* (3rd edn, Oxford University Press 2002) 72–73.

the role of scholars and leaders in laundering innovations so as to balance progress and tradition.

The imperative to demonstrate rule by God remains in modern discourse. This prospect has been subject to commentary by western scholars, who have noted the utilisation of such argumentation, as well as its capacity to serve in local and regional political rivalries, with different shareholders seeking to demonstrate their adherence to Islamic values over one another.⁵⁷ Naturally, different interpretations of what God's law actually is have emerged; there has for instance been a resurgence to an ostensibly "pure" understanding of rule by God that strives to restore a very reductive and ahistorical understanding of tawhid to Islamic societies.⁵⁸ Different interpretations of what a society governed by God should look like means that differences in opinion on different governments and leaders may exist. Accusing a ruler of permitting the infiltration of western values and institutions remains a requisite prelude to violent rebellion or action; Faraj, for instance, stresses the importance of asserting "rule of God" in the Middle East as a primary and foundational step.⁵⁹ The strategy of utilising obscurantism in order to discredit Muslim regimes, or to serve as a locum for discontent in the non-Muslim world is a well-established strategy.

In the contemporary environment, arguments in favour of a return to the rule of God are to some extent buoyed by the failure of more secular attempts at legislating the Middle East. The "rule by man" offered by the late Muslim imperialists, subsequent colonists, and successive dictators experimented with noxious Marxist and nationalist approaches to imposing order.⁶⁰ Ensuring the primacy of God's rule today is fraught with difficulties that have served to exacerbate this process. The temporal and cultural context in which the exemplary communities resided grows ever more distant. Nevertheless, the assertion that a given ruler or regime are not ensuring rule by Sharia, and therefore God, has become a key mechanism in the process of "Islamic

⁵⁷ Cornell, for instance, notes some of the benefits that accompany being the most orthodox Islamist actor in a region. See Svante Cornell, 'Taliban Afghanistan: A True Islamic State' in Brenda Shaffer (ed), *The Limits of Culture: Islam and Foreign Policy* (Belfer Center for Science and International Affairs 2006).

⁵⁸ Maher (n 17) 145.

⁵⁹ Reiterating the perspective that the Islamic world must do away with "hypocrite" secular leaders. See Mohammad Abdus Salam Faraj, *The Absent Obligation* (Vision Printing 2000) 64.

⁶⁰ This theme is usually identified in relation to Sayyid Qutb and the later Muslim Brotherhood. See Hendrik Hansen and Peter Kainz, 'Radical Islamism and Totalitarian Ideology: A Comparison of Sayyid Qutb's Islamism with Marxism and National Socialism' (2007) 8 *Totalitarian Movements and Political Religions* 55.

outbidding”⁶¹ engaged in by fringe Salafist and jihadist movements. These puritanical elements, who are prohibitively precise in their image of what God’s rule should resemble, accept no compromise with modernity whatsoever; whilst such groups may be equally incapable, if not worse, at realising anything approximating tawhid, this fact does not interfere with the process.

4.3 Classical Islamic institutions; the Ulema, the Ummah, and the Caliph

This chapter has so far sought to suggest that in relation to Islamic international law and Islamic governance, Islamic leaders have historically been bound to fulfil certain functions. By presenting an ahistorical utopian vision of these functions, it is possible for reformists, ideologies, and revolutionaries to suggest that these functions are not being fulfilled. Accordingly, terrorist actors and unconventional armed groups assert that they are capable of realising these features.⁶² This is naturally, however, a competitive process with a range of political movements and violent organisations seeking to derive legitimacy in this manner. As already mentioned, there are some key differences between how unconventional armed groups utilising Islam understand Islamic jurisprudence, and how it was understood and operationalised throughout much of Islamic history. Nevertheless, it is important to understand upon what basis today’s unconventional armed groups have been able to assume the authority that was conventionally vested in Islamic systems of governance.

The manifestation of jihad as a rationale for contemporary armed violence must be understood within a structural context. In order to arrive at a contemporary definition, it is essential to identify the individuals and institutions who were historically responsible for defining Islamic warfare in a given context or occurrence; who was duty bound to participate within an instance of jihad; and who was in charge of planning, organising, and declaring a cessation of hostilities. The subsequent decline of these checks and balances is a central contributing factor to the emergence of contemporary Islamic thought on the subject of collective violence.

⁶¹ This term refers to the tendency for Islamist organisations to engage in often brutal competitions where each tries to show a greater commitment to imagined Islamic values. See Monica Duffy Toft, ‘Getting Religion?: The Puzzling Case of Islam and Civil War’ (2007) 31 *International Security* 97.

⁶² *March* (n 43) 235.

Although Islam may be readily associated with a number of polities and empires across the history of the religion, Islamic law (Sharia) primarily addresses individuals,⁶³ not groups. It is individuals who are understood to be held accountable for their own deeds after death, and therefore they have a responsibility to ensure that the proper rules and rituals of the faith are observed.⁶⁴ Yet the realisation of an Islamic lifestyle has frequently been understood to require certain restrictions to exist, imposed by a central hierarchy upon a population.⁶⁵ At least as much as other religions, and perhaps to a greater extent, conforming to the expectations of the Islamic faith has required an Islamic community under the control of a leader responsible for maintaining Sharia in public life. This, in turn, required scholars responsible for determining how the law should be applied within a specific context, whilst maintaining its Islamic character.⁶⁶ The basis for maintaining the Islamic lifestyle outside of this framework has been questioned by numerous theorists.⁶⁷ In this sense, Islamic law in a practical sense has, for much of history, been a product of institutions that together served to ensure the implementation of Sharia at the collective level.

This inclination towards centralised organisation and leadership has resulted in a range of organised Islamic communities and polities throughout history.⁶⁸ Distinctive means of political organisation and governance have been exhibited across time,⁶⁹ as well as exhibiting changes based upon culture and geography.⁷⁰ This approach maintained a reciprocal relationship between Islamic-revealed scripture and several key institutions. These key institutions included a professional scholarly class (ulema) responsible for appointing judges and interpreting the law; the Ummah, or Islamic lay community; and a secular hierarchy of leaders (caliphs,

⁶³ Tengku Ahmad Hazri, 'The Rule of Law in Islam: Between Formalism and Substantivism' (2016) 7 *Islam and Civilisational Renewal* 66, 69.

⁶⁴ Quran 59:7 <<https://quran.com/?local=en>> accessed 14 August 2018.

⁶⁵ It is possible for instance, to suggest that Muslims are obligated to live under Muslim rule, and should therefore migrate in order to achieve this condition. There are naturally variable perspectives as to whether this applied at any point, applies in specific circumstances, or is a universally binding pronouncement. See A. Aldeeb Abu-Sahlieh Sami, 'The Islamic Conception of Migration' (1996) 30 *The International Migration Review* 37.

⁶⁶ As history has progressed, the Islamic world has naturally encountered new problems; this has naturally required the body of Islamic law to be extended to new conditions, with a distinct literate and qualified class required to perform this task. Hallaq (n 45) 57–59.

⁶⁷ Reza Pankhurst, *The Inevitable Caliphate?: A History of the Struggle for Global Islamic Union, 1924 to the Present* (Oxford University Press 2013) 70.

⁶⁸ As Hodgson notes, Islamic civilisation has evolved over time, employing a varied array of political traditions within different historical contexts. See Marshall G.S. Hodgson, *Venture of Islam, Volume 3: The Gunpower Empires and Modern Times* (University of Chicago Press 1974) 411–412.

⁶⁹ Wael B. Hallaq, *The origin and evolution of Islamic Law* (Cambridge University Press 2005) 71.

⁷⁰ Hallaq (n 45) 53.

sultans/kings/emirs, etc.) who were responsible for ensuring the implementation of Islamic law. These institutions interacted to ensure the realisation of “Islamic governance”.⁷¹ Whilst titles may have altered, or the precise relationship between these institutions evolved, the existence of these three quantities is present in the vast majority of organised Islamic systems of governance.

The classical Islamic governance structure that these institutions comprised served to impose, to a degree at least, separation of powers, and accountability of those in authority.⁷² More importantly, this governance structure imposed a formalism on the interpretation and application of the law.⁷³ A number of codes of law (*Usul al-fiqh*) were subsequently produced and applied in a range of political contexts. Nevertheless, the essential relationship between the Muslim population, the scholars, and the rulers was maintained. The differences between various classical schools were indicative of the adaptations to diverse cultural and geographical realities, or the discrepancies in how the various sources of Islamic law were applied and understood.

The formality of this arrangement afforded a degree of stability in how both personal and collective duties were interpreted. For the purposes of this study, this topic is relevant to the already discussed notion of religious war (*jihad*). In Sunni Islam, the Islamic variation on the holy war was eventually rendered progressively inaccessible by this institutional formality; only leaders of communities were supposed to have the authority to declare *jihad*.⁷⁴ Moreover, the formal interpretations proffered by institutionally established Islamic scholars regarding *jihad* have served to modulate how injunctions towards religious violence in the Quran and Sunnah are framed, for example, the manner in which *jihad* was understood as both a collective and individual responsibility.⁷⁵

In the contemporary situation, these key institutions have been incapable of maintaining their authority over the global Islamic population. Consequently, new theorists and practitioners have presented new approaches to the Islamic “law of war”, that, as this study will explore, rival the most permissive articulations of *jihad* from Islamic history. Building upon the essential thesis that Islamic systems of governance

⁷¹ Muhammad Qasim Zaman, ‘The Caliphs, the “Ulamā”, and the Law: Defining the Role and Function of the Caliph in the Early “Abbāsid Period”’ (1997) 4 *Islamic Law and Society* 1.

⁷² Hallaq (n 8) 49.

⁷³ *Ibid* 49.

⁷⁴ Munir (n 40) 1294.

⁷⁵ Adnan A. Zulfiqar, ‘Jurisdiction Over *Jihad*: Islamic Law and the Duty to Fight’ (2017) 120 *West Virginia Law Review* 468.

have proved to be incompatible with the prevailing state system⁷⁶ and that traditional institutions have suffered as a result,⁷⁷ the exploration of both the historic importance of these institutions and the consequences of their decline is meaningful. This assessment serves to illustrate how new interpretations of jihad have emerged and subsequently coalesced into contemporary terrorist and extremist movements.

Perhaps the most relevant alteration in the context of this thesis is the decline of the ulema in Islamic life. This largely informal designation referred to the scholars who traditionally discussed the application of Sharia in different contexts.⁷⁸ Conventionally, such scholars were formally educated and afforded status and significant authority within the framework of Islamic civilisation. Although the precise nature of this arrangement has varied immensely throughout the centuries of Islamic history,⁷⁹ its role in relation to the wider Islamic Ummah and Islamic leadership remained relatively stable until comparatively recently. Such institutions persist today, and whilst still influential, their role is now significantly different to that which had prevailed for much of Islamic history.

Entry into the ulema has traditionally been predicated upon a professional career path, acquired through study within a madrassa or under an established scholar, or other similar institutions of Islamic education. The formality of this accreditation is usually maintained through accreditation; an ijaza – authorisation or credential – would be secured after an acceptable standard had been reached by a candidate.⁸⁰ These institutions were not exclusively schools of law; the ulema studied a range of subjects related to science and civics.⁸¹ The importance of this institution is made most apparent in providing stability and formality to the interpretation of the law and the governance of Islamic communities.⁸² Moreover, the institution traditionally played a role in stabilising the application of the law by more tangible authorities such as emirs, caliphs, and sultans, issuing guidance and ensuring the smooth transfer of power,⁸³ as

⁷⁶ Hallaq (n 69) 48–49.

⁷⁷ Ibid.

⁷⁸ ‘Regarded as the guardians, transmitters and interpreters of religious knowledge, of Islamic doctrine and law’ See ‘ULAMA’ in *Encyclopaedia of Islam, Second Edition* (Brill) <http://referenceworks.brillonline.com/entries/encyclopaedia-of-islam-2/ulama-COM_1278> accessed 14/12/1018

⁷⁹ Zaman, ‘The Caliphs, the “Ulamā”, and the Law: Defining the Role and Function of the Caliph in the Early “Abbāsid Period”’ (n 71).

⁸⁰ Josef W. Meri, *Medieval Islamic Civilization: An Encyclopedia* (Taylor and Francis 2014) 201–202.

⁸¹ Crone and Hinds (n 46)

⁸² Hallaq (n 69) 57.

⁸³ Ibid.

well as holding such leaders to account in exceptional instances.⁸⁴ The result was a largely transactional exchange between the ulema and various leaders, with the ulema providing the caliph with a degree of legitimacy in return for the influence of law, appointments, and political accommodations.⁸⁵

The ulema does not constitute a formally ordained clergy and does not by necessity hold licences or official appointments, but may be better understood as an informal scholarly class.⁸⁶ The historical role of the ulema in Islamic societies would suggest that their power is more comprehensive than that of a priest in the Christian tradition, for instance.⁸⁷ Traditionally, as a scholarly legal class, the ulema maintained a type of financial independence, operating as merchants and living off endowments, and even collecting taxes on their own behalf.⁸⁸

This informality has traditionally permitted flexibility; although the different schools of Sunni Islam establish thresholds for individuals who may be considered to be authoritative in legal matters, this distinction was not prescriptive, and the independence of the ulema has allowed them to adapt to different political realities and cultural norms.⁸⁹ As Hallaq suggests, in the classical Islamic legal tradition, legal scholars had a clear position in the hierarchy of Muslim societies, and a well-defined role in establishing how the law was interpreted and applied in different contexts.⁹⁰ Hallaq argues that this role allowed for the stable interpretation of key sources of law, whilst affording flexibility in light of the different customs and peoples to which the Sharia was applied.⁹¹ The ulema therefore provided inertial stability to how an Islamic government operated, whilst driving the adaptation of Sharia to different contexts and emerging problems.

More recently, the role of the ulema has been subject to decline, a process that continues to date. This decline is not mono-dimensional, as several processes conspire to deconstruct the authority and undermine the influence of the ulema. For instance, in Indonesia, the increasing “rationality” of citizens and the upsurge of secular

⁸⁴ Shmuel Bar, ‘The Implications of the Caliphate’ (2016) 35 *Comparative Strategy* 1, 2.

⁸⁵ Wael B. Hallaq, *Shari‘a: Theory, Practice, Transformations* (Cambridge University Press 2009) 133; Mohammed Ayoob, *The Many Faces of Political Islam – Religion and Politics in the Muslim World* (University of Michigan Press 2009) 5.

⁸⁶ Zaman, *The Ulama in Contemporary Islam – Custodians of Change* (n 13) 9.

⁸⁷ *Ibid* 9.

⁸⁸ Kuran (n 27)49.

⁸⁹ Zaman, *The Ulama in Contemporary Islam – Custodians of Change* (n 13) 97.

⁹⁰ Hallaq (n 45)133.

⁹¹ Hallaq (n 45) 53.

nationalism are specified as forces that progressively undermine the ulema;⁹² alternately, the postulation is that past compromise and accommodation with secular authorities has discouraged all ulema engagements above the local level.⁹³ In the case of Saudi Arabia, Bligh suggests that the traditional ulema have declined in the kingdom for several reasons, specifying conservatism and failure to adapt; at the same time, the ulema's subordination to the house of Saud is responsible for their failing influence over law, matters of policy, and the population in general.⁹⁴ These studies serve to suggest that there are a number of complex ongoing processes that together have served to alter the position of ulema in Muslim culture and society.

Several more general factors also serve to undermine both the authority and influence of these organisations that have conventionally come to comprise the ulema. Traditional scholarly organisations have been obliged to take a position on controversial and divisive topics such as the U.S. presence in the Middle East.⁹⁵ In some cases, the decision of these traditional scholarly organisations has run contrary to the expectations of the wider Islamic community, sparked extensive criticism, and effectively discredited some organisations in the eyes of influential Muslims.⁹⁶ The co-option of several long-standing institutions into the architecture of modern states has to an extent irrevocably tethered them to oppressive regimes, which has since served as the basis for criticism. State-funded ulema is readily discredited by more radical organisations as “puppet mullahs who use their religion for making dollars”.⁹⁷ Additionally, radical organisations such as the Muslim Brotherhood have been consistent in their condemnation of venerable Islamic institutions such as the al-Azhar, considering the latter entirely submissive to the government of Egypt.⁹⁸

Alternatively, the ulema still plays an important role in many nations with Muslim forms of governance. The Dar al-Ifta, despite ostensibly being an organ of the

⁹² Sunny Tanuwidjaja, ‘Political Islam and Islamic Parties in Indonesia: Critically Assessing the Evidence of Islam’s Political Decline’ (2010) 32 *Contemporary Southeast Asia* 29, 31.

⁹³ See M.M. Van Bruinessen, *Indonesia’s Ulama and Politics. Caught Between Legitimising the Status Quo and Searching for Alternatives* (Lembaga Penelitian 1990).

⁹⁴ Alexander Bligh, ‘The Saudi Religious Elite (ULAMA) as Participant in the Political System of the Kingdom’ (1985) 17 *International Journal of Middle East Studies* 37, 45.

⁹⁵ Yossef Bodansky, *Bin Laden: The Man Who Declared War on America* (Rocklin 1999) 30.

⁹⁶ *Ibid* 30.

⁹⁷ Borhan Osman, ‘The Ulama Council: Paid to Win Public Minds – But Do They?’ *Afghanistan Analysts Network* (5 November 2012) <<https://afghanistan-analysts.org/the-ulama-council-paid-to-win-public-minds-but-do-they/?format=pdf>> accessed 5 June 2018.

⁹⁸ Malika Zeghal, ‘Religion and Politics in Egypt: The Ulema of Al-Azhar, Radical Islam, and the State (1952–94)’ (2009) 31 *International Journal of Middle East Studies* 371, 372–373.

Egyptian government, offers rulings through the Islamic world.⁹⁹ In addition, Islamic universities such as the aforementioned al-Azhar may be considered modern core institutions of the ulema. Indeed, Egyptian Islamic institutions have even been identified as the “centre of gravity” of the modern-day Sunni ulema.¹⁰⁰ The Deobandi madrasas of Pakistan may also be regarded as representative of the resilient ulema.¹⁰¹ These vestiges have been accordingly presented as key shareholders in the fight against extremism and terrorism.

The persisting influence of the ulema as an institution is most apparent, not in the Sunni tradition, but in the Shia counterpart. The Iranian “Islamic revolution” was led principally and later entirely co-opted by the Shia ulema.¹⁰² Elsewhere, however, the ulema has not been the means of expressing revolutionary sentiment. Green suggests that amongst other historical factors, the ulema has traditionally taken on various roles in different societies.¹⁰³ In contrast, the Sunni sphere has witnessed the ulema either ossifying into association with the architecture of a particular state, or waning in influence due to competition to alternative sources of law and morality.

From an external perspective, the intellectual capacity and ideological disposition of the global ulema might have been modified through the extensive patronage and funding emanating from the conservative Gulf States, which has served to alter the disposition of Islamic scholars worldwide.¹⁰⁴ Such funding is often accompanied by certain curricula and ideological axioms as part of the bargain. The extent of such funding is arguably of sufficient scope as to fundamentally alter the overall consensus of the global scholarly community; indeed, learned Muslims contending with neo-jihadist groups have commented on the evident paucity of moderate scholars to resist the rise of radicalism.¹⁰⁵

⁹⁹ Ann Black, Hossein Esmaeili and Nadirsyah Hosen, *Modern Perspectives on Islamic Law* (Edward Elgar 2013) 47.

¹⁰⁰ In discussing “centres of gravity” in the ideological conflict against Islamic extremism, Egyptian institutions have been identified. See Joint Military Intelligence College, *Global War On Terrorism: Analyzing The Strategic Threat* (2004) 125–126.

¹⁰¹ Muhammad Qasim Zaman, ‘The Ulama and Contestations on Religious Authority’ in Muhammad Khalid Masud, Armando Salvatore and Martin van Bruinessen (eds), *Islam and Modernity: Key Issues and Debates* (Edinburgh University Press 2009) 213.

¹⁰² Arnold H. Green, ‘A Comparative Historical Analysis of the Ulama and the State in Egypt and Tunisia’ (1980) *Revue des Mondes Musulmans et de la Méditerranée* 31, 31.

¹⁰³ *Ibid* 50.

¹⁰⁴ Tom Wilson, *Foreign Funded Islamist Extremism in the UK* (The Henry Jackson Society 2017) 2–3.

¹⁰⁵ Muhammad Al-Yaqoubi, *Refuting ISIS* (2nd edn, Sacred Knowledge 2016) 1.

Based on the preceding factors, the ability to generate Islamic laws and rules is unlikely to ever reside solely with the learned scholars of the formal schools again; literacy and the mass production of key texts have rendered jurists liable to questioning since the colonial era. Literacy allowed for both Islamic scripture and jurisprudential sources to be accessed independently of the formal indoctrination of the schools. The scripture is now accessible in many languages in mass-produced, widely available printed volumes. This represents a key contributory factor to the emerging tradition of neo-jihadist thinking.

Unlike other faiths, the Islamic community gained political power from the outset; a political component to Muslim identity is therefore naturally present. The term Ummah may be understood as referring to a sense of community between Muslims. The basis for this affiliation is to maintain the faith;¹⁰⁶ with the institutions of the Sharia and jihad relating to this purpose, in that they were both conceived as expressions of this function.¹⁰⁷ The term Ummah has transcended the original monolithic Islamic state, and centuries later, the end of a unitary Islamic community in any political sense. Whilst today the term best equates to an in-group identifier common to Muslims, in addition to its common usage, there is a basis to assert a number of distinctive understandings of the term. These new meanings range from the pluralistic through to the purist, to the prohibitively exclusive. Its relevance to this study is that contemporary theorists often stress a need for awakening, restoration, or revival of the Ummah, referencing previous political manifestations of the community of the faithful under this term. This opportunity to reframe the term Ummah has naturally served modern-day groups seeking to invoke a more violent usage of the term.

Religions generally seek to differentiate themselves from wider populations. Their means of doing so are generally different from those of a race-based, tribal, or nationalistic ideology. The Islamic faith is no different in this regard, with the notion of a distinct Islamic community articulated in the Quran.¹⁰⁸ This designation refers to a unitary religious community that is intended to supersede and unify individuals above previous tribal affiliations.¹⁰⁹ Its efficacy in this regard is most apparent in the

¹⁰⁶ P.M. Holt, 'Introduction' in P.M. Holt, Anne K.S. Lambton and Bernard Lewis (eds), *The Cambridge History Of Islam*, vol 1A (Cambridge University Press 2008) vii.

¹⁰⁷ Ibid.

¹⁰⁸ Quran 3:110.

¹⁰⁹ Hallaq (n 45) 32.

foundation of the religion, in which the pre-Islamic tradition of incessant raiding was dissolved, with the Arab tribes putting aside longstanding enmities upon entering the fold of Islam.

The Ummah was a key factor in the subsequent Arab conquests, in which Arab tribes set aside their enmity in favour of unification under the auspices of Islam.¹¹⁰ As the political reality of the Muslim community changed, and the Islamic world dominated new populations, the legal understanding of the Ummah developed in Muslim societies. Membership in the Ummah provided legal privileges that were not afforded to outsiders;¹¹¹ through the classical period, the notion of Islamic oneness transcending any more pragmatic political arrangements was to some extent maintained as a broader unit of affiliation.¹¹² Indeed, the notion of a Sunni Ummah remained politically meaningful, at least in a limited sense, until the abolition of the caliphate.¹¹³

Naturally, the actual composition of the Ummah has been subject to extensive reinterpretations through the different ages of Islamic history. The idealised notion of the Ummah has frequently clashed with political realities, and its application in a political-legal sense has correspondingly been altered. After the death of the prophet Muhammad, schisms and heterodoxies immediately began to emerge; the early Kajarite/Khawarji sect represented the first of what would be many differences in opinion as to how best to understand the composition of the Islamic community.¹¹⁴ The Sunni–Shia schism is again to a certain extent rooted in such a disagreement; in this case, the conflict first related to the need for submission to a single leader.¹¹⁵ These early splits and fissures have since been compounded by numerous long-standing

¹¹⁰ John L. Esposito, *Unholy War: Terror in the Name of Islam* (Oxford University Press 2002).

¹¹¹ Richard Goldstone, 'Commentary: Religious Minorities and Islamic Law' in Anver M. Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (Oxford Scholarship Online 2012) <<http://oxfordscholarship.com/view/10.1093/acprof:oso/9780199641444.001.0001/acprof-9780199641444-chapter-21>> accessed 16 July 2018, 356.

¹¹² Esposito (n 56) 26.

¹¹³ Ali Erken, *Islam and the Politics of Secularism: The Caliphate and Middle Eastern Modernization in the Early 20th Century*, vol 40 (Routledge 2013) 271.

¹¹⁴ Abu-Mansur 'abd-al-Kahir ibn-Tahir al-Baghdadi (d. 1037), *Moslem Schisms and Sects* (Kate Chambers Seelye tr, Columbia University Press 1920) 32.

¹¹⁵ A.K. Kazi, *Moslem Sects & Divisions* (J.G Flynn tr, Routledge 1984) 11–26.

intra-Muslim conflicts that pose serious questions as to how the Ummah is to be understood.¹¹⁶

The notion of Islamic oneness or an Islamic community has become difficult to assert in the traditional political sense, now that nationality has taken on meaning through the construction of borders and nations. Additionally, the central coordination of the Ummah in a political sense is no longer possible due to the dissolution of the caliph position; it is difficult to find a sole individual or institution capable of effective control over the sum total of Sunni Muslims. Accordingly, it has diminished in meaning to a cultural unit of ritual significance. Based on this evolution, it is perhaps fair to suggest that the concept of Ummah in contemporary Islamic thought is rather wide-ranging. On the one hand, pluralist reformers seek to extend the notion of community indefinitely, equitable with the biblical articulation of “neighbour”.¹¹⁷ Alternately, both traditionalist and radical interpretations of the term prevail; for instance, the notion of the Ummah represents the group united by the Islamic belief system, although to some extent this notion has to be reconciled with the prevailing reality of national citizenship.¹¹⁸ By contrast, groups such as ISIS have chosen to direct the global dissatisfaction of the Muslim community towards reforming a global Ummah as a political unit, whilst recognising that in order to do so, they must destroy aspects of the state system.

Naturally, in asserting a concrete, politicised understanding of the Ummah, the contemporary jihadist approach must contest the reality that currently prevails, namely that Muslim identity is not a sole hybridised Ummah.¹¹⁹ In this contemporary condition, Muslim identity and allegiance is permeated by other national and cultural realities. The means of reasserting the lapsed political content of the term, as Hassan asserts, is via the selective retrieval of doctrine.¹²⁰ In the case of modern terrorist and extremist veins of thought, it is possible to draw upon aspects of scripture and history that conform to their stated aims. As such aims suggest, it is additionally a necessity

¹¹⁶ Present day extremists will reference such events as a basis for invoking takfir (excommunication) in a more contemporary setting. See Mohamed Badar, Masaki Nagata and Tiphany Tuani, ‘The Radical Application of the Islamist Concept of Takfir’ (2017) 31 Arab Law Quarterly 134.

¹¹⁷ Muslim Reform Movement, ‘Who We Are’ <<https://muslimreformmovement.org/whoweare>> accessed 14 March 2019.

¹¹⁸ Dar al-Iftaa, ‘What Does the Concept of “Ummah” Mean in Islam?’ (1999) <www.org/Foreign/ViewFatwa.aspx?ID=8037> accessed 17 April 2018.

¹¹⁹ Riaz Hassan, ‘Globalisation's Challenge to the Islamic "Ummah"’ (2006) 34 Asian Journal of Social Science 311,319.

¹²⁰ Ibid.

that the Ummah itself be purified of foreign influences, invoking the mechanism of takfir to fulfil this purpose. This is rooted in an assessment that the Ummah itself may degenerate into a community of disbelief, and require purging of the Muslims that have permitted this encroachment.¹²¹ In selecting those to be purged, adherence to tawhid is to be used as a determining factor,¹²² though it is likely he utilises this in a vague spiritual sense, rather than giving it a specific technical meaning. At its most permissive, Ummah can relate to all those that foster a relationship with God in a monotheistic sense, resulting in a far more pluralistic definition of who comprises the “in group community”.

In modern pan-Islamic discourse, the Ummah as a commonwealth or nation is frequently articulated.¹²³ This task is of immense complexity now that the community of the faithful has undergone the aforementioned fragmentation. Accordingly, groups such as Hizb ut-Tahrir and the Muslim Brotherhood have sought not only to revive the lapsed political understanding of the Ummah, but through their methods of doing so, drawn upon some very contemporary ideas that are suited to the task. Küntzel suggests that modern Muslim Brotherhood interpretations of the Ummah are not directly comparable with western notions of citizenship, but more comprehensively align with the proto-fascist concept of Volk.¹²⁴ Patterson additionally makes this connection in this case by drawing upon Maududi’s articulation of the Ummah.¹²⁵ Subsequently, the concept articulation in radical jihadi thinking can be likened to the Nazi Völkisch movement. Although the lack of delineation in the Ummah on the basis of race is frequently mentioned,¹²⁶ the substitution of religion for ethnicity as the dividing principle enables this comparison to proceed.

Marxism has also left an indelible mark on how modern jihadists and Islamists understand and articulate the Ummah in their thinking. Drawing upon the Marxist concept of class interaction, some attempts to envision the Ummah bear a likeness to the notion of an oppressed class; this construction has melded with modern-day

¹²¹ Abu Basir al-Tartusi and Abd-al Mun'em Mustafa Halima, *The Conditions of Lā-Ilāha-Ilallāh* (2007) 47.

¹²² Ibid.

¹²³ Black, Esmacili and Hosen (n 99) 69.

¹²⁴ Matthias Küntzel, *Jihad and Jew-hatred: Islamism, Nazism and the Roots of 9/11* (Telos Press 2007) 26.

¹²⁵ David Patterson, *A Genealogy of Evil: Anti-Semitism from Nazism to Islamic Jihad* (Cambridge University Press 2010) 60.

¹²⁶ Bassam Tibi, *Islamism and Islam* (Yale University Press 2012) 87.

jihadist thinking, with jihadist “elites” adopting the role of revolutionaries.¹²⁷ Qutb’s understanding of the struggle between “Islam” and “the west[ern]” societies has also been juxtaposed with the struggle between Marxism and capitalism.¹²⁸ This notion is highly visible when considering how contemporary Islamist structures address themselves to global audiences. For instance, after the Islamic revolution in Iran, a brief yet vigorous attempt was made to export the revolution across the Middle East as a liberation movement.¹²⁹ Neo-Ottoman pretensions in modern-day Turkish politics also suggest an attempt to once again unify the Sunni world under Turkic auspices.¹³⁰ This trend is, however, most apparent in non-state groups; the “transnational pretensions” inherent in such a variety of global Islamism has drawn comparisons with other total ideologies such as the aforementioned Marxism and Nazism.

Put simply, a classical or imperial age understanding of the Ummah cannot by necessity be ascribed to contemporary understandings of the Ummah, particularly those of neo-jihadist theorists. Whilst it still roughly equates to the sum total of Muslims, the relationship between Muslims and centralised power, to each other, and relative to other imagined collectives (notably the west) has mutated. A frequent contention is that an extensive reference to Islamic sources is required to understand the phenomenon of contemporary jihadist violence, particularly when considering how the current understanding of Islamic governance contributes to modern-day jihadism.¹³¹ However, today’s jihadi operatives and scholars are not by necessity cognisant of the ideological frameworks in which they participate, examining Islamic history through a lens occluded by modernity and diverse influences. The current interpretations of this term do not lend themselves well to generalisation,¹³² which itself is perhaps, in turn, a consequence of the intellectual as well as physical fragmentation resulting from the trauma of the last few centuries.

¹²⁷ Paul B. Rich, ‘How Revolutionary are Jihadist Insurgencies? The Case of ISIL’ (2016) 27 *Small Wars & Insurgencies* 777, 779.

¹²⁸ William E. Shepard, ‘Sayyid Qutb’s Doctrine of “Jāhiliyya”’ (2003) 35 *International Journal of Middle East Studies* 521, 535.

¹²⁹ Emadi Hafizullah, ‘Exporting Iran’s Revolution: The Radicalization of the Shiite Movement in Afghanistan’ (1995) 31 *Middle Eastern Studies* 1.

¹³⁰ Stephanos Constantinides, ‘Turkey: The Emergence of a New Foreign Policy: The Neo-Ottoman Imperial Model’ (1996) 24 *Journal of Political and Military Sociology* 323, 334.

¹³¹ Dwight E. Lee, ‘The Origins of Pan-Islamism’ (1942) 47 *The American Historical Review* 278, 286–287.

¹³² *Ibid* 279.

Similarly, to the vast majority of political and religious systems that have existed, for much of history Sunni Islam was hierarchical presided over by a spiritual and temporal leader named the Caliph. Generally in Islam, the ideal leader in a civic sense is expected to reflect the virtues of the prophet Muhammad.¹³³ The rationale behind having a leader like the caliph extends to implementing a social condition that embodies the teachings of Islam.¹³⁴ This approach is apparently constructed so as to ensure God's sovereignty through the implementation of Sharia in the particular communal context over which a leader vicariously presides.¹³⁵ The previous chapter stressed that the elimination of the Islamic doctrines of holy war is at least partly the result of vesting in leaders the authority to declare jihad. Although individual Muslims maintain a duty to apply Sharia in their own lives, submission to a leader of some form is considered to be important. The significance of leadership is repeatedly emphasised in scriptural sources. The passages of the Quran¹³⁶ and various types of hadith may be invoked to recognise the central importance of obedience to leaders. Accordingly, medieval fiqh highlighted the importance of obeying sultans and kings.¹³⁷

The exact form and title assumed, and the relationship between the leader and the general population, have naturally changed through different contexts. After the death of the prophet, the initial model of leadership was to simply carry over the authority vested in the prophets into a successor.¹³⁸ The position of caliph fulfilled this role, with the stewardship of the Islamic community, the Ummah, passing to a single individual, who assumed the obligation of overseeing the application of Islamic law.¹³⁹ The fragmentation of the global Islamic community, as well as the geographical and cultural realities following the Arab conquests, imposed some administrative divisions throughout the Islamic world. Sultans, kings, and emirs became interlocutors between a remote caliph and the distinct communities of Muslims. Confrontations between "true" Islamic leaders and civil movements with insufficiently Islamic leaders abounded; assassinations and coups, justified by an ostensible failure to adhere to Sharia or Islamic rules and norms more generally, occasionally occurred.¹⁴⁰

¹³³ Ali Mohammad Mir, 'Leadership in Islam' (2010) 4 Journal of Leadership Studies 69, 69.

¹³⁴ Ibid 71.

¹³⁵ Hallaq (n 45) 60.

¹³⁶ Quran 4:58.

¹³⁷ Belkeziz (n 55) 37.

¹³⁸ Sayed Khatab and Gary Boums, *Democracy in Islam* (Routledge 2007) 18.

¹³⁹ Majid Khadduri, *War and Peace in the Law of Islam* (Johns Hopkins Press 1955) 11.

¹⁴⁰ Zaman 'Ulama' (n 109).

Failure of a leader to rule by Sharia meant to participate in disbelief.¹⁴¹ The meaning of disbelief in current Islamic conservative thought, is naturally nebulous and expansive.¹⁴² This notion has translated through to modern-day jihadist thinking, with profound consequences for leaders who have permitted non-Islamic rule to take hold. Today, state leaders of the historically Islamic world find themselves in a difficult position of having to adapt to prevailing circumstances, whilst also showing deference towards tawhid. The need to market natural resources, acquire wealth, and ensure security forces act in concert with non-Islamic states invites labels such as taghut¹⁴³ and pharaoh,¹⁴⁴ which adversely affect the leader to whom they are applied. The critical consideration is that should leaders fail to fulfil their duty to uphold Islamic law, the overwhelming consensus for much of history is that they should be overthrown.¹⁴⁵ This is naturally a critical consideration.

The preceding stipulation functions not only as a mandate for violence against regional leaders, but also as an indication that the post of a legitimate Islamic leader is often vacant. The “empty throne” problem has triggered interesting variations of the theme of a universal Islamic leader. The lack of a caliph has elicited speculation as to whether or how the institution can be restored.¹⁴⁶ Additionally, in many state contexts, the question of whether or not the population lives under Islamic rule or whether the government of a state is sufficiently Islamic has been subject to extensive debate, as well as translating into more kinetic forms of expression.

To continue this line of reasoning, should those in positions of authority fail in their appointed duties, or if such leaders are absent, then the authority to act may devolve to those lower in the hierarchy of a given community, and ultimately, to the individual.¹⁴⁷ To provide an example, the leader of an Islamic community traditionally had the privilege of declaring jihad.¹⁴⁸ The reciprocal relationship between the

¹⁴¹ Maher (n 17) 90.

¹⁴² Disbelief, or Kufr, is failing to implement ‘Islamic law, that may in some cases be defined with prohibitive rigor, meaning much of the Muslim world may be participating in Kufr in the eyes of extreme purists. It’s considered to be grounds for Takfir (excommunication/outlawry), and has been proclaimed en masse by ideologues such as Sayyid Qutb’. See Gilles Kepel, *Jihad: The Trail of Political Islam* (I.B Tauris 2006) 31–22.

¹⁴³ Shriaz Maher, *Salafi-Jihadism: The History of an Idea* (Hurst 2016) (n 29) 89–92.

¹⁴⁴ *Flames of War 2* (Al Hayat Media Company 2017).

¹⁴⁵ Bernard Lewis, *Islam and the West* (Oxford University Press 1993).

¹⁴⁶ Liebl (n 49).

¹⁴⁷ Black, Esmacili and Hosen (n 107) 38.

¹⁴⁸ Sadakat Kadri, *Heaven on Earth: A Journey Through Shari'a Law from the Deserts of Ancient Arabia to the Streets of the Modern Muslim World* (1st American edn, Farrar, Straus and Giroux 2012) 150–151.

revealed laws, the leader, and the community was relatively straightforward and is advanced in varying ways by many scholars. Several scholars go as far as saying that only a leader may declare jihad. Should this relationship deteriorate, an outsider movement may possibly assume the legitimacy, and therefore the authority once vested in the leader.

4.4 Implications of classical Islamic law and institutions regarding unconventional armed groups

This chapter has sought to build upon the central contention of this thesis, namely that the adoption of a religious ideology can have a deterministic influence upon the nature of an armed group or actor. When considering contemporary terrorist and non-state groups professing the Islamic faith, there exists a temptation to consider their use of scripture and examples from Islamic history as little more than an exercise in obscurantism. Based on this chapter, it is possible to suggest that a number of transitions have taken place that permits such groups to present themselves as the inheritors of the authority once vested in Islamic polities. This has in part been aided by the decline in the capacity of more longstanding Islamic institutions. The examination of the evolution of key institutions concepts in the last few centuries reveals that the classical understanding of these bodies has been significantly undermined by the progress of history. Coming to terms with the prevailing state system has entailed drastic alterations that involved the weakening of the traditional structures of allegiance and law. To some extent, this situation accounts for the manner in which new theories on and approaches to jihad have emerged.

It is not without significance that the course of events unfolding in relation to today's unconventional armed groups of which ISIS is emblematic echo earlier heterodox and rebel movements. For instance, numerous movements took advantage of the weakening Ottoman caliphate, one of which resulted in the Kingdom of Saudi Arabia.¹⁴⁹ The perceived adoption of European mechanisms of governance, the absence of enforcement of Sharia laws, and the pressures of modernisation were sufficient grounds for asserting that the Ottoman masters were not providing the

¹⁴⁹ Perceived westernisation and reform motivated a number of rebellions throughout the Ottoman Empire. See Belkeziz (n 55) 19.

required framework for the realisation of Islamic existence. Mirroring the Wahhabi War that occurred years earlier¹⁵⁰ was an event in which, under the house of Saud, the Ikhwan made a bloody mess of the Arabian Peninsula, establishing a new orthodox emirate on behalf of the new Saudi state.¹⁵¹ The brutal acts committed by this group gained their imperative from Islamic scripture; the teachings of al-Wahhab permitted the use of jihad against other Muslims.¹⁵² This approach was justified by the aim of recreating the social condition that prevailed in the early Islamic community. By appearing insufficiently Islamic, the Ottoman Empire allowed the conceptual space for various movements, both theologically grounded and behind charismatic individuals, to supplant their previously strong authority.

To return to the example of the Ikhwan, Ibn Saud used the Islamic scripture as the basis for exerting political control beyond what he was, by custom, authorised to do. Wahhabism, as a strand of Islamic revivalism, was the “script” that matched his aspirations, in that it required believers to spread their message by both persuasion and compulsion if need be.¹⁵³ Using this ideology, Saud effectively united what would previously have been squabbling Bedouin tribes into a cohesive band of fighters who would obey his instructions, as long as such instructions were divinely ordained. Buoyed by the movement, they became “[l]iteralists in matters of the faith, [and] the Ikhwan believed that jihad knew no rest and no boundaries”,¹⁵⁴ deeming that killing all who stood against them and did not share their views was a moral duty, as was the more traditional raid and pillage – a massive escalation from the small-scale ghazwas of previous generations.

This historical event demonstrates the possibility of motivating armed resistance through appeal to Islam as a supranational authority or as an alternative to existing forms of governance when authority is deemed to be insufficiently Islamic. By the time of the Ottoman Empire’s dissolution, the notion of a caliphate was largely vestigial, with the caliph position being chiefly ceremonial. After its inevitable dissolution, the Islamic world in the most general sense underwent numerous progressive traumas. To a large extent, these traumas caused the disintegration, or at

¹⁵⁰ Wayne H. Bowen, *The History of Saudi Arabia* (ABC-CLIO 2007) 70–76.

¹⁵¹ *Ibid.*

¹⁵² Tarik K. Firro, ‘The Political Context of Early Wahhabi Discourse of Takfir’ (2013) 49 *Middle Eastern Studies* 770.

¹⁵³ Abdullah F. Alrebh and Toby A. Ten Eyck, ‘Covering the Birth of a Nation: The Rise of Saudi Arabia in *The London Times*, 1927–1937’ (2003) *The Social Science Journal* 130, 136.

¹⁵⁴ Fouad Ajami, ‘Reaping the Whirlwind’ (2004) 136 *US News & World Report* 33.

least deterioration, of both the institution of the caliph and several other institutions that provided the essential structure and formality to the theory and practice of Islamic law and governance. The fragmentation of the Ummah, the supersession of emirs and other Islamic leaders, and the disruption of the ulema may be considered today to be significantly in excess of the circumstances that permitted the Ikhwan to emerge.

Returning to the essential point, classical Islamic ideas of governance are extremely difficult, if not impossible to assert in today's global landscape. This essential point established by the impossibility of asserting such a structure¹⁵⁵ has been elaborated upon in this chapter from an institutional standpoint. This dissolution of the Islamic governance and the forces responsible for initiating its demise has exerted a definite influence upon new theorists who would subsequently recraft classical notions of Islamic statehood, governance, and law. The new ideological project of neo-jihadism is one such reinterpretation, yet it is troubling in that it has reconstructed aspects of the Islamic faith along the lines of pathological twentieth-century ideologies and is of sufficient importance to discuss in the next chapter. For instance, it is worth considering in detail these changes and their relevance to armed conflict and other forms of collective violence. For instance, as noted by Zulfiqar,¹⁵⁶ there exist both collective duties and individual duties in relation to Islamic law. Whilst Jihad was initially understood as a collective duty, it has more recently been understood as individually obligated, a fairly drastic transition in the context of Islamic jurisprudence.¹⁵⁷ Part of this transition can, as has been attempted in this chapter, be linked to the loss or alteration of many of the historical institutions that have, for much of the history of the religion, curated and expressed jihad as a collective duty.

4.5 The importance of Takfir.

Jihad is one thing, yet killing Muslims within the context of the Islamic faith is even more carefully curated than waging war against non-Muslims.¹⁵⁸ Yet there are certainly precedents for overcoming these limitations, permitting Muslims to be

¹⁵⁵ Hallaq (n 45) 48–49.

¹⁵⁶ Zulfiqar (n 67) 429.

¹⁵⁷ Ibid 429–430.

¹⁵⁸ M. Cherif Bassiouni, 'Evolving approaches to jihad: from self-defense to revolutionary and regime-change political violence' (2008) 10 *Journal of Islamic Law and Culture* 61.

identified as the target of jihad.¹⁵⁹ The process for rendering a Muslim permissible to kill is named takfir;¹⁶⁰ not only does invoking takfir remove an individual or group from the umma and its attendant privileges, but is often understood as being attended by an injunction for their death.¹⁶¹ Killing Muslims *en masse* is sometimes deemed important in the modern era, often forming a component of the strategy used by armed groups and terrorists.¹⁶² An awareness of these precedents and the purported basis scripture is important, as contemporary movements and organisations seek justification by equating the situation in which they find themselves with past situations in which Muslims resorted to disenfranchising and killing other professed Muslims.¹⁶³ Such instances have necessitated the production of mechanisms that either permit the use of violence against self-professed Muslims or outlaw Muslims on the basis of their failure to conform to certain expectations. The works of Ibn Taymiyyah remains a key touchstone in this regard.¹⁶⁴ Other scholars discussed the variable mechanisms by which individuals from the privileges afforded by membership of the Ummah would be excluded based on the behaviour of affiliation, with an analysis of takfir. Whilst the invocation of takfir is stressed by most classic and modern thinkers, as a grave matter,¹⁶⁵ it is not entirely absent from modern Islamic discourse.

The modern extremist use of takfir is generally as an internal purity mechanism, to eject individuals from the faith that they see as subverting Islam.¹⁶⁶ Whilst modern jihadists rigorously defend their right to use takfir as a means to justify the killing of Muslims, most Islamic scholars are highly critical of this approach. As Badar *et al* note, however, the approach taken by groups like ISIS today is heterogeneous and is resisted by the vast majority of Islamic scholarly institutions, these having recognised

¹⁵⁹ This step is extensively telegraphed in ISIS's Dabiq magazine, in which most of the Muslim population of the world is identified as apostates. See Dabiq 7 (alhyat media 2015) 17-19.

¹⁶⁰ Mohamed Badar, Masaki Nagata and Tiphonie Tuani, 'The Radical Application of the Islamist Concept of Takfir' (2017) 31 Arab Law Quarterly 134.

¹⁶¹ Ibid.

¹⁶² There have been a number of "takfirist" factions in the last century, of which the Wahhabi of Saudi Arabia are perhaps the most notable. See Firro, (n 52)773-774. The Egyptian Takfir-wal-hijra is also of note, see Barry. Rubin, *Revolutionaries and reformers: Contemporary islamist movements in the Middle East* (State University of NY Press 2003) 13-17

¹⁶³ Badar et al (n 3).

¹⁶⁴ Maher (n 17) 84-85.

¹⁶⁵ Badar et al (n3) 133-137.

¹⁶⁶ Shriaz Maher, *Salafi-Jihadism The History of an Idea* (Hurst 2016)71.

that not only is the current usage of takfir inconstant with Islamic law, but additionally noting the damaging impact it has on Muslims at large.¹⁶⁷

As a brief postscript to the discussion of Takfir, it is work noting the history of takfirist sects in Islam. A common contention in relation to takfirist groups today is that they are Khajarites;¹⁶⁸ a detested sect of Islam dating back to the first fitnah.¹⁶⁹ There is additionally a basis to suggest that today's neo jihadist armed groups can be equated with many examples of Islamic rebellion that were likewise designated as such. It is common practice to denounce radical groups, particularly those that kill or oppress Muslims as kajarites.¹⁷⁰ Of course, those levelling accusations at today's kajarites need to be mindful of the nature of the term. Based upon its historical usage, to invoke such an accusation is not just a mere epithet, but an injunction against the individual accused. for instance, scholars branding modern-day sects as kajarites are not only denouncing them but compelling themselves and other Muslims to go forth and kill them.¹⁷¹ Much like the term Amalekite in the Jewish tradition,¹⁷² the use of such a term is a call to action and imposes an obligation.

The theological progenitors of today's jihadist unconventional armed groups permitted jihad to be used against other Muslims, but only in very specific circumstances- when for example, (in the case of an adversary) they have accepted Islam, but a short time later expressed their enmity towards Islam.¹⁷³ As the movement evolved it rapidly dispensed with such qualms eventually applying to takfir en masse.¹⁷⁴ The relevance of takfir to today's terrorists and unconventional armed groups will be demonstrated in further chapters. For the moment, it is sufficient to say that numerous Islamic groups have lost the support of their associated population by Killing Muslims.¹⁷⁵ Takfir, if appropriately utilised, can be used to place Muslims outside of the fold of Islam, and therefore permit them to be killed. It is important to

¹⁶⁷ Badar, Nagata and Tueni, (n 3) 159-160.

¹⁶⁸ See Muhammad Al-Yaqoubi, *Refuting ISIS* (second edn, Sacred Knowledge 2016) 13-22.

¹⁶⁹ A. K. Kazi, *Moslem Sects & Divisions* (J. G Flynn tr, Routledge 1984)

¹⁷⁰ Shawki Allam, 'The Ideological Battle' <[http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20\(2\).pdf](http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20(2).pdf)>131-137 accessed 9/11/2016,.

¹⁷¹ A verse from the *Hadith Bukhari* (9:84:68) is often utilised to demonstrate the prophet Mohamed predicted the emergence of the Khawarij sect, as with the source above. The following verse, which demands they are killed, is however often omitted.

¹⁷² See I. Lustick, *For the Land and the Lord: Jewish Fundamentalism in Israel* (Council on Foreign Relations 1988) 131.

¹⁷³ Firro (n 52)

¹⁷⁴ Ibid

¹⁷⁵ See Lawrence Wright, *The looming tower : Al-Qaeda and the road to 9/11* (New York : Knopf 2006) c 15.

understand both jihadi and takfiri inclinations present in earlier movements in order to better understand today's armed groups.¹⁷⁶ As the next chapter will demonstrate, a preoccupation of many neo jihadist theorists is marketing the idea of killing Muslims with the same alacrity of non-Muslims to a mass audience.

4.6 Conclusion

Whilst today it is difficult to think of religion of a supranational form of authority and law, the Islamic example demonstrates that this has been the case. In the past, the authority invested in Islamic systems of governance depended upon their adhering to the proscriptions of Islamic international law and Islamic governance. It can be contended that today, having recognised the fundamentally different context in which they find themselves, many Muslim leaders choose to realise these functions in different ways, more appropriate to the prevailing international system and global reality. These changes, however, are not universally accepted, provoking political opposition, terrorism, and the emergence of organised armed opposition.

In relation to the present thesis, the changes that have occurred to the institutions in which Islamic law have been vested are relevant from two different angles. First, it suggests the relevance of religion in terms of understanding modern conflict. Second, it is suggested that there are typical features of religious conflict that differentiate it from armed conflict more generally. It is important to distinguish the different aims and organisational features taken on by organisations seeking to restore “legitimate” Islamic governance. IHL has been conventionally connected to a highly specific form of organised state violence that is difficult to equate with previous instances in which war has been waged for religious purposes, and this poses a potential challenge.

This chapter has made allusions to instances in which a perceived failure on the part of Muslim authorities has resulted in the emergence of movements seeking to overthrow leaders and governments. The argument that follows is that contemporary unconventional armed groups represent a contemporary iteration of this approach. The veracity of this assertion will be addressed next.

¹⁷⁶ Natana J. DeLong-Bas, *Wahhabi Islam : From Revival and Reform to Global Jihad* (I.B. Tauris 2004) 243–79

5 Religious Conflict as a Contemporary Phenomenon

5.1 Introduction

The traditional framework of Islam consisted not only of a system of social norms and law but political powers and rules capable of modulating and restraining how this law and code of morality was applied.¹ Yet, as contended in the last chapter, this system has largely dissolved. This current chapter will address what happens when modern armed groups and political movements seek to secure for themselves the authority once vested in Islamic leaders and systems of governance. As will be set out in this chapter these new individuals and organisations have sought to show deference to classical Islam, whilst also being seen to reject modernity the state system and in particular western influences, they have produced an approach to the use of force that is at once anachronistic and at home in a globalised world. This modern context has resulted in the inclusion of non-Islamic thought, notably the inculcation of traditional Islamic symbols and institutions with concepts drawn from very non-Muslim sources, most notably from fascism and communism.² Visibly, however, the established lexicon has changed little, the rationale for religious violence connected with the Islamic tradition being underpinned by the extensive use of primary scripture and the works of certain classical scholars.³ This ideological approach, termed neo-jihadism, necessitates the organisations mobilised by this ideology peruse certain aims and utilising methods that are generally deemed to be impermissible. This as this chapter will explore, suggests a causal relationship between neo jihadist ideology and the negative trends observed in relation to contemporary warfare

This chapter will identify neo jihadism and its role in contemporary religious conflict so as to better understand the threat with which International humanitarian law (IHL) must contend. The intention is to determine some typical features of this approach to armed conflict that differentiate it from armed conflict as understood by IHL. Due to the examples available, as well as the general focus of this study, the

¹ Nazih N. Ayubi, *Political Islam: Religion and Politics in the Arab World* (Routledge 1991) 120.

² Alan Cassels, *Ideology and International Relations in the Modern World* (Routledge 1996) 237.

³ Cook for instance notes that today's jihadists utilise the same terminology as classical Muslim scholars. See David Cook, 'Islamism and Jihadism: The Transformation of Classical Notions of Jihad into an Ideology of Terrorism' (2009) 10 *Totalitarian Movements and Political Religions* 177, 186.

emphasis will be on contemporary interpretations extracted from the Islamic context. Naturally, this represents a critical limitation when later determining typical features for wider application. Generating an understanding of contemporary religious conflict in the Islamic perspective –or neo-jihadism as it will be termed– is, however, sufficient to articulate some of the more general challenges that IHL must confront if it is to ensure appropriate protections are applied in modern conflicts.

Understanding the basis for contemporary religious conflict is a complex exercise. Despite clear deference to the past, depicting this wider movement as simply revisionist in scope cannot be considered entirely reflective of reality, notwithstanding visible concessions in this regard. Referring to contemporary jihadist theorists, several novel strategies and approaches to Islamic law couched within their published works may be presented. Adaptations and innovations have occurred at the ideological, strategic, and tactical levels to amend both the Quranic and classical legal interpretations of holy war and produce a religious code of law that is better adapted to contend with the prevailing international system, as well as the opportunities provided in terms of insurgency and media-orientated terrorism.

This does not, however, mean that the new form of Islam as a “political religion”⁴ conforms to the traditional, classical concept of Islamic governance and law. Changes to the manner in which the religious or ideological component is interpreted may, in turn, serve as a basis for differentiating contemporary religious conflict from religious conflict of the past. Accordingly, it is useful to accumulate an understanding of the religious ideology in question, as this will dictate aspects of how the groups inculcated with it are organised, how they emerge, and ultimately how they use armed force, altering the aims and methods relevant to the conduct of hostility.

5.2 The Islamic revival and its relevance to today’s unconventional armed groups and terrorists

It is possible to postulate that the emergence of contemporary religious conflict in the Islamic context is due to the appearance and subsequent rejection of a variety of political Islam. Thinkers like Maududi, al-Banna and Qutb reacted to what could be

⁴ In the manner described by Voegelin. See Eric Voegelin, ‘The Political Religions’ in Manfred Henningsten and Eric Voegelin (eds), *The Collected Works of Eric Voegelin*, vol 5 (University of Missouri Press 2000) 70–71.

construed as the encroachment of western ideologies into the domain of the Islamic world.⁵ Not only anti-colonial, but this generation of Islamic scholar was also sceptical of indigenous Islamic institutions and new governments that they saw as having been corrupted by the influence that had diffused from the west.⁶ As a solution, such thinkers would go on to propose a return to a constructed utopian past that was as much a solution defined as the opposite of western modernity as it was conjured from scripture and history.⁷ This new, revolutionary form of Islamism was entirely detached from history and based around an immutable dialectic between the world of disbelief and the realm of the true believers.⁸ These thinkers subsequently exerted immense influence upon organisations like Al Qaeda, ISIS⁹ and others that would subsequently explore the deployment of this theory. Today's theorists have proved adept at utilising the gap created by the degeneration of traditional institutions to present the Islamic world as undergoing a period of crisis.¹⁰ This, in turn, permitted the authority vested in these institutions to be assumed by any organisation or individual that is capable of convincingly demonstrating the appropriate religious credentials. The result of this disintegration is that more established claims to religious legal authority have been forced to compete with a range of both radical and reformist claimants who have pioneered new definitions for these long-standing terms.

The determination of the exact form of governance prescribed in Islamic law is a monumental task. Nevertheless, many thinkers have proclaimed that they possess the knowledge and means to implement a correct form of Islamic authority. Following the model of the early Muslims, the caliphate is idealised by the prominent thinker al-

⁵ M.A. Muqtedar Khan, 'The Political Philosophy of Islamic Movements' in Asma Afsaruddin (ed), *Islam, the State, and Political Authority: Medieval Issues and Modern Concerns* (Palgrave Macmillan US 2011) 155–156.

⁶ The term "tagut", meaning tyrant, is frequently used to identify such regimes. See Aykac Burhan and Durgun Senol, 'The Changing Political Discourse of the Islamist Movement in Turkey' (2018) 40 *Arab Studies Quarterly* 155.

⁷ Milopoulos for instance draws a distinction between post the *Salafiyya* as an idealised Islamic past in post-classical thought, and the subsequent evolution into the Salafism of Qutb, al-Banna and others. See Lazaros Miliopoulos, *The Revolutionary Global Islamism – Politicized or Political Religion? Applying Eric Voegelin's Theory to the Dynamics of Political Islam* (2013) 128.

⁸ Reza Simbar, 'The Changing Role of Islam in International Relations' (2008) 15 *Journal of International and Area Studies* 55, 55–56.

⁹ Such organisations draw upon the broad themes established by revivalist thinkers. See Sanjeev Kumar, 'ISIS and the Sectarian Political Ontology: Radical Islam, Violent Jihadism and the Claims for Revival of the Caliphate' (2018) 74 *India Quarterly* 119.

¹⁰ Nasser Momayezi, 'Islamic Revivalism and the Quest for Political Power' (1997) xvii *Journal of Conflict Studies* 115.

Mawardi,¹¹ and restoration is the ultimate aim of many organisations.¹² Realising this goal today is however considered an insurmountable challenge by many. In the book *The Impossible State*, Hallaq suggests the impossibility of a contemporary “Islamic state” as such; reconciling the western concept of statehood and the notion of the Islamic community as it has been historically understood is impossible.¹³ Hallaq’s essential point is that the implementation of Islamic systems nowadays is impossible. The prevailing state system permits no compromise with the traditional mechanisms of Islamic governance.

In a similar vein, Hussin suggests the “unmaking of Islamic law”¹⁴ in the colonial experience, drawing attention to the divide between the coloniser and the local Islamic elite. Hussin argues that the ensuing crisis that this situation caused initiated the decline of Islamic law as it was subordinated to western colonial legal systems.¹⁵ Significant focus is placed on the rise of western European powers and subsequent colonisation of much of the Islamic world. The nineteenth and twentieth centuries witnessed an additional component: the decline and collapse of the Islamic imperial regime. This experience was similarly damaging to the notions of an Islamic universal state and the divine mandate of Islam to expand. The experience involved exposure to western liberal legal systems and nationalist ideas. The Islamic world later encountered both Marxist and fascist ideas, incorporating them into governance and legal systems.¹⁶

The essential thesis that follows is that conventional Islamic law dissolved following the colonial experience, and Islamic law is incompatible with or at least seriously challenged by the modern system of public international law and the state system. The notions of the Ummah, ulema, and caliph, or emir have indeed undergone a weakening since the classical era. A historical parallel may be drawn between the declining influence of Islamic institutions from the twentieth century onwards and the

¹¹ Leonid Sykiainen, *The Islamic Concept of Caliphate: Basic Principles and a Contemporary Interpretation* (National Research University Higher School of Economics 2017) 3.

¹² Alexander Orwin, ‘In Search of the Vanished Caliphate’ (Hudson Institute 2017) <<https://hudson.org/research/12781-in-search-of-the-vanished-caliphate>> accessed 12 November 2018.

¹³ Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament* (Columbia University Press 2013) 48–49.

¹⁴ See generally Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (University of Chicago Press 2016).

¹⁵ Ibid.

¹⁶ Miliopoulos (n 7) 127.

Catholic church's sixteenth-century experience, in which different interpretations of the faith arising from a translated scripture challenged the foundations of Christendom. This comparison is made by Ayoob.¹⁷ As with the earlier Christian examples, the process now unfolding in the Islamic world has permitted other institutions to arise and acquire the authority once vested in these declining establishments. Current Islamic extremists are not reformers in the vein of Luther to give a parallel Christian example, but rather embody a counter-reformation. A central objection is that traditional authoritative jurists had incrementally changed not only the law governing Muslims but the Sharia itself, adapting and reconciling it to reflect the prevailing circumstances of the era. This adaptation or innovation has seen the wellspring of all the ills that have afflicted the Muslim community through the centuries, subsequently cascading to corrupt Islamic leaders and swathes of the laity.

As Henzel notes, almost all contemporary radical Islamic thinkers linked with contemporary terrorism are outsiders.¹⁸ Considering the degeneration of Islamic governance and scholarship discussed in the previous chapter, the success of these outsider perspectives is relatively easy to understand. Conventional Islamic institutions have not fared well, and a range of practitioner-theorists have emerged to take advantage of the apparent vacuum, pointing to the decline of Islamic systems of law and governance to present a mandate for violent action. This gulf in "authoritative" governance and juristic guidance has prompted the development of a range of radical and reformist interpretations. The weakening of traditional Islamic institutions has facilitated the emergence of a vast array of interpretations and heterodoxies, some of which are not violent in nature. This loss of formality has permitted the solidification of a radical puritanism, alternately identified as Salafism, Salafi-jihadism, Wahhabism and Islamic revivalism.¹⁹ Groups subscribing to this approach display a focus on the re-establishment of an Islamic state²⁰ and a desire to return to an imagined past in which the Muslim community was free of non-Muslim influences, articulated as Bid'ah (innovation) and Shirk (idolatry).²¹ The precise

¹⁷ Mohammed Ayoob, *The Many Faces of Political Islam: Religion and Politics in the Muslim World* (University of Michigan Press 2007) 28.

¹⁸ Christopher Henzel, 'The Origins of Al Qaeda's Ideology: Implications for US Strategy' (2005) 35 *Parameters* 69, 78.

¹⁹ Shiraz Maher, *Salafi-Jihadism: The History of an Idea* (Hurst 2016) 8–10.

²⁰ V.G. Julie Rajan, *Al Qaeda's Global Crisis: The Islamic State, Takfir, and the Genocide of Muslims* (Routledge 2015) 336.

²¹ Abul a'la Mawdudi, *Towards Understanding Islam* (Khurshid Ahmad tr, U.K.I.M Dawah Centre 1960) 25.

standards to assert this purity are naturally difficult to define. This intent to return to the imagined purity of the early Muslim community as a solution to modern-day problems has resonated with groups such as the Hizb ut-Tahrir and the Muslim Brotherhood.²² These organisations are supported globally, and widespread backing for the notion of a unitary Islamic state is additionally exhibited outside of an organised framework.²³ This aspect serves to illustrate the importance of this narrative.

Attempts have been made to distinguish different organisations on the basis of their disposition to violence.²⁴ However, this taxonomy is far from clear-cut.²⁵ Many such groups pursue multiple avenues of spreading their ideology and bringing about their vision. For instance, groups such as the Muslim Brotherhood may be preoccupied with a range of nonviolent strategies that nonetheless aim to undermine the governance of a nation, whilst concurrently waging violent jihad, particularly in situations where their goals are achievable by such strategies.²⁶ Moreover, groups that ostensibly began peacefully thinking dawah alone would be sufficient to achieve their objective have historically transitioned to violence under the frame of jihad as a result of either disappointment or suppression.²⁷

Consistent with the rejection of modernisation and innovation, Salafi groups seek to compound the collapse of the key institutions of the pre-modern Islamic world through criticising the vestiges of these institutions. The brand of revivalism in which such scholars represent an element is not the outcome of formal Islamic reasoning in one of the formal schools of Sunni Islam.²⁸ Instead, new approaches have been prepared that result in an overall lack of coherence among various scholars, given that no structure is imposed upon the acquisition of scholarly knowledge, or with regard to the interpretation of texts. This premise does not mean that such radicals are ignorant of the source scripture or hadith; they merely depart from the traditional means of

²² Zeyno Baran, 'Countering Ideological Support for Terrorism in Europe: Muslim Brotherhood and Hizb ut-Tahrir—Allies or Enemies?' (2006) 5 *Connections* 19, 21.

²³ Alex P. Schmid, *Public Opinion Survey Data to Measure Sympathy and Support for Islamist Terrorism: A Look at Muslim Opinions on Al Qaeda and IS* (ICCT Research Paper, 2014) 25–26.

²⁴ For instance, the classification of "purists, activists, and jihadists" see generally Natana J. DeLong-Bas, *Wahhabi Islam: From Revival and Reform to Global Jihad* (I.B Tauris 2004).

²⁵ Baran (n 22).

²⁶ General Intelligence and Security Service, *From Dawa to Jihad: The various threats from radical Islam*

to the democratic legal order (Ministry of the Interior and Kingdom Relations 2005) 39–42.

²⁷ Daveed Gartenstein-Ross, 'Ansar al-Sharia Tunisia's Long Game: Dawa, Hisba and Jihad' (2013) 4 *ICCT Research Papers* 1; Daveed Gartenstein-Ross, Bridget Moreng and Kathleen Soucy, 'Ansar al-Sharia in Tunisia's Shift to Jihad' (2014) 5 *ICCT Research Papers* 1.

²⁸ Shiraz Maher, *Salafi-Jihadism: The History of an Idea* (Hurst 2016) 185.

interpreting these texts. How drastically the usage and understanding of Islamic terminology and scripture have diverged from its classical understanding is difficult to determine.

To explore one example of contemporary literature, the Quran is frequently cited in the latest presentations of jihadist literature. For instance, the last issue of *Rummya* contained frequent references derived from the Quran in discussing vassal operations in the Philippines and the disposition of the media towards them:

“With regard to the taughut of the Philippines, “Duterte”, his soul has enticed him in that regard and he thought that he could extinguish the light of Allah with his words, but Allah spoke the truth when He said, “They want to extinguish the light of Allah with their mouths, but Allah refuses except to perfect His light, although the disbelievers dislike it” (At-Tawbah 32). Ever since the people of this land embraced Islam, the disbelievers have not ceased planning to wage war against them for so much as a single day.”²⁹

This passage may not be entirely reflective of the approach of the movement in general. Nevertheless, it illustrates the manner by which frequent references to the verses of the Quran contribute to supporting the immediate goals of the organisation. Additionally, among the regularly cited references are various types of hadith such as Abu Dawud,³⁰ al-Bukhari³¹ and Abu Hurairah.³² This represents a visible affinity for scripture. The link between modern-day Islamic religious extremism and Islamic scripture is also apparent in official reactions. The interpretation of modern organisations and theorists is often dismissed as errant or decadent. Indeed, groups such as Al Qaeda and ISIS are often criticized on the basis of selectively exploiting the Quran and other texts.³³ In the works of neo-jihadist literature, scripture is utilised in a reflexive manner. The practice of invoking scripture without the subsequent discussion of authority and potential interpretation has been characterised as “hadith

²⁹ Rumiya Issue 10 (Al Hayat Media Company 2018) 40.

³⁰ Ibid 40–46.

³¹ Ibid 27.

³² Ibid 2.

³³ Muhammad Al-Yaqoubi, *Refuting ISIS* (2nd edn, Sacred Knowledge 2016) 1.

hurling”.³⁴ This visibly authentic, yet ultimately ephemeral use of the scripture invites parallels with earlier long-standing al-hadith inclinations.

Although many jihadist theorists are clearly focused on the scripture, they are not entirely dismissive of scholarly predecessors who have adopted similar positions. A number of scholars, often those considered heterodox in their own lifetime, are invoked as routine. Ibn Taymiyyah and al-Wahhab are frequently cited as fellow travellers by jihadist scholars.³⁵

Finally, modern-day jihadist thinkers have demonstrated an indigenous, independent ability to develop laws and pronouncements of their own. Jihadist thinkers, at first glance, may therefore appear sufficiently authentic to an Islamic audience through the visible adoption of Quranic and classical symbols and terminology. However, it is naturally possible to cast doubts on the consistency of meaning between the classical connotations and interpretations of these artefacts and their contemporary understanding in jihadist awareness.

If not purely Islamic, then what? To illustrate an example, the Islamic foundation of the ideology of ISIS is made explicit through their own self-perception, as expressed in key publications:

“Amirul-Mu’minin said: ‘O Ummah of Islam, indeed the world today has been divided into two camps and two trenches, with no third camp present: The camp of Islam and faith, and the camp of kufr (disbelief) and hypocrisy – the camp of the Muslims and the mujahideen everywhere, and the camp of the Jews, the crusaders, their allies, and with them the rest of the nations and religions of kufr, all being led by America and Russia, and being mobilized by the Jews.’”³⁶

The adoption of a non-normative standpoint on whether ISIS is, in fact, Islamic, reveals a key factor.³⁷ Their frequent use of raw scripture, religious language,

³⁴ Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Khaled Abou El Fadl ed, Rowman & Littlefield Publishers 2014) 263.

³⁵ Maher (n 19).

³⁶ Dabiq 1 (Al Hayat Media Company 2014) 10.

³⁷ Shawki Allam, ‘The Ideological Battle’ <[http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20\(2\).pdf](http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20(2).pdf)> accessed 9 November 2016.

and appeals to faith demonstrate a critical delineation in their ideology into two groups: an inner group of the faithful and a secondary group of outsiders. This delineation dictates the rights and forms of treatment of each group.³⁸ The use of this division denotes an awareness of traditional Islamic culture and law. Additionally, overt hostility towards almost everyone is clearly evidenced in ISIS's own publications: they incite individuals to either join ISIS or otherwise to be regarded as enemies.³⁹ This delineation is additionally framed within the established terminology that is visibly connected with the political thinking of long-standing Islamic scholars.

It must be accepted that ISIS have an awareness of Islamic scripture, expressed through their use of appropriate terminology. Additionally, however, the influence of fascist, proto-fascist, and Marxist lexicons are discernible in the thinking of neo-jihadist scholars.⁴⁰ The inclusion of such language and associated concepts may be attributable to the decline of traditional Islamic institutions that customarily imposed formality on how reasoning was conducted. Historically, such institutions would have limited the ingress of such un-Islamic terminology and concepts. The fusion of these concepts with the vocabulary of traditional Islamic legalism has produced an alternative, more practical understanding of Islamic law that can be communicated easily. Neo-jihadist groups have proved to be particularly competent in usurping the positions of a conventional Islamic polity. Groups central to this study have demonstrated their adeptness in saturating the global discourse through action-centred propaganda,⁴¹ exhibiting sufficient knowledge of Islamic scripture to discredit other groups and approaches, and linking their aims with the disparate grievances and disillusionments of the global Islamic community.⁴² These groups capitalise on the classical interpretations of Islamic symbolism, for instance, drawing upon the authoritative classical understanding of the term jihad and adapting the understanding of key Islamic institutions. This approach has allowed them to reconstruct the concept of an Islamic state and assume authority over Islamic institutions in a unitary political sense. The effort is expended to connect this reimagining to scripture and classical thought,

³⁸ Gilles Kepel, *Jihad: The Trail of Political Islam* (I.B Tauris 2006) 24.

³⁹ Dabiq, issue 1 (Al Hayat Media Company 2014) 10.

⁴⁰ See generally Tamir Bar-On, "Islamofascism": Four Competing Discourses on the Islamism-Fascism Comparison' (2018) 7 *Fascism* 241.

⁴¹ Cameron H. Malin and others, *Deception in the Digital Age: Exploiting and Defending Human Targets Through Computer-mediated Communications* (Elsevier 2015) 197.

⁴² Chassman Alyssa, 'Islamic State, Identity, and the Global Jihadist Movement: How is Islamic State Successful at Recruiting "Ordinary" People?' [2016] *Winter Journal for Deradicalization* 205, 209.

for instance, the longstanding term of takfir sees widespread use when designating vast swathes of the Muslim population that do not conform precisely to a given group's expectations.⁴³

The new, less formal Islamic intellectual landscape has proven beneficial to jihadist thinkers such as al-Banna, Qutb, Faraj, al-Zarqawi, and bin Laden. These individuals proved to be capable of offsetting their lack of formal qualifications with zeal and charisma, as well as the ability to draw upon and direct the widespread dissatisfaction of the population. They have been able to outmanoeuvre the still influential Islamic schools of jurisprudence through saturation and visceral appeal. This strikes a contrast to long-standing religious institutions, many of which have struggled to gauge the desires and direction of the global Muslim population, whilst failing to appear presentable to an increasingly vigilant non-Muslim world. In contrast, such jihadist thinkers have given voice to the widespread dissatisfaction of many Muslims around the globe, and more importantly, offered the group a way out of their malaise and decline.

Neo-jihadist theorists have naturally developed several approaches to justify the emergence of jihad in the modern age; they demonstrate an affinity for the "troublemakers" of the classical era, or those holding heterodox views. Additionally, positions within the classical jurisprudence that conform to their opinions are readily invoked as a means of adding credence to their axioms and behaviours. This premise suggests that although classical Islamic law is reflexively utilised by modern Islamic scholars, an undeniable break in tradition is evident. The scripture and classical texts exist as resources and are drawn upon selectively. Modern terrorism changes this equation, in that multiple routes to access violence in a political and instrumental sense exist. The removal of state's ability to restrict religious life, new technologies, mass migration, interconnectivity, and globalisation all have yet unqualified impacts. Defining armed conflict is accordingly subject to increasing complexity.⁴⁴ Consistent with this principle, different thinkers across the last generation have sought various means of asserting authority over the Islamic world, most notably in relation to jihad. The idealised past that Islamists identified as a destination was increasingly crafted as

⁴³ See Mohamed Badar, Masaki Nagata and Tiphonie Tuani, 'The Radical Application of the Islamist Concept of Takfir' (2017), 31 Arab Law Quarterly 132

⁴⁴ Gertrude C. Chelimo, 'Defining Armed Conflict in International Humanitarian Law' (2011) 3(4) Inquiries Journal/Student Pulse <<http://inquiriesjournal.com/a?id=1697>> accessed 1 February 2019.

an opposing reflection of the ideological forces they encountered through colonialism, secularisation, and nationalism.⁴⁵

5.3 Identifying contemporary religious conflict in the works of key theorists

There is a basis to suggest that a prevalent strain on contemporary religious conflict is linked to the emergence of political Islam. The subsequent failure to implement a current political arrangement based upon an imagined past led to a fracture in which neo-jihadism, an approach permitting and indeed requiring violence and sacrifice in pursuit of this vision, emerged. The challenge posed to IHL was not deliberately contrived by the new groups that developed but arose in reaction to the assumptions held by states and international legal authorities concerning the use of force.

Unconventional armed groups engaging in contemporary religious conflict share some aims with both states and more conventional armed groups. Naturally enough, they wish to survive and expand their influence. In addition, however, they must make an unambiguous commitment to the religious philosophy upon which their very existence is predicated. In relation to groups involved in the “war on terror.” By looking at key theorists, it is possible to determine not only the nature of this challenge; why the aims imposed by neo-jihadism cannot be realised politically, why groups inculcated with this ideology are challenging to confront, and how such groups have developed to take advantage of international legal boundaries.

5.3.1 Hassan al-Banna

Mid-twentieth century Egypt was characterised by a growing sentiment of frustration regarding British imperialism, and dissatisfaction regarding the class divisions brought about by successive attempts at modernisation.⁴⁶ This proved to be sufficient grounds for organised resistance movements to emerge. The Muslim Brotherhood, dating to

⁴⁵ Hakan Topal, ‘Islamists and the Perpetuity of Catastrophe’ (Public Seminar 2014) <<http://publicseminar.org/2014/10/islamists-and-the-perpetuity-of-catastrophe/>> accessed 12 December 2018.

⁴⁶ Whilst colonial rule nurtured dissatisfaction, modernisation carried out by an Egyptian elite was additionally alienating for many ordinary Egyptian people. See generally Nathan J. Brown, ‘Retrospective: Law and Imperialism: Egypt in Comparative Perspective’ (1995) 29 *Law & Society Review* 103.

1928, was the result of the work of a school teacher, Hassan al-Banna.⁴⁷ At a time when the average Egyptian would have experienced intense feelings of dislocation and loss of purpose, al-Banna proved competent in utilising the prevailing sentiment and activism as a means of offsetting his lack of formal theological credentials; instead of taking the established scholarly route, he developed influence through direct activism and engagement, founding the Muslim Brotherhood for this purpose.

Al-Banna was critical of governments administering in the Middle East, generally on the basis of being insufficiently Islamic. He posited that a return to Islamic values and law would bring about an improvement in the lives of ordinary Egyptian Muslims.⁴⁸ In his estimation, these Islamic values existed in the distant past, before western influence had taken hold. He was additionally critical of the incumbent Egyptian government for failing to achieve Islamic rule by expelling foreign influences and thereby providing an example of an Islamic utopia that would be successively imitated across the Middle East.⁴⁹ In *On Jihad*, al-Banna is critical of later generations of Islamic scholars for failing to uphold the tradition of jihad.⁵⁰ He does approve of practitioner theorists who implemented jihad, such as Ibn Taymiyyah and al-Wahhab.⁵¹ He dismisses the supersession of jihad in its bellicose meaning with more spiritual definitions, suggesting that the arguments for such a definition are both weak in their scriptural provenance, and diversionary; correct interpretations, he argues, would never dismiss the vital importance of violent jihad; to solve the crisis, he suggested that the distinction between politics and religion be removed.⁵² By deconstructing this western distinction, al-Banna's vision has Islam permeating every aspect of society.⁵³ He wanted to free the "Islamic Fatherland" from "foreign domination".⁵⁴ He further articulates that until an Islamic nation arises from this fatherland, the Muslims of today are living in sin.⁵⁵ Al-Banna persistently referred to

⁴⁷ Matthias Küntzel, *Jihad and Jew-hatred: Islamism, Nazism and the Roots of 9/11* (Telos Press 2007) 131.

⁴⁸ Richard P. Mitchell, *The Society of the Muslim Brothers* (John Obert Voll ed, Oxford University Press 1993).

⁴⁹ Ibid.

⁵⁰ Hasan al-Bannā, *Five Tracts of Hasan Al-Bannā' (1906–1949): A Selection from the Majmū'at rasā'il al-Imām al-shahīd Hasan al-Bannā* (Charles Wendell tr, University of California Press 1978).

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid 126–129.

⁵⁵ Ibid 31.

⁵⁵ Ibid 31.

the need for sacrifice and struggle in pursuit of his Islamic utopia.⁵⁶ He stresses that those who are called to fight and do not do so will die in sin,⁵⁷ though his notion of fighting also extends to speech against a non-Islamic leader.⁵⁸ It is possible to construe this as an embrace of peaceful means, though it is also entirely possible that he considered the nature of such speech to be violence of a sort; conflation between speech and violence have represented a common theme in subsequent Islamist thinking.⁵⁹

Al-Banna, in a general sense, defined the apparent goal of later jihadist thinkers and additionally cemented the importance of violence and sacrifice into the realisation of an Islamic system, which has largely been a consistent feature in the reasoning of subsequent theorists. Al-Banna also marks the introduction of extreme fascist ideas into the jihadist discourse. His affinity for both Mussolini and Hitler is expressed in his desire to develop the Brotherhood along the lines of the Nazi SS.⁶⁰ Küntzel discusses the nexus between national socialism and the early Muslim Brotherhood, noting this relationship as key in transferring anti-Semitic assumptions into the wider Islamist discourse, a component previously absent from al-Banna's theology.⁶¹

In defining a clear objective, al-Banna laid a foundation for future thinkers to imitate. His fantastic notion of a future Islamic fatherland additionally served as the basis for justifying extreme action to be taken against those barring its realisation. Whilst he did not predict what this would look like in precise terms, the clear goal of Islam at every level of society is recognised as a specific characteristic of this future system of law and governance.⁶² In order to bring this about, he sought to wrest the ability to craft Islamic laws from the traditional schools of Islamic jurisprudence.⁶³ As has been noted, he himself was far from the model of a traditional Islamic scholar or intellectual.⁶⁴ This represents a key contribution to neo-jihadist thought, in that formal

⁵⁶ Mitchell (n 48) 246.

⁵⁷ Ibid 207.

⁵⁸ Bannā (n 50) 155.

⁵⁹ For instance, it is possible to specify the outpouring of violence following the Jyllands-Posten controversy, as well as support for blasphemy laws. See generally Anshuman A. Mondal, 'Visualism and Violence: On the Art and Ethics of Provocation in the Jyllands-Posten Cartoons and Theo Van Gogh's Submission' in Anshuman A. Mondal (ed), *Islam and Controversy: The Politics of Free Speech After Rushdie* (Palgrave Macmillan UK 2014) <https://doi.org/10.1057/9781137466082_6> accessed 29 May 2019.

⁶⁰ Ephraim Karsh, *Islamic Imperialism: A History* (2nd edn, Yale University Press 2013) 214.

⁶¹ Küntzel (n 47) 151.

⁶² Al-Bannā (n 50) 105.

⁶³ Ayoob (n 17) 72.

⁶⁴ Gudrun Kraemer, *Hasan al-Banna* (Oneworld Publications 2014) 54.

and established jurists can be easily dismissed on the basis of their failure and complicity with the colonial suppression of Islam. There is, however, scope to suggest that in determining both the goals and the means of his ideology, he integrated some of the concepts prevalent in his temporal landscape, whilst professing both an idealised vision of the Islamic world that could be, as well as its antithesis in the ominous universal enemy, the west:

“From this, we see that the Muslim makes His life as an endowment for His mission, so that he may gain the next world as a reward for his exertion and efforts in this life. Hence, the Muslim, who has spread the word of Allah, was a guide and teacher adorned with enlightenment, guidance, compassion, and benevolence. Thus the civilized spread of Islam was one of preparing (for the future), of guiding, and teaching. Can this be compared with what Western imperialism is doing at this present time?”⁶⁵

Al-Banna’s universal Muslim state is set against “the west”, or western “imperialism” – an ill-defined quantity that in his understanding was the foremost item challenging the realisation of his Islamic fatherland. Yet, this confrontation is often more permeable than he would initially present. Not only did he profess admiration for fascism and integrate some of its axioms, but was also at times affectionate towards indigenous patriotism, especially if it could be directed against the west. His aims must be understood within the context of his goal of improving life in Egypt⁶⁶ and was arguably pragmatic in approaching this goal, going as far as to incorporate fascist modes of thinking.

5.3.2 Sayyid Qutb

Whilst al-Banna established many themes that remain relevant in subsequent neo-jihadi thought, it was perhaps Qutb who really condensed the incipient principles of

⁶⁵ Hasan al-Banna, ‘To What Do We Invite Humanity?’ (2018) <https://thequranblog.files.wordpress.com/2008/06/_2_-to-what-do-we-invite-humanity.pdf> accessed 14 July 2018.

⁶⁶ David Commins, ‘Hassan al-Banna (1906–1949)’ in Ali Rahnama (ed), *Pioneers of Islamic Revival* (Palgrave Macmillan 1994) 137.

modern-day jihadism into the first workable manifesto. Qutb again has little affinity for the progressive development of Islamic jurisprudence, the leaders of his day, and the condition of the global Islamic lay population by the vestiges of the traditional Islamic institutions. Like al-Banna, Qutb, a fellow Egyptian, was highly critical of the Islamic authorities of his era.⁶⁷ Building on al-Banna's theories, Qutb developed a mechanism to dismiss conventional Islamic institutions of Egypt, this being perhaps his most important contribution. His elaboration of the term jahiliyyah is a condition understood to refer to man's dominion over man,⁶⁸ a term of immense salience to Islamic audiences.⁶⁹ Reversing this condition represented a central rationale for Qutb's works.

Qutb criticises what he saw as the lack of ambition that the religious authorities of his day displayed. Jihad, he argued, was a permanent condition. He contended that the reversal of the condition of jahiliyyah, was foremost in the interests of mankind; humans must be liberated from their own rule, and the divine law of Sharia restored.

Simply put, Qutb advanced the notion that Islam, employed in a holistic sense, was the solution to all of mankind's problems.⁷⁰ he set forth a potential solution to reverse mankind's slide into corruption and depravity – what he considered to be the natural conclusion of the western philosophies characterising his age.⁷¹ Qutb stated that Islam was the only system that could furnish mankind with solutions to arrest the decline.⁷² He was dismissive of the western renaissance and the scientific progress that accompanied it.⁷³ It is possible, therefore, to suggest that Qutb goes into a little more detail than al-Banna in terms of why and how the west is bad, though in a more general sense it conforms with his basic understanding that the west is the general opposite of the Islamic world.

Accounting for the subsequent failure of the nominally Muslim world to usher in its own era of progress, he attacks the state of Islam as expressed by current rulers;

⁶⁷ He is critical, for instance, of what he saw as the reduction of the Quran to a cultural artefact, with its status as a source of law having been removed. See Sayed Qutb, *Milestones* (Islamic Book Service 2006) 3, 7.

⁶⁸ William E. Shepard, 'Sayyid Qutb's Doctrine of "Jāhiliyya"' (2003) 35 *International Journal of Middle East Studies* 521, 254–255.

⁶⁹ Gerald Hawting, 'Pre-Islamic Arabia/The Jahiliyya' in P. Bearman, *Encyclopaedia of Islam* (2nd edn, E.J Brill 1954).

⁷⁰ Qutb (n 67) 3.

⁷¹ Ibid.

⁷² Ibid 4.

⁷³ Ibid.

he cites how the false laws on customs that are not of Islamic origin which have built up, impede Muslim progress.⁷⁴ This corruption of Islamic values has been progressive. In line with this assessment, the first generation of Muslims are the best, with those nearest the prophet being preferable, though as generations passed, the community drifted away.⁷⁵ For Qutb, the condition of jahiliyyah today was to be considered insidious, often masquerading as Islam.⁷⁶ This identifies Christian, democratic, and communist societies; inclusive of Arab nationalist and Arab socialist regimes on the basis that they never asserted Islamic rule in totality, a deficiency linked to the subsequent failure of these approaches.⁷⁷ Qutb effectively brands the true Islamic community as extinct, largely based on the failure of self-identifying Muslims to solely follow Sharia and Islamic scripture, and maintain the legacy of earlier generations, concluding that it is necessary to revise concepts of society, and leadership⁷⁸ in order to restore an Islamic community. In this regard, he expressed a willingness to use physical power and jihad against the jahali systems.⁷⁹ Furthermore, Qutb is dismissive of the Islamic thinkers who think that Islam only allows a defensive war; Qutb takes a more consequentialist stance, expressing how the nature of Islam's superiority requires the offensive to be taken in order to remove injustice from the earth.⁸⁰

Qutb represents an important step in modern jihadist thought for a number of reasons. First, in representing that the western-derived solutions were universally inadequate for human needs. Islam, Qutb naturally concludes, is the solution, though in its modern form it has become weighed down with un-Islamic attributes. Modern Muslims must, therefore, reinvent the pure Islamic community that Muhammad gifted to the first generations of Muslims. Just as the earliest Muslims cut themselves off from the culture that had come before, Qutb encourages the same. These essential axioms have since emerged persistently in neo-jihadist thought.

⁷⁴ Ibid 5.

⁷⁵ Ibid 13.

⁷⁶ Shepard (n 68) 527.

⁷⁷ Travis Morris, *Dark Ideas: How Neo-Nazi and Violent Jihadi Ideologues Shaped Modern Terrorism* (Lexington Books 2016) 9.

⁷⁸ Qutb 14 (n 67) 14.

⁷⁹ Ibid 42.

⁸⁰ Ibid 42–43.

5.3.3 Mohammad Abdus Salam Faraj

Faraj represents a more active progression of Qutb's ideas, along with the addition of Ibn Taymiyyah's reasoning. Faraj dedicates himself to attempting to operationalise his concept of jihad, drawing on scripture when justifying his more practical suggestions. Faraj refers extensively to Ibn Taymiyyah, concurring that jihad was an obligation for Muslims.⁸¹ In examining Egypt, he concluded that as Sharia was not implemented Muslims were not safe, and as a result he is adamant about the utility of force in restoring Islam – "But there is no doubt that the tyrants of this earth will only be removed by the might of the sword".⁸² It is, therefore, the duty of Muslims to assist in performing this feat. Drawing on scripture, Faraj concludes that the implication of Sharia is incumbent on Muslims to work towards; as this can only be completed in an Islamic state, Muslims must also work to establish one.

His reasoning behind the construction of an Islamic state is that Muslims can only be truly free under a condition of Sharia. This condition is predicated on the existence of an Islamic state – one that ensures Sharia is applied correctly. Faraj reiterates how Muslim rulers are in fact not Muslim rulers, but have, due to the infiltration of foreign values, become tyrants (taghut).⁸³ This is functionally similar to Qutb's articulation of jahiliyyah.

One of the key difficulties faced by historical scholars was determining when it was appropriate to kill or wage war against professed Muslims. In constructing a path to the use of force against other Muslims, the history of the Khawarij is invoked by Faraj, to stress the precedent by which other Muslims needed to be fought.⁸⁴ Faraj names two types of threat to be confronted; the near, and the far enemy. The near and far enemies of his era express the need to focus on the near enemy first, building a strong state Islamic in name and function, capable of combatting the "infidels", indicating Israel as a target once this state had been constructed.⁸⁵ This bifurcation is both pragmatic and rooted in the differing notions of the need to reconstruct the Islamic world – removing traitors and heretics – before striking at the outsider.

⁸¹ Mohammad Abdus Salam Faraj, *The Absent Obligation* (Vision Printing 2000) 99.

⁸² Ibid 14.

⁸³ Ibid 14.

⁸⁴ Ibid 33.

⁸⁵ Ibid 50.

Faraj ultimately expresses that through jihad, Islam would rule the world; yet, whilst Faraj is repetitive in his exertions that all Muslims must fight, he draws on the Quran to demonstrate how ultimately Allah would intervene to bring victory.⁸⁶ In terms of conduct in war, Faraj suggests a number of novel approaches ranging from night attacks, martyrdom, deception, and rather quaintly, destroying the enemy's fruit trees.⁸⁷ This demonstrates an inclination towards practical applications of violence. The influence of Qutb is clear in Faraj's writings, though he is far more specific in the form that jihad should take, dismissing accretions suggesting the spiritual nature of jihad, and emphasising it in the form of combat.

These ideas took on a viral appeal, with his definitions of the near and the far enemy remaining influential in jihadist thinking.⁸⁸ Faraj's works also took on an instructive quality for Egypt's jihadist movements, eventually influencing key figures like Al Qaeda's future head, Zawahiri.⁸⁹ Faraj advanced contemporary jihadist thinking on two fronts. First, he simultaneously relegated jihadists to a group struggling against incumbent national regimes, who focused on Islamising countries – an aggressive strategy recognising the reality of a delineated Middle East. Second, he placed jihad at the heart of what it is to be Muslim – an active Muslim striving to overcome the state of jahiliyyah. Anything else made one a Muslim in name only, and therefore part of the problem. Hegghammer notes that, as time has passed, the distinction between near and far enemies has eroded somewhat, with traditionally far enemy groups like Al Qaeda having gradually refocused on the Muslim world, more frequently employing takfirist rhetoric.⁹⁰

Taken together, al-Banna, Qutb, and Faraj all participate in a unitary strand of contemporary jihadist thinking; the construction of a “core doctrine” of Jihadi ideology, that sets the parameters of thinking about Islam and the west. Subsequently, the core concepts of the approach have been developed and ultimately operationalised, both as a mass movement, but also as an individual duty to dispense violence. The validity of this understanding of violence is predicated upon the relatively stable

⁸⁶ Ibid 74.

⁸⁷ Ibid 87.

⁸⁸ See Guido Steinberg and Isabelle Werenfels, 'Between the “Near” and the “Far” Enemy: Al-Qaeda in the Islamic Maghreb' (2007) 12 *Mediterranean Politics* 407.

⁸⁹ Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge University Press 2009) 11, 11.

⁹⁰ Thomas Hegghammer, *The Ideological Hybridization of Jihadi Groups* (Current Trends in Islamist Ideology, 2009) 26.

idealised understandings of the west and the Islamic community. Efforts are made to align these ideals with the longstanding divisions of the world located in imperial Islamic law, with the appropriate terminology apparent in the works of these scholars. Subsequently, different approaches to understanding how to implement the ideal Islamic system of governance has depended upon the theorist in question.

5.3.4 Abul A'la Maududi

Maududi (Abul A'la Maududi, or Syed Abul A'la Maududi Chishti) is a scholar of the Indian subcontinent, whose work parallels much of the thinking discussed in relation to Egyptian revivalist thinkers. Maududi's attempt to revive the political aspect of Islam as a means of offsetting the threat he perceived as emanating from the "west," is most apparent in the nationalist and socialist trends visible in the political discourse of his day.⁹¹ Like his Egyptian counterparts, he emphasised activism as a means of achieving his aims, as well as demonstrably influencing the politics of the nation of Pakistan.⁹² It is perhaps fair to say that Maududi enjoyed significantly more success in interfacing with the government and politics of his nation than his Egyptian counterparts, winning significant concessions for his ideas and movement within the context of the prevailing social framework. This may be a result of the very different setting in which Maududi practised, with greater opportunities afforded by the partition of India along religious lines.⁹³ Much of his writing was devoted to ensuring that the new nation of Pakistan became realised as an Islamic state.

In surveying his writings, it is clear that Maududi was not drawn to more esoteric or reason-based approaches to scripture, but instead emphasised reading the text in a literal manner. This notion of reading scripture at first glance was borne out by his articulation of both Islamic law and governance within his proposed Islamic state. Whilst he suggests that reading should be shallow, his approach is different from what may be identified as traditionalist readings and interpretations, though he presents his interpretation of scripture as a rediscovery of original interpretations.⁹⁴ In

⁹¹ Elisa Giunchi, 'The Political Thought of Abul A'lā Mawdūdī' (1994) 59 *Il Politico* 347, 348.

⁹² Zohair Husain, 'Maulana Sayyid Abul A'La Maududi: An Appraisal of His Thought and Political Influence' (1986) 9 *South Asia: Journal of South Asian Studies* 61, 61–62.

⁹³ Whilst Maududi was not in support of partition, the event served to enhance the thinker's platform. See Lerman Eran, 'Mawdudi's Concept of Islam' (1981) 17 *Middle Eastern Studies* 492, 495.

⁹⁴ In discussing Islamic terms such as *deen* (religion, creed,) *rabb* (master, lord) *ibdah* (obedience) and *ilah* (god) he for instance suggests that the truth of such terms was known to the early Arabs, but has

setting out how the “Islamic state” is unique from other forms of organisation and governance, Maududi advanced the absence of any nationalistic sentiment,⁹⁵ echoing other revivalist scholars who considered nationalism a western innovation. He called the Islamic state an “ideological state”, one in which Islam permeated every aspect of life.⁹⁶ To address the ominous “west” Maududi emphasised the need for the holistic development of Islamic society in order to challenge the dominance of “godless systems of state and law”.⁹⁷ By way of comparison, he draws on the French and Russian revolutions, and devotes some focus to the provenance of the Nazi system, noting that the emergence of fascism would not have been possible had it not been for the conspiracy of historical factors and the philosophies of Hegel, Fichte, Goethe, Nietzsche, and ultimately Hitler, which served to instigate the conditions required for revolution.⁹⁸ He concludes that in the same manner, the example of Muhammad should permeate all aspects of Islamic cultural and social life prior to the Islamic revolution being instigated.⁹⁹ This stresses the foundational nature of revivalist-Islamist thinking in relation to later violence and political efforts. It also serves to explain the grassroots approach Maududi initially took.

Whilst Maududi aspired to “pure Islam”, the vision of Islamic statehood he presented has been contested as being heavily influenced by the experience of the colonial system. From an anthropological position Ahmad, for instance, suggests that having observed the manner in which colonial law presided over the Indian population, Maududi sought to fuse the modern state with Islamic principles.¹⁰⁰ This is borne out by the lexicon adopted by Maududi, for instance conceptualising Muslims as a movement or party.¹⁰¹ In discussing Maududi, there is a marked tendency to discuss aspects of this thought as the “invention of tradition”, meaning the generation of new ideas that have subsequently been assumed to be longstanding Islamic concepts.¹⁰²

been obscured by subtle changes across the centuries. See Abul A’la Mawdudi, *Four Basic Terms* (Abu Asad tr, 4th edn, Islamic Publications Limited) 3.

⁹⁵ Abul A’la Maududi, *The Process of Islamic Revolution* (Kazi Publications 1990) 3.

⁹⁶ Ibid 3–4.

⁹⁷ Ibid 9.

⁹⁸ Ibid 10.

⁹⁹ Ibid 10.

¹⁰⁰ Irfan Ahmad, ‘Genealogy of the Islamic State: Reflections on Maududi’s Political Thought and Islamism’ (2009) 15 *The Journal of the Royal Anthropological Institute* S145, S155.

¹⁰¹ Ibid S156.

¹⁰² Damningly, Roberts notes that Maududi’s articulation of the “Islamic state” bears a striking resemblance to the creation of Israel as a Jewish state. He contends that Maududi aimed to create an Islamic state upon the lines of Israel. See generally Nicholas P. Roberts, *Political Islam and the Invention of Tradition* (New Academia Publishing LLC 2015).

The successful integration of Maududi's thoughts into the ideology of contemporary violent Islamist movements as well as the Pakistani state. The reinvention and reinterpretation of the political order presented as inherent in Islam by Maududi have subsequently become the hallmark of contemporary Islamism.¹⁰³

Maududi and Qutb are often presented as interchangeable when it comes to their essential ideology of Islamic statehood.¹⁰⁴ This is not without significance, especially with regards to establishing typical features. Maududi, unlike his Egyptian counterparts, however, found himself far more involved in statecraft, and accordingly effected direct change not just in civil society, but in the judiciary and government of the Pakistani state.¹⁰⁵ Subsequently, the influence of Maududi and the organisation he sired (Jamaat-e-Islami) waned in influence as the social realities of the modern state caused the ruling elite to sideline Islamists.¹⁰⁶ His influence on fringe groups and extremists, however, has persisted.¹⁰⁷ The utility of considering Maududi is perhaps the extent to which parallels may be drawn between his thought and the approach of Egyptian revivalists, assisting in establishing typical features of the contemporary approach. Maududi also exemplifies the different manner in which the neo-jihadist approach can play out, should civil society and government behave more submissively.

5.3.5 Osama bin Laden

One of the most prominent practitioner-theologists of the twenty-first century is naturally Osama bin Laden. Whilst remembered as an organiser, planner, and figurehead of the group Al Qaeda,¹⁰⁸ he evidences a distinct approach to justifying violent action that is rhetorically more rooted in the institutions of the classical Islamic era, or at least, his personal understanding of how Islamic law and jihad interacted in

¹⁰³ Bassam Tibi, *Islamism and Islam* (Yale University Press 2012) 31–32.

¹⁰⁴ For instance, it is possible to discuss the similarity between the two thinkers' desire to return to a "golden age" though the form of this golden age is coloured by contact with contemporary ideologies and state systems. See R. Scott Appleby, 'History in the Fundamentalist Imagination' (2002) 89 *The Journal of American History* 498, 506.

¹⁰⁵ Riaz Hassan, 'Religion, Society, and the State in Pakistan: Pirs and Politics' (1987) 27 *Asian Survey* 552, 564–565.

¹⁰⁶ *Ibid.*

¹⁰⁷ Appleby (n 104) 498.

¹⁰⁸ Dane Thorleifson, *Usama Bin Laden and Al Qaeda's Operational Design* (Naval War College 2003) 15.

this period.¹⁰⁹ Bin Laden's theology exists within the same framework established by earlier theorists, though with some key variations on the central themes, the most notable of which is an inclination towards classical modes of organisation. First, he is more respectful towards incumbent Islamic institutions than many subsequent thinkers. Referring to the persistent ulema, he notes "[t]hey kept from it the distortion of the stupid, the plagiarism of the liars, the interpretation of the ignorant and the dilution of the profligate tyrants".¹¹⁰ In acknowledging this, however, he is dismissive of the modern ulema, suggesting that they have become corrupt, and have permitted distortions to occur. In relation to a particular scholar, he mentions specifically how this individual permitted usury, failed to condemn a Muslim leader for wearing a cross, criticised the issuing of fatwahas that permitted western involvement in the first Gulf War, and issued a fatwah encouraging peace with "the Jewish enemy". These, to name but a few infractions, were indicative to bin Laden of corruption, and collusion with tyrants and the enemies of God.¹¹¹ His willingness to salvage these institutions rather than place them forever outside the fold of Islam represents a pragmatism not present in the thought of many subsequent thinkers, and even the jihadist organisations with which his name has become intertwined.¹¹²

Bin Laden persists in the essential understanding of the present condition, and the influence of the west upon Islam as established by the earlier theorists of the Egyptian school. Rhetorically, Bin Laden makes a critical contribution, however, in his vision of how to restore Islam to its rightful place. Unlike al-Banna, Qutb, or Faraj, bin Laden seeks to co-opt for himself Islamic authority within the bounds of classical Islamic institutions. This has led to a recognition that whilst appearing irrational and absurd to western audiences, his ideology has a visceral appeal to some Islamic audiences, especially those feeling dislocated or dispossessed by modernity.¹¹³

¹⁰⁹ Michael G. Knapp, 'The Concept and Practice of Jihad in Islam' (2003) *Parameters* 82, 84–85.

¹¹⁰ Osama Bin Laden, 'Open Letter to Shaykh Bin Baz on the Invalidity of his Fatwa on Peace with the Jews' (*Wikisource* 1994) <https://en.wikisource.org/wiki/Open_Letter_to_Shaykh_Bin_Baz_on_the_Invalidity_of_his_Fatwa_on_Peace_with_the_Jews#cite_note-2> accessed 20 July 2018.

¹¹¹ *Ibid.*

¹¹² Roberts (n 102).

¹¹³ See generally Fareed Zakaria, 'Islam, Democracy, and Constitutional Liberalism' (2004) 119 *Political Science Quarterly* 1.

Bin Laden emphasised the importance of organisation.¹¹⁴ Consistent with his position as a globally recognisable figurehead, bin Laden adopted for himself the title of Emir.¹¹⁵ There is evidence in his writings that, to him, this denoted far more than the mere sobriquet that western intelligence services frequently assumed it to be. Emir is a title bin Laden utilised to denote a “true” leader of the Islamic world, in contrast to those he saw as connected to the west.¹¹⁶ This commitment, whilst arguably superficial, differentiates his organisation from Islamic leaders with more secular titles.

By accepting the role of Emir in the modern Islamic community, Bin Laden was accepting not only an accolade, but also a role in Islamic governance. The title of Emir was a critical aspect of how he understood the duty of jihad and his personal capacity to wage one against the “west”. As well as being rooted in classical Islamic empires and communities, thus gaining resonance with his audience, under specific circumstance an emir is afforded the privilege of invoking jihad in the reasoning. Accordingly, bin Laden sought to present the incumbent Islamic institutions as inadequate or corrupted. For instance, he indicates that today’s Muslim governments are in fact, not Muslim, due to their loyalty to the “invader” and further, the scholars of Islam have become little more than the “donkeys that carry the book”,¹¹⁷ failing to reflect an accurate interpretation of Islam, devoid of western influence. This contrasts with his own asceticism, dedication to jihad, and practical commitments – details emphasized in his public image.

Bin Laden was conversant in the specifics as to why Islam had become subordinate to the west, particularly in military matters. He mainly explains the relative position of the Muslim culture as a consequence of enslavement by “Zionists” and “crusaders”..¹¹⁸ This indication of oppression by external forces is, however,

¹¹⁴ In the publication ‘Structures and Bylaws’, it becomes clear that Al Qaeda sought to draw upon modern western management and organisational techniques, whilst veiling these innovations in Islamic language, with chairmen and committees existing alongside Shura councils and emirs. This effort is deeper than mere terminology, however, with Al Qaeda seeking to mimic a range of western examples. See generally CTC, ‘Al-Qa’ida’s Structure and Bylaws’ (2002) <<https://ctc.usma.edu/harmony-program/al-qaidas-structure-and-bylaws-original-language-2/>> accessed 20 April 2017.

¹¹⁵ Ibid 5.

¹¹⁶ Osama Bin Laden, ‘Unknown 27 Dec 2004’ in IntelCenter (ed), *IntelCenter Words of Osama Bin Laden* vol 1 (Tempest Publishing 2008) 90–91.

¹¹⁷ Osama Bin Laden, ‘Letter to all Muslim brothers in the world’ (2018) <<https://dni.gov/files/documents/ubl2017/english/Letter%20to%20all%20Muslim%20brothers%20in%20the%20world.pdf>> accessed 20 July 2018, 3.

¹¹⁸ Ibid 3.

compounded by internal elements, mainly infighting, and the emergence of sects he sees as heterodox.¹¹⁹ He accordingly stresses a practical, more pragmatic approach to jihad that is more grounded in classical Islamic law and theory. Bin Laden's depiction of both the west and Islam is better grounded in history than many approaches that come later; bin Laden's assessment of western material and organisational superiority at this juncture serves to modulate what is possible, as well as extend the timeline for the realisation of an Islamic state. In his own lifetime, he was against, for instance, attempting to install an Islamic state in the Muslim world.¹²⁰ Bin Laden's radical acceptance of the physical limitations of his organisation and the Islamic world in general within the framework of the persistent understanding of Islam and the west sets him apart from the subsequent discussion of jihad found in the writings of more recent neo-jihadists. By grounding his understanding in history, he is forced to relegate the realisation of the actual "Islamic state" to some point in the future.

In summary, bin Laden is far more conversant with the systems and forms of the classical era than many later scholars. He is deliberate in identifying himself as a modern-day emir, or battle leader. This permits him to direct jihad for the purpose of restoring Islamic governance, whilst he predicates the authority to act in this manner upon the degeneration of the ulema and the lack of any "true" Islamic leaders above him. He concurrently recognises the need to co-opt existing institutions and state systems; this indicates his pragmatism in earthly matters. In bin Laden's thought, the west, and its influence over the Islamic world, require inducement to remove; the west does not by its ideal nature contain features that will bring about its own inevitable destruction, nor does he emphasise the destruction of the west as God's prerogative. This pragmatism and innovation stand in sharp contrast to many later theorists.

5.3.6 Anwar al-Awlaki

Bin Laden chose to balance his commitment to neo-jihadist ideology with a certain degree of pragmatism, which in turn affected his methods and grand strategy. In subsequent thinkers' texts, however, the methods, aims, and timescale have become entirely detached from reality, with thinkers emphasising the role that divine

¹¹⁹ Ibid 4.

¹²⁰ Indeed, this position accounted for at least one key fissure in Al Qaeda. See Kenneth Katzman, *Al Qaeda: Profile and Threat Assessment* (2005) 2–3.

intervention will take in defeating the west. The result is an understanding of jihad that is less operationally constrained, more permissive, and more constant, whilst being extremely difficult to understand.¹²¹ Perhaps the most visible theorist in this regard is Anwar al-Awlaki. As a US citizen, Awlaki was perhaps closer to the west, having had an involvement in the Fort Hood shooting, amongst other key terrorist events taking place on American soil.¹²² Much of his work focuses on encouraging western-based Muslims to participate and support the type of jihad exemplified by groups like Al Qaeda and ISIS. *Constants on the Path of Jihad*¹²³ represents an immensely influential text of interesting origins.¹²⁴ Yusuf al-'Uyayri, a jihadist operative in the Soviet-Afghan war, wrote the text, which was subsequently translated and disseminated by the American-Yemeni al-Awlaki, who attached some additions and commentary.¹²⁵ The resulting text is an accessible and clear distillation of the neo-jihadist ideology and belief system that has proved compelling to western audiences.¹²⁶

The actual content of the text is fairly straightforward as to summarise that jihad is to be constant. It has features that must be constantly expressed by Muslims until the end of time.¹²⁷ Unlike bin Laden, he suggests an ahistorical, idealised form of jihad that does not participate in any real limitations or constraints.¹²⁸ It is detached from any pragmatic consideration of the situation, the disposition of power and military strength, or the reaction forces it opposes. It is constant, with all of its features dictated by this central principle. At first glance, the approach advocated by al-Awlaki seems comically ill-adapted to confront the state system, devoid, as it is of any pragmatism; it does not consider operational realities overmuch, the potential reaction of counter-jihadists, nor does it seek to optimise the contribution of each individual

¹²¹ The contention is made that such movements are fundamentally irrational, making decisions that ultimately cause them to implode. Accordingly, it is often difficult to understand or predict their actions. See generally, Anthony N. Celso, 'Cycles of Jihadist Movements and the Role of Irrationality' (2014) 58 *Orbis* 229.

¹²² Robert Chesney, 'The Use of Force Regime and Unconventional Threats: Anwar Al-Awlaki as a Case Study' in William C. Banks (ed), *Counterinsurgency Law: New Directions in Asymmetric Warfare* (Oxford University Press 2013).

¹²³ Yusuf al-'Uyayree and Anwar al Awlaki, *Constants on The Path of Jihad* (Mujahid Fe Sabeelillah ed, 2018).

¹²⁴ Alexander Meleagrou-Hitchens, *As American as Apple Pie: How Anwar al-Awlaki Became the Face of Western Jihad* (ICSR 2011) 9.

¹²⁵ Al 'Uyayree and Awlaki (n 123).

¹²⁶ David Smith, 'American Isis Twitter Scene Reveals Social Media's Power to Radicalise' *The Guardian* (1 December 2015) <<http://theguardian.com/world/2015/dec/01/isis-america-twitter-social-media-radicalisation>> accessed 1 December 2018.

¹²⁷ Al 'Uyayree and Awlaki (n 123) 7.

¹²⁸ Chesney (n 122); he additionally draws upon total war in order to articulate what jihad is, though he fundamentally misunderstands the concept; see additionally Meleagrou-Hitchens (n 124) 72.

convert to the cause. It provides the theological justification for the wresting of authority in matters of war, and firmly locates it with the fighters of the jihadist cause:

*Also, for our earlier Scholars, whenever they would have a dispute over a fatwa, they would send it to the Mujahideen in the frontline; they know that they are guided by Allah”.*¹²⁹

Put simply, they elevate the experience of jihadi practitioner above the reason of the scholar. This represents a desire to detach modern jihad from any sense of the checks or balances that prevailed in the classical eras. *Constants* represent an ideological evolution that is consistent with the means and methods available to extreme neo-jihadists.¹³⁰ Established beliefs of neo-jihadism are framed in such a way as to incite every available follower to commit immediate violence against the “west”, with no conception of practicality. It is readily discernible that such an interpretation not only lends itself to conventional acts of organised violence, but also presents an argument for lone wolf attacks and suicide terrorism. Whilst the strategy that may be extracted from *Constants* seems farfetched, the efficacy of such an approach is apparent in the high-profile attacks that may be directly linked to the text, most notably the aforementioned Fort Hood shooting, and the popularity of his texts throughout the Anglosphere.

Anwar al-Awlaki additionally provides guidance on how it is possible to support jihad, suggesting financing, disseminating information online, and indoctrinating children as good means of supporting the fight against “disbelief” in his publication, *44 ways to support Jihad*.¹³¹ The arguments of Anwar al-Awlaki have been characterised as “arguments for foot soldiers”¹³² in that they are not intended to be coherent or sophisticated, but simply to motivate individuals to involve themselves in jihad. He has been criticised for failing to understand key western insights upon the

¹²⁹ Al ‘Uyayree and Awlaki (n 123).

¹³⁰ Ibid 51.

¹³¹ Anwar al-Awlaki, ‘44 Ways to Support Jihad’ (2009) <https://ebooks.worldofislam.info/ebooks/Jihad/Anwar_Al_Awlaki_-_44_Ways_To_Support_Jihad.pdf> accessed 29 May 2019.

¹³² J.M. Berger, ‘The Myth of Anwar al-Awlaki’ (2011) <<https://foreignpolicy.com/2011/08/10/the-myth-of-anwar-al-awlaki/>> accessed 7 August 2018.

issue of war.¹³³ Key themes are gods supporting any action undertaken against non-Muslims,¹³⁴ and the inevitable nature of victory.¹³⁵

It may be contended that the writings of al-Awlaki are given over entirely to the spiritual aspects of jihad, in which faith alone is the source of victory, an axiom he himself uses,¹³⁶ and the considerations of strategy, means, and logistics to which earlier thinkers showed deference, are ultimately unimportant. Factoring such earthly considerations in may even be framed as demonstrative of a lack of faith; as he explains, only Allah may determine when victory is achieved; judging according to outcome is a form of Kufr, and even if this does not result in defeat on the battlefield due to lack of faith, it will result in a form of spiritual defeat.¹³⁷

The vision provided by this scholar is not parallel to the grand strategy of bin Laden, but instead seeks to motivate widespread Islamic resistance against the encroachment of the west. It suggests a vast, decentralised understanding of jihad that does not depend on collective action. Victory is to be achieved through dedication alone, with little concession made to tactics, strategy, or organisation, with the meaning of victory imbued with spiritual connotations in addition to bringing tangible defeat to the west. This approach has widespread appeal, serves to inoculate jihadist movements against the frequent and humiliating defeats inflicted, and is ideally adapted to take advantage of the opportunities for sporadic terrorism and decentralised modes of warfare that have characterised recent anti-western violence. It is not hard to determine that any group inculcated with such an approach will not be susceptible to externally imposed regulations upon the conduct of hostilities, nor will they be liable to any convention not imposed by force. This, in addition to the difficulty imposed in predicting their actions and behaviours in line with the expectations conventionally applied to non-state groups, illustrates the necessity of distinguishing contemporary religious conflict from armed conflict more generally.

5.3.7 Abu Bakr al-Baghdadi

¹³³ Meleagrou-Hitchens (n 124) 72–73.

¹³⁴ al-Awlaki (n 131) 3.

¹³⁵ Ibid 10.

¹³⁶ Al ‘Uyayree and Awlaki (n 123) 62–63.

¹³⁷ Ibid 28–29.

By the time the organisation ISIS became a serious contender, the concept of neo-jihad was well established to the point of being self-sustaining in the general discourse; yet, elaborations conducted by the leader of ISIS, Abu Bakr al-Baghdadi, serves to illustrate the flexibility of the concept, as well as its operationalisation to an as yet, unprecedented degree. ISIS from its inception has emphasised skill in rhetoric and practical leadership skills above the theological navel-gazing that preoccupied many scholars earlier in the revival.¹³⁸ This is perhaps one reason for their overtaking of Al Qaeda, whose leadership has failed to maintain its grip over what was once its vassal branch in Iraq.¹³⁹ Like Al Qaeda, ISIS has embedded its strategy and performance in the contemporary Islamic historiography of Salafism; unlike Al Qaeda, however, the group has been far less pragmatic, maintaining their commitment to mass violence even in the face of destruction.¹⁴⁰ Whilst this would seem to be counterproductive, representing rejection of the longer term, attrition-driven approach favoured by bin Laden's successors, it has instead resulted in widespread global appeal,¹⁴¹ with the organisation drawing massive numbers of émigré Muslim fighters, and the pledged allegiance of a range of pre-existing terrorist groups.¹⁴²

Baghdadi framed his organisation as a re-enactment of the construction of the early Islamic community.¹⁴³ He places the construction of the Islamic state in Iraq and Syria as part of a religious narrative that has played out timelessly; he participates in the dualist construction of the west and Islam, as well as the meaning of jihad established elsewhere.¹⁴⁴ Somewhat quaintly, he specifies not only western military

¹³⁸ Whilst ISIS is often derided for what has been characterised as a simplistic approach to the faith, its version of the Islamic religion is easy to access, non-elitist and easy to comprehend. See Bernard Haykel, 'ISIS and al-Qaeda—What Are They Thinking? Understanding the Adversary' (2016) 668 *The Annals of the American Academy of Political and Social Science* 71, 78.

¹³⁹ Whilst there are a number of different factors that led to ISIS overtaking its other regional competitors, one contention is that ISIS demonstrated a greater commitment to jihadist values. It did this by focusing its efforts on killing Shia Muslims and Sunni Muslims who opposed them; these proved far easier to kill than the Americans and other western invaders that preoccupied Al Qaeda, permitting ISIS to not only establish a formidable body count, but show that they were committed to undertaking any action in pursuit of their aims. See Kenneth Katzman, *Iraq: Post-Saddam Governance and Security* (CRS Report for Congress, 2007) 31–32.

¹⁴⁰ Haykel (n 138).

¹⁴¹ The adoption of apocalyptic rhetoric seems to aid recruitment. See Jean-Pierre Filiu, *Apocalypse in Islam* (M.B DeBevoise tr, 1st edn, University of California Press 2011) 198; see additionally Karl Umbrasas, 'The Life Course of Apocalyptic Groups' (2018) 11 *Journal of Strategic Security* 32.

¹⁴² Jessica Stern and John M. Berger, *ISIS: The State of Terror* (William Collins 2015) 76.

¹⁴³ Jason Burke, *The New Threat: The Past, Present, and Future of Islamic Militancy* (The New Press 2017) 11.

¹⁴⁴ For instance, stating 'There is no good in living if we do not live under the rule of Allah and in the shade of His shari'a. And how sweet a death it is to die while supporting Allah's religion and defending His shari'a and His rule'. Abu Bakr al-Baghdadi, 'We, Too, Will Wait With You' (Kyle Orton's Blog,

superiority of western and Jewish forces, but the use of sorcery and propaganda by the west and their Muslim (Tagut) allies as a threat with which ISIS contends.¹⁴⁵ Whilst this seems peculiar, the term sorcerer can be considered at least as significant as the use of the more familiar Kajarite or Tagut accusation,¹⁴⁶ not only from the Islamic standpoint,¹⁴⁷ but demonstrating that ISIS is to consider their enemies to be supernaturally evil, a key element of much older, historical religious understandings of warfare.

In addition to applying the structural ideals common to neo-jihadism, his ostensible resurrection of an idealised Islamic state participates more fully in the linguistic formalism of Islamic law. First, the manner in which he styled himself; he took on a range of antiquated titles as a means of claiming authority over the global Islamic community.¹⁴⁸ His assumed authority adds credence to his interpretation of the Quran to serve as an additional basis through which his depiction of scripture takes on a prescriptive character. In addition to adopting the position of sole leader of the Islamic community, Baghdadi emphasises the ultimate unity of the Ummah.¹⁴⁹ The notion of a unitary Ummah is vital to his authority over it, and his instruction to fight.¹⁵⁰ The membership in the Ummah requires certain behaviour – fighting for Islam, and obeying the leader.

To reinforce his view, Baghdadi aggregates the disparate experiences of the global Muslim community as a single experience of unitary oppression, in both east and west, in both Muslim lands and outside of the Islamic world. Though this humiliation is a result of Muslims betraying the cause of jihad,¹⁵¹ the purpose of his Islamic state is to ensure a condition in which Muslims will be free from humiliation

28 December 2015) <<https://kyleorton1991.wordpress.com/2015/12/28/islamic-state-leader-threatens-saudi-arabia-and-israel/>> accessed 23 June 2018.

¹⁴⁵ Abu Bakr al-Baghdadi, 'Even if the Disbelievers Despise Such' (Kyle Orton's Blog, 6 December 2014) <<https://kyleorton1991.wordpress.com/2014/12/06/the-islamic-state-creates-foreign-provinces/>> accessed 24 July 2018.

¹⁴⁶ Naturally al Baghdadi also uses these terms to attack Muslims who do not submit to him. See *ibid.*

¹⁴⁷ Witchcraft is no small matter in many Islamic countries. Sorcery is illegal in both Nigeria and Saudi Arabia, carrying the same penalty as apostasy. See Remke Kruk, 'Harry Potter in the Gulf: Contemporary Islam and the Occult' (2005) 32 *British Journal of Middle Eastern Studies* 47, 47–48.

¹⁴⁸ See Remy Low, 'Making Up the Ummah: The Rhetoric of ISIS as Public Pedagogy' (2016) 38 *Review of Education, Pedagogy, and Cultural Studies* 297.

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

¹⁵¹ Allah also made jihad the best of deeds and the peak of Islam. He placed the honour of the Muslims in jihad and imposed humiliation on those who abandoned it. Allah's messenger said 'If you trade in inah (usury), pursue the tails of cattle, content yourselves with agriculture, and abandon jihad, then Allah will impose upon you humiliation which He will not remove until you return to your religion'. Al-Baghdadi, 'Even if the Disbelievers Despise Such' (n 145).

imposed by external forces.¹⁵² As with other theorists, understanding what is meant by caliphate in Baghdadi's thought is important. He recognised that a caliph must be conversant in Islamic law, and be descended from the prophet's own tribe. Baghdadi was careful to situate any outlandish actions, such as burning alive, or beheading of captives within the precedent of Islamic law and imperial practice. His actual role of caliph was largely autocratic, lacking any balances upon his power.¹⁵³ The elaboration of this community proceeds from the recognition of classical Islamic imperialism, and linguistically and symbolically, Baghdadi has taken on many of the identifiers necessary to be convincing in this regard. He naturally has visibly sought to conform with classical Sharia, implementing dark age punishments, economic practices, and social policies that would have been at home in the period which he aspires to revive;¹⁵⁴ a strategy that the other kind of Islamic state has mirrored in the past.

Baghdadi has, however, been pragmatic in building his Islamic edifice upon the foundations of the former Iraqi regime. Viewing ISIS as a fascist movement has been attempted; one writer has affixed a specifically Trotskyist analysis of fascism to ISIS ideology, constructing a variety of fascism that is ephemerally Islamic (Daeshism) as a regional counter-revolution, targeting concessions to socialism and liberalism that have occurred in the region.¹⁵⁵ To examine the doctrine of Baghdadi, it is possible to suggest that he represents a progression on the original themes established by the earlier scholars of the Islamic revival. Drawing upon the well-established notion that there exists a supernaturally evil enemy in "the west," al-Baghdadi asks his followers to make sacrifices and undertake actions commensurate with this accepted reality. This is in contrast to earlier thinkers, who identified the west, Jews and other Muslims in the same manner, yet called for political engagement, quietist activism, or sporadic acts of terrorism.

¹⁵² 'a day will come when the Muslim will walk everywhere as master, having honour, being revered, with his head held high, and his dignity preserved. Anyone who dares to offend him will be disciplined, and any hand that reaches out to harm him will be cut off. So let the world know that we are living today in a new era'. In Dabiq 12 (Al Hayat Media Centre 2018) 3–3.

¹⁵³ He for instance, maintained power to dissolve any council or organising committee. See Yuval Shany, Amichai Cohen and Tal Mimran, 'ISIS: Is the Islamic State Really a State?' (The Israel Democracy Institute 2014) <<https://en.idi.org.il/articles/5219>> accessed 3 December 2018.

¹⁵⁴ Al-Baghdadi, 'Even if the Disbelievers Despise Such' (n 145).

¹⁵⁵ Ghayath Naisse, 'The "Islamic State" and the Counter-revolution' International Socialism <<http://isj.org.uk/the-islamic-state-and-the-counter-revolution/>> accessed 12 July 2018.

5.4 Neo-jihadism; a contemporised example of religious conflict

The culture and ideology of Islamic revivalism and its zenith in groups like ISIS, Al Qaeda and others are the results of a complex realignment of Islamic law and theology with the type of dialectical thinking that was previously grounded in racial and class-based ideology. It is possible to conclude that the doctrine of neo-jihadism is the product of a single person, time or place, but has been elaborated on, with significant variations by a range of different thinkers who have made progressive contributions.

These interpretations range from the vaguely practical thought, such as bin Laden, to the utterly fantastic, in which the introduction of more religious veins of thought has resulted in an understanding of the utility of force that is more spiritual in nature. Much of this divergence may, however, be accounted for in the different objectives of the thinkers in question, or the different positions they occupied within the wider movement. Some of the works discussed were intended for the consumption of other practitioner thinkers, while many addressed the Islamic population instead, with various objectives in mind, ranging from political mobilisation through to the instigation of immediate jihad, intended to motivate “lone wolf” terrorism.

A consistent feature has been how the west and the Islamic world are understood to relate to one another. The west is understood to be currently ascendant, though insufficiently religious, decadent, and ultimately carrying within its essence its own destruction. This is seen as inevitable, and ultimately, a good thing. This acknowledged, our neo-jihadist thinkers have sought to reassert the notion of a global Islamic community, reacting against the decadence of the institutional jurists and oppressive governments of the historically Islamic world, and the interventions of the “west”. This parallels the typical nature of religious conflict established in earlier chapters, and leads this chapter to its first essential point; that neo-jihadism has many parallels with historic incarnations of religious conflict.

In observing modern-day Islamic groups, their own self-image would suggest that since the essential jihadist “pitch” pioneered by Qutb reached the mainstream, modern-day Islamist groups have sought to demonstrate their commitment to the unadulterated Quran, the early communities of Muslims (Salaf) and a range of prominent classical theorists. Maher stresses the importance of the influence of al-

Wahhabi and Ibn Taymiyyah as key touchstones for modern-day terror scholars.¹⁵⁶ This visibly positions neo-jihadists and their associated movements as revivalist in context. Admittedly, the immersion in Islamic scripture and an aspiration to revive a lost Islamic golden age appear as barriers to depicting neo-jihadism as a new ideological product. It is possible to present these features as superficial, however.

The thinker-practitioners discussed in the course of this chapter have progressively taken on increasing responsibility in achieving this aim. They have proved adept in constructing a system of rules and codes that people have found compelling enough to fight for and support. In line with this development, this chapter has sought to discuss the proposed destination of the Islamic community in the neo-jihadist imagination, as well as the manner of getting there. The essential conclusion is that, like the contemporary institutions and leaders they criticize, they have been influenced by some very western ideas. When thinking about the system to which they aspire, as well as jihad, Islamic thought has absorbed a sort of Hegelian framework, from prolonged contact with western ideologies. This positions neo-Jihadist thought within the same epistemological system as earlier ideologies, notably fascism and Marxism.

This is not an argument against the Islamic purity of neo-jihadists. This argument is not terribly useful in the context of this study, though there are perhaps sufficient grounds to assert that neo-jihadist thought is sufficiently corrupted to wrest power from them on theological grounds. Instead, this provides the space to suggest that it is possible to think about them as functioning in the same epistemological universe as Marxists and Nazis. Neo-jihadi thought introduces a religious essence to this framework, though its attempt to reconstitute imperial Islamic distinctions in the contemporary state system is more useful in understanding how jihad relates to contemporary violence, and moreover, connects the neo-jihadist manner of thinking with other ideologically motivated instances of mass violence. It is accurate to characterise modern-day Islamic groups as possessing carefully considered beliefs.¹⁵⁷ Due to their ostensible Islamic purity, perhaps those subscribing to these groups are not fully cognisant of the precise nature and provenance of these beliefs. This is not to say that the religious appearance of the neo-jihadist movement is in any way irrelevant;

¹⁵⁶ Maher (n 19) iv.

¹⁵⁷ Graeme Wood, *What ISIS Really Wants* (2015) <<https://thinkprogress.org/what-the-atlantic-left-out-about-isis-according-to-their-own-expert-afd98cf1c134/#.j8kybeoni>> accessed 14 July 2018.

command of Islamic symbol and language is vital as a mobilising factor, as well as serving as a means of contesting one another and more contemporary concepts of jihad.

Western scholars long assumed that a reformation was imminent, in which the notions of Sharia and fiqh would not be in any shape laws, but instead, ethical guidelines. This would additionally discharge any need to defend one's faith through the force of arms. Yet it has been radicals of the other sort that have taken the initiative. Radical scholars, whether associated with a terrorist movement or not, share the same goal; the reigniting of the global Islamic state concept.¹⁵⁸ Jihadi thinkers like those discussed have been the dominant voices framing this counter-reformation. This condemnation of authoritative scholars does strike Lutheran parallels; just as the Protestant Reformation cast the church in Rome as a corrupted and unnecessary intercessor between God and his people, so thinkers have cast the traditional ulema as being dedicated to the pursuit of wealth and earthly power, irrevocably tethered to corrupt state governments – or, sensationally – the grand Jewish American conspiracy.

Jurisprudence, in this approach, is devolved to the authority inherent in the individual, as personal as his relationship with God, denying any influence from political or scholarly authorities. The individual Muslim can choose the interpretation of Sharia that conforms with his own. This in a sense permits what Solomon calls the “democratisation of Jihad”¹⁵⁹ in which the right to interpretation of when to act violently in the defence of the faith goes right down to street level.¹⁶⁰ The new jihadist benefit from the conservative Islam generated by the Gulf states, as well as modern mass communications that allow them to saturate the global awareness with their revised interpretation, drowning out the voice of more established and moderate juristic establishments ill-adapted to having to compete for allegiance.

¹⁵⁸ “[...] describes neither terrorism nor civil war, but rather a “world-historical” movement of Islamic revival. Terrorism in this reality-framework is an expression neither of criminal evil nor of an evil vision. Rather, violent radical elements are only a small part of a much broader movement for Islamic restoration, or in the traditional sense inherited from late antiquity, of *renovatio*. *Renovatio*, or another Roman favourite, *reparatio*, speaks more directly to Islamist visions than words like “revival”, which in the western consciousness at least refer more narrowly to simpler religious “awakenings”. For Muslims at least, their vision is one of an entire order restored, of not simply religion but of an entire, “rightly guided” way of life brought back as it should be. For a generation and more the drive for this Islamic restoration has been gathering strength and asserting itself”. See Michael Vlahos, ‘The Muslim Renovatio and U.S. Strategy’ (2004) <http://ideasinactiontv.com/tcs_daily/2004/04/the-muslim-renovatio-and-us-strategy.html> accessed 14 July 2018.

¹⁵⁹ Hussein Solomon, *Jihad: A South African Perspective* (Sun Media 2013) 20.

¹⁶⁰ *Ibid* 20.

The twenty-first-century Islamic discourse is to an extent characterised by the loss of a longstanding and relatively stable system of thought and governance that served to maintain a relationship between the power of law and the faith in a concrete manner. Law in Islam is, after all, a sacred activity. Since the decline of the last Sunni Islamic empire, the dominant philosophical influence acting upon the Islamic world has been purist, conservative, and regressive. Salafism, or its Pakistani fellow traveller deobandism, have served to propagate the notion that the Islamic world would do better to return to its past. Like Hallaq notes, attempts to assert Islamic law within the context of the modern state system are subject to failure and easy to dismiss from a classical Islamic standpoint.¹⁶¹ Neo-jihadist thought naturally, therefore, resists the state system – a rapid, violent unmaking being the preferred means of dislocating the system of states in favour of the universal Islamic state.

5.5 Examples; how has Neo Jihadist ideology caused unconventional armed groups to develop?

“Because organisations that rely on terrorist attacks typically lack the strength to employ more legitimate forms of violence leaders must formulate a narrative that mobilises followers and has consistent elements...without an articulated sense of political purpose, the violence is nothing more than murder and redounds against a group or its cause.”¹⁶²

Extreme violence, if undertaken without a rationalisation, is often counterproductive to the organisation in question, harming their reputation with the population from which they wish to elicit support.¹⁶³ Whilst this is stated above with reference to terrorism, it undoubtedly remains true with dealing with armed groups. Just as terrorist attackers need to justify killing civilians, unconventional armed groups likewise need a narrative that backs up their extreme actions; this process has been considered in this chapter so far by looking at how subsequent theorists have adapted this is highly visible in the context of the war on terror. Whilst al Qaeda initially drew selectively on Islamic history and scripture to produce a mandate justifying mass terrorist attacks

¹⁶¹ Hallaq (n 24).

¹⁶² Audrey Kurth Cronin, *How terrorism ends : understanding the decline and demise of terrorist campaigns* (Princeton University Press 2009) 15.

¹⁶³ Ibid

against non-Muslims,¹⁶⁴ their downfall came following the US occupations of Iraq and Afghanistan; al Qaeda managed to kill more Muslims than westerners,¹⁶⁵ and failed to justify this in a coherent manner, leading to a decline in support.¹⁶⁶ This is a familiar pattern regarding jihadist groups, who often lose support in this manner.¹⁶⁷ ISIS, on the other hand, contrived an interpretation of neo jihadism that offers them far more options in the use of force, even against professed Muslims,¹⁶⁸ with the additional benefit of permitting them to embark on territorial and government projects, even assuming authority over other extremist groups.¹⁶⁹ IHL should therefore take notice of Neo-jihadism. Much like terrorism, it does entail the rejection of norms on the use of force, but additionally constitutes a mandate to occupy territory and wage war, elevating it beyond the more established threat stemming from terrorist groups.

In setting out why neo-jihadism correlates with situations in which IHL becomes difficult to apply, it is first worth noting that neo jihadism is characterised by the rejection of anything it perceives as western or external to Islam.¹⁷⁰ This makes compliance largely unviable, or at least prohibitively difficult. Opposing “the west” and its interests, originations expressing the neo jihadist approach frequently find themselves contending with not only state governments, but some of the most dominant military powers in the world.¹⁷¹ It is worth noting that for instance, even conventionally equipped militaries when enjoying a massive advantage have not met with much success in contending with nations like Israel and America, or western interests in general.¹⁷² This lesson has been well taken by both states and non-state groups, who have begun to understand the futility of attempting a peer level contest

¹⁶⁴ Michael G. Knapp, ‘The Concept and Practice of Jihad in Islam’ (2003) *Parameters* 82,92.

¹⁶⁵ Scott Helfstein, Nassir Abdullah and Muhammad Al-Obaidi, ‘*Deadly vanguards: a study of al-Qaeda’s violence against Muslims*’, Occasional Paper Series, (Combating Terrorism Centre at West Point, December 2009) 10.

¹⁶⁶ *Ibid.*

¹⁶⁷ Lawrence Wright, *The looming tower : Al-Qaeda and the road to 9/11* (New York : Knopf 2006) chapter 15.

¹⁶⁸ Alastair Crooke *The ISIS’ ‘Management of Savagery’ in Iraq* Huffpost (30 August 2014) <https://www.huffpost.com/entry/iraq-isis-alqaeda_b_5542575> accessed 14/08/20167

¹⁶⁹ Jessica Stern and John M. Berger, *ISIS: The State of Terror* (William Collins 2015) 76.

¹⁷⁰ Indeed, ISIS are dismissive of any system of law that does not from God. See Dabiq 10 (alhayat media 2015).

¹⁷¹ Mohammed M. Hafez, ‘Martyrdom Mythology in Iraq: How Jihadists Frame Suicide Terrorism in Videos and Biographies’ (2007) 19 *Terrorism and Political Violence* 95, 99.

¹⁷² Norvell B. De-Atkine, ‘Why Arabs Lose Wars’ (1999) 6 *Middle East Quarterly*. 0.

along conventional military lines, and have adopted different strategies, as well as different ways of looking at the world in order to support these new approaches.¹⁷³

When considering unconventional armed groups, it is well worth considering where exactly they came from. In many cases, organisations like al Qaeda and ISIS owe their initial foothold on the modern battlefield not so much to the appeal of their ideology to a mass audience, but as an alternative to conventional military force. Al Qaeda is perhaps the most prominent example. In order to frustrate soviet expansion in Afghanistan without directly engaging the Soviets, the US clandestinely funded and equipped a range of Islamist organisations.¹⁷⁴ Out of this conflict, both the Taliban al Qaeda emerged.¹⁷⁵ Likewise, what later became ISIS is ultimately rooted in Saddam's Iraqi "return to faith campaign", which owes its existence to the Iraqi conventional military failure to offer any meaningful resistance in the Gulf war of 1991.¹⁷⁶ It is frequently contended that in Syria, Assad actually cultivated armed Islamist groups as controlled opposition, relying upon them behaving in such a brutal and irrational manner as to galvanise support for his regime, which would seem reasonable by comparison.¹⁷⁷ As Ravenscroft suggests, such individuals are highly committed, and therefore perfectly disposed to undertake acts of terrorism and unrestrained violence.¹⁷⁸ There is, therefore, a basis to suggest that religious fanatics are useful to keep around, if only because they can do things that normal people are unwilling to do. As a willingness to kill civilians is a composite element of these additional functions, it is not untoward to suggest that the conflicts in which they are involved may generate high civilian casualty numbers.

Put simply, neo jihadist groups are capable of using force in a manner that state militaries find themselves unable or unwilling to approximate. This is partly because they lack the practical and legal restraints to which most states and non-state groups

¹⁷³ it has for instance been contended that Islamism in general represents an attempt to address the west's military and economic domination of the Muslim world. See Elizabeth Nugent, Tarek Masoud and Amaney A. Jamal, 'Arab Responses to Western Hegemony: Experimental Evidence from Egypt' (2016) 62 *Journal of Conflict Resolution* 254, 254-255.

¹⁷⁴ Brian Glyn Williams, 'Talibanistan: History of a Transnational Terrorist Sanctuary' (2008) 10 *Civil Wars* 40, 57-49

¹⁷⁵ *Ibid*, 40.

¹⁷⁶ Ahmed S. Hashim, 'The Caliphate at War: Ideology, War Fighting and State-Formation' (2016) 23 *Middle East Policy* 42, 43-44; Romain Caillet, "From the Ba'th to the Caliphate: the former officers of Saddam and the Islamic State" (June 2015) NOREF Expert Analysis, 3.

¹⁷⁷ Elizabeth O'Bagy, "*Middle East Security Report 6; Jihad in Syria*" (Institute for the Study of War 2012) 9-10.

¹⁷⁸ Ian Ravenscroft, 'Terrorism, religion and self-control: An unexpected connection between conservative religious commitment and terrorist efficacy' (2019) *Terrorism and Political Violence* 1

are generally subject,¹⁷⁹ but additionally as their ideology dictates that relegating the use of force to the conventional military contest is neither required or desirable.¹⁸⁰ States were perhaps the first to recognise the value of such groups, generally using them to either offset their conventional weakness¹⁸¹ or to achieve functions that conventional militaries generally do not undertake.¹⁸² In this sense today's Islamic unconventional armed groups owe their origins to the utility of their approach to the use of force; they can do things that states are generally unwilling to do. It is therefore not untoward to suggest that the direct targeting of civilians by these groups is far from irrational, but either serves a key role in their wider strategy or is a product of their unique position.¹⁸³ Regardless, the approach taken by these groups clearly goes some way to offsetting the weakness and lack of organisation characteristic of an unconventional armed group. In order to benefit from these advantages, however, it is vital that they are justified. As this chapter will now layout, in the context of the war on terror, this is not as difficult as one may think. Indeed, by examining the evolution of Neo-Jihadism as practically employed, it is possible to suggest that the doctrine has proven sufficiently flexible to shift from a doctrine permitting terrorist attacks against "the west," to one that serves to justify the adverse battlefield behaviour of groups like ISIS.

In terms of practical examples that groups inoculated with neo-jihadist ideology explicitly target civilians or at least fail to respect the status of, it is possible to specify the number of examples. Al Qaeda encapsulates a number of civilian centric

¹⁷⁹ There restraints require that the group in question seeks legitimacy. Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015) 31

¹⁸⁰ Contemporary jihadists have adopted a "by any means necessary. approach" to bringing down "the west." Under such circumstances, an unwillingness to kill civilians, women children or other Muslims is readily framed as an indication of a lack of commitment to the cause. See Dale C. Eikmeier, 'Qutbism: an ideology of Islamic-Fascism' (2007) 37 *Parameters* 85, 89-90

¹⁸¹ As Saddam did following the conventional Humiliation of the gulf war. the Impetus behind the "return to faith campaign was acquiring a corps of Jihadists that would resist any future occupation and invasion by the US. See Hashim (n) 44.

¹⁸² For instance clandestinely destabilising a neighbouring state O'Bagy (n) 15; or opposing the expansion of a geopolitical rival Williams (n).

¹⁸³ Gross considers the importance of the distinction between deliberately and inadvertently killing civilians. Killing civilians and have many "side benefits." He specifies deterrence and terror as useful by-products of the killing of civilians. See generally, Michael L. Gross, 'Killing Civilians Intentionally: Double Effect, Reprisal, and Necessity in the Middle East' (2005) 120 *Political Science Quarterly* 555; it is possible that many armed groups today are cognisant of the utility of killing civilians and have integrated it as a deliberate strategy.

strategies in it's the term 'jihad' notably terrorism, assassination and kidnapping.¹⁸⁴ It has in the past gone to lengths to justify the inclusion of these strategies, citing aspects of Islamic law and scripture in order to justify these extreme measures.¹⁸⁵ Unsurprisingly, this willingness to consider killing civilians has bled through into battlefield the battlefield, with this ultimately resulting in higher civilian casualties, in many cases directly due to their willingness to kill civilians.¹⁸⁶ That said, there is a basis to suggest that al Qaeda has remained more circumspect when it comes to the killing of Muslims,¹⁸⁷ with this restraint echoing their ultimate strategy of instigating a united Muslim reaction against the west.¹⁸⁸

ISIS has compounded the trend established by earlier movements through its enhanced focus on takfir. The adoption of this doctrine not only permitted the organisation to actively kill Muslims, but do so without eroding their support.¹⁸⁹ Whilst a common trend that ruins throughout the development of neo jihadism is that it is permissible to kill Muslims under certain circumstances, under ISIS the doctrine has evolved to make the killing of Muslims not only permissible conduct, but behaviour to be encouraged.¹⁹⁰ This permits them to engage in more permissive strategies, in particular, killing shia civilians and attacking non-compliant Sunni communities.¹⁹¹ these strategies permit ISIS to do things that not only are beyond the inclination of states and conventional armed groups, but that had previously been disdained by other neo jihadists. This innovation was essential to ISIS as it entered its territorial phase, in which far more Muslims than non-Muslims were killed. Classifying these casualties as Kufir helped them maintain a veneer of religious

¹⁸⁴ House Permanent Select Committee on Intelligence, 'Al-Qaeda: The Many Faces of an Islamist Extremist Threat.' (29 July 2015) <http://www.gpo.gov/fdsys/pkg/CRPT-109hrpt615/pdf/CRPT-109hrpt615.pdf> accessed 14/08/2019.

¹⁸⁵ Jerrold M. Post, *Killing in the Name of God: Osama Bin Laden and Al Qaeda* (2002) 2.

¹⁸⁶ Ibid.

¹⁸⁷ Crisis Group, *Exploiting Disorder: al-Qaeda and the Islamic State* (2016) jihad in modern conflict special report 1.

¹⁸⁸ See Bin laden (n 117)

¹⁸⁹ Naturally, most Muslims found this approach objectionable. ISIS core supporters however, appreciated the vigour and resolve ISIS demonstrated though a willingness to purify the Umma.

¹⁹⁰ Lile many other organisations isis is cognisant of the long standing salafi trend that emphasise the need to overthrow the un-Islamic regimes presiding over Muslim lands. See Mohamed Elewa Badar, 'The Road to Genocide: The Propaganda Machine of the Self-declared Islamic State (is)' (2016) 16 *International Criminal Law Review* 1 361, 387-388; it additional has positioned itself as the scourge of the Muslim world, seeking to purify the ummah of all innovation and western influences using force.. See Graeme Wood, *What ISIS Really Wants* (2015)

¹⁹¹ Tore Refslund Hamming, "Polemical and Fratricidal Jihadists: A Historical Examination of Debates, Contestation and Infighting Within the Sunni Jihadi Movement" (ICSR 2019) 15-17.

legitimacy.¹⁹² Moreover, their adoption of the “caliphate” motif was central in their adoption of the structure of law and governance they subsequently used to justify and engage in the mass killing of civilians and other individuals outside of combat.¹⁹³ As ISIS has chosen to stress the imminence of the apocalypse and the inevitability of victory,¹⁹⁴ ISIS is not focused on uniting the Islamic world against western hegemony in line with bin Laden’s vision. Instead, it has billed itself as the scourge of the Islamic world, Purifying the ummah immediately before the hour.

There are many other less central examples that further demonstrate the link between the addition of neo jihadist ideology and higher civilian casualties. For instance, in a number of African states domestically orientated Islamic faith is being displaced by name brand neo jihadism,¹⁹⁵ imported by groups like al Qaeda and ISIS.¹⁹⁶ This has frequently resulted in an escalation; for instance across western Africa, longstanding conflicts over land use involving the predominantly Muslim Fulani herdsman have recently escalated, with imported Salafi-jihadist ideology serving to link-local grievances to a global struggle, thereby mobilising the local Islamic population to greater violence.¹⁹⁷ As the approach spreads from the context in which it arose, neo jihadist ideology can play a role in causing similar movements to emerge in other regions.¹⁹⁸

Finally, it is worth mentioning the additional challenge that the spread of neo jihadist ideology levels. It has long been contended by sociology that ideology has an influence over how the organisations mobilised by and organise themselves. In relation to neo jihadism, it is worth noting that this ideology entails the rejection of the nation-state approach to both organisation and the use of force. Additionally, the salafi focus embedded in neo jihadist thought necessitates that historical Islamic modes of organising and waging war are shown a degree of deference. As ISIS’s adoption of

¹⁹² Ibid

¹⁹³ Celine Marie I. Novenario “Differentiating Al Qaeda and the Islamic State Through Strategies Publicized in Jihadist Magazines” (2016) 39 *Studies in Conflict & Terrorism* 11, 953-967.

¹⁹⁴ Filiu (n 141)

¹⁹⁵ J. Peter Pham, ‘Next Front? Evolving United States–African Strategic Relations in the “War on Terrorism” and Beyond’ (2007) 26 *Comparative Strategy* 39,43.

¹⁹⁶ Hilary Matfess, In Africa, All Jihad Is Local (Foreign Policy, 16 May 2019) <https://foreignpolicy.com/2019/05/16/in-africa-all-jihad-is-local/> accessed 14/09/2019

¹⁹⁷ Emily Estelle “How Ansar al Islam Gains Popular Support in Burkina Faso” (Critical threats, 09 May 2019) <https://www.criticalthreats.org/analysis/how-ansar-al-islam-gains-popular-support-in-burkina-faso> accessed 01/09/2019

¹⁹⁸ Ibrahim Yahaya Ibrahim “The Wave of Jihadist Insurgency in West Africa: Global Ideology, Local Context, Individual Motivations,” (2017) *West African Papers* 7.

the caliphate model demonstrated, the understanding of Islamic history such groups have is anachronistic, as well as being somewhat dictated by the nature of modern conflict. As such, it is difficult to even arrive at a stable understanding of what such groups are, organisationally speaking. It can, therefore, be stated with a degree of certainty that groups mobilised by neo jihadist ideology are unlikely to resemble states, or for that matter, any type of organised armed group to which international public law is accustomed to deal with.

In summation, groups mobilised by neo-jihadist ideology reject all aspects of the international system of laws and norms, and moreover, seek to visually differentiate themselves from the archetype of the nation-state as far as possible. This rejection is apparent in their denunciation of the generally accepted limitations and customs comprising IHL. Neo jihadist groups have rediscovered the utility of an unrestrained approach to the use of force, and are therefore incentivised to actively target civilians and undertake other actions that are generally understood to be forbidden. Moreover, this rejection of the state system alters such groups organise, as they seek to restore an imagined past, pre-modern form of social arrangement, and additionally evade international law, given the distinctive social arrangements to which this anachronistic approach gives rise.

5.6 Conclusion

This chapter has argued that neo-jihadism is a variety of what may be termed contemporary religious conflict. This is a permutation of religious conflict with some elaborations that reflect a more contemporary setting. A central assertion is that organisations adopting this disposition to the use of force will represent a greater challenge to IHL than states or more conventional non-state groups.

In summation, Neo jihadism has assisted in forming “unconventional armed groups,” groups in this thesis understood to challenge IHL’s assumptions as to what an armed group is. Firstly, it adopts a separate proto legal framework that defines itself partly as a rejection of international law and its norms concerning warfare. secondly, it emphasises extreme commitment, with the groups willing to go further in pursuit of Jihad generally ascendant over those with any checks or limitations whatsoever. Most

importantly, it is disconnected from any past formally delineated body of scholars or jurists. This permits it to develop reflexively in the hands of practitioner theorists. This is apparent by the manner in which the neo jihadist movement has evolved in the minds of key thinkers, with a general trend being a move from political engagement, through to sporadic acts of terrorism, to calling for the deaths of everyone outside of whatever movement or organisation a particular theorist is associated with. This is challenging for IHL, in that it frustrates any possibility of imposing restrictions on groups inculcated with Neo jihadist ideology. Moreover, these trends are compounded when the evolution of armed groups in the war on terror is outlined. At this point, it is possible to suggest that this study has made substantial progress in outlining what contemporary religious violence is, and why it is so challenging to confront. This goes some way to resolving one of the critical considerations identified at the outset of this study; namely the difficulty in developing an effective framework for regulating armed conflicts when the nature of a conflict is not understood. Having identified how and why such conflicts are different from both states and more conventional armed groups, a better basis for contesting possible changes now exists. Moving forward, it is appropriate to consider how international law should adapt to this challenge, to determine what adjustments may be appropriate in the next chapter, it will be contended that a central challenge is differentiating these organisations from both states and conventional non-state groups, and determining how to classify them in international public law.

6 Defining ISIS and other Unconventional Armed Groups and their Position in International Public Law

6.1 Introduction

Whilst this thesis focuses explicitly upon the implications of an organisation like ISIS from the perspective of international humanitarian law (IHL), there is a need to consider some of the wider aspects of the organisation; in this case, the more general position such an organisation occupies in public international law. This is based upon an awareness of the importance of legal subjectivity, and the implications of attributing personality to organisations and groups.¹ Today, public international law positions the state as the primary actor,² enjoying full legal personality. Other forms of legal personality are arguably derived from states, who determine when and how legal personality is recognised.³ There are several challenges in fitting a group like ISIS into the existing legal framework. First, whilst it is “state-like”, it is rejected by the UN and other states, and indeed itself has no aspiration to be a state, at least in the formal legal sense. Additionally, it is something of a dynamic organisation, difficult to impose any description or fixed characteristics. These factors differentiate it from existing forms of legal personality. This chapter sets out to determine what form of legal personality, if any, can reasonably be used to describe the organisation, contesting both existing terms, as well as more novel ones proposed in relation to the group.

The aim of this chapter will be accomplished by first drawing upon the understanding of ISIS’s ideology developed in the course of this thesis. Based upon ideology and aims, it is possible to equate ISIS with a number of Islamic “states”, movements, and rebellions throughout history.⁴ This thesis has additionally sought to

¹ The subjectivity of an organisation or institution, once determined, carries a range of consequences. See Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 675-699.

² *Ibid.*

³ For instance, as is the case with international organisations. See generally Clarence Wilfred Jenks, ‘The Legal Personality of International Organizations’ in Fleur Johns (ed), *International Legal Personality* (Routledge 2017).

⁴ ISIS has been aligned with a number of historical organisations. The Ikhwan of Saudi Arabia Simon Mabon and Grant Helm, ‘Da’ish, the Ikhwan and Lessons from History’ (Foreign Policy Centre 2016) <<http://css.ethz.ch/en/services/digital-library/articles/article.html/658e36f5-fb4a-47f6-a6d1-6a77ea5c37ff/pdf>> accessed 13 January 2019; the Mahdist uprising, Anthony Celso, ‘The Islamic State

foster an understanding of the “universal state”, and the relevance of such an organisation to contemporary problems. Accordingly, this chapter will examine how similar movements were described in the past; from the point of view of international law, this requires looking back some distance, when movements similar to ISIS populated international relations. Whilst the reaction of early European international law to similar problems is both undesirable and likely impossible under today’s international law, the notion of an “uncivilised state” as a means of understanding organisations possessing territory but deemed impossible to include in a shared legal framework, represents an interesting starting point for analysis.

I will then briefly assess the relevant features of ISIS, before examining it in the context of determining legal personality. Under the prevailing international legal system, it has proved a challenge to reconcile ISIS’s real, concrete conformity with the objective standards for statehood, and the characteristics that make it both undesirable, and by some lines of reasoning, impossible to define in accordance with the available varieties of international legal personality.

Moving forward, this chapter will suggest that international law is currently undergoing a change, with a new approach to classifying ISIS and similar groups emerging within the context of the war on terror. Whilst this is an ongoing process, it is possible to observe that the approach states and international organisations have taken towards armed groups in the war on terror differentiates “terrorist” organisations with a territorial component from existing forms of legal personality. Ultimately, this chapter will suggest that a revised form of legal personality that can be equated with that of an “uncivilised state” is being synthesised and used to define groups of this kind. This, in turn, has implications for the treatment of the groups and their constituent individuals, as well as dictating aspects of how states and international organisations respond.

The chapter will then draw upon one of the fundamental contentions of this thesis, namely that in groups like ISIS, it is possible to observe an aspiration to found a “universal state”. The challenge ahead is understanding where such an institution fits in a system of international public law built around nation states. At the current juncture, international law is not equipped to recognise such an institution or its

(IS) and the Sudanese “Mahdiyyah”: A Comparative Analysis of Two Failed Apocalyptic Jihadist States’ (2018) 4 *International Journal of Political Science*; and even, on behalf of Islamic scholarship, the early Kharijite sect Muhammad Al-Yaqoubi, *Refuting ISIS* (2nd edn, Sacred Knowledge 2016).

implications for a state-centric system of international public law. This assessment can be based upon the specific case of ISIS, namely, an acknowledgement that ISIS has state-like features, and even characteristics usually reserved for states, yet, it is excluded from statehood. Whilst there have been many concessions in terms of the organisation's aptitude, based upon the manner in which the organisation and its affiliated individuals are understood, and indeed treated, it is possible to contend that it is impossible to align ISIS with statehood, or for that matter, any other currently recognised understanding of legal personality.

The core thesis of this chapter is that ISIS and similar groups, in terms of both its expressed aims and its actual existence, conforms to that of a "universal state". Whilst international law is not currently equipped to articulate the features of such a state, it is of significance that in past iterations of international law, such institutions were considered external to international law, and excluded. As a second critical consideration, it is possible to observe that in the context of the war on terror, with reference to the notion of the ISIS "proto-state", a number of legal distinctions have already been made that functionally differentiate the group from other existing legal categories. It is, therefore, possible to support an argument that within the war on terror, a new form of legal personality for non-state groups like ISIS is emerging.

6.2 The contemporary universal state, and the gaps and boundaries that make it possible

If organisations like Al Qaeda, the Taliban, and ISIS were easy to destroy, and international law was equipped with appropriate implements to do so, they would not exist for long. In this regard, it is worth considering what may be an unbreakable rule for the purposes of international law and regulation. In assembling an international system comprising laws, norms, borders, and courts, it effectively calls into existence an organisation capable of exploiting the borders, boundaries, and loopholes inherent within it. Naturally, this may not be technically true, and those with a mind to do so may look back and trace a path of evolution by which the characteristics of modern terror groups have developed over time, or been co-opted from other organisations, gradually producing the type of actor we see today. Regardless of the precise origins, it is possible to consider the emergence of a group like ISIS as a product of the gaps

and blind spots that exist in a system of sovereign states and the system of international public law governing them.

This chapter suggests two details relevant to the discussion of the legal personality of transnational terrorist actors in possession of the territory. First, that they represent a threat to the current system of international law, a threat that would be compounded should such organisations be recognised as states, proto-states, or aligned with any other identity that would see them afforded rights derivative of those afforded to states, or set them on the path of statehood. Second, it is useful to consider the international legal system in line with other organisations and institutions on the world stage, namely that its chief objective is its own survival and perpetuation. International law is to some extent voluntary.⁵ Moreover, international law should not act to deprive states of the capacity to act in their own self-interest.⁶ These fundamental factors are important to keep in mind when considering the possibility of attributing personality to such organisations.

It is possible to list a number of loopholes in international public law that make contemporary terrorist groups like ISIS possible. First at the system level, it is possible to suggest that understanding the world to exist primarily of a tapestry of sovereign states can be exploited; by operating across borders, non-state actors can insulate themselves to some extent from reprisal at the hands of any state it wrongs.⁷ The advantage is given to the transnational actor, with the most durable criminal and terrorist groups keeping this in mind.

Then, there is the legal understanding of force. The right to use force of a certain scale is a privilege of states,⁸ as with Weber's suggestion that a state is "a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory".⁹ Yet the downward proliferation of

⁵ It is difficult to determine why exactly states obey international laws. See Michael Payne, 'The Basis of Law in Hart's "The Concept of Law"' (1978) 9 *The Southwestern Journal of Philosophy* 11.

⁶ Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford University Press 2005) 3.

⁷ William Lind and others, 'The Changing Face of War: Into the Fourth Generation' in Aaron Karp, Regina Karp and Terry Terriff (eds), *Global Insurgency and the Future of Armed Conflict: Debating Fourth-Generation Warfare* (Routledge 2007) 19.

⁸ Conquest is effectively illegal, for as much as it is worth. See International Law Commission of the UN, 'Draft Declaration on Rights and Duties of States', [December 1949], Article XI; see additionally Oona Hathaway and Scott Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Allen Lane 2017).

⁹ See Max Weber, *From Max Weber: Essays in Sociology* (Hans Heinrich Gerth and C. Wright Mills (eds), Milton Park 2009) 78.

technology¹⁰ and the disruptive influence of globalisation means that even a fly-by-night terrorist organisation can strike at the heart of a state.¹¹ ISIS has proved capable of equalling and exceeding the capacities of states, effectively conquering territory.¹² Whilst conquest is no longer a legal means of acquiring a state,¹³ it is enough to suggest that the type of force once seen as the preserve of states can be co-opted by terrorists and other marginal actors. In its understanding of armed attack and self-defence, international law preserves the use of force for states; accordingly, recognising the capacity for terrorist groups to undertake such an attack requires careful forethought; can we afford the right for states to defend themselves without recognising terrorist groups as belligerents, combatants or a version thereof, with the rights and privileges international law has carefully curated?

There is then the question of population. Individuals are considered to constitute states, and states, to some extent, derive their legitimacy from their population, in addition to possessing territory.¹⁴ Is it sufficient to acquire such population and territory by terror, and maintain order in the same manner? Even where it is the case, it may prove difficult to demonstrate to any reasonable degree that the possession of a population by an organisation like ISIS was the result of terror, at least to any reasonable objective standard.¹⁵

What is a terrorist group? It is defined as an organisation without legitimacy; yet, one that has been able to conquer territory, administer it, and displace the de jure governments of an area.¹⁶ The legal understanding of such facts is currently inconsistent with the possibility that such a group can do these things without being afforded at least a few rights and privileges. The fundamental uniting problem is that in the notion of statehood, we inextricably link the concepts of legitimacy and capability; it is extraordinarily difficult under the current system of international law

¹⁰ Sometimes called “downward migration” of capability. See Aaron Karp, ‘The Changing Ownership of War: States, Insurgencies and Technology’ (2009) 30 *Contemporary Security Policy* 375.

¹¹ The World Trade Centre attack of 2001 remains a key example in this regard, exceeding the capacity of many state militaries in terms of accomplishing destruction. See Derek Jinks, ‘September 11 and the Laws of War’ (2003) 28 *The Yale Journal of International Law* 1, 2–5.

¹² Charles C. Caris and Samuel Reynolds, *ISIS Governance in Syria* (Middle East Security Report 2014) 4.

¹³ International Law Commission of the UN, ‘Draft Declaration on Rights and Duties of States’ (December 1949) Art XI.

¹⁴ See generally, Montevideo Convention on the Rights and Duties of States (12 December 1933).

¹⁵ The scale of this challenge can to some extent be understood through looking at a parallel debate framing the Nazi regime. See Robert Gellately, ‘Rethinking the Nazi Terror System: A Historiographical Analysis’ (1991) 14 *German Studies Review* 23.

¹⁶ See Caris and Reynolds (n 12).

to recognise that the first exists without attributing the second. This is to an extent made apparent in legal thinking on the matters of statehood,¹⁷ and the legitimate use of force.¹⁸ Whilst international lawyers may contend that legitimacy is a product of institutions,¹⁹ it may be stated that it is to some extent a product of power.²⁰ More indirectly, legitimacy may, in the context of state-building, be considered a product of services delivered to citizens.²¹ At the current juncture, there is a need to recognise that an organisation (ISIS) has achieved state powers and been the most prominent service provider in a given territory. Concurrently, there is a recognition that it must be excluded from the status (statehood) that is inextricably linked to the capacity to marshal military force and govern the territory.

Effectiveness is, by most metrics, an important test of statehood,²² yet even a despotic regime may be effective, as long as it lasts.²³ In analysing a terrorist group that has demonstrated state competencies, a dilemma is apparent; either accept that should a terrorist group achieve the trappings of statehood, it is granted the rights and the privileges of a state, and duties that come with it, or concede that whatever state-like features such a group may accrue, its fundamental nature and manner of achieving such features forever render it beyond the pale, incapable of becoming a state or gaining any form of legitimacy.

Finally, and not without merit, is the consideration as to whether or not a rebellion or insurrection intends to form a state. International authorities have in the past assumed this characteristic to be inherent in any roughly organised movement under arms, irrespective of their expressed aims or behaviour.²⁴ It is difficult when

¹⁷ For instance, the Montevideo criteria as set down do not burden the reader overmuch with limitations as to how the criteria for statehood are attained.

¹⁸ In Chapter 5 it is contended that the application of IHL in the case of a NIAC is partially related to the competence of the parties involved.

¹⁹ Miles Kahler, 'Legitimacy, Humanitarian Intervention, and International Institutions' (2010) 10 *Politics, Philosophy & Economics* 20.

²⁰ See Robert I. Rotberg, 'The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair' in Robert I. Rotberg (ed), *When States Fail: Causes And Consequences* (Princeton University Press 2004).

²¹ Ruby Dagher, 'Legitimacy and Post-conflict State-building: the Undervalued Role of Performance Legitimacy' (2018) 18 *Conflict, Security & Development* 85.

²² Crawford, it being the "dominant general principle". James Crawford, *The Creation of States in International Law* (2nd edn, Clarendon 2006) 98.

²³ Hersch Lauterpacht, *Recognition in International Law*, paperback re-issue 2012 (Cambridge University Press 2012) 137.

²⁴ For instance, in referring to a range of conflicts that are little more than banditry, in which the rebel group in question has no desire to take over the state with which they contend, they are nonetheless aligned with liberation movements of the past. See Jeffrey Gettleman, 'Africa's Forever Wars: Why the

preoccupied with past examples to conceive of armed groups finding chaos and destruction as sufficient reward, or as is the case within the war on terror, aspiring to unmake the notion of a system of sovereign nation-states entirely.

Importantly, accepting such organisations as states, or on the path to statehood, would run contrary to the interests of many states, and indeed the system of international law itself. If one is willing to acknowledge the nature of the problem, then it is possible to explore the possibility of understanding an organisation like ISIS as an organisation with the capacities of a state, but without any of its legitimacy, or indeed any of its sovereignty. This suggests the pursuit of a third path, namely, to reveal some legal manner by which to concede that a territorial organisation can do the things a state does, whilst remaining illegitimate due to the nature of its provenance. In paying attention to the past iterations of international law, it is possible to suggest that such an arrangement was previously present.

6.2.1 Conceptual discussion; non-state groups in a world of states

International law has previously gone about recognising the capacity for some varieties of “states” to perform functions such as occupying territory and governing a population, whilst concurrently forcing them to exist outside the fold of international law, not a party to any privileges or rights. Understanding the manner in which this was accomplished involves examining some of the more uncomfortable assumptions found in the works of early international legal scholars:

“Les conditions sociales et politiques dans lesquelles vivent les peuples musulmans et les peuplades païennes et sauvages, rendent impossible t’application du droit international aux rapports avec ces nations barbares ou à moitié civilisées. Les relations internationales reposent sur ridée de la communauté que ton ne peut imaginer sans la solidarité des intérêts et l’analogie des tendances entre les nations. Tes pays musulmans se dirigent exclusivement

Continent's Conflicts Never End.’ (Foreign Policy 2010)
<<https://foreignpolicy.com/2010/02/11/africas-forever-wars/>> accessed 11 December 2018.

diaprès le Coran qui est hostile et intolérante l'égard de tous les peuples pratiquant d'autres religions."²⁵

A critical problem from the perspective of a system of international law is deciding which organisations are considered legitimate, and therefore capable of being incorporated into a system of shared behaviour and values, and which are to be excluded. The above quote suggests that historically, possession of territory alone is not nearly enough to merit peer inclusion, sovereignty, or other privileges. Thus, the system of public international law common to European nations preserved a means to not recognise "states", that whilst objectively similar to those accepted by the system, were deemed undesirable to include. It may be contended that the early system of regulation common to European nations was based on a shared set of religio-cultural values. Whilst it can be argued that this is no longer the case, it may be suggested that statehood is not simply a question of possessing territory, whatever additional standards are imposed.

The notion that a shared system of law between nations requires a deeper basis for existence than the mere possession of territory is longstanding. For much of human history, it has proved difficult to pinpoint and define the quality that permitted different peoples to abide by a shared system of laws.²⁶ This is reflected in the rather exclusory understanding of statehood found in some early treaties. Such treaties were presented as a congress between "civilised nations".²⁷ It may be suggested that "civility" was a defining factor in the early public international law of Europe; "uncivilised" nations were not allowed entrance into any shared legal system.²⁸ Early

²⁵ (Tr.) 'The social and political conditions in which the Muslim peoples, pagan peoples and savages live make it impossible to apply international law to relations with these barbarous, part-civilised nations. International relations rest on the links of the community that one cannot imagine without the solidarity of interests and the analogy of preferences between nations. The Muslim nations are guided exclusively by the Quran, which is hostile and intolerant to all peoples practicing other religions'. Fedor Fedorovich Martens, *Traité de Droit International* (Chevalier-Marescq 1883) 239.

²⁶ It is reasonable to ask why any state bothers to obey international law at all, when the incentives to do so may contradict the immediate interests of a state. See generally Koh Harold Hongju, 'Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

²⁷ The St Petersburg declaration for instance is limited in application to "civilised nations". General principles of law recognized by civilised nations is preserved in customary law. The statute of the ICJ, Article 38 additionally uses the language "civilised nations".

²⁸ It is contested for instance that the inclusion of "civilised" in the early terminology was specifically excluded due in part to the lack of a shared heritage and Christian values. See Ted van Baarda, 'The Moral Dimension of Asymmetrical Warfare: An Introduction' in Ted van Baarda and Richard Verweij (eds), *The Moral Dimension of Asymmetrical Warfare: Counter-terrorism, Democratic Values and Military Ethics* (Martinus Nijhoff 2009) 5–6.

international legal thinking was characterised by a curious balance between the acknowledgement of a universal natural law common to all peoples, and the exclusion of the full participation of non-western nations, often on the basis of race or religion.²⁹

It must naturally be stressed that nineteenth-century scholars populated a different international landscape to that which we inhabit today. The notion that treaties and compacts could exist between peoples of different cultures had been challenged numerous times in history.³⁰ This trend was visible in the creation of the “Muslim peoples” specified by Martens,³¹ who, in his understanding, had been known to utilise a rationale for conflict that was understood by the non-Muslim west as immutable.³² This perception of the Muslim world and its limited capacity to enter shared international public law was common among scholars and statesmen of the period, and functionally similar arguments were employed to exclude all non-western nations. The notion of an “uncivilised state” that functionally served the same purpose as a civilised one, but lacked the capacity to enter into a legal system, limited the attribution of a legal personality to a small number of nations of a common heritage and faith. This distinction was of great importance, in that the laws of warfare were not generally understood to apply in cases of war with an uncivilised nation, save at the digression of the commander.³³ In addition, there were a number of more subtle negative implications.³⁴ Where treaties and compacts did exist between civilised and non-civilised nations, European states would have understood this as a result of their military superiority and capacity to police the behaviour of the “uncivilised” parties.³⁵

There is naturally disagreement as to whether this was really the case, with Crawford indicating the recognition of a sort granted to a range of African and Asian powers to dispute the division of the world into civilised and uncivilised nations and

²⁹ Martens, whilst dismissive of non-civilised peoples, does recognise a shared awareness of natural law. See Martens (n 25); Lorimer likewise embraces this perspective though more on the basis of race than religion, mentioning progressive and non-progressive races. See James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities*, vol 1 (W. Blackwood and Sons 1883) 101–102.

³⁰ Whilst many such treaties have been struck, many can be specified that have been rapidly broken.

³¹ Martens (n 25) 239.

³² The characteristic example of this being the first barbary war and the treaty of Tripoli. See J.E.G. de Montmorency, ‘The Barbary States in International Law’ (1918) 4 Transactions of the Grotius Society 87.

³³ Whilst this position may have been contested at the level of scholarship, it is overly apparent in guidance issued to troops. See War Office, *Manual of Military Law* (HM Stationery Office 1914) 235.

³⁴ Alexander Orakhelashvili, ‘The Idea of European International Law’ (2006) 17 European Journal of International Law 315.

³⁵ Jens Bartelson, *War in International Thought* (Cambridge University Press 2017) 174.

peoples.³⁶ Koskenniemi, on the other hand, suggests that the civilised/non-civilised distinction formed an important division in the legal thinking of the colonial period.³⁷ Admittedly, much of this debate surrounds the deprivation of territory in pursuit of colonies, not the imperative to exclude actors who would threaten the integrity of the shared legal system.

The exclusion of nations considered uncivilised by the west, and Islamic nations, in particular, did not hold. As scholars have noted, the Ottoman Empire was an early participant in the concert of Europe. This serves to demonstrate that at the time, European nations and the Ottoman empire were satisfied with each other's capacity to abide by conventions, treaties, and standards of armed conflict, and respect the integrity of borders:

Overall, Ottoman treaty-making practices reveal that the Ottomans not only modified Islamic international law to justify their diplomatic and legal relations with the European states but also adopted some principles of European customary law. The Ottomans abandoned an essential provision of Islamic international law – namely, that of perpetual war and temporary truces with the non-Muslim world. The Ottomans' engagement in multilateral negotiations as an alternative to unilateral dictation of peace terms, their adoption of European customary law principles, their willingness to ratify peace treaties without time limits and their establishment of formal alliances with non-Muslim states demonstrate that the Ottoman Empire was not a traditional Islamic state that isolated itself from European affairs; rather, by this time it was an active actor in European politics.³⁸

The integration of non-Christian nations into a shared system of international public law cannot be understated, as it had profound implications for the future. It also

³⁶ Crawford (n 22) 258–266.

³⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 152.

³⁸ See 'The Emergence of the Idea of "International Law" in the Ottoman Empire before the Treaty of Paris (1856)' (2014) 50 *Middle Eastern Studies* 233.

indicates the rationale behind the exclusion of non-Christians. Indeed, the Ottomans, upon entering into a shared system of international law with European nations, quickly found themselves in conflict with a number of self-proclaimed “Islamic states” and rebellions. These entities universally identified all other political arrangements as infidels and invoked the same perpetual war that Western legal scholars had earlier documented, though this time, against other Muslims.³⁹

It is difficult to distinguish the extent to which the apparent rejection of non-Christian states was rooted in prejudice, though racial and cultural bias undeniably formed a potent component of this division.⁴⁰ Yet, to some extent, this divide reflected the existence of a range of religious and cultural institutions whose existence made a shared system of international public law impossible. It is no doubt of some utility to critically examine the western elements of international law⁴¹ and the role the notion of uncivilised states and peoples played in colonialism and manifest destiny.⁴² It is equally important to understand what such a delineation was seen as accomplishing; what practical end excluding the majority of peoples from a shared system of law was understood to have achieved by Europeans. It is possible the limitation of a shared system of international public law for Christian nations was specifically aimed at excluding more archaic forms of political arrangement that were not capable of recognising borders and entering into treaties. In the Islamic case, this may be best related to encounters that European states had with a range of Caliphs, Emirs and Mahdi’s who made the case that the Islamic world must be in a state of perpetual war with non-Muslims. Whilst such arrangements did not characterise all interaction between Islam and the west, it is not unreasonable to question the capacity for western nations in this period to distinguish between the multiple different permutations of Islamic societies that have existed throughout history. As Western states lacked the

³⁹ See for instance the Mahdist uprising that declared all Turks to be “infidels”. Lidwien Kapteijns, ‘Mahdist Faith and the Legitimation of Popular Revolt in Western Sudan’ (1985) 55 *Africa: Journal of the International African Institute* 390; or the Ikhwan rebellion represents another example, see Sami Zubaida, ‘Sectarian Violence as Jihad’ in Elisabeth Kendall and Ewan Stein (eds), *Twenty-first Century Jihad: Law, Society and Military Action* (I.B Tauris, 2015) 143.

⁴⁰ There are certainly arguments to be made in this regard. See Martti Koskenniemi, ‘Race, Hierarchy and International Law: Lorimer’s Legal Science’ (2016) 27 *European Journal Of International Law* 415.

⁴¹ Bartelson (n 35) 181–182.

⁴² Antony Anghie, ‘The Evolution of International Law: Colonial and Postcolonial Realities’ (2006) 27 *Third World Quarterly* 739, 737–738.

ability to distinguish between “civilised” and “uncivilised” non-Christian nations, expediency dictated the exclusion of them all.

Historically, a nation’s capacity to comply with public international law⁴³ was related to a shared religio-cultural shibboleth. This permitted the establishment of behavioural conventions, ultimately forming a system of international law.⁴⁴ Groups not sharing these attributes were excluded.⁴⁵ It was not initially presumed that a system of organised states would ever exist outside of Europe.⁴⁶ There have naturally been some changes as the capacity of international public law has developed, and the early emphasis on expediency has given way to more developed means of assessing the presence of a legal personality and the capacity to comply. Modern public international law does not assess whether or not a nation should be included on the same basis as earlier permutations of the system. Rather, it has a significantly broader application. It can be suggested that this is because a nation’s capacity to enter into agreements of this nature is no longer predicated on the basis of a shared culture or religion, but upon the presence of objective criteria and recognition by other states as peer organisations.⁴⁷ It is on this basis that a shared public international law has been able to proliferate around the world. To dismiss outright the powerful normative implications of the word “civilised”,⁴⁸ it is possible to determine a transition. If “civility” can be defined as the feature of a state that allows it to enter into public international law and subsequently abide by it, then in contemporary public international law, this capacity is not, at least in general, qualified by a shared culture or history, nor denied on the basis of race, religion, or ideology, as it was in the age of “civilised nations”. This has been made possible by a fundamental change in how statehood, or full legal personality, is understood. This transition may be related in part to the notion of “liberal” and “non-liberal” states, which has replaced the previous

⁴³ Though based upon these limitations, European International Law may be a more appropriate term.

⁴⁴ Henry Wheaton, *Elements of International Law* (3d edn, rev and cor edn, Lea and Blanchard 1846) 15–16.

⁴⁵ This is undoubtedly the position of legal scholars at the time. See John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press 1894) 143.

⁴⁶ Kalevi Jaakko Holsti, *Taming the Sovereigns: Institutional Change in International Politics* (Cambridge University Press 2004) 128.

⁴⁷ Whilst there are multiple prominent theories as to how statehood is achieved, as well as many marginal cases that challenge the notion of typical paths to statehood, it is possible to conclude that emulating a certain culture or configuration is not requisite. Indeed, it is generally possible to specify a range of objective features common to all states that have a causal link with the status of statehood.

⁴⁸ There is plenty of discussion of the term “civilised” that limits the meaning of the term to its modern normative implications. Xavier Mathieu, ‘The Dynamics of “Civilised” Sovereignty: Colonial Frontiers and Performative Discourses of Civilisation and Savagery’ (2018) 32 *International Relations* 468.

distinction between Christian and non-Christian.⁴⁹ Whilst still exclusive, the notion of liberal states' participation in international law divests itself of many of the "subjective beliefs not demonstrable by reason"⁵⁰ upon which pre-liberal notions of international order depended. Recognition as a legitimate state is now ascribed either based on the presence of certain features or possibly, upon the acquiescence of other states.⁵¹ The precise formula for achieving statehood is naturally variable based upon historical circumstances and geopolitical context, but it can be suggested that a rough guide has been established with relative clarity based on convention. The objective criteria specified by the Montevideo convention have been proved suitable by a variety of political arrangements of disparate origins.⁵² The majority of these states have demonstrated their capacity to enter into international agreements and comply with all aspects of international law; whether or not the Montevideo criteria have a deterministic relationship with this capacity is an interesting question to contest.

Nevertheless, the inclusive approach to statehood currently used presents a problem. Statehood is not based on any normative quality; this opens up the possibility of questionable arrangements being recognised. Moreover, once statehood is achieved, states are difficult to unmake; incompetent states, failed states, and pariah states still benefit from sovereignty.⁵³ Whilst the contemporary state system is by most metrics the preferable one, a relative disadvantage is its inability to exclude bad actors at will. Moreover, the borders and populations of states have proved difficult to revise based on changing notions of nationality; whilst it has been stressed that establishing new

⁴⁹ 'The very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall 19th century distinctions between 'civilized' and 'uncivilized' States, rewrapped in the rhetoric of Western political values and institutions. Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal/non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern a world of liberal and non-liberal States. Exclusionary norms are unlikely to be effective in regulating that world'. A.M Slaughter, 'International Law in a World of Liberal States' (1995) 6 *European Journal of International Law* 503, 506.

⁵⁰ Koskenniemi, 2006 (n 37).

⁵¹ The so-called declaratory theory of statehood is dependent on possessing a range of criteria, not dependent on the recognition of other states. The contrasting constitutive theory places inclusion at the digression of existing states. See Hugh Lauterpacht, 'Recognition of States in International Law' (1944) 53 *Yale Law Journal* 385, 386–387.

⁵² The UN records 193 diplomatically recognised states. See UN, "member states" (un.org) <<https://un.org/depts/dhl/unms/whatisms.shtml>> accessed 23 January 2019.

⁵³ As Holsti notes, once a state is recognised, this prevents the recognition of any would be states within their territory. Holsti (n 46) 131–132; moreover, statehood cannot be rescinded on purely normative grounds, though a rough state may be subject to a range of sanctions and restraints. See Thomas H. Henriksen, 'The Rise and Decline of Rogue States' (2001) 54 *Journal of International Affairs* 349.

states is not out of the question, this is now problematic given the fragmentation initiating new states causes.⁵⁴

There are a number of points of contention that may suggest that the state has had its moment at the centre of international law. There are abundant critiques that suggest that the spread of the state system is rooted in colonial expansion.⁵⁵ Growing discomfort with the state is visible in various pan-continental movements, regional unions, and imperial revivals. There is then the notion that the state is being made increasingly irrelevant by globalisation.⁵⁶ Many see the imposition of borders as a hindrance. There is, for instance, general dissatisfaction with the lines drawn following the dissolution of imperial institutions.⁵⁷ It is frequently contended that borders were drawn without due deference to ethnic, religious, and cultural divides.

This brings the discussion to the problem at hand. In relation to ISIS and similar groups of an unconventional nature, there has been extensive speculation as to whether or not it is technically appropriate they be ascribed the status of a state.⁵⁸ ISIS has played a key role in developing this discussion, a consequence of the group's geographical presence and rudimentary provision of government in Iraq and Syria, which many observers have reacted to with surprise, this not fitting the assumed model of a terrorist group.⁵⁹ Whatever the material reality of the group, inclusion of such an organisation in the "family of nations" would perhaps be taken by many as an indication of the limitations of the international system. ISIS would not welcome such a step either, given their self-identification and critiques of the state system. At the current juncture, it can be suggested that the world lacks a clear means of distinguishing a group like ISIS from states, whilst concurrently recognising that such

⁵⁴ Boutros Boutros-Ghali, *An Agenda for Peace Preventive Diplomacy, Peacemaking and Peacekeeping: Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1* (1992) UN Doc A/47/277-S/24111 [17].

⁵⁵ Epifanio San Juan, 'Nation-State, Postcolonial Theory, and Global Violence' (2002) 46 *Social Analysis: The International Journal of Social and Cultural Practice* 11; Gordon L. Anderson, 'The Idea of the Nation-state is an Obstacle to Peace' (2006) 23 *International Journal on World Peace* 75.

⁵⁶ Whilst globalisation is not simply the negation of state sovereignty, the changing global situation is exerting a transformative effect. See Eric C. Ip, 'Globalization and the Future of the Law of the Sovereign State' (2010) 8 *International Journal of Constitutional Law* 636.

⁵⁷ Raffaella A. Del Sarto, 'Contentious Borders in the Middle East and North Africa: Context and Concepts' (2017) 93 *International Affairs* 767.

⁵⁸ Whilst there has yet been no authoritative assertion that ISIS represented a state, its real characteristics have been sufficient to merit examination. See Marco Longobardo, 'The Self-Proclaimed Statehood of the Islamic State Between 2014 and 2017 and International Law' (2017) 33 *Anuario Español de Derecho Internacional* 205.

⁵⁹ In terms of methods, objectives and means of action. See generally Michael Weiss and Hassan Hassan, *ISIS: Inside The Army Of Terror* (Regan Arts 2015).

an entity has capacities that are well in excess of those conventionally attributed to non-state groups. Additionally, based upon the commitment of ISIS to the notion of a “universal state”, it may prove necessary to mitigate or alter the rights and privileges of the organisation, its constituent individuals and affiliates, if not outright outlaw it in the manner of an “uncivilised nation”.

Why look back to previous, more exclusive understandings of legal personality? In times of challenge, international law has often sought to discern the way forward by examining the past.⁶⁰ In a sense, ISIS represents a new manifestation of a perennial problem. Today, it is not desirable that one equates ISIS with the notion of uncivilised or half-civilised states that existed in the past; it is also optimistic to believe that an institution like ISIS can develop into an archetypical liberal state. It is important to acknowledge that in the past; early systems of international law identified the existence of organisations like ISIS. Accordingly, the legal system lacks a means of designating a group that has, in many dimensions, the capacity of a state, yet needs to not only be excluded from participation in international law, but to be actively confronted.

There are multiple possibilities for moving forward. One option is to identify ISIS as a state. This would be considered by many as undesirable, although it would enhance the possibilities of addressing the organisation through mechanisms such as International Criminal Law (ICL) and IHL, which can be effectively applied to states. Alternatively, ISIS could be recognised with some partial form of legal personality, sufficient to create criminal liability and to allow states to wage war against it. Such an arrangement would be consistent with previous instances, where such an acknowledgement has been made in order to attribute criminal responsibility to an entity, or the individuals comprising one. Additionally, ISIS could simply be considered a collection of individuals with no inherent collective nature. Ultimately, this chapter seeks to explore the extent to which an organisation of ISIS’s nature may be subject to international law, making specific reference to an emerging legal framework in the context of the “war on terror”.

⁶⁰ Most fields of international law make use of past judgments. For example, see *Gabcikovo-Nagymaros Project*, Judgment ICJ report (1777) (Separate Opinion Of Vice-President Weeramantry) <<https://icj-cij.org/files/case-related/92/092-19970925-JUD-01-03-EN.pdf>> accessed 14 January 2019 96; it is additionally of benefit to specify the manner in which international legal scholarship is pivoting to acknowledge different international legal histories and events typically excluded from contemporary international legal consideration. See Ignacio De La Rasilla Del Moral, ‘The Shifting Origins of International Law’ (2015) 28 *Leiden journal of International law* 419, 424-426.

This chapter suggests a range of key values that need to be incorporated into the discussion of ISIS's legal personality. Based on the organisation's self-perception, stated aims, and ideology, there is a need to consider alternative political arrangements that are not formally recognised. In particular, its stated identity as a "caliphate" suggests its aspiration for a more archaic, pre-state arrangement. It contains the notion of a universal state purported to preside over more than a geographically contiguous people contained to a modest swathe of territory, but all adherents of a faith, irrespective of their location. Such a universal state is impossible to reconcile with the existence of distinct nation-states presiding over territory and defined populations.

Whilst at the current juncture, there is no concrete legal means of understanding ISIS' legal personality, it is not unreasonable to suggest the within the context of the war on terror, a new understanding of legal personality is emerging to describe such groups. Through an examination of the status of ISIS as an organisation and the manner in which it is contended with, it is possible to suggest that both states and international organisations have made progress towards reconciling the organisational and ideological peculiarities of similar entities given their de facto resemblance to a state. The manner in which these features are reconciled suggests an understanding of legal personality that is functionally comparable to the notion of an "uncivilised state", as articulated in early European international law.

6.2.2 ISIS and other unconventional armed groups: a challenge in a world of states

In examining the adversaries that states confront in what is often referred to as the war on terror, it is not untoward to suggest that terrorist organisations in this conflict have developed into challenging organisations to classify. For instance, the striking success of ISIS in overwhelming states carries worrying implications. From 2013 onwards, the organisation proved itself capable of overwhelming the militaries of Iraq and Syria on the battlefield, banishing state civil control and governance from a significant swathe of territory, and running it in line with its own vision.⁶¹ This proved sufficient for some to express that ISIS broke with the wider jihadist movement, as no previous movement had actually founded a state.⁶² However, ISIS did not petition the UN and

⁶¹ Weiss and Hassan (n 59).

⁶² Longobardo (n 58) 206.

other states for recognition. It does not address the governments of Iraq and Syria in order to formalise their administration of a new autonomous region. It has not asked for their borders to be recognised. Instead, ISIS envisions an ever-expanding sphere of influence.⁶³ It can be contended that this disregard is perhaps based upon ISIS' recognition of their own abhorrence in the eyes of the UN⁶⁴ and anticipation that any conventional diplomatic requests would be rebuffed.

A deeper examination suggests that ISIS did not desire inclusion, this being inconsistent with their stated aims. Instead, ISIS has behaved in a manner consistent with their expressed identity as a “caliphate” or universal Islamic community, retracing the path of rebellion taken by previous messianic movements. The group has made a range of statements professing their rule over all “true” Muslims.⁶⁵ Its motto of “remaining and expanding”⁶⁶ professes not a desire to participate in a society of nations, but to negate one. Moreover, the group has achieved a dominant role in partnerships with a range of other violent jihadist groups.⁶⁷ Much energy has been expended by the group in proving themselves to be Islamic in nature, marshalling a range of scholarly arguments for this purpose. Rather than seeking recognition and a place within a family of nations, ISIS has sought out a different framework of legitimacy, and moreover, experienced some success in doing so. Based on the way ISIS presents themselves, it is possible to suggest that it identifies with the notion of a “universal state” made explicit by their repeated references to themselves as a caliphate, and their leaders as caliphs. The revival of a Muslim “universal state”, or caliphate, has been extensively explored by Islamic revivalist scholars.

It is important to differentiate ISIS as an Islamic universal state from the notion of an Islamic nation-state.⁶⁸ Whilst one might expect to operate within a system of states, as demonstrated by the many Islamic nations that already exist, the other has historically proved incapable of being included. Additionally, the implications of

⁶³ For Instance, “remaining and expanding” See Dabiq, 5 (Al Hayat Media Center 2015) 22.

⁶⁴ The UN issued several unambiguous condemnations of ISIS that may indeed be interpreted as making it impossible, or at least illegal to recognise ISIS.

⁶⁵ Dabiq 1 (Al Hayat Media Center 2014) 11.

⁶⁶ Dabiq, 5 (Al Hayat Media Center 2015) 22.

⁶⁷ US Department of State, *State Department Terrorist Designations of ISIS Affiliates and Senior Leaders* (2018).

⁶⁸ As Maher suggests, the distinction between caliphate and statehood is important. See Maher, (n 19) 4–5.

permitting a “universal state” to function in a state-centric system are profound.⁶⁹ Such an entity may well be capable of governing a population and holding territory, irrespective of whatever state-like features it accrues. However, it is unlikely that it would ever be possible to address such an organisation through conventional means, or impose any legal expectations upon it, save by force. Nor can the organisation easily revise its goals in line with statehood, as such a step would require abandoning the very principles upon which it has founded its legitimacy in the minds of its adherents.⁷⁰ It remains paramount to consider where exactly ISIS fits in the international legal system. There are individuals that should be prosecuted and matters of armed conflict that need to be resolved. Assigning ISIS statehood or any legal personality associated with statehood may have ramifications in relation to how and when states use armed force and may affect the aftermath of the organisation. Some acknowledgement of their collective nature is required in order to acknowledge their capacity to commit “state crimes”, as well as wage war. One approach would be to simply exclude ISIS from possessing any legal personality, state or otherwise, or modify its legal personality based on the argument that the group has exhibited an abhorrent nature. The disjunction between ISIS’s achievement of state capacities and rejection of its statehood on the basis of objectionable nature brings back the idea of the half-civilised or “uncivilised nations”. If ISIS is to be ascribed a modified or synthesised legal personality, this would perhaps be better justified in objective terms.

6.3 The ideology of unconventional armed groups (ISIS)

Why even mention ideology? States, it should be conceded, do not emerge out of nowhere but coalesce around some form of identity. As Tilly suggests, control over territory is simply the starting point for a state, to be followed by the construction of state apparatus, finally leading to the production of “political identity”.⁷¹ In relation to

⁶⁹ Supranational forms of authority have been specified as potential destabilising factors. As a religious institution, the “universal state” compounds many of these processes.

⁷⁰ ISIS has built its foundations around perpetual war against everyone. If it was to recognise borders and a fixed population, it would lose its sole claim to legitimacy as a caliphate. It has been suggested that such organisations are driven to make bad policy decisions in order to maintain ideological purity and to attract support from a wider population. See Brynjar Lia, ‘Understanding Jihadi Proto-States’ (2015) 9 *Perspectives on Terrorism* 31.

⁷¹ See Anna Leander, ‘Wars and the Un-making of States: Taking Tilly Seriously in the Contemporary World’ in Stefano Guzzini and Dietrich Jung (eds), *Copenhagen Peace Research: Conceptual Innovations and Contemporary Security Analysis* (Routledge 2003); see also Charles Tilly, ‘War

ISIS, and arguably, other jihadist groups, this process has been somewhat backwards – a globalist, religious identity looking for a political arrangement and grounding in the occupation of territory. It is important to understand that the state-building projects undertaken by groups like ISIS depend on the authority of the identity which is assumed by becoming an emirate or caliphate in the Islamic tradition, and to what extent their behaviour is thereby dictated by the manner in which they and their followers understand these terms.

The material facts related to ISIS can be presented in such a way as to indicate it was state-like,⁷² or at least presented as though the group were on the path to statehood in a manner that is consistent with a range of insurrections and separatist movements that have unfolded before.⁷³ However, the simple material facts of the situation obscure the full picture. A critical factor to consider is how ISIS see themselves and relate this identity to the international system. An organisation with several precursors across Islamic history, ISIS draw upon the thinking of a well-established and prolific sectarian approach to faith, and its perspective on the international system of law can be considered as deriving from this approach. This attitude towards the Islamic faith is characterised by a rejection of everything that is un-Islamic; this relates to both institutions of a western origin and additionally, any un-Islamic “innovations” that have been developed within the imagined Islamic world. Heuristically, ISIS is anchored in a contrived understanding of early Islamic history, which it is striving to restore. This would take any demesnes under ISIS back to a period before the state system, during which political arrangements were fundamentally different.

Religion as a rationale for war, violence, and atrocity has a long history across many faiths.⁷⁴ Islam is no exception, serving as the ideological justification for a number of conflicts both in the past and more recently. The Islamic Foundation of

Making and State Making as Organized Crime’ in Peter Evans, Dietrich Rueschemeyer and Theda Skocpol (eds), *Bringing the State Back In* (Cambridge University Press 1985) 181–184.

⁷² UNSC (S/2018/770) ‘Seventh Report of the Secretary-General on the Threat Posed by ISIL (Da’esh) to International Peace and Security and the Range of United Nations Efforts in Support of Member States in Countering the Threat’ (16 August 2018) <<https://undocs.org/en/S/2018/770>> accessed 12 January 2019.

⁷³ Whilst it is possible to present ISIS as abhorrent, brutality alone is not enough to exclude the organisation, and it is possible to specify a number of independence struggles that parallel the group’s rise to power.

⁷⁴ See Chapters 2, 3.

ISIS' ideology and their self-perception are made explicit in key publications. The following is an excerpt from one of their publications:

*Amirul-Mu'minin said: 'O Ummah of Islam, indeed the world today has been divided into two camps and two trenches, with no third camp present: The camp of Islam and faith, and the camp of kufr (disbelief) and hypocrisy – the camp of the Muslims and the mujahidin everywhere, and the camp of the Jews, the crusaders, their allies, and with them the rest of the nations and religions of kufr, all being led by America and Russia, and being mobilized by the Jews.'*⁷⁵

Whilst many Islamic schools would argue that strict rules exist to prevent exactly the type of behaviour that ISIS engage in,⁷⁶ ISIS scholars have been able to justify the methods it employs, arguing that certain scenarios allow for the tenets cited to be overridden based on need, authority, or the identity of the victim.⁷⁷ In light of the aims of this study, the extent to which ISIS may be characterised as a legitimate expression of the caliphate is less important than demonstrating that they themselves believe it to be the case, with this identity subsequently dictating their actions and disposition towards those outside the group.

The concept of an “Islamic state” as a universal state was once prevalent, though it has been lesser used since the nineteenth century.⁷⁸ Nevertheless, the concept has proved resilient, with a range of groups advocating for the restoration of such a state.⁷⁹ Accordingly, ISIS and their precursors have recognised a need to disassemble and undermine existing nation-states, and by extension, the laws governing them. The most comprehensive account of ISIS' system-building can be gleaned from the Islamist publication, *The Management of Savagery*. In summary, this document

⁷⁵ Dabiq 1 (Al Hayat Media Center 2014) 10.

⁷⁶ Shawki Allam, 'The Ideological Battle' <[http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20\(2\).pdf](http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20(2).pdf)> accessed 9 November 2016.

⁷⁷ Rumiyah 2 (Al Hayat Media Center 2016) 22–25.

⁷⁸ The Ottoman caliphate is ostensibly the last example of a Sunni Muslim “caliphate” though several more recent pretenders to the title can be specified.

⁷⁹ Hizb ut-Tahrir, 'Hizb ut-Tahrir; Definition' (Hizb ut-Tahrir) <<http://hizb-ut-tahrir.org/index.php/EN/def>> accessed 18 November 2016.

reflects an acute awareness of the situation prevailing in the Middle East. As the name suggests, ISIS' essential strategy is to institute a condition of "savagery"⁸⁰ by destroying existing civic services and security provided in the region before embarking on a campaign of violence. Under these circumstances, even the inferior services that the contemporary "Islamic state" is capable of offering constitutes governance. More importantly, this strategy suggests that ISIS as a universal state recognises itself as being in active competition with nation states.

One study demonstrates how structurally, the ISIS administration resembles the structure of classical Islamic examples of states, and moreover, that it may have developed a better system than had previously existed in the region.⁸¹ Unsurprisingly, however, based on ISIS' actions against non-Sunni Muslims and those it perceives as un-Islamic, the organisation has been universally condemned. Islamic scholars have constructed refutations demonstrating how ISIS is not Islamic.⁸² On the other hand, many works have also emerged seeking to demonstrate the compatibility between Islam and the international order, emphasising Islam's inherent peacefulness.⁸³ As for ISIS, it clearly advocates an Islamic system of governance. Since ISIS is an Islamic revivalist organisation rooted in the Middle East, it makes sense that it does not set out to construct a nation-state, nor does it intend to remould Middle Eastern states along ethnic-nationalistic lines. This is unsurprising given the memorable failures of pan-Arabism and ba'athism.⁸⁴ In the construction of a restoration, ISIS have chosen to resort to religion as a unifying force.⁸⁵

It is possible to align ISIS with the manner in which the "Islamic state" or nation was described by western statesmen and lawyers according to early European international law. It embodies the features western observers specified as a universal feature of "Islamic peoples", which precluded inclusion in any shared system of international law. First, ISIS reject the state system and the system of international law

⁸⁰ Abu Bakr Naji, *The Management of Savagery: The Most Critical Stage Through Which the Umma Will Pass* (William McCants tr, John M. Olin Institute for Strategic Studies Harvard University 2006).

⁸¹ Mara Reevekin, *The Legal Foundations of the Islamic State* (The Brookings Institution 2016).

⁸² Shawki Allam, 'The Ideological Battle' <[http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20\(2\).pdf](http://dar-alifta.org/BIMG/The%20Ideological%20Battle%20(2).pdf)> accessed 9 November 2016.

⁸³ Gary Bous Sayed Khatab, *Democracy in Islam* (Routledge 2007).

⁸⁴ Fred Halliday, 'The Perils of Community: Reason and Unreason in Nationalist Ideology' (2000) 6 *Nations and Nationalism* 153.

⁸⁵ Monica Duffy Toft, 'Getting Religion?: The Puzzling Case of Islam and Civil War' (2007) 31 *International Security* 97.

governing the state system. Islamic nation-states do exist;⁸⁶ ISIS however, do not aspire to be an Islamic nation-state, nor does it feel that existing nations of this nature should exist. Islam, ISIS argues, is inconsistent with statehood, and the Islamic nation-state is considered an abomination in jihadist doctrine. This rejection extends to all nation-states; the only legitimate political form is believed to be ruled by God, officiated by Islamic rulers on earth. According to this interpretation, the potential for a universal state to recognise and enter into relations with states is not possible. This again serves to align ISIS with the type of organisation that existed prior to the state system or that existed in parallel to it. According to ISIS, the nation-state, is a western innovation. To the extent that an entity's aspiration to be a state or to align with any form of legal personality is important, there serves a basis for excluding or modifying the legal personality attributed to ISIS.

Second, there is the rejection of peace. The Islamic State exists in a constant state of war, and, if it wishes to remain consistent with its ideology, can never reliably enter into any treaty or cease-fire. Palabiyik suggests that key merit of the Ottoman empire was its abandonment of the concept that Islam must engage in continuous war and temporary peace towards all peoples of a non-Islamic character.⁸⁷ Naturally, it would not have been productive to include a nation openly expressing such a belief within a shared system of international public law. This rejection of peace has profound implications for the end of hostilities. This implication applies even to the individual terrorist or henchman, whose words cannot be trusted, even if the organisation's leadership were defeated or forced to dissolve. This approach is perhaps borne out in battlefield perfidy of ISIS, and the frequent failure of radicalisation programmes. Most profoundly, this approach suggests that relations can never be normalised with the entity. The implications of this distinctive feature of the organisation should be reflected in how legal personality is attributed to it as an organisation.

Defining any destructive twenty-first century organisation such as ISIS is not an easy exercise. The group represents a significantly challenging entity for international lawyers to grasp and confront.⁸⁸ First, ISIS sees itself as a religious state

⁸⁶ The Organisation of Islamic Cooperation (OIC) includes 57 nations.

⁸⁷ Palabiyik (n 38).

⁸⁸ '[I]nternational law does not adequately address the activities of IS, because several legal and practical issues hinder its application'. See Holli Edwards, 'Does International Law Apply to the

outside of a system of sovereign states.⁸⁹ That is to say that the group recognises no other legitimate form of political arrangement except their own.⁹⁰ More generally, the type of political arrangement that it advances as an alternative to the nation-state is appropriately described as a religiously-orientated, universal state. Historians examining the history of international law may note that the initiation of the European state system and subsequent European system of international law is to some extent rooted in the negation of competing religious “universal states” albeit of the Christian variety.⁹¹ As discussed earlier, the western understanding of the Islamic “universal state” can be specified as the basis by which all Islamic peoples found themselves excluded from early European international law.

The success ISIS has achieved in realising a “universal state” indicates an additional source of stress placed upon a state-centric system of public law. The capacity for individuals of disparate nationalities to identify with ISIS on religious grounds suggests an inversion of the conventional political arrangement of the state. It suggests a backward movement to pre-state political arrangements that prevailed prior to the state-centric system of public international law.

6.3.1 International legal personality and unconventional armed groups

It is important to reflect on the identity of unconventional armed groups like ISIS from an international legal perspective in order to determine its position in armed conflict, as well as its position more broadly. Not only has it been established that legal personality, or statehood, plays a role in determining the system of law that prevails in armed conflict, but also that it has important implications in terms of criminal liability. There is then the relevance of legal personality to issues of compliance. In short, legal personality has profound ramifications for unconventional armed groups,

Islamic State? Towards a More Comprehensive Legal Response to International Terrorism’ (2017) 1 Strategic Security Analysis.

⁸⁹ Maher’s discussion illustrates the resistance to the concept of the nation-state within jihadist thinking. In the nation state it is impossible to fully implement the *Sharia*, and therefore all such arrangements are a form of tyranny. See Shriaz Maher, *Salafi-Jihadism: The History of an Idea* (Hurst 2016) 94–96.

⁹⁰ It has been contended that the abolition of the caliphate represents a trauma upon the Muslim population, and many groups have subsequently sought to revive it. See Gilles Kepel, *Jihad: The Trail of Political Islam* (I.B Tauris 2006) 42–43.

⁹¹ See for instance Janis, who interpreted the deconstruction of “majoritarian cultures” of faith through the restriction of religious freedom by states as a paramount feature. See Mark Weston Janis, ‘The Shadow of Westphalia: Majoritarian Religions and Strasbourg Law’ (2015) 4 Oxford Journal of Law and Religion 75; see additionally Leo Gross, ‘The Peace of Westphalia, 1648–1948’ (1948) 42 American Journal of International Law 20.

and could potentially influence the future trajectory of groups like ISIS, and the regions that have hosted such groups.

Like any new potential subject of international law, there is a range of different perspectives as to how best to understand the group. An important consideration is that at this juncture, the debate outside of law has been extremely broad, with a vast array of potential designations presented by governments and scholars. Then, there is the group's self-image to consider, along with the position it purports to occupy within Islamic theology.⁹² This has bled into the very naming process of the group, with varying names such as Daesh, ISIS, ISIL, and the Islamic State all being used, each carrying varying normative⁹³ and even legal meaning.⁹⁴

The naming problem is indicative of a wide range of more extensive difficulties, many of which impact the potential subjectivity of the group in international law. At this juncture, there are a number of authoritative histories that chart ISIS through the period of its existence.⁹⁵ The group has, by most estimations, passed through a number of phases, with its territorial presence, strategy, and organisation varying throughout these phases.⁹⁶ The group could be formally described in a different manner depending on the moment in history. The problem identified already is that despite the inclusion of the term "state" in many of the group's titles, ISIS does not consider itself to be one in any technical sense, and indeed, dismisses any potential for inclusion in an international system. The group's vision is in part an expression of messianic sentiment,⁹⁷ which, in part, is a derivative of many themes of the wider Islamic revival movement.⁹⁸ The extensive propaganda circulated by the group⁹⁹ provides extensive details as to how it intends to reach this goal, and

⁹² The group's choice of civil structure and declaration of a new caliph has been contested by a range of Islamic scholars. See Allam, 'The Ideological Battle'; Al-Yaqoubi (n 4).

⁹³ Daesh, for instance can be considered to be an insulting name, depending on whom you ask.

⁹⁴ The distinction between the names ISIS and ISIL is of not insignificant legal importance; when the group rebranded, the US Department of Justice stuck with the earlier ISIL for some time; the attachment to Al Qaeda placing the group under earlier congressional approval issued in the wake of the 9/11 attack. See Johan D. Van der Vyer, 'The ISIS Crisis and the Development of International Humanitarian Law. (Islamic State in Iraq and Syria)' (2016) 30 *Emory International Law Review* 531, 538.

⁹⁵ Some excellent examples are David Kilcullen, *Blood Year: Islamic State and the Failures of the War on Terror* (C. Hurst and Co Ltd 2016); see additionally Weiss and Hassan (n 59). Both these texts chart ISIS through a number of distinct phases and emphasise the shifting nature of the group.

⁹⁶ *Ibid.*

⁹⁷ Naji (n 80).

⁹⁸ See Zhongmin Liu, 'Commentary on "Islamic State" Thoughts of Islamism' (2013) 7 *Journal of Middle Eastern and Islamic Studies (in Asia)* 22.

⁹⁹ Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-first Century* (University of Pennsylvania Press 2008).

the exceptional actions permitted to achieve it.¹⁰⁰ Whilst its aims and intent have proved appealing enough to recruit many to their cause, it precludes any acceptance by the international community or any other form of legal normalisation outside of armed conflict.

From an organisational standpoint, the group is complex in nature.¹⁰¹ For much of the group's history, it was presided over by a single leader, an emir,¹⁰² and later a caliph,¹⁰³ who headed the expansion of the bureaucracy that co-opted many aspects of former regimes,¹⁰⁴ providing services intended to supplant those of the nominal state of the territory occupied by the group.¹⁰⁵ Whilst in the short term, ISIS proved adept at recreating basic civil functions, their governance and judicial bodies could, at best, be described as theatrical extortion and extreme brutality serving to maintain the appearance of order.¹⁰⁶ Now, ISIS' state-building project has largely disintegrated.¹⁰⁷ In spite of this reversal, its mission of remaining and expanding has gone unaltered, although this mission is pursued somewhat more subtly. In the absence of a clear heartland and leader, followers of the ISIS world vision, of a "worldwide caliphate", operate with relative autonomy. The group operates not only in Iraq and Syria but also in Yemen,¹⁰⁸ Khorasan (Pakistan/Afghanistan),¹⁰⁹ West Africa,¹¹⁰ Algeria, South East

¹⁰⁰ Dabiq, 5 (alHayat media Center 2014) 22.

¹⁰¹ Kabir Taneja, *Understanding ISIS: From Conception to Operations* (Observer Research Foundation occasional paper series 2017) 12–13.

¹⁰² Loretta Napoleoni, 'Profile of a Killer' (Foreign Policy, 20 October 2009) <<https://foreignpolicy.com/2009/10/20/profile-of-a-killer/>> accessed 23 February 2019.

¹⁰³ David Vergun, 'Task Force Commander: ISIS Forces Degraded From Caliphate to Caves' (US Central Command, 11 December 2018) <<http://centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1711312/task-force-commander-isis-forces-degraded-from-caliphate-to-caves/>> accessed 23 February 2019.

¹⁰⁴ Specialists were for instance compelled to work for ISIS. See Islamic State Wilayat al-Anbar, 'Specimen 4E: Notice to Service Offices in Hit, Anbar Province' (Aymenn Jawad Al-Tamimi, 27 January 2015) <<http://aymennjawad.org/2015/01/archive-of-islamic-state-administrative-documents>> accessed 11 August 2018.

¹⁰⁵ This plan is articulated in a prominent jihadist manual. See Naji (n 80).

¹⁰⁶ On the one hand, the ISIS system of governance is not vastly different to that of Saudi Arabia. See Rori Donaghy and Mary Atkinson, 'Crime and Punishment: Islamic State vs Saudi Arabia' (Middle East Eye, 20 January 2015) <<https://middleeasteye.net/news/crime-and-punishment-islamic-state-vs-saudi-arabia-0>> accessed 1 February 2019; it can however be contended that its execution varies significantly.

¹⁰⁷ The UNSC for instance suggests that ISIS has degraded from a proto-state to a covert network. See UNSC S/2018/770 [13].

¹⁰⁸ Jeremy M. Sharp, *Yemen: Civil War and Regional Intervention* (Library of Congress Congressional Research Service 2015, updated 24 August 2018) 6.

¹⁰⁹ As in Syria and Iraq, state weakness has allowed ISIS to become a significant threat in this region. See Kashif Mumtaz, 'ISIS: Assessment of Threat for Afghanistan, Pakistan and South and Central Asia' (2016) 36 Strategic Studies.

¹¹⁰ The group Boko Haram, has for instance pledged allegiance to the worldwide caliphate of ISIS.

Asia, the Sinai of Egypt, and Libya.¹¹¹ It has a more token presence in Lebanon, Jordan, and Saudi Arabia and motivates terrorist attacks of variable impact across the globe. Most worryingly of all, it has demonstrated an ability to aggregate longstanding grievances or local disagreements in which Sunni Muslims participate in their single organisation. The territorial provinces of ISIS are therefore more than remnants, but may represent a greater threat than the territorial proto-state phase did. Moreover, many observers have stressed that the group may re-emerge, either in one of its provinces or even in its former heartland. Today, ISIS is recognised as a “covert global network”,¹¹² further complicating matters. In summary, the history of the group, their means of organisation and their wholesale rejection of any inclusion within the international system make determining the legal nature of the group difficult.

Whilst in the broader discussion, ISIS has been difficult to define, from an international legal standpoint, the question can be simplified. A formal approach to the group would see ISIS placed into one of a number of potential categories. Performing this examination is required in order to determine whether ISIS have any responsibilities under international law. This involves discussion of the concept of international legal personality in order for people to understand the type of subjectivity ISIS may have and the concept from which rights and obligations are recognised.¹¹³

6.3.2 ISIS as individuals under international law

Perhaps the most unsatisfying conclusion with regard to the question of ISIS and legal subjectivity would be that, despite an apparently shared collective identity, their constituents remain individuals. Whilst this is a permissible means of defining personality,¹¹⁴ this could perhaps be taken as an acknowledgement of the law’s inability to otherwise understand the collective nature of the group.

¹¹¹ Raphaël Lefèvre, ‘The Resurgence of Al-Qaeda in the Islamic Maghrib’ (2018) 23 *The Journal of North African Studies* 278, 280–282.

¹¹² UNSC (S/2018/770). Seventh report of the Secretary-General on the threat posed by ISIL (Da’esh) to international peace and security and the range of United Nations efforts in support of member states in countering the threat (16 August 2018) <<https://undocs.org/en/S/2018/770>> accessed 12 January 2019.

¹¹³ Janne Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law* (TMC Asser Press 2004) 3.

¹¹⁴ Brownlie (n 1)65.

This is not a complete admission of the shortcomings of international law, however. Individuals, after all, have accumulated substantial rights and obligations, most notably through human rights law and international criminal law. Individuals can break international criminal law,¹¹⁵ and additionally, benefit from human rights. The advantage of the individual approach to ISIS is that it does not preclude the law from aggregating them under certain circumstances; for instance, individuals can be understood as congregating in a militia, or a terrorist cell, where appropriate thresholds are achieved. This is consistent with the approach of considering the ISIS movement in detail,¹¹⁶ considering different provinces to be disaggregated, and dealing with the problem of global terrorism, the ISIS proto-state and other territories as separate phenomena. This approach is not without its proponents, who stress the need to apply existing thresholds and standards to the threat posed by ISIS.¹¹⁷ Additionally, a terrorist group or movement is not a cohesive entity in the same manner as a state, lacking the “bright line” that distinguishes a terrorist from civilians.¹¹⁸

There are, however, disadvantages that come with seeing ISIS members solely as individuals. It serves to somewhat obfuscate the collective nature of the group. It would, for instance, render it difficult for western nations to connect acts of terrorism committed domestically with wider organisations in the manner that the US¹¹⁹ and France¹²⁰ have found expedient. In terms of bringing individuals to justice, there is little hope. Whilst addressing crimes such as genocide would fall under the essential mandate of the ICC,¹²¹ which has recognised the seriousness of the crimes being committed by ISIS, it contends that the basis for proceeding is simply not present.¹²² Any ad hoc solution is also rendered remote, as it would be dependent on the security

¹¹⁵ICRC, “Individual criminal responsibility”, ICRC database <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule102#_inannoar>. Accessed 03 February 2019

¹¹⁶ Benjamin Wittes, ‘What Is Hybrid Conflict?’ (Lawfare, 11 September 2015) <<https://lawfareblog.com/what-hybrid-conflict>> accessed 1 August 2018.

¹¹⁷ Scholars have noted that, for instance existing categories can conceivably be applied to the group. Vaios Koutroulis, *The Fight Against the Islamic State and Jus in Bello* (2016).

¹¹⁸ Gabriella Blum and Philip B. Heymann, ‘Law of Policy of Targeted Killing’ (2010) 146–147.

¹¹⁹ Audrey Kurth Cronin, ‘ISIS is Not a Terrorist Group’ (2015) 94 Foreign Affairs.

¹²⁰ Stephane de Sakutin, ‘Hollande Says Paris Attacks “An Act of War” by Islamic State’ (*Reuters*, 14 November 2015) <<https://reuters.com/article/us-france-shooting-hollande/hollande-says-paris-attacks-an-act-of-war-by-islamic-state-idUSKCN0T30JG20151114>>. Accessed 17 february 2019

¹²¹ Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 5.

¹²² Fatou Bensouda, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Alleged Crimes Committed by ISIS* (International Criminal Court 2015).

council's referral.¹²³ There also exists the possibility that realising ISIS members as individual persons cannot take place without considering whether there are any special legal conditions that negate any of the rights and privileges conventionally enjoyed by individuals. If terrorists are declared to be beyond the law, a condition related to outlawry, or *Hostis humani generis*,¹²⁴ a term previously used in relation to torturers, pirates, and slavers,¹²⁵ would impose upon states a duty to extradite or prosecute terrorist individuals.¹²⁶ However, many states may prove unable or unwilling to do so.

The US and others have raised questions as to the legal personality of some individuals, demonstrating a willingness to disregard individual rights under the law based upon their status as terrorists,¹²⁷ or alternately as “unlawful combatants”.¹²⁸ These individuals are said to exist within a legal gap between lawful combatant and civilian,¹²⁹ and therefore inhabit what has been termed a legal “black hole”.¹³⁰ This perspective has been used to advocate for enhanced interrogation,¹³¹ detention¹³² and targeted killing¹³³ to variable success. However, there is vociferous opposition to the view that ISIS individuals are unlawful combatants and inhabit such a legal gap.¹³⁴ The discussion surrounding terrorists as individuals raises the question as to whether

¹²³ See Julian Veintimilla, ‘Islamic Law and War Crimes Trials: the Possibility and Challenges of a War Crimes Tribunal Against Assad Regime and ISIL. (Bashar al-Assad, Islamic State of Iraq and the Levant)’ (2016) 49 Cornell International Law Journal 497.

¹²⁴ Douglas Richard Burgess II, *Hostis Humani Generis: Piracy, Terrorism and a New International Law* (The University of British Columbia 2003) 310–315.

¹²⁵ *Filartiga v Pena-Irala* 630 F. 2d 876 (US 2nd Circuit, US 1980).

¹²⁶ “Duty” may not be accurate, in that the duty to extradite or prosecute is considered by some to be more voluntary than binding. See Dan E. Stigall, ‘Ungoverned Spaces, Transnational Crime, and the Prohibition on Extraterritorial Enforcement Jurisdiction in International Law’ (2013) 3 Notre Dame Journal of International & Comparative Law 1.

¹²⁷ Discussed in *Boumediene v Bush* and *Al Odah v United States*; see additionally David D. Cole, ‘The Sacrificial Yoo: Accounting for Torture in the OPR Report (former Dept. of Justice lawyer John C. Yoo, Dept. of Justice Office of Professional Responsibility)’ (2010) 4 Journal of National Security Law & Policy 455.

¹²⁸ The idea of unlawful combatants has characterised the war on terror. See Knut Dörmann, ‘The Legal Situation of “Unlawful/Unprivileged Combatants”’ (2003) 85 International Review of the Red Cross 45.

¹²⁹ M. Katherine B. Darmer, ‘Waterboarding and the Legacy of the Bybee-Yoo “Torture and Power” Memorandum: Reflections From a Temporary Yoo Colleague and Erstwhile Bush Administration Apologist (Jay Bybee, John C. Yoo) (Lincoln's Constitutionalism in Time of War: Lessons for the War on Terror?)’ (2009) 12 Chapman Law Review 639.

¹³⁰ Michael Galchinsky, ‘Quaint and Obsolete: The “War on Terror” and the Right to Legal Personality’ (2013) 14 International Studies Perspectives 255, 261.

¹³¹ Cole (n 127).

¹³² *State of Israel v. Marwan Barghouti*, for instance concluded that “unlawful combatants are not entitled to POW status. See *State of Israel v. Marwan Barghouti* (ruling) 092134 /02 (12 December 2002)

¹³³ See Andris Banka and Adam Quinn, ‘Killing Norms Softly: US Targeted Killing, Quasi-secrecy and the Assassination Ban’ (2018) 27 Security Studies 665, 695–696.

¹³⁴ Burgess (n 124).

an association with ISIS is a sufficient basis for individuals to fall within a spectrum ranging between terrorist and “unlawful combatant”. Their status as individuals under the law could be modified based on their professed allegiance or some action they have committed. Regardless of the legal facts, it is important to note the aspersions cast upon the status of ISIS affiliates and fighters by other states as a component of any status they are granted.

6.4 ISIS statehood

The group ISIS both controlled territory and administered it in a manner not entirely dissimilar to that of a state government.¹³⁵ To speak plainly, ISIS was never going to be a state, and take its place in the “family of nations” subject to law, as with other states.¹³⁶ This was made apparent in the group’s own visceral rejection of the state system,¹³⁷ as well as the reluctance of existing states to afford it anything approaching legitimacy.¹³⁸ Nevertheless, it is important to juxtapose ISIS with theories of statehood to discern how it falls short of most previous iterations of states. International criminal justice has often depended upon an organisation being a state or displaying a state-like a nexus,¹³⁹ whereas ISIS is denied state status.¹⁴⁰

Statehood would be convenient for a number of reasons. First, the use of armed force against the group simply requires that a reference is made to the UN charter for this to qualify as self-defence.¹⁴¹ Again, this has ramifications in terms of how such a war should be fought. Qualifying ISIS as a state prevents the emergence of complicated legal questions. There is sufficient conceptual space to permit scholars and others to reasonably discuss the potential for statehood in the context of ISIS. The process for determining whether an organisation is a state is not a matter of universal consensus, and there are a number of potential approaches. This exercise first requires

¹³⁵ Longobardo (n 58).

¹³⁶ Lassa Oppenheim, *International Law: A Treatise* (2018, 3rd edn, Longmans 1920) 373.

¹³⁷ Dabiq 15 (alHayat media center 2016)30–31.

¹³⁸ Andrew Coleman, ‘The Islamic State and International Law: An Ideological Rollercoaster?’ (2014) 5 *Journal of the Philosophy of International Law* 75, 79.

¹³⁹ See Marko Milanović, ‘State Responsibility for Genocide’ (2006) 17 *European Journal of International Law* 553. For instance, genocide has always been considered a “state crime”.

¹⁴⁰ See Asaf Siniver and Scott Lucas, ‘The Islamic State Lexical Battleground: US Foreign Policy and the Abstraction of Threat’ (2016) 91 *International Affairs*. There has been significant reluctance to allot an official position based on the status this might confer.

¹⁴¹ UN Charter Art 51.

a legal definition of statehood. Based upon legal discussions, two approaches stand out, namely the declaratory and the constitutive approaches.¹⁴² The constitutive approach confines attribution of statehood to states that are recognised by other states as possessing legal personality. Groups like ISIS do not exist because states do not consent to their existence. Alternately, the attribution of legal personality has, to some extent, often been reliant on an entity in some way being accepted by international society, with states granting institutional rights and obligations.¹⁴³

As ISIS has not been recognised as a peer by states, the only possible interpretation may be arrived at by examining whether ISIS is a state based upon it having achieved certain objective features according to the declaratory theory.¹⁴⁴ Despite arguments that were made for ISIS' statehood, key dissenting factors have emerged.¹⁴⁵ It is commonly held that states need to, in some way, acquiesce to the existence of a new state.¹⁴⁶ In this regard, it can be suggested that recognising ISIS as a state is rendered impossible by the position affirmed by the UNSC that ISIS/ISIL and its affiliates represent a "global and unprecedented threat to international peace and security".¹⁴⁷ Such unambiguous statements naturally preclude any states from recognising ISIS.

The declaratory theory effectively renders statehood a matter of historical fact, not judgment. No other party gets a say in the matter. Whilst there is no universally recognised legal test, some guidance is available. The Montevideo criteria stress the need for a permanent population, defined borders, established governance, and the capacity to enter into relations with foreign governments.¹⁴⁸ Should these criteria be met by a group like ISIS, then the implications for the war on terror and global security would be significant. It is possible to indicate that at one point, ISIS aspired to many of the trappings of declarative statehood in their rudimentary systems of

¹⁴² William Thomas Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory' (2009) 27 Boston University International Law Journal 115, 118.

¹⁴³ James R. Crawford, *The Creation of States in International Law* (2 edn, Oxford University Press 2007) 25–26.

¹⁴⁴ Worster 119.

¹⁴⁵ Coleman 79; Yuval Shany, Amichai Cohen and Tal Mimran, 'ISIS: Is the Islamic State Really a State?' (*The Israel Democracy Institute* 2014) <<https://en.idi.org.il/articles/5219>> accessed 3 December 2018.

¹⁴⁶ Scott Pegg, *International Society and the de Facto State* (illustrated edn, Ashgate 1998) 26.

¹⁴⁷ UNSC, Res 2249 (20 November 2015) UN Doc S/RES/2249.

¹⁴⁸ See "Montevideo Convention on the Rights and Duties of States", Council on Foreign Relations, accessed 28 September 2017 <<https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166aef>>.

governance.¹⁴⁹ Additionally, whilst ISIS never considered themselves to be a state in the formal sense, it is possible to indicate other situations in which the intent to found a state was disregarded.¹⁵⁰ It is therefore perhaps worth exploring ISIS in relation to the declaratory theory of statehood.

6.4.1 ISIS as a declaratory state

Verifying whether ISIS ever possessed the features commonly equated with the existence of a state is by no means an easy task. Whilst ISIS claimed to have many governmental structures and a defined territorial area of control, it is difficult to determine with any degree of accuracy what was really taking place. The UN did recognise ISIS as employing a rough-cut version of governance.¹⁵¹ Likewise, state militaries factored in ISIS' governance into their assessments.¹⁵² Other testaments to the efficacy of ISIS' civil structures are discernible from reports on their crimes, which acknowledge a complex system for dispersing slaves and committing other crimes of an international character.¹⁵³

It is naturally possible to indicate documents that reflect rules and laws.¹⁵⁴ For example, ISIS issued laws, encapsulating aspects of daily life, criminal justice, and punishments.¹⁵⁵ Additionally, ISIS provided basic civic services in several key areas.¹⁵⁶ The group identified and recruited specialists from former regimes, as well as from the global Muslim population, bringing in professionals from around the world.¹⁵⁷

¹⁴⁹ See Longobardo (n 58).

¹⁵⁰ Crawford, for instance, discusses the issue of statehood in relation to Taiwan, and the extent to which it may be considered distinct from China. See James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (2012) 156.

¹⁵¹ UNSC S/2018/14 <http://un.org/en/ga/search/view_doc.asp?symbol=S/2018/14> accessed 12 January 2019.

¹⁵² See Christopher Blanchard and Carla Humud, 'The Islamic State and U.S. Policy' (2016) 18 *Current Politics and Economics of the United States, Canada and Mexico* 477.

¹⁵³ UN Human Rights Council, "*They Came to Destroy*": *ISIS Crimes Against the Yazidis* (UNHRC 2016).

¹⁵⁴ UNSC S/2018/14 (n 151)

¹⁵⁵ Rukmini Callimachi, 'The Case of the Purloined Poultry: How ISIS Prosecuted Petty Crime' (*The New York Times*, 1 July 2018) <<https://nytimes.com/2018/07/01/world/middleeast/islamic-state-iraq.html>> accessed 28 February 2019.

¹⁵⁶ Longobardo (n 58).

¹⁵⁷ 'We make a special call to the scholars, Fuqaha' (experts in Islamic jurisprudence), and callers, especially the judges, as well as people with military, administrative, and service expertise, and medical doctors and engineers of all different specializations and fields. See Dabiq issue 1. (Al Haya Media 2015) 11.

It is difficult to determine whether this government was ever effective. It was never sustainable, funded as it was on gold and plunder, and its basic economy faltered the minute its outward expansion was checked, resulting in the collapse of its civic functions.¹⁵⁸ As for the possession of territory, whilst ISIS directly controlled key supply routes and population centres, it simply terrorised and extorted compliance by exploiting tribal and clan structures throughout much of their territory. Even at its peak, it is possible to suggest that in real terms, ISIS did not meet the criteria specified by the Montevideo convention. Their control was never assured, and their capacity for governance was limited. Even if ISIS wanted to become a state, it is likely that the circumstances of their origins and the reality of the situation would have forever prevented them from doing so. Alternately, the picture of the Islamic State presented in its own publications suggests that it implemented a system of government.

If the lack of acceptance by the wider international society is not taken as an insurmountable obstacle to statehood, it may be the case that for a period, the group constituted a state. If one is willing to interpret the Montevideo criteria in a flexible way, there is some basis to suggest that it conforms, in a basic sense, to the definition of a state.¹⁵⁹ Whether or not this was the case in formal legal terms, it is important to note that not only was ISIS able to displace existing states, it was also able to impose an alternative framework of order.

6.4.2 Other approaches to statehood

Whilst there are orthodox approaches to statehood, history and law both open up different paths and means for understanding the process for achieving statehood, which may be of more utility in the case of ISIS. International law acknowledges a range of routes by which a people can remove themselves from an existing state, should they be sufficiently oppressed.¹⁶⁰ International law now makes provisions for peoples to manifest their destinies, seceding from an existing state to determine their own future,¹⁶¹ a right rooted in the post-colonial proliferation of states. Such a move

¹⁵⁸ See Jacob Shapiro, 'A Predictable Failure: The Political Economy of the Decline of the Islamic State' (2016) 9 CTC Sentinel 28.

¹⁵⁹ See Shany, Cohen and Mimran.(n 145)

¹⁶⁰ James Crawford and Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal*/Antonio Cassese (Cambridge University Press, 1995).

¹⁶¹ General Assy Res. 2625 (XXV), UN Doc. A/RES/25/2625 (1970).

remains permissible, should a people be subject to foreign oppression or a racist regime.

First, ISIS purports to represent all Sunni Muslims. Regarding ISIS as the exclusive manifestation of Sunni Muslims' will is not accurate. Moreover, the region is not under foreign occupation. It can be contended that generally, a people need to be prevented from realising their identity within the context of whatever state already exists.¹⁶² There was nothing to prevent the Sunni population from pursuing their identity within the framework of states that already existed. There are some grounds to suggest that ISIS could be considered a state for the purposes of international criminal liability. *Kadic v Karadžić*, for instance, addressed a government-like organisation maintaining territorial control.¹⁶³ The Bosnian–Serb Republic was sufficiently state-like to attribute command authority to its leadership. This republic established that liability exists “whether a person (within the organization) purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists”.¹⁶⁴ In a sense, ISIS could be designated as a de facto state¹⁶⁵ as it is factually a state, if devoid of the wider legal foundations for statehood.

It is possible to place ISIS under the definition, advanced by Pegg, of a de facto state, which would suggest that ISIS is a product of an Islamist survival strategy;¹⁶⁶ this, taken with the inability of the de jure or sovereign states of the region to exercise control over the territory. The position that elements of ISIS constitute a de facto state is advocated for by Özpek, who suggests that its state-like features have strengthened in response to competition with other jihadist groups.¹⁶⁷ The accumulation of state-like features is heavily associated with its military effectiveness when compared to

¹⁶² ‘The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances’. See Canadian Supreme Court, Reference re Secession of Quebec, [1998] 2 S.C.R. 217 [126].

¹⁶³ *Kadic v Karadžić*: (Opinion of 2nd Circuit re: Subject Matter Jurisdiction) Docket Nos 94-9035, -9069 (13 October 1995).

¹⁶⁴ *Ibid.*

¹⁶⁵ A de facto state, having control of a given geographical territory, but devoid of substantive recognition. See Pegg (n146)26.

¹⁶⁶ *Ibid.*

¹⁶⁷ Burak Özpek and Yavuz Yağış, ‘Competitive Jihadism: Understanding the Survival Strategies of Jihadist de Facto States’ (2019) 8 All Azimuth 23.

other similar movements. It competes with the states of Iraq and Syria.¹⁶⁸ Critically, this discussion cannot be held separate to the organisation's own self-image. The group never considered itself to be a state in the strict legal meaning of the term, nor could it accept such a designation and remain consistent with its position in the context of its own ideology.¹⁶⁹ This seemingly blocks the inclusion of ISIS in any of the definitions that would constitute "established legal persons".¹⁷⁰ The group has never sought "full constitutional independence and widespread recognition as a sovereign state",¹⁷¹ a feature that is implicit in the definition of a de facto state. Moreover, the absence of the aspiration to be a state distinguishes it from the *Kadic v Karadzic* case.

The ICC provides additional indications that move away from the state-centric approach, whilst stressing the need to apply crimes against humanity in circumstances where there is organisation of some form. The situation in Kenya demonstrates a move away from more conventional concepts of state organisation, and a willingness to embrace a more functional understanding when considering the organisational requirement:

*"The Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values."*¹⁷²

Although this definition was contested, and the charges in this situation ultimately withdrawn, this emphasis of capability over formal identification could conceivably apply to ISIS based on its organisational capability.

The criteria do not represent universal legal standards for statehood and are little more than useful forms of guidance. As Kelsen suggests, statehood must be considered at the juncture of theory and practice; in real terms, a state is only a state

¹⁶⁸ Ibid.

¹⁶⁹ Dabiq issue 15, (alHayat Media Center 2016) 30–31.

¹⁷⁰ Brownlie (n 1).

¹⁷¹ Pegg (n146) 26.

¹⁷² Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya ICC-01-09-19 (31 march 2010) [90]; see also Marat Shterin and Akhmet Yarlykapov, 'Reconsidering Radicalisation and Terrorism: the New Muslims Movement in Kabardino-Balkaria and its Path to Violence' (2011) 39 Religion, State and Society 303.

insofar as other nations choose to treat it as such.¹⁷³ In terms of partial personality, non-state groups participating as belligerents in an armed conflict have a degree of subjectivity in international law, specifically in terms of IHL. Before discussing non-state armed groups and their subjectivity, it is necessary to discuss what they are. Conventionally, a non-state armed group was aligned with decolonisation and liberation movements, although this term may also refer to insurgencies and other conflicts not linked to these specific ends.¹⁷⁴ The following describes these non-state groups:

“These entities all have some degree of effective control of territory through military means and are acknowledged as persons with whom the international community can engage with on the international plane. These entities are highly organized (e.g., they might even adopt internal ‘legislation’) and often resemble states.”¹⁷⁵

There are, it must be conceded, many factors that conflict with the consideration of ISIS as a non-state armed group. First, terrorist groups, largely speaking, are not considered parties in IHL.¹⁷⁶ Second, ISIS has already been attributed a range of characteristics that are not generally associated with conventional non-state groups, many of which have been mentioned in the course of this chapter.

A key acknowledgement is that today, non-state entities are more present in international law than in the past:

“The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its

¹⁷³ Hans Kelsen, ‘Recognition in International Law: Theoretical Observations’ (1941) 35 *The American Journal of International Law* 605, 605.

¹⁷⁴ William Thomas Worster, ‘Relative International Legal Personality of Non-state Actors’ (2016) 42 *Brooklyn Journal of International Law* 207, 299.

¹⁷⁵ *Ibid* 229.

¹⁷⁶ For instance, the *Tasdic* judgment explicitly excludes terrorist groups. See *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72, Appeals Chamber (2 October 1995) [70].

*history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States”.*¹⁷⁷

Full legal personality is attributed to states. Other organisations have historically existed with partial rights or responsibilities. Examples include free cities, as specified in earlier permutations of international law,¹⁷⁸ governments in exile, non-state armed groups in IHL, transnational corporations, and international organisations. Crawford, for instance, discusses the “transnational” aptitude of people to organise in such a way as to escape the capacity for states to regulate them, referring explicitly to transitional corporations in this regard.¹⁷⁹ The group ISIS could represent such an entity, albeit working to a very different end.

One of the key attributes of “non-state” actors in the international legal system is the limitation of these actors in certain fields of the international legal system.¹⁸⁰ Although ISIS may have a limited status because of states’ need to wage war and attribute criminal liability, this still represents a limited form of personality. Cronin suggests “proto-state” as a term of utility in the case of ISIS, and notes that ISIS seemingly has no desire to win legitimacy to rule over the Sunni population.¹⁸¹ The proto-state, as a term, has become prevalent in both the language of international lawyers and scholars examining ISIS. In the context of the war on terror, ISIS are joined by al-Shabab, the al-Nusra front, the Taleban, and Boko Haram, who were all described as proto-states at some point during their existence.¹⁸² Proto-statehood has

¹⁷⁷ *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, 1949 ICJ Represent 174 at [178].

¹⁷⁸ Christian Hattenhauer, ‘Free Cities’ (Max Planck Foundation, 2007) <<http://opil.ouplaw.com/abstract/10.1093/law:epil/9780199231690/law-9780199231690-e1285?prd=OPIL>>. Accessed 22 April 2019.

¹⁷⁹ James Crawford, ‘Negotiating Global Security Threats in a World of Nation States: Issues and Problems of Sovereignty’ (1995) 38 *American Behavioral Scientist* 867, 880.

¹⁸⁰ Davor Muhvić, ‘Legal Personality as a Theoretical Approach to Non-State Entities in International Law: The Example of Transnational Corporations’ (2017) 1 *Pécs Journal of International and European Law* 7, 17–18.

¹⁸¹ Audrey Cronin, ‘ISIS is Not a Terrorist Group’ (*Foreign Affairs*, 18 February 2019) <<http://foreignaffairs.com/articles/143043/audrey-kurth-cronin/isis-is-not-a-terrorist-group>> accessed 26 February 2015.

¹⁸² Lia (n 70) 33–34.

also been used to describe a vast range of armed groups that control territory and exercise, to a limited extent, administration over both territory and population.¹⁸³ It is possible to suggest that its current usage with regard to groups within the context of the war on terror needs to be differentiated from its more general usage.

Historically, the proto-state was understood to refer to a precursor; a term of art used to describe the juncture in which an insurrection or rebellion had taken over a territory and begun to administer it, but not yet formed a nation state, or been defeated by the de jure power of a territory.¹⁸⁴ In the context of the war on terror and ISIS, such a progression cannot be assumed; not only is it blocked from achieving the status of a state, but it has effectively bypassed defeat. In the terrorist, or jihadist context, the proto-state is often conceptualised as an attempt to outbid other terrorist groups.¹⁸⁵ This makes the construction of the proto-state an effort to impress and draw the support of other jihadists, not accumulate the capacity to become a state.

Typically, a proto-state would be based around the rejection of a specific state's authority to rule over a people or group, who would secede and seek to form their own state. This characteristic is modified in the case of ISIS, and has been variably absent in the range of other proto-states that pledged allegiance to the group;¹⁸⁶ they instead reject the authority of the entire international system, and accordingly, do not wish to create a state. If one goes as far as to entertain its mythology, then one must have conceded that its long-term aspirations are indeed limited, given that once certain messianic criteria are met by the organisation, the world must end.¹⁸⁷

In using the word proto-state to conceptualise a territorial jihadist organisation, it is possible to confuse the manner in which the term has been used in the past with its present use. A caliphate need not achieve de facto control over the world's entire Muslim population; indeed, if one excludes the very early days of the Islamic faith, then no unitary organisation can profess to have ever achieved as much. More importantly, it is critical to grasp that no matter the disposition of Islamic scholars, ISIS and its constituent individuals understand the project as a caliphate. Whatever the position of the scholars, the use of the term caliphate is sufficient for ISIS to shield

¹⁸³ Ryan D. Griffiths, *Age of Secession: The International and Domestic Determinants of State Birth* (2016).

¹⁸⁴ Ibid.

¹⁸⁵ Lia (n 70) 36.

¹⁸⁶ US Department of State (n 76)

¹⁸⁷ Graeme Wood, *What ISIS Really Wants* (2015) (n 157).

itself from the meaning of any reprimand, and remove itself from any normal moral context. It is enough to demand the allegiance of every identified Muslim, and enough for some to listen. ISIS understand themselves as a universal state and therefore behave as if this were so.

As already mentioned in the course of this chapter, ISIS is just one of many organisations that have congregated around the same mission. Moreover, more often than not, the focus of this messianic fury has been other Muslim states and peoples. Whilst the question as to whether ISIS represent *the* caliphate is a matter for theological debate, it is possible to suggest that they themselves imagine this to be the case and behave accordingly.

6.5 The war on terror; is a new form of personality applicable to unconventional armed groups being synthesised?

Suggesting that the war on terror comprises a new approach in international law is nothing short of controversial. It does, however, indicate that the understanding of non-state groups and terrorist organisations within the “war on terror” is different to the manner in which similar groups and organisations may be treated outside of this campaign. Whilst as yet, no authoritative acknowledgment of this difference is apparent, state practice indicates that in the context of the war on terror, there is a need to modify international law. This is apparent in the way organisations like the Taliban, Al Qaeda, and ISIS are treated. Whilst it is not yet possible to conclude that a new form of personality derivative of statehood has emerged, the innovations undertaken by states in relation to such groups is not without importance.

6.5.1 The Taliban and Al Qaeda; an intermediate case?

Prior to engaging with the current state of the war on terror, it is important to consider how it began. Examination of early US approaches to the war on terror can reveal a fundamental misunderstanding of the enemy. The misleadingly titled “strategy for combating terrorism” is focused upon the destruction of leadership and material support. Thus, the opening of the war on terror was preoccupied with engaging and

destroying the enemy. To be clear, Al Qaeda did not resemble a state. The Taliban, the organisation harbouring them, did.¹⁸⁸

Prior to 2001, the Taliban had held power over much of Afghanistan for at least four years, even being recognised by a handful of states.¹⁸⁹ There is evidence to suggest that the Taliban possessed the capacity to institute governance.¹⁹⁰ It was additionally anti-western, Islamic in character, and was actively harbouring Al Qaeda, an international terrorist group. The Islamic Emirate of Afghanistan, therefore, represented to the US a promising target for military force. The position of the Taliban, it is contended, is significantly different from that of later organisations within the context of the war on terror. Having earlier achieved de facto control of the majority of the nation, they demanded recognition from other states, and represented themselves as the sole legitimate government of the territory.¹⁹¹ The Taliban did not commit an armed attack against the US. The group did, however, make clear that they would continue to shelter Al Qaeda, following the 9/11 attacks.¹⁹²

In reconciling the Taliban with the imperative to use force against them, a number of labels have been invoked. Following the attacks of 2001, the US immediately sought to identify the Taliban as a legitimate target in pursuit of self-defence.¹⁹³ There was then the manner in which the Taliban chose to fight, in a manner that by international standards, was not considered by the US to be consistent with the customs of war.¹⁹⁴ International lawyers have stressed that there was a legal basis for differentiating the Taliban from their guests, however, based upon their de facto control of a territory.¹⁹⁵ This line of reasoning is most apparent in the resistance to the US assertion that the Taliban were not entitled to prisoner of war status.¹⁹⁶ That this assessment having been made primarily upon the affiliation of the Taliban with a transnational terrorist organisation.

¹⁸⁸ George H. Aldrich, 'The Taliban, Al Qaeda, and the Determination of Illegal Combatants' (2017) 96 *American Journal of International Law* 891, 839.

¹⁸⁹ Council on Foreign Relations, 'The Taliban' (2018) <https://cfr.org/interactives/taliban?cid=marketing_use-taliban_infoguide-012115#!/taliban?cid=marketing_use-taliban_infoguide-012115> accessed 17 February 2019.

¹⁹⁰ Daniel Benjamin and Steven Simon, *The Age of Sacred Terror* (Hi Marketing 2002) 169.

¹⁹¹ Jonathan Cristol, *The United States and the Taliban Before and After 9/11* (Palgrave Pivot 2019).

¹⁹² Aldrich (n 188)

¹⁹³ Rüdiger Wolfrum and Christiane E. Philipp, 'The Status of the Taliban: Their Obligations and Rights under International Law' (2002) 6 *Max Planck Yearbook of United Nations Law Online* 559, 586.

¹⁹⁴ Fact Sheet: Status of Detainees at Guantanamo (7 February 2002) <<https://georgewbush-whitehouse.archives.gov/news/releases/2002/02/20020207-13.html>> accessed 12 January 2019.

¹⁹⁵ Wolfrum and Philipp (n 193).

¹⁹⁶ *Ibid* 596–597.

Their early ideological origins dictated more modest aims than those it specified later; more transnational varieties of global jihadism, at least in their earlier incarnations. The potent influence of Pashtun tribalism, in which most Taliban themselves participated, imposed geographical, racial limitations upon their jihadist struggle, limiting their sphere of interest to an area traditionally dominated by Pashtuns; Afghanistan and regions of neighbouring Pakistan.¹⁹⁷ Unlike its partner organisation Al Qaeda, and later ISIS, this limited its activity to a particular geography. In this regard, it is possible to suggest that the Taliban represent an intermediate case; somewhere between a movement aspiring to the legitimacy of a member of the international community, and one supporting a messianic future. As Kepel suggests, whilst the Taliban's Deobandi tradition shares a literalist approach to scripture and jihad, it differs from more globally-orientated Jihadi-Salafists inasmuch as it is focused inward upon a particular people and nation.¹⁹⁸

What stopped the Taliban from becoming realised as an Islamic nation-state? Disregarding the war on terror in Afghanistan would certainly obscure one of the major factors behind the group's ill fortunes, though it is important to note the failure of the Taliban project to gain traction prior to the war on terror. It is possible to suggest that part of the reason for their failure to be recognised in spite of their de facto control of Afghanistan is due to the manner in which they sought to reconcile their nationalistic identity with their jihadist ideology. Unfortunately, this did not prove to be a stable arrangement. It is possible to observe friction between the two identities – Sharia and Pashtun nationalism – a fundamental contradiction.¹⁹⁹ Domestically, it has been suggested that the nationalist impulse arising from Pashtun identity was overwhelmed by the global, Salafist brand of jihad expressed by Al Qaeda and its leadership, who wielded increasing influence over the Taliban through access to global funding and support,²⁰⁰ in an event that could be interpreted as an instance of religious outbidding,²⁰¹ or more compellingly, simple economics. The stresses of this contradiction are also evident in terms of the Taliban's initial pursuit of statehood. Even having achieved a position close to dominating the Afghan state, recognition

¹⁹⁷ Mariam Raqib and Amilcar Antonio Barreto, 'The Taliban, Religious Revival and Innovation in Afghan Nationalism' (2013) 16 *National Identities* 1, 18.

¹⁹⁸ Kepel (n 90) 222–223.

¹⁹⁹ Oliver Roy, 'The Taliban: A Strategic Tool for Pakistan' in Christophe Jaffrelot (ed), *Pakistan: Nationalism Without a Nation* (Zed Books 2002) 158.

²⁰⁰ Kepel (n 90) 233–234.

²⁰¹ Toft (n 85).

was limited to a handful of other Islam-orientated nations.²⁰² As the history of the Taliban demonstrates, its internal pursuit of Islamism/jihadist legitimacy proved incongruent with its external goals of international legal recognition stemming from its nationalist identity elements. A number of statements criticising the oppression and brutality of its regime were issued,²⁰³ with this likely accounting for its limited recognition. Looking back, the Taliban may be conceived as an expression of state force, namely that of Pakistan. Whilst this has been alleged multiple times by NGOs²⁰⁴ and elements of the US security services,²⁰⁵ an authoritative recognition of this would not be expedient for geopolitical reasons.

They have also been conceptualised as “suicidal” in that their ideology and belief system consistently cause them to make decisions that undermine their future capacity to govern,²⁰⁶ with this, in turn, jeopardising any progress towards statehood. Their initial legitimacy, founded on stamping out corruption and lawlessness, soon gave way to a spiral of religiously orientated oppression and violence, that soon eliminated any legitimacy they may have derived from the population.²⁰⁷ This oppression drew vocal criticism. Likewise, their commitment to jihadist goals caused them to invite and harbour elements of a transnational terrorist network, the then pre-eminent Al Qaeda. These links, dating back to the Soviet invasion, drew international attention following the 9/11 attacks, and formed the rationale behind the US-led invasion that toppled the regime.

Prior to 2001, whilst recognised as a threat to peace and security, the UNSC repeatedly stressed the option of working with the Taliban and others in order to better

²⁰² Pakistan, UAE and Saudi Arabia. See Canada: Immigration and Refugee Board of Canada, Saudi Arabia: Information on whether the government officially recognizes the Taliban government in Afghanistan, and if so, the date recognition was extended; and whether the government of Saudi Arabia provides the Taliban government with any kind of support, 1 March 1998, SAU28966.E <<https://refworld.org/docid/3ae6ab2c60.html>> accessed 20 March 2019.

²⁰³ See UNSC Res 1333; UNSC Res 1267.

²⁰⁴ Human Rights Watch, ‘Pakistan’s Support of the Taliban’ (2001) <<https://hrw.org/reports/2001/afghan2/Afghan0701-02.htm>> accessed 13 March 2019.

²⁰⁵ Associated Press, ‘Pakistan Condemns US Comments About Spy Agency’ (23 September 2011) <https://web.archive.org/web/20130727053454/http://news.yahoo.com/pakistan-condemns-us-comments-spy-agency-044440789.html%3B_vlt%3DA2KJ3vVYX3xOdRkA9EZNXyoA?rnd=005681253004174930714413> accessed 20 March 2019.

²⁰⁶ The precise terminology being a “Samson state”, used to refer to a state that makes decisions contrary to its own. Svante Cornell, ‘Taliban Afghanistan: A True Islamic State’ in Brenda Shaffer (ed), *The Limits of Culture: Islam and Foreign Policy* (Belfer Center for Science and International Affairs 2006).

²⁰⁷ Ruthven Malise, ‘The Eleventh of September and the Sudanese Mahdiya in the Context of Ibn Khaldun’s Theory of Islamic History’ (2002) 78 *International Affairs* (Royal Institute of International Affairs 1944–) 339.

the security and human rights situation.²⁰⁸ The narrative changed following the US invasion, with the Taliban identified as harbouring Al Qaeda leadership elements, justifying their destruction as a political and military force in the region. After the US invasion, the group initially made a commitment to restore the Islamic emirate, aiming at toppling the foreign-installed government in Kabul. In this enterprise, the organisation was able to draw upon a clandestine jihadist global network and alleged support from neighbouring Pakistan and Gulf-based funds. The following years of violent insurgency and sectarian violence are a testament to the organisation's durability, local connections, and global support. Regardless of the group's successes, at the current juncture, the organisation's aims have shifted and it is now far more wary of achieving a monopoly, instead seeking to effect a power-sharing arrangement with the Afghanistan government and the various warlords.²⁰⁹ This has been claimed as a great success,²¹⁰ though it must be noted that similar moves have failed in the past.²¹¹

There is then the contention that the leadership of the Taliban, having spent time overseas, have changed and softened their position on the nature of the Islamic state, yet the rank and file will accept nothing short of the Islamic emirate being restored.²¹² The adoption of a more moderate power-sharing agreement is additionally likely to separate the Taliban from any revenue streams and foreign support.

The Taliban finds itself already engaged in a struggle with other Islamist groups, such as ISIS. It has even gone as far as to suggest it is now willing to fight the group on the US's behalf.²¹³ It is possible to represent the Taliban's move towards a power-sharing agreement as positive. More cynically, it is possible to suggest that the Taliban's leadership are out of touch with their movement, who remain committed to the Islamic emirate. Moreover, ISIS' global brand ideology of a caliphate could prove capable of outbidding the more nationally-orientated Taliban.

²⁰⁸ UNSC Resolution 1333.

²⁰⁹ Borhan Osman and Anand Gopal, 'Taliban Views on a Future State' (Center On International Cooperation, 2016) <https://cic.nyu.edu/sites/default/files/taliban_future_state_final.pdf> accessed 17 March 2019.

²¹⁰ See 2019 promised a peace framework in which the Taliban guarantee that Afghanistan will not be used for terrorism in return for withdrawal of US troops. <<https://nytimes.com/2019/01/28/world/asia/taliban-peace-deal-afghanistan.html>> accessed 20 March 2019.

²¹¹ Jean Heery, "What is the Taliban?" <<https://institute.global/insight/co-existence/what-taliban>>. Accessed 12/09/2019.

²¹² Osman and Gopal (n 209).

²¹³ Ibid.

Conceptualising the Taliban as an intermediate case between today's transnational terrorist organisations and more conventional revolutionary movements is useful for the following reason: it shows that such an arrangement is unstable; the Taliban's pursuit of dual legitimacy resulting, ultimately, in the loss of both. The case of the Taliban may additionally be taken as an indication that recognition is not predicated solely upon control of a territory, but requires aspirant nations to make a commitment to the fundamental values of the international community.²¹⁴

6.5.2 Defining ISIS in the context of the “war on terror”; self-defence against a global threat?

This chapter has so far considered the possible manners in which ISIS and other similar groups can be defined. Two key details can be noted. First, there is difficulty aligning ISIS with statehood, or, for that matter, any understanding of a legal personality. There is the physical reality of ISIS as a transnational movement in addition to its territorial presence. Finally, there is the manner in which ISIS defines itself.

Creating a new personality for a group like ISIS that takes into account its peculiar characteristics would probably represent an insurmountable challenge for a system of public international law that is inextricably linked with the notion of a nation-state as a unitary actor.²¹⁵ There is a lack of knowledge as to what solution would best serve the long-term interests of states and safeguard the integrity of international law and its various subfields. Rather than expecting a solution to be apparent based upon legal deduction and principles, it may be better to conceive of international law itself as a product of historical compromise and circumstance. In this vein, this study now considers whether the formal approach to defining ISIS has been superseded by the manner in which the organisation and the conflict(s) it participates in are identified in practice.

The first contention to make is that organisations like ISIS have already changed international law. As Scharf notes, international law has already made some

²¹⁴ Wolfrum and Philipp (n 193) 577.

²¹⁵ Marks for instance suggests that much of international legal thought is state-centric, with this imposing limitation upon the capacity for legal scholars to frame issues. See Susan Marks, 'State-Centrism, International Law, and the Anxieties of Influence' (2006) 19 *Leiden Journal of International Law* 339.

curious elaborations in relation to the group.²¹⁶ Whilst ISIS does not participate directly in the shaping of international law, by its existence it does force states and international organisations to reconsider and revise legal institutions. More broadly, the “war on terror” is perhaps rooted in the defensive reaction to the 9/11 attacks and subsequent terrorist activities around the world. It began as a formless action against a poorly defined gallery of nations and organisations, or the “axis of evil”.²¹⁷ At the current moment, however, the war on terror has progressively evolved, influencing international law. It is possible to advance that, in addition to changing legal assumptions about the use of force, a new form of legal personality has been applied to the groups representing the side of “terror” in the conflict.

It can be contended that at its instigation, the “war on terror” was engaging what Scharf characterised as a “different form of threat”.²¹⁸ At the war’s initiation, the primary target, Al Qaeda, had already accomplished a range of attacks against American military and civilian targets, and represented a complex and durable networked threat. The inception of the “war on terror” demonstrated the capacity of such organisations to commit an attack that equalled and indeed exceeded the capacity of many state threats.²¹⁹ Whilst this has taken shareholders some time to come to terms with, the interaction between states, their militaries, the international system, and various authorities in the form of legal experts and scholars has begun to articulate a new understanding of such groups for the purpose of armed conflict.

First, based on the “war on terror”, it is possible to suggest that a distinctive form of international legal personality has been called into existence specifically to differentiate groups like ISIS from more conventional non-state groups (terrorists), and states alike. This has been done to account for the specific humanitarian challenges it poses and to address their transnational nature. This new system draws not only on IHL but is based on domestic legal systems and the advice and orders issued by states. In contrast to the manner in which terrorist groups and other organisations were identified in the opening years of the “war on terror”, in the case of ISIS, a number of

²¹⁶ Michael P. Scharf, ‘How the War Against ISIS Changed International Law’ (2016) Paper 1638. Faculty Publications 1 24.

²¹⁷ Referring to a gallery of pariah and failed states, “Axis of evil”. See <<https://web.archive.org/web/20111011053416/http://millercenter.org/president/speeches/detail/4540>>.

²¹⁸ Scharf (n 216).

²¹⁹ Wolfrum and Philipp (n 193) 559–560.

distinctive features that are sufficient to differentiate it from any previously established form of legal personality have been acknowledged.

The first indication that a new form of personality is emerging specifically in relation to the “war on terror” is related to self-defence. Self-defence is applicable only in instances where one state attacks another.²²⁰ The ICJ has been relatively steadfast in maintaining this perspective, specifying an element of state involvement as vital for an “armed attack” to be said to have taken place.²²¹ The perspective has been progressively reinforced by judgments by the ICJ in relation to Israel²²² and Uganda/DRC.²²³ The ICJ’s position is fundamentally at odds with reality, with the acceptance of self-defence against non-state actors increasingly accepted by states.²²⁴

To be specific, this acceptance of the capacity for non-state groups to independently reach the threshold for “armed attack” is largely confined to the “war on terror”. The context of the war has in part entailed recognising that non-state actors can be just as threatening as states, from their very instigation. It is now broadly accepted that the capacity to commit an “armed attack” is not exclusive to states.²²⁵ This, in turn, has altered how self-defence is understood. As Hakimi summarises, US operations in Syria illustrate the erosion of the principle that defensive force may not be used against non-state actors, though there is a lack of a precise legal standard by which to abide in such situations.²²⁶ It cannot, however, be assumed that such a position would be applicable to all non-state groups, but would be limited to groups of a certain capacity, or of a certain nature. This suggests an imminent schism between more conventional non-state groups that are not sufficient to warrant the use of defensive force, and those, like Al Qaeda and ISIS, that does justify the use of defensive force.

²²⁰ Art 51 UN Charter.

²²¹ *Nicaragua v. United States of America* (1986). The case concerns military and paramilitary activities in and against Nicaragua. Judgment of 27 June 1986 102 [195].

²²² International Court of Justice (2004). Legal consequences of the construction of a wall in the occupied Palestinian territory. Advisory opinion of 9 July 2004 62 [139].

²²³ *Democratic Republic of The Congo v. Uganda* (19 December 2005). Case concerning armed activities on the territory of The Congo judgment 221–222 [141–145].

²²⁴ See Federica I. Paddeu, ‘Use of Force Against Non-state Actors and the Circumstance Precluding Wrongfulness of Self-Defence’ (2016) 30 *Leiden Journal of International Law* 93.

²²⁵ Tom Ruys and Sten Verhoeven, ‘Attacks by Private Actors and the Right of Self-defence’ (2005) 10 *Journal of Conflict & Security Law* 289.

²²⁶ Monica Hakimi, ‘Defensive Force against Non-State Actors: The State of Play’ (2015) 91 *International Law Studies* 1 25.

The “war on terror” is primarily populated by groups of the second nature. The invocation of the NATO treaty, Article 5,²²⁷ marked the legal initiation of the “war on terror”.²²⁸ The US expressed to the UN that the attack of 9/11 represented an “armed attack”. The early “war on terror” can be conceived of as the rapid realignment of treaties in line with the notion that a non-state actor can commit an armed attack, and can be the subject of a self-defence argument. Subsequently, the UNSC omitted reference to states in Resolutions 1368 and 1373.²²⁹

There was widespread support for the coalition intervention in Afghanistan, as with earlier instances of international intervention seen as primarily humanitarian in nature; more criticism has been levelled since the 2003 Iraq intervention, which has been framed as “pre-emptive self-defence”.²³⁰ Self-defence has been used by a range of nation-states to justify the use of airpower against ISIS.²³¹ In the initial phase of the war, the notion of states “harbouring” terrorists was a central point of contention; there were discussions as to the responsibilities of a state with regard to preventing terrorist activity within their respective territories.²³² The group ISIS has required this notion to be revised; the contention made by the US is that the territorial dimension of ISIS existed in an area that may be likened to the concept of “ungoverned space” or a “no man’s land”. The contention that Iraq and Syria lost legal control of this territory has profound implications for international law, should it become recognised as a new customary law.²³³

Nevertheless, there are now sufficient events that can be framed as self-defence against non-state actors, suggesting that armed attacks can take place without the involvement of an opposing state that either supports or harbours the group in question.²³⁴ It is additionally possible to contend that the notion of invoking self-defence against non-state groups is spurred by the inclination of non-state actors within the context of the “war on terror” to attack or encourage others to preform

²²⁷ The North Atlantic Treaty (1949) Article 5.

²²⁸ John C. Yoo and James C. Ho, ‘The Status of Terrorists’ (2003).

²²⁹ UNSC 1368 and UNSC 1373.

²³⁰ See John Yoo, ‘Using Force’ (2004) 71 *University of Chicago Law Review* 729.

²³¹ Specifically, France, UK and USA. See UN Doc. S/PV.7565, 2–9; see also SC Res. 2249 (2015); and Australia UN Doc. S/2015/693, 9 September 2015.

²³² Scharf (n 216) 24; Theresa Reinold, ‘State Weakness, Irregular Warfare, and the Right to Self-defense Post-9/11’ (2011) 105 *American Journal of International Law* 244, 245.

²³³ See Russell K. Jackson, ‘Lawlessness Within a Foreign State as a Legal Basis for United States Military Intervention to Restore the Rule of Law’ (2006) 187 *Military Law Review* 1.

²³⁴ Reinold (n 232).

attacks within a wide range of states. Al Qaeda and, to a lesser extent perhaps, ISIS, have exhibited capacities in this regard. A non-state group behaving conventionally would be unlikely to be capable of causing equivalent damage to western states.²³⁵ The development of self-defence in the context of the “war on terror” has been undoubtedly spurred by the persistent anxiety of a terrorist group armed with weapons of mass destruction.²³⁶ Whatever the precise reasoning behind the broadening of self-defence to non-state groups, it is accepted that the most convincing arguments are made in relation to terrorist groups within the “war on terror”.²³⁷ It can, therefore, be stated that non-state armed groups operating within the “war on terror” are attributed to a characteristic that is not reflected outside of this context. At the current juncture, it must be stressed that there is a certain degree of uncertainty regarding when and where it is possible to utilise defensive force against a non-state organisation or group. Reinhold suggests that there is, however, a willingness on the part of states to revise self-defence in order to better reflect changing realities.²³⁸

On the one hand, it is possible to specify features exclusive to states and attributed to armed groups within the context of the “war on terror”. On the other hand, it is possible to specify features attributed to armed groups within the context of the “war on terror” that serve to disassociate an organisation like ISIS from statehood and other existing forms of legal personality.

At this point in the war on terror, it can conclusively be stated that in relation to armed conflict, combat, targeted killing, and other uses of force or the threat thereof, terrorist groups, territorial or otherwise, and their associated individuals are presented as not having the rights and privileges generally understood to exist in such contexts. Speaking generally, there has been a great deal of discussion surrounding the treatment of enemy combatants in the context of the war on terror, particularly in relation to the various tribunals and systems utilised by the US regarding detainees affiliated with terrorist groups.²³⁹ By the time ISIS emerged, a range of states had developed specific approaches to dealing with detained terrorists/combatants. By this time, the notion of

²³⁵ Bruce Hoffman, ‘Rethinking Terrorism and Counterterrorism Since 9/11’ (2002) 25 *Studies in Conflict & Terrorism* 303, 307.

²³⁶ Michael Lacey, ‘Self-defense or Self-denial: the Proliferation of Weapons of Mass Destruction’ (2000) 10 *Indiana International & Comparative Law Review* 293.

²³⁷ Andrew Clapham, *Human Rights Obligations of Non-state Actors* (Law Academy of European ed, Oxford University Press 2006) 271–300.

²³⁸ Reinold (n 232).

²³⁹ George H. Aldrich, ‘The Taliban, Al Qaeda, and the Determination of Illegal Combatants’ (2002) 96 *The American Journal of International Law* 891.

such individuals inhabiting a “legal gap”²⁴⁰ had given way to a recognised need to place such individuals within a stable legal framework. It is naturally important to consider the starting point for classifying the status of terrorist individuals in the “war on terror”. First an enemy combatant can be described as an individual to be detained for the duration of hostilities,²⁴¹ likewise recognised in the Geneva conventions.²⁴² The treatment of those under arms in the context of the “war on terror” has not diverged radically from the notion of a combatant contained in the Geneva Convention, though states have sought to present that groups are not entitled to such treatment.²⁴³ They have, however, recognised that enhanced detention is inconsistent with the orthodox interpretation of the Geneva Convention. The ongoing nature of the conflict has been framed as an endless, shifting confrontation, contained within the “war on terror”.

As hostilities against groups like ISIS have never really come to an end, there is a risk that once a sentence or period of detention runs out, an individual can simply rejoin the conflict at the nearest front. Whilst states have developed programmes of deradicalization to prevent this, the efficacy of these programmes is frequently called into question. It can be contended that the shift towards a more ambiguous form of detention reflects the reality of conflict within the “forever war”. States have struggled to generate a reliable framework that is consistent with human rights whilst concurrently containing the threat posed by individuals affiliated with terrorist groups. This marks a departure from existing standards within the context of the “war on terror”.

Several observers have sought to align the status of hostile individuals within the “war on terror” with *Hostis humani generis*.²⁴⁴ In examining modern terrorists, some have concluded that this is not a great leap, given the similarity of contemporary terrorism to activities previously designated as such.²⁴⁵ Such a designation has

²⁴⁰ See Fionnuala Aolain, ‘Hamdan and Common Article 3: Did the Supreme Court Get it Right? (9/11 Five Years on: A Look at the Global Response to Terrorism)’ (2007) 91 Minnesota Law Review 1532; Dörmann (n 128).

²⁴¹ Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, Art. 20, 36 Stat. 2277, 2301.

²⁴² Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, Art. 118, 6 U.S.T. 3406.

²⁴³ Ari Fleischer, Special White House Announcement Re: Application of Geneva Conventions in Afghanistan (17 February 2002) <<https://state.gov/s/l/38727.htm>> accessed 4 February 2019.

²⁴⁴ Elimma C. Ezeani, ‘The 21st Century Terrorist: Hostis Humani Generis?’ (2012) 3 Beijing Law Review 158, 165.

²⁴⁵ Burgess (n 124) 315–317.

ramifications that reach beyond other immediate clear consequences in criminal law terms.

6.6 The “unconventional armed group” in the “war on terror”: a twenty-first century “uncivilised state”?

This chapter commenced with a conceptual discussion, contrasting the ideas about statehood and legal personality held historically in European public international law with the definitions of statehood that prevail today. The distinction between civilised and uncivilised nations had the benefit of limiting the provision of legal personality to nations that shared history, religion, and culture. This prevented the inclusion of peoples that, in the sensibilities of the era, were seen as incapable or unwilling to conform to the same standards as European nations. It additionally permitted European states to act decisively and without legal impediment against the then alien, uncivilised nations of the world. This system, it can be contended, is no longer extant; no longer is legal personality rooted in a normative shibboleth but is attainable by any people upon the realisation of certain features. Moreover, any community imagined upon racial or religious grounds can confidently set out upon the path to statehood, should circumstances merit such a move.

In examining the problem of unconventional non-state armed groups today, particularly in relation to the war on terror, it is possible to observe challenges to the manner in which statehood is understood. Based upon the assessment of this chapter, it is difficult to conclude whether ISIS ever achieved the objective standards generally regarded in relation to statehood, nor can they be interpreted as being in a legitimate rebellion against an oppressive occupation. If statehood or other forms of legal personality are purely a matter of historical fact, however, then there is nothing to stop a group like ISIS from attaining such status, and thereby benefiting from the rights and privileges afforded to states. It is therefore compelling to ask what would happen if another similar group could be conclusively demonstrated to be in adherence with the specified criteria.

This chapter has sought to introduce additional perspectives in relation to unconventional armed groups that alienate them from statehood. First, there is the immutable reality that recognition of any legal personality is dependent upon the behaviour of other actors in the system; namely, the recognition and treatment by

states and international organisations. There is then the self-image of organisations like ISIS and its imagined trajectory, as suggested by publications and statements made by its leaders. Upon this basis, it is possible to suggest that ISIS conceives of itself as a “universal state”, or in Islamic parlance, a caliphate.

A key touchstone in thinking about the evolving nature of such groups and their position should be the legal manoeuvres accomplished in relation to *Kadic v Karadžić*.²⁴⁶ It may be the case that groups like ISIS have exceeded the features of governance that were specified in relation to this case. The critical detail that may be specified, however, is that unlike the incipient Serb republic, groups like ISIS do not aspire to become states or autonomous actors of any sort within the international system. This is significant.

There is no distinction existing in international law that recognises the notion of a universal state. This chapter has however suggested that in the context of the war on terror, an elaborate identity has begun to emerge that is perhaps best articulated in relation to ISIS. Whilst not recognised as a state, ISIS has been attributed to a range of state-like capacities, many of which are not generally attributed to “non-state” groups. This distinctive legal personality has a range of visible ramifications that not only encapsulate how ISIS is treated on the battlefield, but also affect how institutions and individuals’ interface with the group.

Where acknowledged in the modern parlance, ISIS is often referred to as a proto-state – proto often taken to mean primitive. Such a word is not burdened by the history of the term “civilised”, though it obscures the very clear connection between ISIS and past incarnations of the universal state. Today the capacity of international law is somewhat greater, and, whilst the idea of an “uncivilised state” can be used in the context of ISIS, there is nothing to suggest that such a category of legal personality today would entail the complete absence of either legitimacy or personality. Nor need it be the case that nation states be given the freedom to contend such organisations today, as they did in the past.

6.7 Conclusion

²⁴⁶ *Kadic v Karadžić* (Opinion of 2nd Circuit re: Subject Matter Jurisdiction) Docket Nos 94-9035, -9069 (13 October 1995).

In an essay written in 1882, Ernest Renan sought to define the origins of a nation; discussing the kingdoms, empires, and the tribes of history, he concluded that these earlier states, depending on shared ethnicity or imposed religion, quickly reach their breaking point. He believed that a true, legitimate nation must be grounded on a shared moral purpose, describing state as the expression of ideals. In suggesting this, Renan touched on the identity of the modern nation-state.²⁴⁷

As part of this essay, Renan discussed the other forms of historical nation into which humans have organised themselves. In the past, a “nation” may have been defined in terms of familial connections, extended over generations, ethnic homogeneity, or the imposition of religious identity as a criterion for membership.²⁴⁸ Renan argues that such notions are outmoded; these systems could not be expected to meet the global complexities of the nineteenth century, this argument based on the frequency with which they resorted to barbarity and subsequently collapsed.

It is possible to go back and recognise that in early permutations of international law, it was possible to conceive of territorial organisations existing outside of international law, effectively excluded upon largely normative characteristics. This chapter has sought to suggest that this was in part the result of western nation-states lacking the means of determining what qualities were required to participate meaningfully in a shared system of regulation. It is also the case that at this juncture in world history, there existed a range of political arrangements that could not be expected to accept the existence of stable borders and conventions required by early international law. It is possible to specify the “caliphate” as one such form of political arrangement. In relation to the war on terror, international law finds itself confronting a territorial organisation that share many of the characteristics frequently associated with statehood, yet critically does not desire any stable relationship with other states or the international system.

Naturally, it is neither desirable nor practical to reimagine an “uncivilised state” in relation to current problems regarding groups like ISIS. Total exclusion from the international system would perhaps suit the needs of states in terms of destroying such organisations, but would leave little room for criminal liability, or inducing

²⁴⁷ See E. Renan, *What is a Nation?* (Tapir Press 1996) 28, ‘Man is neither a slave to his race, nor to his language, nor to his religion, nor to the course of rivers, nor to the direction of mountain ranges. A great aggregation of men, sane and warm-hearted, creates a moral conscience called a nation’.

²⁴⁸ *Ibid.*

compliance. The notion that the disposition of a territorial entity can dominate and govern a territory yet not achieve anything approaching the legitimacy of a sovereign nation is an important feature of early international law, and it is worth considering how this may be significant in relation to contemporary problems. Today's problem is that, as in the past, there exist organisations that have the objective features of states, yet do not aspire to be states. This is perhaps most apparent in the example of ISIS, though it is possible to specify other similar organisations whose fundamental ideology makes their behaviour inconsistent with inclusion in a system of states. There is significant difficulty in aligning the group with existing legal subjects in international law. This is not to say that they have no personality, however.

In examining the legal personality of groups within the war on terror, it is possible to suggest that an evolution in thinking about legal personality is taking place. This evolution reflects a need to separate legitimacy from capacity; to acknowledge that an organisation may, for instance, achieve the objective features of statehood, yet its means of doing so, as well as its future intentions, mean that it does not receive the considerations usually granted to states. It is important to recognise that such organisations of which ISIS is emblematic have state features which are important to consider when thinking about self-defence, or in relation to the criminal liability of commanders and leadership.

The wider implications of ISIS for public international law are of immense significance. In today's thinking, some have considered the proto-state of which ISIS are emblematic as a possible future direction for international law. As this chapter has argued, however, it is of no small importance that ISIS, in its own self-perception, resembles the type of organisation that was historically specifically excluded from earlier iterations of international law – the universal state. By examining the real treatment and legal understanding of non-state groups in the context of the war on terror, it is possible to contend that international law is developing a modified understanding of a non-state group that can be likened to “an uncivilised state” of the past.

7 Is IHL Capable of Recognising that ISIS/Unconventional Armed Groups Are Different, and Applying Rules Appropriately?

7.1 Introduction

This study is now in a position to consider exactly the legal challenge generated by unconventional armed groups of which ISIS is emblematic, in view of both their specific characteristics and the challenges brought about by the divergence of such groups from the typology of the non-state group in IHL. This chapter will first assess how IHL has conventionally categorised armed conflict, before identifying trends that serve to question the effectiveness of these categories; namely the “transnationalisation” of conflict, and the challenge of triggering humanitarian protections in situations involving unconventional armed groups – in particular, the challenge in aligning these conflicts with the criteria used by IHL to both identify and classify armed conflicts. The chapter will then consider the theoretical approaches that have been developed to more closely bring into line IHL and the realities of modern conflict, considering transformative approaches, as well as more modest adjustments. This serves to demonstrate the need to adapt, as well as the procedural challenge associated with any change in the manner in which IHL categorises conflicts. Finally, this chapter will discuss the possibility of generating a more effective framework that ensures appropriate protections are applied to conflicts involving unconventional armed groups.

As this chapter will suggest, the key problem is an epistemological one, in that the means of understanding warfare upon which IHL relies does not represent an effective means of understanding the type of conflict perpetrated by groups like ISIS. This in turn would suggest that formal credentials (statehood) or indices (intensity, organisation) that IHL has conventionally relied upon to identify and categorise armed conflict do not represent good hallmarks for determining what type of force states should be permitted to use, or when assessing the humanitarian needs in relation to many new conflicts. As IHL presents no effective framework for “knowing” such new wars, the categorisation of armed conflict is often misapplied, resulting in a shortfall of humanitarian protections. This serves to suggest a need for either a revision to the

existing categories, or the inclusion of additional criteria that permit such conflicts to be understood.

7.2 IHL's understanding of armed conflict, and the challenge posed by unconventional armed groups like ISIS

IHL is frequently presented as universal, with its essential principles present across different historical approaches to warfare. Consistent with this principle, a range of different origins of the system has been postulated from a vast range of religious and cultural perspectives.¹ Whilst the moral foundations of IHL may indeed be present in multiple different traditions, the specific formal origin of IHL in twentieth-century Europe² imposes some limitations upon the universal applicability of the system, and critically, the manner in which war is defined and categorised. Contemporary IHL is to some degree, an artefact of this place and period. Whilst IHL has subsequently been revised to better apply to different contexts, it may be contended that there is still a commitment to classical state conflict as an “ideal” form of warfare, with both states and non-state groups anticipated to adhere to this model.

Naturally, IHL's continuing commitment to the state variety of warfare presents blind spots. Groups like ISIS serve to question the conventional paradigms of state conflict and conflict against conventional non-state groups.³ Both ISIS and other unconventional armed groups represent the realisation of a number of longstanding trends in warfare that, taken together, represent a foundational threat to applying IHL; asymmetric tactics, ideology comprising intractable hatred, and rejection of the conventional incentives for inducing compliance. Taken together, these features mean that such groups are difficult to identify with “non-state” groups as they are described in IHL. In order to understand how such trends, represent a challenge, it is necessary

¹ Linkages between IHL and various traditions have been established in relation to Islamic, Indian and Chinese approaches to war to specify just a few possible origins. See respectively Mohamed Elewa Badar, ‘Jus in Bello under Islamic International Law’ (2013) 13 *International Criminal Law Review* 593; V. Mani, ‘International Humanitarian Law: An Indo-Asian Perspective’ (2001) 83 *International Review of the Red Cross* 59; He Xiaodong, ‘The Chinese Humanitarian Heritage and the Dissemination of and Education in International Humanitarian Law in the Chinese People's Liberation Army’ (2001) 83 *International Review of the Red Cross* 141.

² Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press 2010) 119.

³ See Benedetta Berti, ‘What's in a Name? Re-conceptualizing Non-state Armed Groups in the Middle East’ Palgrave Communications <<https://doi.org/10.1057/palcomms.2016.89>> accessed 29 November 2016, 1.

to first understand the current order and the manner in which IHL defines armed conflict.

7.2.1 The incumbent system of IHL

The laws of armed conflict were initially crafted to regulate armed conflict between states.⁴ Successively, however, non-state armed groups became potential participants within the laws of armed conflict. Whilst this expansion represented a positive step from the point of view of humanitarian organisations, it is possible to suggest that IHL is only capable of effectively responding to situations involving armed groups that mimic states; this is not surprising in that the humanitarian protections applied in non-state conflicts are derivative of the protections developed in order to regulate states, though the extension of IHL to non-state groups is curtailed by the nature of state sovereignty.⁵ Through customary law, the situation has since developed in such a way as to ensure that the majority of protections applied to international armed conflict (IAC) can be applicable in non-international armed conflict (NIAC).⁶ This represents a challenge in relation to the increasing involvement of armed groups utilising unconventional methods and means in warfare. In such cases, expecting states to follow such rules may be inconsistent with the reality of unconventional situations, these restrictions having been contrived for a very different sort of war.

IHL is recognised as a legal attempt to introduce humanitarian principles into war. To some extent, it represents a continuation of the longstanding sentiment that war is not the absence of a legal order, but a separate one.⁷ Whilst the laws governing armed conflict today are formally very young,⁸ they are in some aspects related to the laws and customs established following the construction of the state system.⁹ Though

⁴ See Nicolas Lamp, 'Conceptions of War and Paradigms of Compliance: The "New War" Challenge to International Humanitarian Law' (2011) 16 *Journal of Conflict & Security Law* 225, 225–226.

⁵ Rodger Bartels, 'Timelines, Borderlines and Conflicts: the Historical Evolution of the Legal Divide Between International and Non-international Armed Conflicts' (2009) 91 *International Review of the Red Cross* 35.

⁶ *Ibid.*

⁷ 'A good definition must bring out [...] that war is a state or condition of affairs, not a mere series of acts of force'. See Arnold D. McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals' (1925) 11 *Transactions of the Grotius Society* 29, 33.

⁸ Solis (n 2) 119.

⁹ 'It may be a matter of some controversy among historians as to when one should date the beginning of the modern states-system. [...] Less open to debate, however, is that somehow the idea of such a system is historically as well as conceptually linked with that of an international Rule of Law'. See

it is more generally stressed that the moral basis for this system of regulation is much older and less exclusive,¹⁰ it is not unreasonable to suggest that some specific aspects of IHL are inherited from the classical western laws of war. It is difficult to determine to what extent the formal historical origins of IHL limit its applicability to new situations, though there are a number of definitions and principles that may be considered a legacy of earlier thinking about warfare. It cannot be implied however, that IHL has remained static. In the classical laws of war, war was considered a state activity. The balance between “civilised nations” was sustained by reciprocity, in that a sovereign nation’s inclusion in the system of regulation was predicated upon conforming with the laws of war.¹¹ Under this system, conduct of states in war was, to an extent, constrained by the recognition that any infraction would generate a response, to the ultimate detriment of the instigating state. Today, the balance is not maintained by reciprocity, with humanitarian principles instead providing the counterweight to the military inclination of states.¹² Despite realist misgivings, the system of IHL has worked well to constrain states,¹³ though it may well be the case that, despite taking on a more humanitarian appearance, the notion of reciprocity remains important.¹⁴ Today, the classical “laws of war” are superseded by the Geneva Conventions and customary elements of IHL which have established that a number of rights and privileges enjoyed by both civilians and combatants that are non-reciprocal in nature, exist irrespective of whether or not all participants in a conflict choose to abide by them.¹⁵ At the basal level, the IHL aims to balance the need to use violence

Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1 *European Journal of International Law* 4, 4.

¹⁰ ‘First and foremost, the precepts of international humanitarian law belong to the whole of humanity, both politically and culturally’. See V.S. Mani, ‘International Humanitarian Law: an Indo-Asian Perspective’ *International Review of the Red Cross* <<https://icrc.org/en/doc/resources/documents/article/other/57jqzm.htm>> accessed 12 January 2019.

¹¹ Many scholars stress that there has subsequently been a move away from this state of affairs, however. See Theodor Meron, ‘The Humanization of Humanitarian Law’ (2000) 94 *The American Journal of International Law* 239, 243; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press 2004).

¹² *Ibid.*

¹³ See Oona Hathaway and Scott Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Allen Lane 2017) 366-370.

¹⁴ Steven Watts, ‘Reciprocity and the Law of War’ (2009) 50 *Harvard International Law Journal* 365, 366.

¹⁵ See ICRC, ‘Practice Relating to Rule 140. The Principle of Reciprocity’ (2018) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule140> accessed 14 September 2018.

against humanitarian principles: necessity, proportionality, distinction, and the prohibition against causing unnecessary suffering.¹⁶

The Geneva Conventions changed the reciprocal nature of the laws of war, as well as introducing organisations that were not the *de jure* peers of states into the laws of armed conflict. Whilst recognising that there was a need to ensure that certain rebellions and uprisings were recognised, the desire to maintain the sovereignty of the state ensured that the same protections were not applied to all internal matters.¹⁷ The expedient compromise was to create one set of rules for when states fight each other, and a separate set of rules for when states fight “non-state” organised armed groups within their own borders. At the point of drafting, the threats posed by non-state armed groups were not particularly pressing when compared to state on state conflict.¹⁸ This justifies the sparse nature of the discussion surrounding non-state armed conflict at this point. At first glance, the inclusion of non-state situations may be taken to suggest that IHL has made significant progress in expanding beyond the constraints found in the classical laws of war, and better embodying a universal system of regulation for the use of armed force.

A closer examination of how armed conflict is understood, however, suggests that there are many commonalities between the two potential categories of armed conflict, indeed, that the gap between the two has narrowed considerably over time.¹⁹ That is not to say that the two are identical, however. Based upon the prevailing system, conflict status is, and remains, immensely important. This has been the case since the 1949 Geneva Convention’s entry into force.²⁰ Prior to these and subsequent treaties, the characterisation mattered little. Today, however, the manner in which a conflict is classified serves to modify aspects of how force may legitimately be used, as well as in determining what may represent a breach or atrocity.²¹ The prevailing taxonomy of armed conflict is relatively straightforward, consisting as it does of only

¹⁶ Marco Sassòli, Antoine A. Bouvier and Anne Quintin, *How Does Law Protect In War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, 2011) 1–2.

¹⁷ Bartels (n 5).

¹⁸ ‘The law of NIAC is considerably more under-developed than the law governing IAC’. See Daniel Bethlehem and others, *International Law Meeting Summary; Classification of Conflicts: The Way Forward* (Chatham House 2012).

¹⁹ Bartels (n 5).

²⁰ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, Arts 2 & 3.

²¹ Leslie C. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press 1993) 65–66.

two categories, though the categories themselves are somewhat vague.²² Importantly, the International Criminal Court (ICC) sets out different lists of crimes applicable in IAC compared to NIAC.²³ Additionally, the existence of a condition of armed conflict may permit a state to potentially abrogate aspects of its human rights commitments.²⁴ These factors make the application of different categories of armed conflict an important factor in safeguarding civilians and those otherwise out of combat. Nevertheless, the process for determining which category to apply in a given situation has been derided as a largely political process,²⁵ which somewhat de-emphasises the role played by the objective criteria specified by treaties and custom.

Today, the Geneva Conventions of 1949 and the Additional Protocol I are the primary mechanisms governing IAC. In the case of NIAC, Common Article 3 of the Geneva Conventions and Additional Protocol II (1977) are the instruments applicable. Beneath NIAC, actors are subject to domestic law, and in some situations, international criminal law.

7.2.2 Armed conflict – IAC (Common Article 2)

The most straightforward situation that may be conceived is the eventuality in which two states (high contracting parties) contracted to the Geneva Conventions enter declared hostilities with one another. In such a scenario, all of the available rules of the Geneva Conventions and often the Additional Protocol I of 1977 apply, depending on whether or not they are ratified by the belligerents involved.²⁶ Accordingly, IAC represents the most comprehensive of the different categories.

The instigation of IAC is not reliant upon the level or nature of armed force being used, with the participant's status as states determining that armed conflict exists, irrespective of its specific nature. This is confirmed in the 2016 commentary.²⁷ In

²² See Sandesh Sivakumaran, 'Re-envisioning the International Law of Internal Armed Conflict' (2011) 22 *European Journal of International Law* 219.

²³ Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Art. 8.2.

²⁴ Dietrich Schindler, 'The International Committee of the Red Cross and Human Rights' (1979) 19 *International Review of the Red Cross* 3, 8.

²⁵ '[D]etermining the legal character of an armed conflict is rooted in an inherently political interpretation of black letter treaty law'. See Siobhan Wills, 'The Legal Characterization of the Armed Conflicts in Afghanistan and Iraq: Implications for Protection' (2011) 58 *Netherlands International Law Review* 173.

²⁶ Solis (n 6) 150.

²⁷ ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 Article 2: Application of the Convention (2016) [208] <<https://ihl->

addition however, Protocol I extends the definition of IAC to cover “wars of national liberation”,²⁸ being relevant to conflicts against occupiers and racist and colonial regimes.²⁹ This means that the existence of IAC is no longer solely defined by both parties having the formal credentials of statehood, but may require an assessment of the nature of the conflict taking place, and the character of the non-state party.

Mindful of the euphemistic or clandestine manner in which conflicts are often classified by belligerents, the status of IAC is not dependent upon open declaration, but requires the armed conflict to take place between two states.³⁰ This has conventionally been readily discernible based upon the tendency for states to rely upon their conventional armed forces to settle disputes. Naturally, the UN Charter³¹ now bans armed force between states.³² This has represented a positive step in terms of limiting armed conflict, and moreover has been effective, as the decline in interstate war and conquest continues to exemplify.³³ Whilst it is likely that formal state declarations of war are relegated to the past, any armed conflict between two states would be covered under Article 2, with protections applied to the fullest extent.³⁴

The ICRC recognises that it is increasingly the case that non-international conflict characterises contemporary warfare.³⁵ This could be construed as either a change to the geopolitical reality or as an indication that the legal restrictions placed upon states have proven effective.³⁶ Regardless of the reasons behind this trend, the

databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518 accessed 11 October 2018.

²⁸ Additional Protocol I, Art. 1, para 4.

²⁹ In terms of the scholarship on this matter, distinguishing wars of national liberation from other forms of conflict is as challenging as the perennial debate between “terrorist” and “freedom fighter”. O’Connell has stressed that the distinction is nothing more than political, being a matter of ‘subjective judgment’. See Daniel Patrick O’Connell, ‘Le Principe De Non-intervention dans les Guerres Civiles: Observations de M. Daniel Patrick O’Connell’ (1972) 55 *Annuaire de l’Institut de Droit International* 589, 589; the notion of such wars being distinct from terrorism remains contentious. See generally, Robert A. Friedlander, ‘Terrorism and National Liberation Movements: Can Rights Derive From Wrongs?’ (1981) 13 *Case Western Reserve Journal of International Law* 281.

³⁰ Dietrich Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979) 163 *Collected Courses* 119, 131.

³¹ United Nations, *Charter of the United Nations*, 24 October 1945, Art 2(4).

³² The efficacy of the UN Charter in this regard has been subject to commentary, with scholars suggesting that the article aimed to outlaw war, though there has subsequently been grave cynicism regarding its efficacy in this regard given the continuous use of force by states, and the looming threat of nuclear war. See Oscar Schachter, ‘The Right of States to Use Armed Force’ (1984) 82 *Michigan Law Review* 1620. Some scholars are more optimistic, however, noting the sharp decline in the incidence of violence following this declaration. See Hathaway and Shapiro (n 13).

³³ Hathaway and Shapiro (n 13) 353.

³⁴ Solis (n 2) 151.

³⁵ ICRC, commentary of 2016, Article 2: Application of the Convention (n 23) [194].

³⁶ Hathaway and Shapiro (n 13).

challenges involved in regulating NIAC are likely to continue to dominate discussion in the absence of major state on state war.

7.2.3 Non-international armed conflict (Common Article 3)

Conflicts are not always international. “Armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” is covered by Article 3 common to the 1949 Geneva Conventions.³⁷ NIAC are conflicts that do not have international involvement, with the absence of this characteristic serving to distinguish them from IAC, as defined in the previous article of the convention.

NIAC does not, however, define all conflicts that are not IAC. A key preoccupation present in Article 3 is distinguishing armed conflict from situations that do not reach an appropriate enough scale to be designated as such. The drafting process reflected upon the importance of depriving “brigands” and “criminals” the legitimacy afforded by the framework of armed conflict, and allowing states to deal with such threats without deferring to IHL,³⁸ is a difficult task that has subsequently been reflected upon by scholars.³⁹ Accordingly, it was determined that the categorisation of NIAC should apply only should certain thresholds be reached. For this purpose, “intensity” and “organisation”, are established as relevant to determining the presence of armed conflict. The two terms are highly visible in the judgments of the ICTY,⁴⁰ and additionally apparent in more recent situations before the ICC, with the trial judgments for both the Katanga and Lubanga both containing consideration of the criteria.⁴¹ This demonstrates the importance of achieving certain thresholds for armed conflict to exist; it also infers that failure to achieve these thresholds means that armed conflict does not, at least formally speaking, exist. As such, there are many violent situations in which the threshold for armed conflict is not achieved, and domestic laws prevail.

³⁷ “High contracting parties” referring to states.

³⁸ This problem emerged in early commentaries. See Jean S. Pictet and others, *Commentary; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* vol 1 (International Committee of the Red Cross 1952) 44.

³⁹ The problem has been further discussed by a range of scholars, some of whom have stressed that this remains a problem that is particularly visible in relation to terrorist groups. See R.E. Brooks, ‘War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror’ (2004) 153 *University Of Pennsylvania Law Review* 675.

⁴⁰ *The Prosecutor v Fatmir Limaj* (Judgment) ICTY IT-03-66-T (30 November 2005) [94–170].

⁴¹ See *The Prosecutor v Lubanga* (Judgment) ICC-01/04-01/06-2842 (14 March 2012) [506–509]; *The Prosecutor v Katanga* (Judgment) ICC-01/04-01/07-3436 (7 March 2014) [521] [1986].

The means to determine if a situation is an armed conflict or not have naturally developed. The initial standards for armed conflict are first elaborated in Additional Protocol 2. The initial criteria specified in Article 2 of the original Geneva Convention were fairly limited in the actual text, which recognised the potential for variable interpretation of Article 3 of the same.⁴² Accordingly, it introduces some essential characteristics: the existence of organised armed groups capable of controlling territory, and capable of sustained military operations.⁴³

Subsequently, the ICTY went as far as to define a threshold for triggering the instigation of a NIAC, specifying “banditry, unorganised and short-lived insurrections and terrorist activities”⁴⁴ as not being subject to NIAC.⁴⁵ This, along with the organisational capacity of the group⁴⁶ assists in determining if a situation meets the requisite scale for NIAC to be applicable. The category additionally requires armed conflict to be of a protracted nature.⁴⁷ From the outset, the notion of international legal involvement in conflicts of an internal nature fostered division.⁴⁸ Many state representatives did not approve of international interest in what they saw as fundamentally internal matters.⁴⁹ Some voices in the drafting process would have seen “large-scale civil war” subject to the same restrictions as IACs, whereas others stressed the importance of disincentivising civil war, and ensuring that the position of states was not compromised.⁵⁰ This stresses the manner in which state interests have influenced how the threshold for armed conflict is established, suggesting that in generating treaties, states pragmatically limited the types of organisations that are able to access IHL.

⁴² Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977. Commentary of 1987, Material Field of Application [4448] <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DCC12563CD00439E89>> accessed 17 December 2018.

⁴³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Art 1, para 1.

⁴⁴ *Prosecutor v Tadic*, (Judgment) ICTY IT-94-1 (7 May 1997) [562].

⁴⁵ Mohamed Badar, Ahmed Al-Dawoody and Noelle Higgins, ‘The Origins and Evolution of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla del Moral and Ayesha Shahid (eds), *International Law and Islam* (Brill Nijhoff 2018) <<https://brill.com/view/book/edcoll/9789004388376/BP000021.xml>> accessed 09/09/19

⁴⁶ *Ibid.*

⁴⁷ *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY IT-94-1 (2 October 1995) [70].

⁴⁸ See *Final Record Of The Diplomatic Conference Of Geneva of 1949* vol 2-b (Federal Political Department 1950).

⁴⁹ *Ibid.*

⁵⁰ *Ibid* 10–11.

Some scholars have sought to clarify in general the thresholds for establishing a NIAC. Vité suggests that this may be determined when a state is forced to deploy its army, any police force being inadequate for the purpose,⁵¹ a conclusion that is supported somewhat by assessments made by Israel⁵² and judgments made by ICTY.⁵³ Others have stressed that the means for determining if a situation is of sufficient intensity and of an organised nature is a complex endeavour, with the exact thresholds needing a systematic case-specific examination in order to be determined.⁵⁴ One of the criteria to be considered is whether the belligerent organisation considers itself to be a state and has comparable attributes to one;⁵⁵ this explicit statement directly addresses the issue that the other criteria only imply; namely that whilst some variation may be permitted, the non-state group is expected to emulate a state in order for IHL to be applicable.

The means provided for determining whether an armed group escalates a situation to Article 3 situations are guidelines, and some variation is to be expected between cases. It is not, however, unfair to say that the features established by Article 3 relate to armed groups that are capable of mimicking state practice in warfare. This has been successively reinforced by the additional protocols and Tadic criteria, judgments made by the ICC, and assessments made by courts at the state level. This is unsurprising, given how frequently this model has proved to be effective.⁵⁶ Yet, the dependence of the criteria upon state-like features questions the application to situations of organised armed conflict in which the non-state armed group does not mimic a state in its organisation and operations.

IHL has extremely limited relevance to an Article 3 conflict when compared to an IAC, even if the standards for belligerent rights are achieved by an armed group. In such scenarios, the conduct of hostilities is generally regulated by the domestic law of the nation in question, any relevant regional system, and human rights regulations. Much of IHL is not applicable in the case of a NIAC under Article 3. Yet, as Solis

⁵¹ Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 *International Review of the Red Cross* 69, 76.

⁵² *Ajuri v IDF Commander* HCJ 7019/02; HCJ 7015/02 (3 September 2002), [1–4].

⁵³ *The Prosecutor v Boškoski* (Judgment) ICTY IT-04-82-T (10 July 2008) [178].

⁵⁴ Pictet and others (n 41) 49–50.

⁵⁵ '[...] the insurgents have an organization purporting to be a state'. See *ibid* 50.

⁵⁶ Non-state groups have conventionally deferred to mimicking state capacities and means, not only because it is morally preferable to the use of terror but based upon a perception it can be faster and more effective. See Yoweri Kaguta Museveni, 'The Strategy of Protracted People's War: Uganda' (2008) 88 *Military Review* 4, 7–8.

suggests, not only are the domestic law of the state, and human rights law additional considerations, but wider aspects of IHL are proliferating into NIACs.⁵⁷ Accordingly, it can be suggested that states will find themselves subject to significant restraint irrespective of what condition of armed conflict is upheld as applicable in a situation.

7.2.4 From a NIAC to an IAC

Naturally, it is possible for a situation of armed conflict to cross the boundary between the two categories. Some guidance on what is required for this to occur is present. Speaking generally, the intervention into an existing internal armed conflict by a third-party state has the potential to escalate the classification to IAC, depending upon the role they take in the conflict.⁵⁸ The subtraction of the international component may additionally de-escalate the conflict to a NIAC.

The Tadic case introduces the prospect of conflicts not fitting into the categories, namely in the possible “internationalization”⁵⁹ of armed conflict. This is in part a recognition that the nature of the armed conflict can be transitory. Determining to what extent another state can become involved in a conflict, without triggering a change, or bring about an internationalisation does not readily submit to a clear threshold, however.⁶⁰ Some indication as to the complexity of this process may be gained from the discussion as to the threshold for internationalisation; the ICJ, for instance, offers a different insight into the threshold, considering “effective control” as important.⁶¹ Recent commentary on the Geneva Conventions recognises that the debate between the more restrictive doctrine of effective control and the ICTY’s broader overall control is ongoing,⁶² a trend that has additionally been acknowledged in the academic discourse.⁶³

⁵⁷ Solis (n 2) 154.

⁵⁸ Ibid 24–25.

⁵⁹ Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (n 30) 225.

⁶⁰ A. Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 *European Journal of International Law* 649.

⁶¹ *Nicaragua v United States of America* (Judgment) ICJ (27 June 1986) [109] [111–112].

⁶² Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 Article 2: Application Of The Convention [269] <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> accessed 18 December 2018.

⁶³ A range of scholars have raised this issue regarding both support and occupation. See Cassese (n 58); Stefan Talmon, *The Responsibility of Outside Powers for Acts of Secessionist Entities*, vol 58 (2009).

The process for moving between such situations is practically elaborated in the Lubanga case in which the ICC extensively discussed the means for classifying armed conflict, considering whether a foreign state's occupation influences the type of armed conflict taking place.⁶⁴ This includes considering whether the involvement of a third-party state had any bearing on crimes committed by an informal militarised organisation with no tangible connection to any state – the question being: does the presence of the forces of another state elevate the situation in relation to non-state groups operating in the same territory?⁶⁵ Discussion as to this point varied throughout the case, with the pre-trial chamber's assertion that the situation may have been international in nature⁶⁶ rejected by the subsequent trial chamber.⁶⁷ This ruling is indicative of the challenge in determining more complex situations – in this case, occupation.

The ramifications of a downgrade in the category of armed conflict are discussed in some detail by Wills.⁶⁸ Specifically, the ICRC suggested in relation to Afghanistan that the subtraction of the international component and subsequent downgrade of the situation to NIAC had profound implications for the protection of civilians and non-combatants.⁶⁹ Wills further notes the importance of this transition following the establishment of an interim government in Iraq.⁷⁰ Essentially, Wills contests that the determination of which category exists is a largely political process.⁷¹ Whilst there is no doubt a political aspect to deciding when the transition between categories takes place, scholarly insights specifying objective criteria about the threshold for escalation/de-escalation also exist. Boothby suggests that generally, the level of state support must exceed finance and material elements, though the level of control required varies; questions arise based upon the character of the group, as well as its precise relationship to another state.⁷² A foreign state rendering assistance to a legitimate government within a conflict is generally permissible, whereas assisting the

⁶⁴ *The Prosecutor v Thomas Lubanga* (Judgment) ICC-01/04-01/06-2842 (14 March 2012) [507–511].

⁶⁵ See Gilder Alexander, 'Bringing Occupation into the 21st Century: the Effective Implementation of Occupation by Proxy' (2017) 13 *Utrecht Law Review* 60.

⁶⁶ *The Prosecutor v Lubanga* (decision on the conformation of charges) ICC-01/04-01/06-803 (29 January 2007) [204–207].

⁶⁷ *The Prosecutor v Lubanga* (Judgment) ICC-01/04-01/06-2842 (14 March 2012) [563–566].

⁶⁸ Wills (n 25) 192–196.

⁶⁹ *Ibid* 196.

⁷⁰ *Ibid* 197–200.

⁷¹ *Ibid* 206.

⁷² William H. Boothby, *Conflict Law: the Influence of New Weapons Technology, Human Rights and Emerging Actors* (Springer 2014) 25.

non-state armed group serves to escalate the condition to an IAC, depending upon the nature of the assistance. Proxy involvement does not generally elevate the situation, at least until the point of direct combat operations. Solis stresses the interpretive framework for moving between different categories of armed conflict is subject to change.⁷³ Ongoing situations may result in drastic changes to how movement between different categories is interpreted. For now, however, it is perhaps fair to say that ongoing debates as to the threshold between the different categories of armed conflict are indicative of difficulty in clearly asserting which humanitarian protections apply in a given situation. In brief, it is often difficult to assert clearly the type of conflict taking place in complex scenarios such as occupation, or in situations with proxy state involvement.

7.2.5 Limitations; boundary issues

In attempting to bring forward IHL to better address contemporary situations, some of the shortcomings and assumptions of the past need to be considered. It has been suggested that “armed conflict” was never especially well defined in IHL, and changes the manner in which force has now completely erased any distinctions between categories.⁷⁴ This acknowledgement is compounded by the apparent difficulty in applying the categories of armed conflict to new forms of conflict. This may be due to the manner in which states become involved in the conflict, which is often ambiguous. Additionally, this may be dictated by the manner in which armed groups, though not sufficiently organised or competent, nonetheless present a significant humanitarian threat. There may be a multitude of factors that limit IHL’s capacity to align modern conflicts with the categories that have been established.

The categorisation of armed conflict found in the current system of IHL is not a definitive taxonomy of conflict, as evidenced by the need to elaborate upon it further as time elapses. Presumably, in the process of drafting, signatories of the treaties and protocols comprising the written portion of IHL did not speculate as to the potential scope of future conflict, but sought to better ensure that the balance of operational need and humanitarian principles was maintained in relation to the types of conflicts

⁷³ Solis (n 2) 155.

⁷⁴ Charles Garraway, ‘To Kill or Not to Kill?—Dilemmas on the Use of Force’ (2009) 14 *Journal of Conflict and Security Law* 499, 500–501.

dominant at a given juncture. This is evident in the focus of the early Geneva Conventions, in which the threat of state on state violence was the primary type of conflict contended with – the challenges arising from non-state groups a secondary consideration. Subsequent protocols and changes in customary application of IHL are indicative of a growing need to ensure that humanitarian principles are applied in conflicts centred on non-state groups. This has served to practically increase the volume of rules that apply to situations involving non-state groups.

At the current juncture, the limitations imposed by the state-centric foundations of IHL seem to prevent the appropriate inclusion of humanitarian principles in a range of situations: post-conflict occupations, situations with international involvement, conflicts of low intensity, or conflicts with a transnational aspect. Since 2001, the manner in which states and other actors classify conflict has also been called into question.⁷⁵ The fact that the armed groups of today are significantly different from those of the past is now clear,⁷⁶ challenging, in particular, the state-centric manner in which the capacity of non-state armed groups is identified. Even attempting to adapt IHL in good faith is complicated by dependence on the types of objective criteria for assessing conflict that has been progressively reinforced since the initial Geneva conventions.

Does this result in a shortfall of humanitarian protections in conflicts involving such groups? This is difficult to determine, taking into account the aforementioned strategic gap – it is impossible to say, with certainty, what level of humanitarian protection is appropriate in situations involving more unconventional armed groups. It has been stated that the rules of IHL are largely not applicable to most aspects of the war on terror,⁷⁷ which suggests that there is no standard for assessing how humanitarian concerns should be balanced in unconventional conflicts. It is therefore not untoward to suggest that when the current system is confronted with challenging situations, there is a possibility that undesirable or inappropriate sets of regulations may be applied.

⁷⁵ Naz K. Modirzadeh, 'The Dark Sides of Convergence: A Pro-Civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict' (2010) 86 US Naval War College International Law Studies (Blue Book) Series 349.

⁷⁶ Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015) 11.

⁷⁷ Rosa Brooks, 'The Politics of the Geneva Conventions: Avoiding Formalist Traps' (2005) 46 Virginia Journal of International Law 197.

So far, this chapter has explored how the classification of armed conflict was understood historically. It may well be the case that the contemporary condition is sufficiently different to advocate for the manner in which conflicts are classified to be revisited, in order to address a shortfall in the application of humanitarian protections. The prevailing legal order has been effective in terms of limiting state conflict, a factor that must be balanced against the trends advocating for a renovation. Yet, when conflict does take place, it is proportionally more deadly to civilians.⁷⁸ Contemporary observers have noted that whilst the overall incidence of violence has been decreasing, worrying trends in the type of violence taking place are present,⁷⁹ for instance, the growing proportion of civilian casualties relative to overall casualties.⁸⁰ Whilst the reasons behind this are complicated, it is reasonable to assert that this phenomenon is partly due to the nature of the existing regulatory system, and its potential to regulate new types of conflict. First, the situation has changed, with inter-state warfare increasingly rare. It is instead non-state groups that increasingly characterise contemporary warfare, a fact acknowledged by the ICRC.⁸¹ Only a few rules apply in the case of such conflicts, which is to be considered unsatisfactory.⁸² Second, these groups are different enough from the armed groups of the past as to complicate the application of IHL as it stands.

The incongruities, gaps, and overlaps of the current system of IHL provide unwilling states with “escape hatches”.⁸³ This is bad, in that states may defect from the application of IHL through the clever use of legal lacunae when it is expedient to do so. Even states wishing to apply IHL correctly may find themselves unable to do so effectively, as conflict moves further away from the expectations imposed by IHL.⁸⁴

⁷⁸ Antonio Cassese, ‘Current Trends in the Development of the Law of Armed Conflict’ in *The Human Dimension of International Law* (Oxford University Press 2008) <<http://oxfordscholarship.com/10.1093/acprof:oso/9780199232918.001.0001/acprof-9780199232918-chapter-1>> accessed 24 December 2018.

⁷⁹ Max Boot and others, ‘Chapter One: The Changing Character of Conflict’ (2015) 1 *Armed Conflict Survey* 11.

⁸⁰ Max Boot and others ‘Chapter Two: Maps, Graphics and Data’ (2015) 1 *Armed Conflict Survey* 69, 78.

⁸¹ ICRC, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 Article 2: Application of The Convention (2018, 2019) [194].

⁸² Cassese (n 76) 34.

⁸³ M. Cherif Bassiouni, ‘The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors’ (2008) 98 *The Journal of Criminal Law and Criminology* (1973–) 711 (n 9) 727.

⁸⁴ Oona Hathaway and others, ‘Which Law Governs During Armed Conflict? The Relationship Between International Humanitarian Law and Human Rights Law’ (2012) Paper 4724 Faculty Scholarship Series 1883, 1885–1886.

Additionally, some sprawl is evident in state approaches. This is particularly evident when considering targeted killing. The US has embarked upon a lengthy series of drone strikes against terrorist targets in other states; domestically, this is justified by the 2001 authorisation upon the use of force, which permits action to be taken against organisations responsible for the 9/11 attacks.⁸⁵ Internationally, the US has referred to its right to self-defence regarding the 9/11 attacks.⁸⁶ The no armed conflict approach has proved more expedient than acknowledging the need for a specific framework for contending the war on terror. The US has steadily been increasing the use of force that they frame as taking place outside of armed conflict. New US policy has been criticised on the basis of permitting lethal targeting to take place “outside areas outside of active hostilities”,⁸⁷ with the generation of this term itself indicative of an emerging grey zone.

It is additionally possible to invoke events that have questioned the capacity for states to determine conflict status. For instance, Colombian intervention against the Revolutionary Armed Forces of Colombia (FARC) in Ecuador has controversially been presented as a NIAC, due to the focus of armed force being directed against the FARC, rather than the state of Ecuador.⁸⁸ The ISIS situation alone introduces numerous questions as to how states approach armed conflict classification.⁸⁹ American, Turkish, and Russian involvement in either Iraq or Syria has been presented by different parties at different times as supporting the *de jure* governments of Iraq and Syria in the contest of a NIAC, or escalating the condition of the conflict to an IAC.⁹⁰ Events such as these demonstrate that an objective determination of the conflict status is often beyond the capacity of states.

⁸⁵ See Benjamin McKelvey, ‘Due Process Rights and the Targeted Killing of Suspected Terrorists: the Unconstitutional Scope of Executive Killing Power’ (2011) 44 *Vanderbilt Journal of Transnational Law* 1353.

⁸⁶ Harold Hongju Koh, ‘The Obama Administration and International Law’ <<https://state.gov/documents/organization/179305.pdf>> accessed 15 December 2018.

⁸⁷ The phrase is an unusual one. It can be implied that this phrase appears to transcend what has been a clear dichotomy between peacetime and armed conflict. See Max Brookman-Byrne, ‘Drone Use “Outside Areas of Active Hostilities”: An Examination of the Legal Paradigms Governing US Covert Remote Strikes’ (2017) 64 *Netherlands International Law Review* 3, 5.

⁸⁸ Felicity Szenat and Annie R. Bird, ‘Columbia’ in Elizabeth Williamhurst (ed), *International Law and the Classification of Armed Conflicts* (Oxford University Press 2012) 233–235.

⁸⁹ It can be suggested that there are factors advocating for placing the ISIS conflict in alternating categories; David Wallace, Amy McCarthy and Shane R. Reeves, ‘Trying To Make Sense Of The Senseless: Classifying The Syrian War Under The Law Of Armed Conflict’ (2017) 25 *Michigan State International Law Review* 555, 567; others suggest that whilst the situation is on balance rather clear, the nature of ISIS does have some challenging implications, for instance in relation to geographical application of IHL. See Vaios Koutroulis, *The Fight Against the Islamic State and Jus in Bello* (2016).

⁹⁰ Koutroulis (n 87).

This sprawl in state practice has led observers to discuss the manner in which the state concept of a “globalised non-international armed conflict” is being incorporated into international law, bringing with it changes in how notions of active hostility and targeted killing are understood.⁹¹ That is to say that state practice is already diverging from the existing manner of regulating armed conflict to such an extent that it has become possible to speculate as to the existence of potential new categories to reflect state needs. Finally, the blurring of boundaries is not something exclusive to state practice. The ICRC itself is complicit in this process. For instance, it has stated that civilians may participate directly in hostilities, without this constituting a war crime.⁹² Though this was subsequently redacted,⁹³ this indicates that no party has a clear picture of how boundaries should be maintained as the use of armed force changes. There are then, a number of factors that demonstrate that the regulatory system of IHL is not best disposed to the reality of modern conflicts.

7.2.6 Limitations; basic principles

As well as the legal gaps emerging within IHL, there is scope to suggest that as a system of regulation, IHL is facing a more existential form of threat arising from the shifting nature of modern conflict. This may be articulated through reference to the core principles that IHL imposes to govern all actions in relation to armed conflict. Irrespective of context, when action is required, military commanders are required to direct their actions against military objectives and ensure that any damage to civilian populations is not disproportionate to the objective to be achieved.⁹⁴ Failure to assert these conditions within a situation may constitute a breach of IHL. It can be suggested that in relation to many contemporary forms of conflict, such assessments cannot readily be made. There is a propensity for kinetic operations to reproduce and exacerbate many of the factors that fuel groups like ISIS and al Qaeda, whilst the rampant brutality of ISIS has conversely met a great deal of support. Moreover, the conventional methods used to degrade and destroy ISIS have in no way compromised

⁹¹ Naz K. Modirzadeh, ‘International Law and Armed Conflict in Dark Times: A Call for Engagement’ (2014) 96 *International Review of the Red Cross* 737, 744–746.

⁹² ICRC, *International Humanitarian Law and The Challenges of Contemporary Armed Conflicts* (2003) 9–10.

⁹³ Ingrid Detter, ‘The Law of War and Illegal Combatants’ (2007) 75 *George Washington Law Review* 1049.

⁹⁴ Sassòli, Bouvier and Quintin (n 16).

what it expresses as its central mission.⁹⁵ This may serve as a basis to suggest that concepts of proportionality and necessity, when applied to such unconventional armed groups, require a significantly different basis for interpretation.

All of IHL's criteria are difficult to assert in the absence of clear and effective understanding of the military mechanics of the situations in question. For instance, changes in the nature of war may, in turn, alter notions of what represents a justifiable target. To indicate the potential disruption this could entail, it is possible to indicate a divergence in how such principles are interpreted. This problem predates the war on terror – for instance, the general awareness of the role propaganda was playing in the Yugoslavia conflict was used as the basis for conducting strikes against state-run media outlets. The Rwandan genocide has also been invoked in order to justify the need to destroy,⁹⁶ or otherwise address⁹⁷ broadcast equipment. Despite the clear role that propaganda played in these conflicts, this was not considered an acceptable justification.⁹⁸ Yet, as wars become more population-centred,⁹⁹ the argument for strikes against personnel and infrastructure engaged in the psychological aspect of warfare are becoming an increasingly common argument to make, particularly in the absence of conventional command and control structures to disrupt.¹⁰⁰ Just as the circumstances present in the industrialised wars of the twentieth century led to a general acceptance that targets related to military production and infrastructure could be justifiably attacked,¹⁰¹ the structure and nature of modern conflict is increasingly

⁹⁵ See Graeme Wood, *What ISIS Really Wants* (Atlantic 2015) which suggests that ISIS is dissimilar to earlier violent Islamist movements in that it makes a sincere commitment to restoring a seventh-century social order and bringing about the apocalypse, rather than using Islamism to achieve more modern political aims; Will McCants, *The ISIS Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State* (St. Martin's Press 2015) additionally maintains that the group's physical destruction in no way compromises their commitment to bringing about a messianic apocalypse.

⁹⁶ US Department of Defense Office of General Counsel, *An Assessment of International Legal Issues in Information Operations* (1999) 9.

⁹⁷ It is possible to speculate that jamming broadcast networks would represent a more expedient solution, though such an act has frequently been equated with military force, and considered unacceptable outside of armed conflict in much the same way as more kinetic methods. See Jamie Frederic Metz, 'Rwandan Genocide and the International Law of Radio Jamming' (1997) 91 *The American Journal of International Law* 628.

⁹⁸ International Criminal Tribunal for the Former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (2001) B iii.

⁹⁹ The shift towards populations is a well-established trend in contemporary conflicts. See David Galula, *Counterinsurgency Warfare: Theory and Practice* (John A. Nagl ed, Praeger Security International 2006).

¹⁰⁰ Mehdi Semati and Piotr M. Szpunar, 'ISIS Beyond the Spectacle: Communication Media, Networked Publics, Terrorism' (2018) 35 *Critical Studies in Media Communication* 1.

¹⁰¹ Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* (3rd edn, International Committee of the Red Cross 2001) 100–101.

shifting, along with what constitutes an acceptable target. In the context of the war on terror, propagandists have become strategic level targets.¹⁰² This is in part due to the lack of an otherwise discernible command structure to target,¹⁰³ though could perhaps be considered indicative of future state behaviour towards unconventional armed groups.

Can this sprawl into propagandists be justified? It is almost impossible to tell. Whilst a range of theorists have indicated the pivotal role the sophisticated propaganda is having on the course of the conflict, in such events it is difficult to apply the test criteria specified in IHL. Yet by specifying that conflicts involving unconventional armed groups must be fought in the same manner as wars against states, or the non-state groups that mimic them, it may have the side effect of making such wars unwinnable for state belligerents. The propagandist question is indicative of a need to challenge foundational assumptions as to how war needs to be fought.

7.3 Theoretical approaches to align IHL with unconventional armed groups like ISIS

The disconnect between the types of war described in IHL and the reality of modern warfare is not an uncommon domain of inquiry. The rapid changes made clear in relation to unconventional armed groups raise the question of adaptation; international lawyers need to discern where it is appropriate to generate new rules aimed at transforming how armed conflict is understood, or if more moderate and incremental change is a more appropriate response.

The humanitarian shortfall has naturally been considered in some detail in relation to this problem with a number of potential solutions suggested, many based on how IHL has been adapted in the past. In relation to modern conflicts, non-state groups have been identified as an anomaly in a state-centric legal system.¹⁰⁴ Realigning IHL around non-state belligerents is accordingly a key consideration. The standards for armed conflict defined in the Tadic criteria and additional protocols

¹⁰² Propagandists, like al Anwar al-Awlaki, have for instance represented “signature strikes” for the US drone program. See Daniel Byman, ‘Why Drones Work: The Case for Washington’s Weapon of Choice’ (2013) 92 *Foreign Affairs* 32.

¹⁰³ See George Michael, ‘Leaderless Resistance: The New Face of Terrorism’ (2012) 12 *Defence Studies* 257.

¹⁰⁴ Zakaria Daboné, ‘International Law: Armed Groups in a State-centric System’ (2012) 93 *International Review of the Red Cross* 395, 395.

encounter difficulties in confronting increasingly unconventional opponents in the war on terror. Some have suggested that the characteristics of modern conflicts place them in a legal gap, in the conceptual space between the categories set out in the Geneva Conventions and additional protocols.¹⁰⁵ Alternately, some have suggested that transnational armed conflicts could be absorbed into an existing category.¹⁰⁶ The question as to which category is appropriate in terms of balancing needs is subject to extensive argumentation.

The shifting character of war from primarily a form of state interaction to one in which non-state groups predominantly instigate conflicts is a key acknowledgement of how adjustments should be made. A second critical acknowledgement is the “transnationalisation” of conflict, – the propensity for conflicts to straddle borders, or in extreme situations be geographically disaggregated to some degree. Finally, there is the difficulty in getting the unconventional armed groups themselves to comply with conventions and regulations in any sense, with some theorists approaching this as a possibility that should be explored, and others dismissing the possibility.

There have been longstanding criticisms of the manner in which armed conflict has been classified, in addition to new criticisms that have emerged or intensified following 2001. To begin, there is the increasing role that “armed groups” are taking in modern conflict. IHL, state-centric as it is, has taken only an incidental interest in non-state violence for much of its history. Recognising that the manner in which armed conflict is classified has been adjusted in the past, proposals to place transnational armed groups at the centre of a new system of classifying armed conflict have emerged. The proposal to renovate IHL is based on (1) the desirability of triggering humanitarian protections in atypical conflicts (2) the need to address new types of transnational, high capability armed groups, and (3) the need to constrain state behaviour in relation to new types of conflict. The need to adapt has condensed around discussion of revising the dichotomy between IAC and NIAC to include a “hybrid”¹⁰⁷ or “transnational”¹⁰⁸ category of armed conflict as a reflection of modern warfare.

¹⁰⁵ For instance, this was indicated in the US position in *Hamdan v Rumsfeld*. See Geoffrey S. Corn, ‘Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict’ (2007) 40 *Vanderbilt Journal of Transnational Law* 295, 309.

¹⁰⁶ Tilman Rodenhäuser, ‘Armed Groups, Rebel Coalitions, and Transnational Groups: The Degree of Organization Required from Non-State Armed Groups to Become Party to a Non-International Armed Conflict’ (2017) 19 *Yearbook of International Humanitarian Law* 2016 3.

¹⁰⁷ Andreas Paulus and Mindia Vashakmadze, ‘Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization’ (2009) 91 *International Review of the Red Cross* 95, 108–109.

¹⁰⁸ Corn (n 96) 296.

Whilst a number of different solutions to the crisis IHL is facing have been advanced, they all draw upon the factors identified. Nonetheless, in considering the practicality of revising IHL, a range of more modest adjustments have been suggested, along with the proposed overhaul required to revise the categorisation of armed conflict.

7.4 New category of armed conflict; Transnational armed conflict

In a reflection of the revolution in military affairs that has characterised the last few decades,¹⁰⁹ some theorists have suggested that a revolution in the regulation of armed conflict should follow. Like all revolutions, the exact outcome of this transition is not characterised by a precise outcome, though the implementation of a new category of armed conflict is one of the chief suggestions as a means of addressing emergent legal gaps. There is, however, little guidance as to how such a category would be operationalised. “Transnational armed conflict” itself remains something of a fuzzy concept, and is not currently recognised as a legal term.¹¹⁰ The notion of a new transnational legal category may in part be defined in opposition to existing categories, and the examples of the types of wars these categories have been conventionally applied to cover.¹¹¹ The war on terror, as understood in the US imagination, has been cited as an example of this form of conflict,¹¹² though generally, it may refer to wars with a transnational footprint, commonly involving a transnational armed group. Some better examples may be the actions of Kurdish factions in Iran and Turkey,¹¹³ or Hezbollah against Israel.¹¹⁴ These conflicts may represent an intermediate form of transnational conflict, though arguably the concept has seen its full expression in transnational Islamist terrorist groups such as ISIS in the context of the war on terror.

¹⁰⁹ See Colin Gray, *Strategy for Chaos: Revolutions in Military Affairs and the Evidence of History* (Frank Cass 2004).

¹¹⁰ See Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors* (Oxford University Press 2010).

¹¹¹ A transnational armed conflict is not strictly internal, nor can it be distinguished as a state-on-state interaction. This makes such conflicts frustrating to classify in the prevailing framework of IHL.

¹¹² Marco Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’ (2006) 6 Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series 1, 5.

¹¹³ Kurdish groups have invited the designation as transitional, based upon the dispersion of their organisation across a number of international borders. This is a longstanding conflict which in part illustrates the practical advantage in utilising international boundaries. See Johannes Jüde, ‘Contesting Borders? The Formation of Iraqi Kurdistan's de Facto State’ (2017) 93 *International Affairs* 847; Michael Gunter, ‘Foreign Influences on the Kurdish Insurgency in Iraq’ (1993) 34 *Orient* 105.

¹¹⁴ Specifically, in relation to the 2006 Lebanon war.

Hoffman defines the potential legal classification of transnational armed conflict as “armed hostilities with a transboundary character that involve non-State actors and thus seemingly escape the classic division of international and non-international armed conflict”.¹¹⁵ Whilst he is dismissive of the need for such a category,¹¹⁶ this definition serves to capture the objective nature of the term, though perhaps obfuscates the full challenge of such situations that may be more complex than a strictly technical definition.

In discussing the revision of IHL, it is possible to document a longstanding convergence brought about by the ever-increasing influence of customary international law in the basic principles of IHL, where the protections associated with IAC proliferate into all conflicts. This is evident in the Israeli experience with Hamas in Gaza¹¹⁷ as well as in *Hamdan v Rumsfeld*.¹¹⁸ Scholars have discussed the potential for a minimum standard of rights applicable in all situations of armed conflict, which would be of particular importance in situations insufficient to trigger protections at the lower end of the armed conflict (internal strife).¹¹⁹ Drawing on such a convergence, some like Carron argue that all existing categories of armed conflict should be dissolved in favour of a single, unitary condition of armed conflict.¹²⁰ This is additionally contended by Mastorodimos, who references potential situations in which either NIAC or IAC could conceivably be agreed to exist.¹²¹ More commonly,

¹¹⁵ Tamás Hoffmann, ‘Squaring the Circle? – International Humanitarian Law and Transnational Armed Conflicts’ in Michael J. Matheson and Djamchid Momtaz (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts (Les Regles et Institutions du Droit International Humanitaire a l’Epreuve des Conflits Armes Recents)* (Martinus Nijhoff Publishers 2007).

¹¹⁶ *Ibid* 43.

¹¹⁷ As discussed in reports. See UN, ‘Legal or Other Proceedings undertaken by both the Government of Israel and the Palestinian Side, in the light of General Assembly Resolution 64/254, including the Independence, Effectiveness, Genuineness of these Investigations and their Conformity with International Standards’ . Human Rights Council; Committee of Independent Experts “in International Humanitarian and Human Rights Laws to Monitor and Assess any Domestic, *Report of the Committee of Independent Experts in International Humanitarian and Human Rights Laws to Monitor and Assess any Domestic, Legal or Other Proceedings undertaken by both the Government of Israel and the Palestinian Side, in the light of General Assembly Resolution 64/254, including the Independence, Effectiveness, Genuineness of these Investigations and their Conformity with International Standards* (2010) 6 [17–19].

¹¹⁸ The ruling that category 3 protections applied to detainees in this case for instance forms the basis for asserting the need for a new hybrid category of armed conflict. See Corn (n 96); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹¹⁹ Meron Theodor, ‘Towards a Humanitarian Decision on Internal Strife’ (1984) 78 *American Journal of International Law* 859.

¹²⁰ Djemila Carron, ‘Transnational Armed Conflicts: An Argument for a Single Classification of Non-international Armed Conflicts’ (2016) 7 *Journal of International Humanitarian Legal Studies* 5.

¹²¹ Konstantinos Mastorodimos, ‘The Character of the Conflict in Gaza: Another Argument towards Abolishing the Distinction between International and Non-international Armed Conflicts’ (2010) 12 *International Community Law Review* 437.

however, transnational armed conflict may be understood as referring to a third category, applicable in a situation in which neither existing category is fully realised. Unsurprisingly, however, in recognising the revolutionary nature of such revisions to IHL, much of the debate has centred around existing instruments and their applicability to transnational situations.

In relation to AQ, Milanovic discusses the ramifications on a global war on terror.¹²² The US had difficulty in deciding what kind of war the global war on terror was, initially adopting IAC between the US and AQ, though, after *Hamadan v Rumsfeld*, the conflict has consistently been equated with a global NIAC by US administration. Milanovic examines the legal tenability of such a designation, stressing the difficulty in aggregating the disparate, transnational wings of AQ, noting that it is difficult to tether the transnational features of the organisation to the conflict taking place in Afghanistan.¹²³

In defining transnational armed conflict, Sassòli places transnational armed groups at the centre of the concept.¹²⁴ He recognises that IHL is already applicable to armed groups. His discussion of the concept is fundamentally sceptical. In discussing AQ, he contends that the war on terror should be split into different situations in which different categories of armed conflict may be applicable, rather than framed as a single event.¹²⁵ In this sense, he is recognising AQ as a single, cohesive entity in relation to armed conflict. Sassòli defines the critical problem with creating a new category of transnational armed conflict – that few if any definite proposals as to how it may be accomplished exist.¹²⁶ He refers explicitly to the lack of specifics on the case of those advocating for revisions.¹²⁷

Sassòli's essential criticism that there is a lack of specifics in proposals as to how best to adapt IHL is applicable to most discussions of transnational armed conflict. Whilst scholars are explicit in the need for such a category, there is little content available that explicitly discusses how to best integrate new categories into the existing body of IHL. For example, Corn and Jensen set out how transnational armed

¹²² Marko Milanovic, 'The End of Application of International Humanitarian Law' (2014) 96 *International Review of the Red Cross* 163.

¹²³ *Ibid* 185–187.

¹²⁴ Marco Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law' (2010) 1 *Journal of International Humanitarian Legal Studies* 5, 6.

¹²⁵ Sassòli (n 110) 10–14.

¹²⁶ *Ibid*.

¹²⁷ *Ibid* 21.

conflict should be implemented in terms of regulation.¹²⁸ Their argument is oriented around the “fundamental principles” of the law of armed conflict, and they ultimately stress a requirement that a certain package of regulatory tools should apply.¹²⁹ This package relates to how persons and property should be targeted, based upon the increased risk to which civilians are exposed in new conflicts,¹³⁰ as well as considering how belligerents should be detained.¹³¹ Whilst Corn and Jensen are clear in how the fundamental humanitarian principles of IHL should be applied to new conflicts of a transnational nature, they do not consider any aspect of operationalisation – the principles they have identified, and the regulations they advance, are presented as a first step.¹³² Little guidance is offered as to how to implement their package.

Naturally, excessive and rapid pressure to renovate IHL through grand measures is liable to irritate states. Recognising the many barriers to drastic renovations, some scholars identify the changing nature of law, but are dismissive of the need for any change to the existing body of international law. Rodenhäuser, for instance, situates transnational armed groups in the existing framework of IHL, saying that they can most readily be absorbed into the existing category of a NIAC.¹³³ Other scholars concur with the option of in some way refining existing legal concepts to address new trends, for instance, addressing the definition of self-defence in “transnational armed conflicts”.¹³⁴ Such approaches may more readily be implemented, and as such, are more pragmatic than pushing for more radical changes.

Naturally, there are scholars who disregard the need for a new category to reflect the transnationalisation of war altogether. Meltzer suggests that the need for an additional category may be dismissed – the thresholds defined in Article 3, particularly the manner in which these thresholds were interpreted in the Nicaragua case, are sufficient to ensure that humanitarian principles are applied in all conflicts.¹³⁵ This

¹²⁸ G. Corn and E.T. Jensen, ‘Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations’ (2009) 42 *Israel Law Review* 46.

¹²⁹ *Ibid* 79.

¹³⁰ *Ibid* 61–62.

¹³¹ *Ibid* 78.

¹³² *Ibid* 79.

¹³³ See Rodenhäuser (n 105).

¹³⁴ Claus Kreß, ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts’ (2010) 15 *Journal of Conflict & Security Law* 245, 258.

¹³⁵ Nils Melzer, ‘The Paradigm of Hostilities’ in Nils Melzer (ed), *Targeted Killing in International Law* (Oxford University Press) <<http://oxfordscholarship.com/view/10.1093/acprof:oso/9780199533169.001.0001/acprof-9780199533169-chapter-10>> accessed 17 October 2017.

essential point is again advocated for by Vité, who stresses the need to differentiate violent events into either NIAC or IAC based upon specific factors present in each case.¹³⁶ The approach taken by these scholars serves to emphasise the desirability of not disrupting the practice of IHL.

Based upon the changing nature of warfare, it is likely that some change to IHL will become necessary to address asymmetric conflicts, however. Considering the difficulty in creating a new framework for IHL, and the additional challenge of getting states to accept it, some scholars have found it more useful to consider what changes can take place within the prevailing framework of IHL. These changes either relate to the more comprehensive application of existing mechanisms, or minor adjustments made to expand certain definitions. For instance, one potential approach is to adjust the method used to apply categories of armed conflict in order to encapsulate the changing nature of armed groups. John-Hopkins stresses the importance of robust social analysis of new non-state groups, in order to correctly understand the capabilities and organisational dynamics of new types of non-state organisation, and how leadership and capability are distributed within them.¹³⁷ The need to challenge the dependence of IHL on a state-centred understanding of organisation and capability has been identified and represents a central avenue to explore in relation to situations involving transnational armed groups, or new wars. This essential point has been made by a range of “new wars” theorists in relation to conflicts involving today’s Islamist networks¹³⁸ and has been identified as a possible approach for IHL to adopt.

There have been several robust arguments made for reconstructing the definitions of armed conflict so as to include in the definition gangs and terrorist entities.¹³⁹ Sophisticated arguments are made upon the basis that today, rebellions take less energy to organise,¹⁴⁰ and many states are weak enough to succumb to

¹³⁶ Vité (n 50).

¹³⁷ M. John-Hopkins, *The Rule of Law in Crisis and Conflict Grey Zones: Regulating the Use of Force in a Global Information Environment* (Routledge 2017) 151.

¹³⁸ See David Kilcullen, *Blood Year: Islamic State and the Failures of the War on Terror* (C Hurst and Co Ltd 2016).

¹³⁹ See Dennis Rodgers and Robert Muggah, ‘Gangs as Non-State Armed Groups: The Central American Case’ 30 *Contemporary Security Policy* 301; Moritz Schuberth, ‘The Challenge of Community-Based Armed Groups: Towards a Conceptualization of Militias, Gangs, and Vigilantes’ (2015) 36 *Contemporary Security Policy* 296.

¹⁴⁰ See M.R. Sarkees, F.W. Wayman and J.D. Singer, ‘Inter-state, Intra-state, and Extra-state Wars: A Comprehensive Look at their Distribution over Time, 1816–1997’ (2003) 47 *International Studies Quarterly* 49.

unconventional and disorganised groups,¹⁴¹ with this serving as the basis for a lowering of thresholds in relation to armed conflict. Revising ideas surrounding how armed groups are organised is a modest adjustment when compared to generating a new category.

As a means of addressing the enhanced risk to which civilians are exposed in contemporary conflict, the prospect of inducing compliance amongst armed groups is discussed by a number of authors. This notion may be predicated upon the idea that there are codes of honour that, whilst varying from culture to culture, have a form of universal salience.¹⁴² Kritsiotis discusses this in relation to disintegrated states.¹⁴³ He contends that the basic protections contained in Article 3 should apply to such situations, and suggests a number of mechanisms for inducing compliance in such scenarios. He further stresses the importance of shared traditions, though acknowledges the difficulty of asserting such values in a battlefield populated increasingly by irregulars and paramilitary gangs, who often do not express these values.¹⁴⁴ Some rebel groups, as Jo suggests, are willing to follow international norms, and exert restraint.¹⁴⁵ Yet, it would be premature to assume that compliance is a workable option in all cases based upon the possibility of including some groups.

The notion of introducing mechanisms to induce compliance is complicated by several factors. There are a range of incentives and costs that the international system can impose on states that do not translate over to non-state groups.¹⁴⁶ Another central sticking point is that the armed group in question must wish to pursue legitimacy, in either the international or domestic framework, in order to be brought to heel.¹⁴⁷ Whilst secessionist rebels, for instance, may have a reason to seek legitimacy,¹⁴⁸ it cannot be assumed that this will be the case with groups motivated by other concerns. In

¹⁴¹ Thomas Risse and Ursula Lehmkuhl, 'Governance in Areas of Limited Statehood – New Modes of Governance?' (2006) 1 SFB-Governance Working Paper Series 1, 5–6.

¹⁴² Michael Ignatieff, *The Warrior's Honor* (Holt Paperbacks 1998) 116–118.

¹⁴³ Dino Kritsiotis, 'International Humanitarian Law and the Disintegration of States' (2000) 30 *Israel Yearbook on Human Rights* 17.

¹⁴⁴ *Ibid* 20–31.

¹⁴⁵ Jo Hyeran, 'Compliant Rebels: Rebel Groups and International Law in World Politics' (Cambridge University Press 2015) 31.

¹⁴⁶ Admittedly this mainly relates to states who can be addressed by the imposition of costs by third party states – for instance Alliance trade, and intergovernmental organisations can alter expected benefits in war. See Alyssa K. Prorok and Benjamin J. Appel, 'Compliance with International Humanitarian Law: Democratic Third Parties and Civilian Targeting in Interstate War' (2014) 58 *The Journal of Conflict Resolution* 713.

¹⁴⁷ Jo (n 144) 236.

¹⁴⁸ Hyeran Jo and Beth A Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 *International Organization* 443, 459.

contending with the compliance issue, Sassòli states that armed groups are bound to IHL in the same manner as states.¹⁴⁹ His proposed method for inducing compliance would be to permit armed groups to report their compliance to a designated international body, and to craft a range of sanctions against such groups should they transgress.¹⁵⁰ In a sense, the suggested leverage for inducing compliance in non-state armed groups conforms to the approach already applied to states.

The sticking point in getting non-state groups to comply is summarised most succinctly by Lamp. He summarises the problem as follows: the wars of today differ fundamentally from the concept of war that the conventional “paradigm of compliance” upon which the application of IHL is predicated is not meaningful in the new type of wars.¹⁵¹ Compliance of non-state groups may indeed face insurmountable barriers. First, any attribution of enhanced rights to non-state groups would be unacceptable to states.¹⁵² Additionally, the conventions of IHL has proved of limited utility in such situations, in that such groups do not abide by treaties.¹⁵³ Any initiative aimed at inducing compliance in more unconventional armed groups faces deep challenges; not only do brutality and savagery confer benefits in terms of attention, but extreme ideologies also represent a barrier to inducing compliance.¹⁵⁴ Ultimately, it must be considered that non-state groups are different from states, and seeking to impose the same structures of accountability is unlikely to produce progress.¹⁵⁵ New mechanisms for compliance, if compliance is possible at all, must be considered in relation to unconventional armed groups.

One very reasonable argument is to ensure that states follow the rules of IHL more effectively; authors note that any state must certainly conform with IHL’s notions of necessity, proportionality, and distinction, irrespective of the specifics of a

¹⁴⁹ Sassòli (n 113) 5–6.

¹⁵⁰ Ibid.

¹⁵¹ Lamp (n 4).

¹⁵² Wills (n 25); John-Hopkins (n 126).

¹⁵³ As Kaufman suggests, attempts by the international community to construct more inclusive identities, effect power sharing, or to reconstruct states have failed repeatedly in relation to ethnic conflicts with long histories of intercommunal violence. See Chaim Kaufmann, ‘Possible and Impossible Solutions to Ethnic Civil Wars’ (1996) 20 *International Security* 136.

¹⁵⁴ Jo (n 144) 59.

¹⁵⁵ Katharine Fortin, ‘Armed Groups and Procedural Accountability: A Roadmap for Further Thought’ in Terry D. Gill and others (eds), *Yearbook of International Humanitarian Law Volume 19, 2016* (T.M.C Asser Press 2018) <https://doi.org/10.1007/978-94-6265-213-2_6> accessed 14 November 2018.

conflict.¹⁵⁶ There is a justifiable focus on the US in terms of state compliance.¹⁵⁷ Based upon the US approach in practice, there is evidence to suggest that some states have already begun to generate self-imposed restraints in excess of what IHL requires, having recognised that the situation is changing.¹⁵⁸ An example of this is the guidance contained in FM3-24.¹⁵⁹ This sentiment is somewhat countermanded by the often unsporting manner in which the US has interpreted the rules of armed conflict with regards to targeted killing, however.¹⁶⁰ Hoffman considers the behaviour of states in relation to new types of conflict to represent something tantamount to a defection from IHL as a system of regulation, and is therefore resolute that the best solution is to get states to obey the laws of armed conflict as they stand.¹⁶¹ It may be considered unfair, however, to expect a state to continue to apply IHL when fighting adversaries that breach IHL in order to achieve a military advantage.¹⁶² The notion of “lawfare”, which describes situations in which the law is used in order to achieve military objectives an armed actor may be incapable of achieving conventionally, is increasingly prevalent.¹⁶³ The notion of parties utilising IHL in such a manner could serve as a basis for state defection from IHL as a regulatory system. Forecasting a way to increase compliance is a tricky prospect to begin with;¹⁶⁴ the inclusion of unconventional armed groups that have limited incentive to comply complicates the future of IHL a significant manner.

One very clear consequence of current trends, documented by John-Hopkins, is the inclusion of international human rights law in situations that are tantamount to

¹⁵⁶ Aiden Warren and Ingvild Bode, *Governing the Use-of-Force in International Relations: The Post-9/11 US Challenge on International Law* (Ingvild Bode ed Palgrave Macmillan 2014) 130.

¹⁵⁷ The US effectively represents a hegemon, and therefore represents the driving force behind the generation of new laws. See *ibid* 144–145.

¹⁵⁸ John-Hopkins (n 126) 244.

¹⁵⁹ Stressing the need to conform to the rules of the host nation as well as the need to be aware of Common Article 3 in relation to insurgents. See *FM 3-24* (2006) Appendix D [Legal Considerations].

¹⁶⁰ For instance, US courts have been unwilling to rule on armed conflict when the ruling could compromise the wider political approach to the war on terror. See *Al-Aulaqi v Obama et al.* 10-1469 (JDB) Document 31 (United States District Court for the District of Columbia, United States) 18; Lesley Wexler, ‘Litigating the Long War on Terror: The Role of *al-Aulaqi v Obama*’ (2011) 9 *Loyola University of Chicago International Law Review* 176.

¹⁶¹ Hoffmann (n 114).

¹⁶² A. Paulus and M. Vashakmadze, ‘Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization’ (2009) 91 *International Review Of The Red Cross* 95, 96–97.

¹⁶³ See Charles J. Dunlap Jr., ‘Law and Military Interventions: Preserving Humanitarian Values in 21st Conflicts’ (Humanitarian Challenges in Military Interventions Conference) 4–6.

¹⁶⁴ William C. Bradford, ‘In the Minds of Men: A Theory of Compliance with the Laws of War’ (2004) 36 *Arizona State Law Journal* 1243, 1244.

armed conflict.¹⁶⁵ Whilst IHL and human rights are exclusive bodies of law, there is increasing interaction between the two bodies, which in turn is drawing increasing interest.¹⁶⁶ The fusion of the two bodies into “fundamental standards of humanity” has subsequently been discussed.¹⁶⁷ This potential merger, however, faces definitional challenges,¹⁶⁸ and moreover would be contrary to longstanding state interests in prosecuting the war with a relatively free hand.¹⁶⁹ Nevertheless, it is increasingly evident that situations can arise in which both bodies may be invoked at the same time.¹⁷⁰ Whether or not this is indicative of a gradual supersession of IHL in favour of human rights is difficult to tell at the current juncture. It is also difficult to discern if this would, functionally, be radically different from the convergence of IAC and NIAC discussed by Carron, in which the higher standards of IAC would be universally applicable.¹⁷¹ The human rights angle is further discussed by Kretzmer, who suggests that the development of international human rights law challenges the assumption that states are unrestrained in the absence of IHL.¹⁷² He suggests that in situations that cannot be definitively defined as IAC, states should first be held to the “law enforcement model”, and permitted to escalate to an armed conflict model only if the thresholds specified in Additional Protocol 2 are met. Like John-Hopkins, he suggests that the notion of fundamental standards of humanity should apply in all situations.¹⁷³ He recognises a critical barrier in getting states to conform to such prescriptions.¹⁷⁴

Scholarship has served to present a spectrum of different potential avenues that could be used individually or in concert in order to ensure that humanitarian principles interface better with modern conflicts. In contrast, however, the ICRC reasserts the

¹⁶⁵ John-Hopkins (n 126) 8.

¹⁶⁶ See Noëlle Quénivet, ‘Introduction: The History of the Relationship Between International Humanitarian Law and Human Rights Law’ in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff 2008).

¹⁶⁷ Theodor (n 119); Marco Odello, ‘Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law’ in Roberta Arnold and Noëlle Quénivet (eds), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff 2008).

¹⁶⁸ Odello (n 155) 56.

¹⁶⁹ UN Human Rights Council. (n 116) [17–19].

¹⁷⁰ The Public Commission to Examine the Maritime Incident of 31 May 2010; the Turkel Report, *Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* 64 [10–11].

¹⁷¹ Carron (n 110).

¹⁷² David Kretzmer, ‘Rethinking the Application of IHL in Non-international Armed Conflicts’ (2009) 42 *Israel Law Review* 8, 8.

¹⁷³ *Ibid* 35–36.

¹⁷⁴ *Ibid* 44.

importance of maintaining the system as it stands.¹⁷⁵ This is representative of the inertia encountered by any attempt to revise or adjust the incumbent assumptions of IHL regarding the manner in which armed conflict is classified. This is not to say that IHL is not capable of adapting to new wars – there exists the foundational acknowledgement that non-state groups exist and are bringing about change. Where recognised, however, these non-state groups are anticipated to behave in a manner that is relatable to that of a state.¹⁷⁶ This represents a barrier in more unconventional cases of non-state groups. The ICRC has, however, recognised the transition towards new wars¹⁷⁷ and this may serve as a potential point of ingress in presenting change.

To finalise the discussion as to the varying potential approaches, it must be noted that bringing about any significant change to the framework of IHL is challenging. Whilst a number of theorists discuss the possibility of change, it is first difficult to produce a workable framework for adaptation; no one is sure as to how best to operationalise adaptation. The difficulty of any foundational change to conventions is made apparent by the discussion surrounding the transnational armed conflict. Yet the central acknowledgement that there is a need to better align IHL with the changing character of armed conflicts taking place is apparent even in scholarship that is dismissive of a need for a radical revision of IHL.

7.5 Explaining the difficulty in applying conventional categories of armed conflict to unconventional armed groups (ISIS)

As this chapter has made clear, IHL has made steps to better align itself with the shift towards non-state groups. In doing so, it has however cemented many of the conventional assumptions regarding the fundamental nature of non-state armed groups, with the Tadic criteria and the specifics of Additional Protocol 2 reinforcing that IHL applies only to a certain state-centric archetype of war, and therefore requires non-state groups to be state-like for IHL to be applicable. Whilst these additions indicate a capacity to adjust the criteria for determining different conditions of armed

¹⁷⁵ See ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts'. Report prepared for the 30th International Conference of the Red Cross and Red Crescent (October 2007).

¹⁷⁶ Lamp (n 4) 230–231.

¹⁷⁷ ICRC, 'Armed Conflicts Linked to the Disintegration of State Structures'. Preparatory document drafted by the International Committee of the Red Cross for the first periodical meeting on international humanitarian law. Geneva, 19–23 January 1998.

conflict, they also indicate a reliance on objective factors over cognitive ones, and an inability to consider how the fundamental nature of more unconventional armed groups evades the objective thresholds that have been set out.

Morgenthau contested the “methodological assumptions” underpinning international law, specifying a need to reconcile “the science of international law and its subject matter”.¹⁷⁸ In this case, it is of value to question the assertion of IHL that the level of humanitarian protections available in a conflict can be meaningfully aligned with the criteria currently used in each category of armed conflict. It is possible to suggest that the problem of adapting IHL to new conflicts involving transnational armed groups is predominantly an epistemological problem – IHL has developed and refined a limited set of objective criteria that are used to determine what rules and limitations should be imposed on how hostilities are conducted in a given situation. This is not an attack on the legal-positivist method in international law as such, but a questioning of the validity of the indices used in the method. The criteria used at the current juncture are not the best means of establishing which humanitarian protections need to apply in conflicts involving unconventional armed groups that may constitute a different threat to civilians, in comparison to the scale or intensity of the conflict taking place. In considering the possibility of adapting how the characteristics of armed conflict in IHL are assessed, the challenge in measuring war as a condition must be considered, as well as the procedural challenge in establishing thresholds agreeable to states.

War, as a condition, has historically been considered difficult to quantify in any meaningful sense. As Dawes writes, the preferential means of understanding war historically has been through attempting to quantify it:

“Counting is the epistemology of war. War is bounded by the referential extremes of the prebattle roll call and the postbattle body count and is constituted by the mundane and innumerable calculations (days counted, supplies counted, miles counted) that

¹⁷⁸ See Hans J. Morgenthau, ‘Positivism, Functionalism, and International Law’ in Gerry Simpson (ed), *The Nature of International Law* (Routledge 2001).

make war in theoretical writings susceptible to formulation [...]. A single death is a tragedy [...] but a million deaths is a statistic."¹⁷⁹

Base arithmetic is useful to an extent, though numbers alone are not sufficient to automatically imply a proportional relationship with the humanitarian threat. The disposition of forces or the associated body count does not give a full insight into the associated threat posed to civilians, or non-combatants. To its credit, IHL does not rely solely upon arithmetic or geometrical methods in the classifying armed conflict. Based upon a cursory examination of how armed conflict is categorised, it is possible to say that several features matter: formal credentials (state/non state), the competence of combatants (intensity, organisation), and, to a lesser extent, as per the Additional Protocol 1, certain more abstract, or cognitive factors, have been established in determining the category that should apply (wars of liberation/anti-colonialism).

As a framework for assessing conflict, IHL is limited by the information available regarding conflicts. With regard to classifying armed conflict, it is desirable to understand the strategy and nature of the belligerents involved. In the absence of a defined strategy or stated intentions, decision-makers must instead attempt to identify what is happening based upon other factors. The decision made must be defensible, and appear to be based on independent standards. Whilst the decision made may have a political aspect,¹⁸⁰ it is undesirable that this factor be overt. An objective framework based upon these objective indices is more desirable and is understood to be capable of determining the character of the situation. In the case of the classification of armed conflict, this character imposes what protections and standards should apply.

In IHL, the criteria established have to be agreeable to states, and possible for states and other interested parties to identify. This gives an advantage to the more objective and physical characteristics associated with belligerents. This may be cited as a key factor in the criteria that have been established so far, both for distinguishing armed conflict from lesser forms of banditry and criminality, as well as differentiating the different sorts of armed conflict from one another. This approach has few

¹⁷⁹ James Dawes, *The Language of War: Literature and Culture in the U.S. from the Civil War through World War II* (Harvard University Press 2005) 30.

¹⁸⁰ Wills (n 25).

drawbacks if new armed conflicts conform with the type of conflicts anticipated by IHL.

Because of dependence on the established indices, when conflicts do not conform to expectations, the determination of conflict status may appear to be random, with the protections applied unsuitable for the reality of conflict taking place. This disconnect has come to be expected in relation to more unconventional instances of organised violence. Based upon present conflicts, it is possible to suggest that this is somewhat responsible for the confusion that often surrounds the classification of armed conflict and the associated shortfall in humanitarian protections.

The emergent question as to how to revise the classification of armed conflict in order to better ensure that appropriate protections are applied to civilians in new wars, has generated many potential answers. There is a risk of simply replicating the same problems as before, however. The conflicts of today are not solely defined by their transnational nature; the groups responsible are not simply non-state groups who operate in multiple territories, but have additional characteristics that must be considered. As this study will argue, there is a definite need to understand the changing cognitive aspects of warfare, and integrate this understanding into how conflicts involving unconventional armed groups are classified.

7.5.1 The connection between IHL and the Clausewitzian theory of war

To grasp the gravity of changes in terms of the regulation of armed conflict, it is important to understand that the system of IHL is based upon certain assumptions of how force is used, who uses it, and to what end. Put simply, when drafting IHL as a system of regulation, the parties responsible had to rely upon the understanding of warfare that could be extracted from conflicts past and present, as well as relying upon the assumptions of the philosophy of war.

Without contesting the universal origins of the moral component of IHL, the historical circumstances of IHL's formal origins suggest an association with a particular approach to understanding war. It is fair to say that in IHL, the technique for knowing about the war that prevails is distinctly Clausewitzian.¹⁸¹ In broad terms,

¹⁸¹ Clausewitzian – relating to the philosophical understanding of war articulated by Carl Von Clausewitz. See Carl von Clausewitz, *On War* (Beatrice Heuser, Michael Howard and Peter Paret eds,

this means that it is dependent upon convention, and places states at the centre of its model of understanding.¹⁸² These characteristics are common to both IHL and the classic manual on war. Enshrining this approach in IHL has proved expedient for the purpose of state on state interaction and has additionally proved an effective means of understanding groups that are not formally a state, but emulate state features. If one accepts that IHL exists primarily to regulate state on state violence,¹⁸³ then the Clausewitzian framework represents an effective means of knowing about the war for the purposes of regulating the instigation and conduct of wars. This is not least because the type of war that Clausewitz considers is interstate war.¹⁸⁴ At the time Clausewitz codified his philosophy of war, many of the customs and laws we recognise today existed in contests between European states,¹⁸⁵ suggesting that Clausewitzian assumptions are not at odds with today's systems of international law.

Despite the contention that Clausewitz purely advocated for war, van Creveld contends that it is the Clausewitzian paradigm that serves as the foundation for today's international system of regulation.¹⁸⁶ Van Creveld suggests that in the Clausewitzian universe, regulations placed upon warfare are justifiable from a purely practical perspective. War is an organised condition, and war between states would be unthinkable without a degree of regulation.¹⁸⁷ The Clausewitzian understanding of war as a contest in a series of both political and violent contests additionally necessitates that constraints be imposed.

So far as there is such a thing, a Clausewitzian war is a "good war". As Hayashi relates in terms of military necessity:

To the rational soldier of the Clausewitzian cast, a good war is one in which every act is 'militarily necessary' – that is, executed professionally and with the optimal resource mobilisation, and directed towards a clearly defined, strategically sound and

abridged edn/abridged with an introduction and notes by Beatrice Heuser, Oxford University Press 2008).

¹⁸² See Martin van Creveld, 'The Clausewitzian Universe and the Law of War' (1991) 26 *Journal of Contemporary History* 403.

¹⁸³ Lamp (n 4).

¹⁸⁴ Clausewitz (n 169).

¹⁸⁵ van Creveld (n 170).

¹⁸⁶ *Ibid* 425.

¹⁸⁷ *Ibid*.

reasonably attainable military goal. Here, military necessity is essentially a matter of identifying the range of realistic courses of action having reasonable chances of generating the desired outcome, and selecting and pursuing one that is superior to the others on the strength of its chances and resource efficiency.

Conversely, wars can be poorly fought in a variety of ways. For example, the acts taken may be insufficient, though necessary, for the achievement of their respective military goals; they may be excessive (i.e., more than necessary) in relation to the goals; they may simply have no bearing whatsoever on their supposed goals; and/or they may be taken for their own sake and without any particular purpose at all. Inefficiencies would also emanate from ill-advised, unrealistic or otherwise badly defined military goals. In reality, uneconomical wars are often the combined result of these acts and goals.”¹⁸⁸

To simply summarise actors in a Clausewitzian war: they are unitary actors capable of conducting a “rational calculus” of ends and means and constraining their use of force accordingly.¹⁸⁹ States, whilst the ideal practitioners of this archetype of war, do not hold it in complete monopoly. A war involving non-state actors is nothing new. As Smith contends, whilst numerous rebellions and uprisings have taken place in the past, they did not radically alter the Clausewitzian approach to war; for instance, revolutionary movements of the past still orientated themselves around the grand strategic aim of governing a state.¹⁹⁰ The maintenance of the central objective of becoming a state was sufficient to ensure that rebel groups, whilst innovating at a tactical level, did not differ fundamentally from states in their overall organisation.¹⁹¹ This to some account suggests why IHL models its understanding of non-state groups on the state itself. Plainly, a non-state group of conventional attributes would be

¹⁸⁸ Nobuo Hayashi, ‘Requirements of Military Necessity in International Humanitarian Law and International Criminal Law’ (2010) 28 Boston University International Law Journal 39, 44.

¹⁸⁹ Clausewitz (n 169).

¹⁹⁰ Rupert Smith, ‘Thinking About the Utility of Force in War Amongst the People’ in John Andreas Olsen (ed), *On New Wars* (Norwegian Institute for Defence Studies 2007) 21–32.

¹⁹¹ *Ibid.*

capable of the same “rational calculus” that Clausewitz technically preserves for states.¹⁹²

War, for the purposes of IHL, does not represent the absence of the legal system that prevails when nations are at peace, but a separate legal order invoked when certain conditions are met. Indeed, the conduct of war is one of the most regulated human endeavours.¹⁹³ This again is a further indication of the connection between IHL and the Clausewitzian epistemology of war. IHL first envisions war as a contest in which the parties are states, or are similar to states in the manner in which they organise a force.¹⁹⁴ This notion is borne out by both the Geneva Conventions and the Additional Protocol 2 of 1977.¹⁹⁵ Additionally, IHL presupposes that the utility of force is to achieve victory over a military adversary. It is expected that states or sub-states, will use some sort of military force in order to achieve this aim.¹⁹⁶ In this context, the notion of a “combatant” makes sense. This expectation is common to both state conflicts and those involving sub-state armed groups. This aspect has remained unchanged from the classical European laws of war.

There are, naturally, those actors who argue that on a fundamental level, the Clausewitzian understanding of law remains a useful tool in understanding contemporary non-state conflicts, or new wars.¹⁹⁷ The Clausewitzian approach to war naturally has its blind spots, however. As the Lieber code makes clear, the foundational understanding of war in IHL is burdened with assumptions:

*Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war”.*¹⁹⁸

¹⁹² Clausewitz (n 169).

¹⁹³ Martin Van Creveld, *Transformation of War* (Free Press 2009) 89.

¹⁹⁴ Lamp (n 4) 232.

¹⁹⁵ See Jed Odermatt, ‘Between Law and Reality: “New Wars” and Internationalised Armed Conflict’ 5 *Amsterdam Law Forum* 19.

¹⁹⁶ See Additional Protocol I, Art 43.

¹⁹⁷ See Bart Schuurman, ‘Clausewitz and the “New Wars” Scholars’ (2010) 40 *Parameters* 89.

¹⁹⁸ Francis Lieber, *Instructions for the Government of Armies of the United States, In the Field* (1869) <<https://archive.org/details/governarmies00unitrich/page/n5>> accessed 12 December 2018.

The restriction of the laws of war to the Clausewitzian paradigm of war in early treaties comprising armed conflict is additionally made apparent in the application of the term “civilised nations”. Whilst these same assumptions are not explicit in the Geneva Conventions or Additional Protocols, the essential understanding is that the term “war” or “armed conflict” is limited to the type of contest in which nation-states habitually engage. A form of war modulated by rationality suggests that a state only uses force to the extent of its utility.¹⁹⁹ This is apparent in the reliance on the state model, which is explicit in IAC and implied by NIAC.

It is fair to conclude that the prevailing system of IHL has more than a passing relationship with the Clausewitzian theory of war, a relationship that is particularly clear in how war is defined in IHL. This relationship, however, becomes an issue as the war in practice moves away from the state contest described by Clausewitz, the Leiber code, and presumably, the subsequent Geneva conventions. Part of this dislocation is that the aforementioned approach that IHL has taken in identifying and classifying wars may no longer be sufficient to understand the nature of a conflict.

7.6 Questioning the epistemology of IHL in the case of unconventional armed groups

It can be conceded that the manner in which IHL understands war is of some utility in relation to state conflict, and additionally, it is capable of grasping non-state violence, so long as the non-state belligerent mimics the state way of doing things. The categories based upon the criteria bear a reasonable relationship to the humanitarian risk in each situation, and therefore, the categorisation of armed conflict is, if not perfect, a reasonable representation of what considerations should be granted to civilians in different situations involving the use of armed force. This is naturally mitigated by state interest and of course, the chaotic nature of war.

First, it must be stressed that the challenged posed by today’s unconventional armed groups is by no means an original one. So-called “new wars” are not really new but have been understood to a degree at least as long as *On War* has been around. Von-Decker, in an early criticism of Clausewitz, suggests that there is an absence of a

¹⁹⁹ Michael Handel, *Masters of War: Classical Strategic Thought* (2000) 60.

“centre of gravity”²⁰⁰ in conflicts that deviate from the conventional model; drawing on experience of asymmetric warfare, he suggests that conventional theories and approaches to war are largely obsolete when applied outside of Europe.²⁰¹ Decker’s experience in Algeria is indicative of the boundaries drawn in the early laws of war, limiting the laws of war to “civilised nations”, with conflict on the fringes of Europe and the US subject to the different framework of understanding.²⁰²

To return to the notion that there has been a cultural shift in the nature of war,²⁰³ the assumption that conflict has changed is sufficient to suggest that the means of understanding conflict should be examined. Indeed, there is no guarantee that the means of assessing conflict that has been useful in the past bears any relationship to the threat posed to civilians and those otherwise out of combat in new wars. An assessment of wars involving unconventional armed groups is sufficient grounds to challenge the manner in which IHL understands wars and applies categories. If wars can no longer be aligned with the Clausewitzian model, then this would have profound effects on the utility of IHL. In these new wars, the nature of the humanitarian threat may not scale effectively with the formal credentials of the belligerents, or the organisation and intensity achieved by non-state groups. This possibility has been acknowledged in the consideration of “new wars”.²⁰⁴ The new wars concept suggests that the types of conflicts taking place today may be antithetical to the Clausewitzian approach to war. New wars, whilst wide-ranging in their actual exhibition, have the common feature of inverting the expectations of war imposed by reliance on the Clausewitzian model.²⁰⁵

Recognising that the wars of today are different from the wars of the past, a range of different terms has emerged to mark this transition. Asymmetric wars, a revolution in military affairs, fourth generation wars, etc. are just a few of the potential

²⁰⁰ Clausewitz repeats a need to trace the enemy’s strength back to the fewest possible sources, and ideally one alone, and destroy it in a timely manner – this is the meaning of centre of gravity.

²⁰¹ Decker discusses the irrelevance of the Clausewitzian, or European strategic approach to war in the introductory portion of his reflections on war in Algeria, compiled within a decade of the publication of *On War*. See Carl von Decker, *Algerien und die Dortige Kriegführung: Nach Offiziellen und Andern Authentischen Quellen, und den auf dem Kriegsschauplatze Selbst Gesammelten Nachrichten Bearbeitet* (Herbig 1844) iii-vii; Thomas Rid, ‘The Nineteenth Century Origins of Counterinsurgency Doctrine’ (2010) 33 *Journal of Strategic Studies* 727.

²⁰² Rid (n 189).

²⁰³ Bassiouni (n 9) 714.

²⁰⁴ See Kaufmann (n 152).

²⁰⁵ Mary Kaldor, ‘Inconclusive Wars: Is Clausewitz Still Relevant in these Global Times?’ (2010) 1 *Global Policy* 271, 278.

approaches. To avoid the complex lexicon associated with this transition, for the purposes of the study the term “new wars”²⁰⁶ will be used. As common features, these conflicts are asymmetrical in nature. Western, or more specifically, US dominance on the conventional battlefield means that opposing actors need to develop manners of fighting that are different enough so as to evade our power – this difference having become so pronounced as to represent a different form of warfare.²⁰⁷ As such, the conflicts considered today are not distinguished solely by non-state groups’ proclivity to operate transitionally, but can be attributed a range of features that together, are sufficient to situate them outside of the conventional understanding of warfare.

There are a number of factors that contribute to the unconventional nature of today’s non-state actors. Victory in a conflict today is not articulated in terms of battles won, body count, or control of territory, but in winning the hearts and minds of the people.²⁰⁸ As it is the control of the civilians that opposing sides now frequently contest, a greater degree of civilian casualties is to be expected.²⁰⁹ This transition towards populations has been well-documented by a range of theorists²¹⁰ and forms the core of contemporary military doctrine.²¹¹ Additionally, many modern conflicts simply do not respond to convention or treaty. Longstanding hatred of a religious nature means that peace or ceasefire does not mark the end of hostilities. A development of this nature may simply mark a transition to lower intensity conflict, with the constant threat of a resurgence in higher intensity violence.²¹² This fundamentally challenges the regulatory framework that IHL has conventionally applied to constrain war.

These trends, as with many of relevance to the unconventional nature of armed groups, are longstanding and predate 2001. This, in the eyes of some observers, is sufficient to dismiss the notion that the essential character of conflict has changed.²¹³ Legal scholarship is, to some extent, cognizant of the shift taking place in how war,

²⁰⁶ Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn, Polity 2012).

²⁰⁷ Rod Thornton, *Asymmetric Warfare: Threat and Response in the Twenty-first Century* (Polity Press 2007) 155.

²⁰⁸ See Gian P. Gentile, ‘A Strategy of Tactics: Population-centric COIN and the Army (essay, reprint)’ (2011) 41 *Parameters* 116.

²⁰⁹ Naturally this depends on the willingness of the belligerents to confront each other in such situations. See James D. Fearon and David D. Laitin, ‘Ethnicity, Insurgency, and Civil War’ (2003) 97 *American Political Science Review* 75.

²¹⁰ Galula (n 98).

²¹¹ See *FM 3–24* (n 158).

²¹² See Kaufmann (n 152).

²¹³ Colin S. Gray, ‘How Has War Changed Since the End of the Cold War?’ (2005) 35 *Parameters* 14.

and more broadly force, is understood. The dichotomy between the longstanding “Clausewitzian” understanding of war and the understanding of armed conflict proffered by “new wars theorists” is discussed by Grey, for instance.²¹⁴ The instigation of the war on terror has however served to exacerbate and aggregate longstanding trends in armed conflict to the extent that nation-states have difficulty applying IHL to new situations.²¹⁵ As Münkler explains, the presence of the factors identified simultaneously is sufficient to alter the character of war.²¹⁶ This serves to emphasise the importance of conflicts involving ISIS and groups like it in any revisions to the mechanisms of IHL.

The challenge to the longstanding Clausewitzian paradigm is summarized by Kaldor. The past inter-state form of conflict has now been superseded by new forms of violence that encapsulate aspects of war, organised crime, and the use of terrorism and atrocities.²¹⁷ New wars are fought with different goals in mind, utilise different methods, and are financed by different means.²¹⁸

“The political narrative of the warring parties is what holds together dispersed loose networks of paramilitary groups, regular forces, criminals, mercenaries and fanatics, representing a wide array of tendencies – economic and/or criminal self-interest, love of adventure, personal or family vendettas or even just a fascination with violence. It is what provides a licence for these varying tendencies. Most new wars are about identity politics – that is to say, the claim to power in the name of a religious or ethnic identity. Moreover, these identities are often constructed through war.”²¹⁹

²¹⁴ Stephen Haines, ‘The Nature of War and the Character of Contemporary Armed Conflict’ in Elizabeth Wiliamhurst (ed), *International Law and the Classification of Conflicts* (1st edn, Oxford University Press 2012).

²¹⁵ Hathaway and others (n 78) 1885–1886.

²¹⁶ Herfried Münkler, ‘What is Really New about the New Wars? – A Reply to the Critics’ in John Andreas Olsen (ed), *On New Wars* (Norwegian Institute for Defence Studies 2007).

²¹⁷ Kaldor, *New and Old Wars: Organized Violence in a Global Era* (n 206).

²¹⁸ *Ibid.*

²¹⁹ Kaldor, ‘Inconclusive Wars: Is Clausewitz Still Relevant in these Global Times?’ 278.

New wars are fought by groups that are conventionally disorganised and driven by multivariate motivations. Such groups cannot be expected to perform the “rational calculus” that Clausewitz prizes.

The armed groups in new wars take on a variety of different forms.²²⁰ Many of these new forms diverge radically from the assumptions about the nature of the organisation and competence conveyed by IHL in the past. As McInnes notes, the instigation of the war on terror also brought to the fore new technical aspects. Past wars were localised, undertaken upon the basis that civilian deaths should be minimised, and fought by professionals within a framework in which those involved only experienced risk within the phrase, and had certain privileges.²²¹ The single event of 9/11 represented an inversion of these expectations.²²² The war on terror has been defined as a global Islamist insurgency,²²³ questioning the logic of disaggregating it into a range of regional situations. To link together groups and individuals, Kilcullen draws upon a number of distinctly non-state means of organising – he references family links and marriages, financial networks, and patron relationships in order to depict the organisational features common to the global Islamist movement.²²⁴ These do not enter into conventional understandings of organisation.

There are then the theorists arguing that there is nothing new about conflict today, such as Smith, who references longstanding guerrilla techniques.²²⁵ Some other scholars suggest additional reasons for being sceptical of the new wars concept. Dexter, for instance, suggests that the new wars concept serves only as an excuse for western interventions in conflicts.²²⁶ Dexter additionally presents any adaptation of law to reflect such new wars as the criminalisation of wars fought by non-westerners, or in a non-western way.²²⁷ Echeverria notes how the concept has revised itself several

²²⁰ Bassiouni (n 9) 715–716.

²²¹ Colin McInnes, ‘A Different Kind of War? September 11 and the United States’ Afghan War’ (2003) 29 *Review of International Studies* 165.

²²² *Ibid.*

²²³ David J. Kilcullen, ‘Countering Global Insurgency’ (2005) 28 *Journal of Strategic Studies* 597.

²²⁴ *Ibid.*

²²⁵ Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (1st Vintage Books edn, Vintage Books 2008).

²²⁶ Helen Dexter, ‘New War, Good War and the War on Terror: Explaining, Excusing and Creating Western Neo-interventionism’ (2007) 38 *Development and Change* 1055.

²²⁷ *Ibid.*

times already.²²⁸ These normative criticisms do not, however, alter the changing nature of humanitarian needs in modern conflict.

Lamp summarises one aspect of the problem as follows; the wars of today differ fundamentally from the concept of war in the conventional “paradigm of compliance” (upon which the application of IHL is predicated), and is not meaningful in the new type of wars.²²⁹ “New wars” fundamentally challenge the understanding of war upon which the function of IHL is predicated.²³⁰ This is partially a consequence of a divergence from the Clausewitzian “ideal type” undertaken by the armed groups of today.²³¹ The initial challenge comes in the resurgence of savagery and barbarity associated with non-state groups participating in these conflicts. A secondary challenge, though one of perhaps greater importance to address, is the position adopted by states when fighting this type of conflict. Fighting non-state groups requires states to adapt in turn, which, due to the nature of the adversary, often results in civilians/non-combatants experiencing greater exposure to violence than would be acceptable in the past state on state, Clausewitzian type of war. This is partially dictated by operational reality, and partly due to uncertainty as to what rules should apply when fighting unconventional non-state groups.

First to address is the inclination towards savagery exhibited by new non-state groups. This somewhat emotive language refers to the propensity for non-state groups to have aims and employ methods that are not in keeping with the expectations imposed by humanitarian principles. This in part, may relate to Kaldor’s recognition of the difference between wars fought upon the basis of ideology and those fought for identity.²³² Many of the identities around which non-state groups coalesce have drawn an association with excessive violence; religious²³³ and ethnic²³⁴ identities having both been identified in this manner. The notion that fighting for such reasons fundamentally alters the manner in which armed force is used is not always direct, however. For

²²⁸ I.I. Antulio J. Echevarria, *Fourth-Generation War and Other Myths* (2005) 1–4.

²²⁹ Lamp (n 4).

²³⁰ Dino Kritsiotis, ‘International Humanitarian Law and the Disintegration of States’ (2000) 30 *Israel Yearbook on Human Rights* 17.

²³¹ Odermatt (n 183) 19–20.

²³² Kaldor suggests that whilst the wars of the past were fought for ideological reasons, today they are fought on the basis of identity groups. See Mary Kaldor and Robin Luckham, ‘Global Transformations and New Conflicts’ (2001) 32 *IDS Bulletin* 48, 52.

²³³ See generally, David S. New, *Holy War: The Rise of Militant Christian, Jewish, and Islamic Fundamentalism* (McFarland & Co 2002).

²³⁴ See Ignatieff (n 141).

instance, it has been contended that what would conventionally be understood as war crimes and atrocities are in fact methods essential to the operation of these new wars.²³⁵ Whilst non-state actors may be capable of fighting in accordance with the laws of armed conflict, the advantages conferred on them by breaking the laws significantly outweigh any benefit incurred by behaving within the expectations imposed by the system. Ignatieff makes this point in relation to the Balkan conflict.²³⁶ The benefits afforded by behaving in such an adverse manner are perhaps most visible in relation to Islamic extremist groups; groups like Al Qaeda and ISIS prove the dual benefit of such perfidy; the “propaganda by deed” afforded by acts of atrocity, as well as the tactical advantages gained through inducing terror in civilian populations. Kaufman suggests that in such identity-driven struggles, segregation is the only viable option for ending such conflict – intractable hatred not yielding to any convention or treaty.²³⁷ This serves to demonstrate a critical problem with assumptions concerning convention and compliance.

It must be stressed, however, that there are no truly objective means of establishing a causal link between the ideological motivation behind non-state groups and the manner in which they challenge IHL in any specific manner. First, concepts such as ethnicity or religious groups are not altogether concrete, as countless postmodern critiques of such conceptualisations would suggest.²³⁸ Additionally, the notion that there is an indelible link between ethnicity or religion, and particularly adverse battlefield behaviour, is first of all contested, with some theorists indicating the importance of considering other variables that could be responsible,²³⁹ as well as scholars who consider religion specifically as having an opposite causal effect in relation to humanitarian behaviour in war. For instance, there is often a significant division between the purported message of armed groups and their actual motivations;

²³⁵As Ignatieff summarises, war crimes and atrocities are now integral to the prosecution of war. See *ibid* 5–6.

²³⁶ *Ibid* 5–6.

²³⁷ As Kaufman suggests, attempts by the international community to construct more inclusive identities, effect power sharing, or reconstruct states have failed repeatedly in relation to ethnic conflicts with long histories of intercommunal violence. See Kaufmann (n 152).

²³⁸ In terms of ethnicity, it is possible to survey a multitude of critiques that suggest ethnicity isn’t concrete, or significantly less important in conflict than it is proposed to be. See B. Gilley, ‘Against the Concept of Ethnic Conflict’ (2004) 25 *Third World Quarterly* 1155; in relation to religion, Cavanaugh has famously argued that the influence of religion on violence cannot be defined in substantive terms, being inseparable from other historic and political influences. See William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Oxford University Press 2009) 123–127.

²³⁹ Cavanaugh (n 238).

this is made apparent, albeit with hindsight of the brushfire conflicts and liberation movements of the Cold War era, in which there was often a disjunction between the ideology of movements that leaders sought to align themselves with and the motivations of the rank and file of their organisations.²⁴⁰ Despite taking on the trappings of liberation movements, many groups identified as “non-state armed groups” aspire to nothing more than continuous banditry.²⁴¹ Even organisations like ISIS that have been suggested to consist of true believers with a consistent commitment to a shared religious ideology from the bottom up,²⁴² may likewise be revealed to be more complex or fragmentary in retrospect. Such possibilities eloquently present reasons for excluding any consideration of ideology from IHL, and instead sticking with characteristics that are more objective and less transitory when determining what humanitarian protections should apply.

The shift towards new wars has not passed unnoticed by states, however, with state practice acknowledging a need to fight new wars differently. In the Clausewitzian understanding of war, it is possible to articulate reasonable limitations on the use of force that serves to protect individuals, whilst permitting states sufficient space to assert themselves. In the state context, the strategic focus has most often fallen upon the destruction of the state’s military forces,²⁴³ this being sufficient to the type of objectives that states conventionally consider worth pursuing. IHL, for its part, framed the conventional “centre of gravity” effectively, permitting states the space to pursue it within both NIAC and IAC. In new wars, the defeat of the enemy cannot be articulated solely in military terms. Moreover, unlike the stable form of Clausewitzian

²⁴⁰ This risk was identified by Lan, who suggested that traditions and religion proved more attractive to Zimbabwean peasants involved in liberation, in contrast to the ideological commitments held by the movement’s leadership. See David Lan, *Guns and Rain Guerillas and Spirit Mediums in Zimbabwe* (James Currey 1985); this characteristic is additionally identified in relation to the Simba rebellion; whilst leaders claimed to be Maoist, the ideology of the rebels themselves was more traditional, as evidenced by their adherence to pre-colonial bantu war rituals, which in the eyes of some, constitutes a sort of proto-nationalism. See Luca Jourdan, ‘Mayi-Mayi: Young Rebels in Kivu, DRC’ (2011) 36 *Africa Development* 89.

²⁴¹ Jeffrey Gettleman, ‘Africa’s Forever Wars: Why the Continent’s Conflicts Never End’ (*Foreign Policy* 11 February 2010) <<https://foreignpolicy.com/2010/02/11/africas-forever-wars/>> accessed 11 December 2018.

²⁴² Wood (n 95).

²⁴³ ‘What do we mean by the defeat of the enemy? Simply the destruction of his forces, whether by death, injury, or any other means; either completely or enough to make him stop fighting [...] The complete or partial destruction of the enemy must be regarded as the sole object of all engagements [...] Direct annihilation of the enemy’s forces must always be the dominant consideration’. Clausewitz (n 200).

war,²⁴⁴ the opposing sides may have very different ideas of what victory entails.²⁴⁵ Critically, this has implications for state practice. The rules of engagement required to engage modern unconventional armed groups have become so complicated as to impact conventional militaries' ability to fight effectively.²⁴⁶ State militaries, therefore, are incentivised to fight wars differently, pioneering new ways to disrupt unconventional armed groups²⁴⁷ by, for example, striking at different kinds of targets, and utilising the language of IHL in order to articulate and justify changing approaches. From the state perspective, it is again possible to suggest that there are some foundational difficulties in fighting new wars. The first problem is that, practically speaking, no one knows how to win them. It is difficult to say, for instance, if a sprawl into killing propagandists has any discernible impact on an unconventional armed group. This, in turn, has ramifications in how the rules and principles of IHL are considered in light of new state practice.

The fact that no one knows how to win new wars is of immense importance. As considered earlier in this chapter, states may have already identified the elusive “centre of gravity” in conflicts against unconventional non-state groups, namely through the termination of ideologues and propagandists. This is, however, far from certain and additionally lies outside of actions typically considered acceptable by IHL. There is some limited recognition that when states fight these new unconventional non-state groups, a higher proportion of civilian casualties is to be expected than when conventional militaries fight. This is dictated by the reality of fighting an adversary that is often indistinguishable from civilians, or is willing to utilise civilian populations to offset any military advantage states have. As yet, however, it is difficult to consider the maximum exposure civilians should experience. In the absence of such information, it is immensely difficult to effect a balance between operational requirements and humanitarian principles in relation to situations involving unconventional armed groups. A second failing from the state perspective is that whilst states have an interest in abiding by humanitarian principles and applying IHL, it is often difficult to determine what rules to apply. Notions of intensity and organisation

²⁴⁴ ‘The natural aim of military operations is the enemy's overthrow [...] Since both belligerents hold that view, it would follow that military operations could not be suspended [...] until one or other side were finally defeated. Ibid.

²⁴⁵ Odermatt (n 183) 29.

²⁴⁶ Martin Van Creveld, *Transformation of War* (Free Press 2009) 176.

²⁴⁷ In the last few decades, a remarkable variety of manuals and texts considering how to effectively fight new wars have emerged.

are assessed in relation to state-based competencies. There is little scope for aggregating a transnational conflict if the central belligerent is of an unconventional nature, employing methods of command and organisation that cannot be recognised by state criteria;²⁴⁸ there are layers of converging complexity to confront.

Adapting to new wars is not simply a question of incorporating non-state groups more fully into IHL. This may have served in the case of past wars of revolution. Recognition is required that the incentives and punishments that have worked in altering the behaviour of states in a humanitarian way are not automatically applicable to all forms of non-state groups. Both states and the ICRC are increasingly struggling to assert the boundaries between peace, NIAC, and IAC. This is particularly apparent when dealing with non-state groups related to the war on terror.

7.7 Generating a new approach to aligning humanitarian needs and the reality of armed conflict through revising categorisation in IHL

The outcome of the analysis conducted so far in the chapter is an awareness that there are a number of factors that need to be considered in creating a successful alignment between IHL and conflicts involving unconventional non-state groups like ISIS; the problem in achieving alignment encapsulates a range of problems in addition to the commonly discussed transnational element. As this chapter has recognised, there is a range of potential strategies for renovating IHL in relation to the change brought about by unconventional armed groups. These range between the transformative, such as the implementation of a new category of armed conflict, through to relatively minor changes to the interpretation of existing rules in order to accommodate changes.

Additionally, this chapter has sought to develop an understanding of the reasoning behind the conventional classification of conflict, drawing upon the understanding of war underpinning the manner in which conflict is classified. An indelible link may be drawn between the western, Clausewitzian philosophy of war and IHL that has translated through to the manner in which armed conflict is classified and defined. Following consideration of the different nature of conflict involving unconventional armed groups, there are reasonable grounds to suggest that the criteria that IHL uses to detect and classify armed conflict bear little relationship to the

²⁴⁸ Milanovic (n 112).

humanitarian threat associated with conflicts involving unconventional armed groups. The problem is that IHL assumes a stable relationship between the criteria it has established for classifying armed conflict and the extent to which humanitarian protections should be applied. This is representative of dependence upon a particular objective means of “knowing” armed conflict. It has additionally been presented that the nature of conflicts involving unconventional armed groups is sufficiently different as to suggest that the criteria/indices used to classify armed conflict need to expand and consider other factors if they are to have any prospect of correctly aligning IHL with conflicts involving unconventional armed groups.

What the proposed approaches to align IHL with the changing nature of conflict have in common is a reliance upon the conceptual tools that have been established for assessing the categories of armed conflict. This indicates that there is difficulty in moving away from the notions of organisation, intensity, and statehood that have conventionally been used to classify conflict. The conventional categorisation of armed conflict resulted from assumptions prevalent concerning the nature of war at the time of drafting, and these assumptions have been subsequently reinforced by the additional protocols and the Tadic criteria. It is possible to suggest, based on the “new wars” approach, that contemporary conflicts involving unconventional non-state groups diverge from the assumptions inherent in IHL’s approach to armed conflict. This suggests that inclusion or substitution of other indices may allow for a more comprehensive assessment of the humanitarian threat to be made. The integration of a new mechanism for distinguishing armed conflict based on cognitive identification may allow for the humanitarian threat posed in conflicts involving unconventional armed groups to be better aligned with the categories of armed conflict. This chapter has briefly discussed the possibility of integrating ideology into IHL for this purpose. The question as to whether this would represent a positive evolution in IHL will be discussed.

7.7.1 How to define a “successful alignment”?

As referred to through the course of this chapter, the desired outcome is to make certain that IHL ensures appropriate civilian protections are applied in a conflict involving unconventional armed groups. Whilst progress has been made in developing

NIAC as a category applicable to non-state armed groups in general, there is scope to question whether the adjustments that have been made since the initial convention are helpful in correctly categorising conflicts involving unconventional armed groups. It is not clear how the elaborations upon the category of NIAC made so far relate to unconventional armed groups. Additionally, there is a lack of any means that could consistently and reliably see conflicts involving unconventional armed groups being placed in any single category of armed conflict.

A failure to articulate a workable framework for the inclusion of wars involving unconventional armed groups by IHL risks either the tacit recognition of a legal blind spot or the initiation of an unrestrained “Grotian moment”,²⁴⁹ in which the law develops rapidly as the threat posed by unconventional armed groups continues to grow. The divergence observed in state practice towards such groups stresses the imminence of such a transition. This is not automatically a bad thing, but it is perhaps more desirable that such a moment be managed.

The initial problem is that defining success in the landscape of IHL is a contentious task. First, there is no agreement as to how questions arising through the application of international law should be approached.²⁵⁰ Second, IHL, having in the past developed through pluralistic means²⁵¹ introduces a range of different influences in considering how it may evolve in the future. A good starting point is to consider the different parties involved in the generation and interpretation of IHL. States, for instance, have recognised that in order to effectively fight unconventional armed groups, they need to interpret aspects of IHL differently, which has manifested clearly in how they interpret the categories of armed conflict. A successful alteration from the state perspective would entail, for instance, the implementation of a new category of armed conflict which clarifies and systematises the different approach to unconventional armed groups that are emerging in practice. As an additional component, state interests are often at odds with one another.²⁵²

Whilst it is difficult to determine where precisely the ICRC fits into the generation of IHL, it represents an authoritative voice that would seek to prioritise

²⁴⁹ See Michael P. Scharf, *Customary International Law in Times of Fundamental Change: Recognizing Grotian Moments* (Cambridge University Press 2013).

²⁵⁰ See Steven R. Ratner and Anne-Marie Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ (1999) 93 *The American Journal of International Law* 291.

²⁵¹ Green (n 21) 24.

²⁵² Mastorodimos observes this in relation to the categorisation of the Gaza conflict. See Mastorodimos (n 212).

humanitarian need in any evolution of IHL. The application of existing standards represents a good starting point in assessing the inclinations of the ICRC. Some theorists suggest that the non-state armed groups of today are capable of influencing the direction of IHL. Whilst this may prove palatable in regard to more conventional armed groups such as those specified in Additional Protocol 1, the prospect of more unconventional armed groups which are characterised in part by their proclivity towards savagery, is less desirable.

In terms of effecting a balance between the different inclinations of parties involved in the formulation, regarding a successful alignment between IHL requires reference to IHL as it stands. There is a need to understand first the foundational principles that form the basis for decisions made within a particular body;²⁵³ in the case of IHL, these are well established in the wider scholarship. There is accordingly a need to ensure that any realignment is consistent with the broad humanitarian principles underpinning the theory and application of IHL if one accepts that these principles remain a constant.

The influence of existing treaties and conventions is uncertain. Discussion of “transnational armed conflicts” in IHL yields a number of different potential approaches, ranging from the argument that such conflicts take place in a legal void, through to arguments for incorporating it into existing categories. It has been acknowledged that the many modern conflicts have already demonstrated the shortcomings of the criteria that have conventionally been utilised to trigger the application of IHL to a conflict.²⁵⁴ The difficulty of ensuring civilians receive adequate protections is a product of the difficulty in determining when an “internal disturbance”²⁵⁵ becomes an armed conflict of a non-international character, and at the boundary between NIAC and IAC.

As for a conceptual approach in developing a possible solution, a purely positivist approach to this question seems inadequate based upon the reliance of the approach upon formal criteria.²⁵⁶ After all, this chapter has taken a critical view of the value of the rules as they stand, and additionally has stressed the need for an understanding of unconventional armed groups, which is beyond the scope of the

²⁵³ L. Oppenheim, ‘The Science of International Law: Its Task and Method’ (2017) 2 *American Journal of International Law* 313, 341.

²⁵⁴ Corn (n 96) 296.

²⁵⁵ Additional Protocol 2.

²⁵⁶ For an assessment of the limitations of positivism, see Morgenthau (n 178)

positivist approach. There is, therefore, scope to explore supplementary means of analysis in relation to the problem. On the other hand, it is not useful to disregard conventional legal scholarship in its entirety.

First, a common feature of discussion is the effort it takes to re-align IHL in any drastic sense. Any significant change, such as the implementation of a new category of transnational armed conflict, requires a new convention to be developed, or at the very least, new additions to be made to existing ones. Such an approach would not only entail significant disruptions but would also require an extensive timeline to bring into existence. The practical considerations of changing or adjusting armed conflict in IHL should, therefore, centre around modest goals that are more likely to be palatable to states and practical to accomplish. A second priority should be preventing undue disruption to the operation of IHL as an instrument for regulating conflict between states. Any erosion to the primary function of IHL in favour of better regulating conflicts involving unconventional armed groups, who are, largely speaking, inferior in their capacity to commit violence, would represent more of a failure than a success.

The ability to enforce IHL upon unconventional armed groups is a quantity relevant to success in regard to the stated problem. As international legal compliance remains something of a “primitive science”,²⁵⁷ this is by no means an easy undertaking. Inflicting costs upon the non-compliant is often taken as a measure of success,²⁵⁸ and may have to serve in lieu of compliance.

7.7.2 Moving forward/boundaries

The analysis conducted in the course of this chapter has sought to question the applicability of the conventional approach in IHL to understanding and subsequently categorising armed conflict. This has been conducted upon an understanding that assessments of “intensity” and “organisation” as conventionally set out in IHL do not form an effective basis for classifying armed conflicts involving a non-state armed group that is unconventional in nature. Ideology plays a key role in distinguishing unconventional armed groups from their conventional counterpoints and suggest that

²⁵⁷ Bradford (n 152) 1244.

²⁵⁸ John C. Harsanyi, ‘Measurement of Social Power, Opportunity Costs, and the Theory of Two-person Bargaining Games’ (1962) 7 Behavioral Science 67.

it may be of utility to integrate different, more cognitive criteria into classifying such conflicts.

In the language of IHL, protections should apply “without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict”.²⁵⁹ Without challenging the normative implications of this assertion, an awareness of the new wars approach suggests that appropriately tailoring humanitarian protections to situations involving unconventional armed groups requires an understanding of the nature and origin of the conflict – the manner in which these unconventional armed groups diverge in terms of their aims and means of achieving them is of a critical nature. Suggesting that a group’s ideology, or convictions, have an influence over how they fight is not particularly controversial.²⁶⁰ In inferring from this that a group’s ideology may have a deterministic relationship over the scale and nature of the humanitarian threat that they produce when involved in an armed conflict, it is possible to draw again upon the rich body of literature surrounding “new wars” which suggests that this is the case.²⁶¹ Suggesting that IHL could draw upon the causal relationship between ideology and humanitarian threat in order to better ensure that humanitarian protections and military needs are aligned in such conflicts immediately runs into fierce resistance, however.

The complication in adjusting IHL to include more cognitive criteria along with the objective ones is challenging to assert. Categorisation based on largely objective criteria is already often criticised on political grounds.²⁶² The inclusion of more cognitive criteria redoubles the possibility for politicisation; for instance, there is the immense difficulty in labelling modern transnational terrorist groups in a manner that is not political,²⁶³ in addition to the challenge of defining any additional cognitive criteria in a manner that can be easily understood and applied. Yet, some headway in

²⁵⁹ This language is exhibited both within the content of the Geneva Convention and additionally in the ICRC’s database of customary IHL. See ICRC IHL database; Customary IHL, Rule 88. Non-discrimination <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule88> accessed 2 January 2019.

²⁶⁰ Olivier Bangerter, ‘Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not’ (2011) 93 *International Review of the Red Cross* 353, 359–360.

²⁶¹ The notion that the changing dynamics of “new wars” is to some extent rooted in the changing nature of ideology is explicitly stated by a number of new wars theorists, see Kaldor (n 205).

²⁶² Wills (n 25).

²⁶³ Robert Barnidge, *Non-state Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle* (T.M.C Asser Press 2008) 17.

the classification of armed conflict is present, as indicated by the inclusion of “national wars of liberation” in the criteria for the application of IAC.

Scholars that have recognised a shift have taken place do not always suggest that international law should change, but suggest additional factors need to be considered. Reisman would suggest that the growing disconnect between the law and the facts on the ground can be in part resolved by drawing upon how elites react to “incidents” taking place.²⁶⁴ As he himself admits, this is difficult in many incidents, in which facts are often obscure.²⁶⁵ Yet, there is perhaps the possibility of considering the deeper synthesis between unconventional armed groups and the use of force by states evident in the practice of key actors, such as the US.

Based upon an assessment of how to define a successful alignment between the manner in which IHL is categorised and the reality of armed conflict, it can first be determined that the existing process faces limitations when applied in relation to conflicts involving unconventional armed groups. There is then the pluralist nature of IHL and the definitional and procedural challenges in approaching conflicts involving unconventional armed groups to consider. This complexity serves to advocate for a highly specific case-based approach in order to determine if the understanding of the armed conflict that prevails in IHL may be effectively realigned in order to ensure that appropriate protections are set out with regard to armed conflicts involving non-state armed groups.

The criteria established in order to determine what category should be imposed, however, have come unstuck in relation to conflicts involving unconventional armed groups. There are grounds to consider the inclusion of additional factors in defining armed conflict status, as well as to challenge the ones that are widely accepted. Whilst a causal relationship between ideology and humanitarian threat can be extracted from the scholarship surrounding “new wars”, incorporating this relationship into how IHL assesses the nature of an armed conflict faces many challenges. Even a cursory examination of the scholarship surrounding the nature of armed conflict suggests that an increasing proportion of civilian casualties is an immutable reality of modern

²⁶⁴ W. Michael Reisman, ‘International Incidents: Introduction to a New Genre in the Study of International Law. (Special Feature – The Incident as a Decisional Unit in International Law)’ (1984) 10 *The Yale Journal of International Law* 1.

²⁶⁵ *Ibid* 16.

conflict.²⁶⁶ This serves to stress the importance of invoking humanitarian principles when possible. This is, however, a matter of increasing complexity as many contemporary conflicts fail to reach the thresholds required for humanitarian protections to be invoked. This stresses that killing civilians does not require much in the way of competence, and can perhaps even be accomplished without a dedicated military.

7.8 Conclusions

This chapter began by stating that IHL represents a balance between humanitarian concerns and the need for states to wage war. The current manner in which IHL balances these conditions was presented, along with some current trends that threaten the application of IHL, specifically concerning how armed conflict is categorised. Moving forward, this chapter surveyed the potential responses suggested as a means for better aligning the balance of IHL, based upon the assertion that the nature of war has shifted, with this shift in part due to the change imposed by the increasing prevalence and impact of unconventional armed groups.

The “new wars” approach recognises a change in the character of armed conflict. Not only does conflict frequently involve non-state groups, the nature of these non-state groups is often alien when compared to the state model. As the war on terror has made clear, neither states nor new unconventional armed groups have developed effective strategies for achieving their objectives. This strategic gap makes it difficult to define precisely how to resolve the balance between humanitarian concerns and states’ use of violence.

This chapter asserted that the challenge facing IHL is deeper and more expansive than can be encapsulated by the sole focus on the transnational proclivity of contemporary conflict. The unconventional armed groups of today are not simply distinguished from conventional armed groups and states by their transnational nature but operate in a fundamentally different way. This divergence places them outside of the state-centric, Clausewitzian understanding of armed conflict central to IHL’s understanding of warfare. The analysis conducted in this chapter is illustrative of some key themes of

²⁶⁶ ‘the percentage of civilian casualties has risen from 19% in world war one [...] to 90% in the armed conflicts of the 1990s’. Corn and Jensen (n 117) 62.

relevance to the wider thesis. First, aligning IHL to reflect the reality of modern conflict is a key concern. Second, the challenge posed by unconventional armed groups goes much deeper than their transnational nature.

Introducing a transnational condition of armed conflict would permit states the operational space they require in order to effectively fight such groups, whilst ensuring that relevant protections in relation to civilians, combatants, and property are triggered. It would draw into the fold the type of conflict that has increasingly characterised the twenty-first century. This new category, however, must reconcile itself not only with the transactional proclivities of unconventional armed groups, but the “way of war” practised by these groups, and most importantly, the specific pressures imposed on states by unconventional armed groups.

To return to the case central to this thesis, integrating a detailed understanding of neo-jihadist goals and methods allows for a better bounding of a new category of transnational armed conflict in the case in question.

8 Concluding Examination

8.1 Findings

The advocates of IHL suggest that it represents a universal system that has transcended the circumstances of its origins and can provide states with an approach to humanely winning any conflict.¹ The ICRC, for instance, would specify that in relation to new challenges like ISIS, parties need only carefully consider how to apply existing rules, which will allow new transnational threats of this nature to be neatly and comprehensively dissected into a range of discrete international and non-international conflicts, as well as situations that are not conflicts and that may be addressed as domestic criminal situations.² Exactly how this will work is however as yet unclear. Moreover, proponents of IHL as it stands assume that involved states are aware of an approach to humanely confront such organisations and ultimately beat them, all whilst only causing an acceptable amount of collateral damage.³ If states are aware of such an approach in relation to groups like ISIS, then they are certainly concealing it effectively.

The first problem identified by this thesis is that IHL is dependent upon its understanding of the interstate approach to warfare in relation to all instances of armed conflict. This has been evidenced first by examining the history of IHL, its sources, and the manner in which concrete material elements have been set out in order to understand non state armed conflicts. Whilst in theory, IHL represents a body of law that is capable of adapting to changes in the nature of armed conflict, its capacity to understand, and therefore effectively regulate conflicts that diverge rapidly from its state centred expectations is questionable. As current approaches to the use of force

¹This is after all the purpose of IHL; the assertion of universality is central to the system's identity. See Hans-Peter Gasser, 'International Humanitarian Law and the Protection of War Victims: Extract from "International Humanitarian Law: An Introduction"', (ICRC, 30 November 1998) <<https://icrc.org/en/doc/resources/documents/misc/57jm93.htm>> accessed 20 November 2018.

² See ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts'. Report prepared for the 30th International Conference of the Red Cross and Red Crescent (October 2007).

³ As this thesis has stated determining what represents humanitarian behaviour is understood to usually represent a "common sense" exercise; it is however apparent that states do not even know how to win many modern conflicts, let alone do so in a humane manner. See Gabriella Blum, 'The Fog of Victory' (2013) 24 *European Journal of International Law* 391, 391-392.

by non-state armed groups such as ISIS do not conform to the state approach, problems have begun to emerge. Later chapters set out in detail the problems arising from IHL's dependence on interstate war. Perhaps most visibly, the categories comprising IHL do not cover all potential forms armed conflict can take; moreover, there are gaps between these categories that can provide an advantage to noncompliant armed groups,⁴ with ISIS providing an interesting example of the possible adverse ramifications of these gaps and boundary issues. There are a number of specific problems that can be specified. Trying to fit organisations like ISIS in the current framework falls to account for the way in which geographically dispersed conflicts can be connected to one another,⁵ and the lack of conventional competence these groups often display.⁶ Secondly, the criteria that international law has for determining if an organisation is capable of waging an armed conflict and when one is taking place are not correctly disposed to fully understand an organisation like ISIS and its approach to the use of force. This leads to what military scientists would describe as friction.⁷ Rather than simplifying matters, applying international law as it stands has instigated a piecemeal, disaggregated and often confusing response that may well be part of the reason behind the ongoing nature of this conflict, and therefore, its often outsized impact on human welfare.

There are some very good reasons as to why international law should hold its course, however. IHL has served effectively in constraining many state and non-state conflicts and certainly has contributed to the incremental decline of armed conflict and its adverse impacts.⁸ Incorporating unconventional armed groups like ISIS would require adjustments to be made. The inevitable changes required to do so effectively risks destabilising the progress that has been made in regulating more conventional forms of warfare. There are additionally compelling arguments supporting the status quo arrangement and its capacity to effectively address ISIS, stressing the value of

⁴ See Mark Klamburg "Exploiting legal thresholds, fault-lines and gaps in the context of remote warfare" in Jens David Ohlin, (eds) *Research Handbook on Remote Warfare* (Edward Elgar 2017) 201.

⁵ As the group's grip on territory in Iraq and Syria has weakened, these connections become even more important to acknowledge. See Greg Simons, 'Brand ISIS: Interactions of the Tangible and Intangible Environments' (2018) 17 *Journal of Political Marketing* 322.

⁶ As thesis has contested, Groups like ISIS are not conventionally equipped to meet the standards of "intensity and organisation" required to trigger a state of "armed conflict."

⁷ Specifically, the law serves to constrain the freedom of states to undertake military action. Whilst Clausewitz did not consider international law as a source of friction, as van Creveld indicates it is supremely relevant to wars today. See M. Van Creveld, *Transformation of War* (Free Press 2009) 89.

⁸ Oona Hathaway and Scott Shapiro, *The Internationalists: And Their Plan to Outlaw War* (Allen Lane 2017) 334-335.

being able to respond in detail, and the value of approaching the organisation as a criminal organisation where possible.⁹

There is another perspective, however, one that this thesis has sought to cultivate. An organisation like ISIS and perhaps unconventional armed groups, in general, can only survive and prosper in an international environment in which states are constrained from addressing them in a rapid and decisive manner.¹⁰ ISIS exemplifies how an organisation can take advantage of globalisation and a liberal legal framework governing the use of force. IHL is currently ill-equipped to understand and address such groups. This needs to change, and rapidly, if IHL is to maintain its position as the most widely recognised approach to regulating the conduct of warfare; should it fail to support states in addressing such groups it is likely that they will simply defect from the system.

This thesis can advance some modest suggestions regarding the course IHL and international law could take in order to better address the central case of this thesis, ISIS, and by extension unconventional armed groups more generally. These suggestions mainly relate to the two major problems covered in the course of this thesis- how groups like ISIS should be identified in international public law, and to what extent and how IHL should be revised in order to better address such groups. Additionally, it is reasonable to post some conclusions regarding the distinctive nature of religious conflict in contrast to interstate war and more conventional approaches to the use of force, and the importance of this difference being acknowledged.

8.1.1 Unconventional armed groups challenge IHL by not behaving like states in how they organise and use force.

This study began by examining why international law views armed conflict in the way it does, and what events and assumptions have determined the type of organisations understood as capable of contesting one. It has been asserted in this thesis that IHL is orientated around interstate warfare, and though mechanisms exist to

⁹ Benjamin Wittes, 'What Is Hybrid Conflict?' (Lawfare, 11 September 2015) <<https://lawfareblog.com/what-hybrid-conflict>> accessed 1 August 2018

¹⁰ Tanisha. M. Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (2018) 248-249.

adapt to new trends in armed conflict, the more radically a situation diverges from interstate war, the more limited the capacity for IHL to comprehend the challenge becomes. This state of affairs is understandable given that it is perhaps the most threatening form of armed conflict, and moreover, for much of the recent past, the most prolific. This orientation does, however, challenge IHL's capacity to understand and relate regulations in more contemporary situations that do not conform to this archetype; this limitation is most apparent in relation to IHL's definition of non-state armed groups.

In chapter 2, it was recognised that IHL is very much a living body of law; providing sufficient will exists, it is possible to produce new treaties to legislate the conduct of hostilities, or through the mechanisms of customary law, assert new rules arising from state behaviour against groups like ISIS. In relation to the problem, however, it is questionable as to whether or not there is sufficient will to alter IHL. Even was this the case, it was suggested that there is no basis to assert what adaptations would bring IHL into better alignment with new conflicts, there being a distinct lack of any understanding of unconventional armed groups like ISIS and the key differences between wars contested by such groups and those fought by more conventional non state groups in the past. As IHL is focused around the state approach to using force, with state like competencies forming the basis for recognising non-state parties to armed conflict, this becomes a problem in that many modern organisations do not organise along state lines and often fight in a different manner. This chapter further contended that this is what is occurring, using the "war on terror" and ISIS as an example. Groups mobilising on the basis of religious extremism, in particular, have deviated from the assumptions IHL has cultivated in terms of what groups should be defined as capable of engaging in armed conflict. This also permitted some initial insights into why unconventional armed groups could represent a deeper challenge, indicating distinctive underlying social structures, as well as different aims and objectives that may cause further deviations from the state approach to armed conflict.

In contending with unconventional armed groups, IHL is disposed to presume that all belligerents consider armed conflict as a contest of military force, fought for rational objectives.¹¹ In later chapters, these assumptions were related to the

¹¹In the past "provisions of international law for the protection of civilians fitted well with the organizational rationality of the military apparatus." Herfried Münkler, *The New Wars* (Polity Press

Clausewitzian approach to warfare. Unconventional armed groups represent a clear challenge to IHL in this regard, subverting the assumptions resulting from dependence on this approach. Unconventional armed groups are liable to challenge IHL in different ways; indeed, unconventional armed groups can only be unified in a negative sense; organised armed groups that contest the application of IHL.¹² Focusing, as this study has upon a central example, however, it is possible to go into a little more detail. This study first realises a distinction between conventional armed groups -those generally deemed capable of actuating a NIAC- and unconventional armed groups. An unconventional armed group is disinclined, unwilling or unable to mimic state behaviour both on and off the battlefield. Most likely, as is the case with ISIS, they do not aspire to become part of the international system.¹³ Even should they, they are generally incapable of achieving this aim in a meaningful sense.¹⁴ To consider their battlefield behaviour, firstly, meaningfully and decisively defeating such groups in a conventional sense does not result in victory. As Blum writes;

*“Victory is still frequently imagined in World War II terms: invasion, defeat of armed forces, capitulation of the defeated, capture of the capital and leaders, and installation of a new government. Many earlier wars have taken a similar form, and some recent wars included certain elements that resemble this model. But not all wars require such elements for victory; nor is it that when these elements do present themselves (for instance, in Afghanistan or Iraq), we commonly think about these wars as having been decisively ‘won’.”*¹⁵

2005) 83; see additionally Morrow, who suggests that the laws on war codify a shared understanding, inverting the causality of IHL. See Morrow (n 11) 49-50.

¹² Gangs, criminal organisations, religious groups; all could be described as unconventional armed groups. Benjamin Lessing, ‘The Logic of Violence in Criminal War: Cartel-State Conflict in Mexico, Colombia, and Brazil’ (2012); Letizia Paoli and others, ‘Tajikistan: The Rise of a Narco-State’ (2007) 37 *Journal of Drug Issues* 951; Jennifer Hazen, ‘Understanding Gangs as Armed Groups’ (2010) 92 *International Review of the Red Cross* 369. Is it Possible to suggest these varieties of armed actor are as different from one another as they are from conventional armed groups or states.

¹³ As Maher notes, a caliphate is very different to a nation state. See Shriaz Maher, *Salafi-Jihadism The History of an Idea* (Hurst 2016) 4-5.

¹⁴ The Taliban served as an excellent example in this regard. Whilst possessing much of the territory of Afghanistan, due to amongst other factors, their religious ideology, the Taliban was committed to undertaking acts antithetical to being recognised. See Svante Cornell, ‘Taliban Afghanistan: A True Islamic State’ in Brenda Shaffer (ed), *The Limits of Culture: Islam and Foreign Policy* (Belfer Center for Science and International Affairs 2006) 264.

¹⁵ Gabriella Blum, ‘The Fog of Victory’ (2013) 24 *European Journal of International Law* 391, 392.

The absence of an appropriate, accessible means to defeat such groups, it becomes difficult to determine what actions are justifiable for states to undertake. For instance, it is generally acceptable to inflict some civilian casualties, should the value of the object justify such action. Now, however, the objectives in state war- destroying military capacity, killing leaders and capturing territory- have an undetermined impact on how the conflict unfolds. Such unconventional armed groups do not even understand the use of force in a conventional military sense. Moreover, even the most humiliating defeats can be transmuted into propaganda victories; either due to the prohibitively heavy humanitarian costs imposed upon states in engaging an adversary that does not express regard for distinction, or to call for yet more mobilisation against their enemy. Most worryingly, the application of conventional force simply brings about a mutation in organisation and methods.¹⁶ This means that the strategies delineated as acceptable for states to use by IHL are not necessarily an appropriate approach, considering the way unconventional armed groups diverge from the type of actors IHL is prepared for. It may additionally dictate that the balance of military necessity and humanitarian need is calculated differently. A critical consideration is therefore that IHL must be mindful that in such new conflicts, Non-state groups are not compelled to mimic the state approach to the use of force. Accordingly, they may not exhibit the features that IHL requires for establishing a condition of armed conflict. The split this thesis has proposed between conventional and unconventional armed groups can be considered a fairly novel way of identifying the challenge; the fact that each unconventional armed group may merit extremely specific consideration additionally justifies the restricted nature of this study.

8.1.2 Religion can have a deterministic influence on the armed groups it mobilises, altering how they are organised and how they use force. IHL needs to be mindful of these differences.

The challenge of religious groups in relation to IHL is far from hypothetical, with groups like ISIS having already necessitated alterations.¹⁷ In light of this, the thesis set out to first establish the distinctive nature of religious conflict. This approach is

¹⁶ Anthony H. Cordesman, 'Modern Warfare: The Changing Nature of War in the Middle East and North Africa' (2016) 37 *Harvard International Review* 21, 21-22.

¹⁷ Michael P. Scharf, 'How the War Against ISIS Changed International Law' (2016) Paper 1638. Faculty Publications 1.

innovative in that the role religion plays in violence is often obscured, with it being identified as a pretext, rather than a root cause of conflict. Religious conflict or warfare has, in the estimation of many religious traditions represented a separate, proto-legal framework in which the restrictions applied to warfare more generally could be disregarded.¹⁸ Whilst the historical approach to religious armed conflict is inaccessible today, religion remains a potent call to action, and many contemporary movements seek to suspend normal practice in the use of force in the manner faiths did in the past.

Contemporary religious conflict, based upon the examination conducted in chapter 5 has some typical features that challenge IHL. In relation to the central case, taking on religious identity is a prominent aspect of what causes ISIS to exhibit erratic and unconventional behaviours. ISIS and a range of similar organisations within the context of the war on terror, for instance, prove that the adoption of a religious identity necessitates that such organisations take on religious goals. As Bartels suggests;

“In these contemporary conflicts, armed groups often reject the system built around state sovereignty and governmental authority, as their aim is not to overthrow the government in order to simply replace it. Instead, their fighting largely follows from the desire to impose their ideology and values.”¹⁹

This suggests that many conventional aims and objectives are absent or ancillary to groups such as ISIS. Being ideologically focused, many of the features associated with armed groups will not need to be present. Ultimately, the central problem identified was the inability of IHL to understand armed groups of a religious nature; being accustomed to equating humanitarian threat upon the basis of either the legitimacy of an entity- a characteristic that in many cases has a relationship with destructive capacity-²⁰ or competence in military terms.²¹

¹⁸ This was a consistent feature of the three major approaches discussed in chapter 2, all understood that war fought for religious purposes as subject to different wars and more limited restraints.

¹⁹ Rogier Bartels, ‘The Relationship between International Humanitarian Law and the Notion of State Sovereignty’ (2018) 23 *Journal of Conflict and Security Law* 461.

²⁰ States, in the past were considered to have a monopoly over the legitimate use of force within a given territory. Consistent with this right, it is fair to assume that the states are capable of bringing the most force to bear.

²¹ In setting out the requirements for organisation and intensity, IHL established bounds for differentiating “armed conflict” from other forms of violence not meriting the application of special rules. These boundaries assume that armed groups will need to mimic state competencies in order to present a humanitarian threat.

Another issue is compliance. Based on the sources that have been examined, some religious ideologies have a deterministic connection with compliance issues. An exclusive ideology reasoning along with an awareness of the way states are means that groups like ISIS do not consider themselves to be subject to international law. as Jo notes;

“Ideology looms large in the Syrian context, as it dictates the military strategies of ISIL and at the same time causes ISIL to see legitimacy as stemming from religious principles – which fundamentally clashes with the order of international law and with political notions of legitimacy. And the consequences of ISIL’s religiously based conception of legitimacy has been plain to see civilians who do not support ISIL are labelled as enemies of their jihad rule and justified as targets for ISIL violence”²²

Religion as a supranational form of authority has been observed as having a destabilising effect on the secular inclined governments of the middle east.²³ It is clear that groups like ISIS do not aspire to be seen as legitimate within the framework of international public law. International law is therefore exposed to the same problem, in that those inculcated with religious ideology will draw legitimacy from an alternative framework. Rejecting the norms and values enshrined in IHL seems to enhance the reputation of groups like ISIS in this alternative framework. accordingly, there is a basis to suggest that neo jihadi ideology causes associated groups to exhibit issues with compliance.

Based on the case of ISIS, there is a basis to assert that it is important for IHL to engage with the problem of contemporary religious violence on two fronts. Firstly, it is imperative that a new means for understanding the type of conflict propagated by such groups are generated. Secondly, it is important that the deterministic influence religion has on unconventional armed groups in terms of participation within both international public law and IHL. Many of the trends associated with ISIS and more loosely with contemporary religious conflict may naturally prevail more widely. Indeed, some of the challenges the author has connected to ISIS could be caused or compounded by more widely prevailing trends in armed conflict.

²²Hyeran Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics* (Cambridge University Press 2015) 251.

²³ Olivier Roy, ‘Islamism and Nationalism’ (2003) 104 *Pouvoirs* 45, 56.

The statements made by this thesis regarding the importance of considering the aims an armed group expresses are original, in that they seek to expand legal discussion into an aspect of IHL previously considered inviolable; the reasons that people go to war have conventionally been disregarded, with the aim being to ensure fair treatment irrespective of the reasons for fighting. As this thesis determined that wars fought for a religious imperative may take on a distinctive character, it is imperative that this disinterest is therefore revisited.

8.1.3 Before considering how to revise IHL to address ISIS in a humanitarian manner, they must be appropriately classified, and an understanding of how to defeat the group must be cultivated.

The final question posed in relation to this thesis related to how IHL and perhaps international law in general should change, with the primary aim of determining how best to go about ensuring that civilians and those not in combat are protected in practice. A critical consideration in this regard was considering what approach may be viable in relation to ISIS.

The first problem was how to classify organisations like ISIS. Based on the in-depth analysis of the groups' ideology, this thesis was able to recognise that ISIS cannot comprehensively be classified as a state. The case of the Taliban was additionally discussed, by way of demonstrating that pursuing statehood and legitimacy within the neo-jihadist framework is likely result in the loss of both. In investigating this thesis, the idea of an "uncivilised state" was encountered; a category previously invoked as expedience to describe states and empires that Europeans did not fully understand, and did not deem possible to include in their shared international law.²⁴ This thesis would not suggest that such a term is useful in relation to ISIS today, though it is important to note that the situation broadly reflects the one confronting those early, largely Christian, European states. Groups like ISIS cannot be made to comply with any shared norms or laws concerning the use of force, do not wish to become a state, and for their part, do not recognise the rights of any other state or

²⁴ Alexander Orakhelashvili, 'The Idea of European International Law' (2006) 17 *European Journal of International Law* 315.

system to exist. As international law is more developed than it was in the 19th century, however, simply declaring them to be an outlaw state is neither desirable or necessary. It may however prove necessary to produce an approach that insulates states from the predations of groups that do not recognise the value of restraining warfare. Finally, the notion that a new form of personality is already being synthesised to describe ISIS was discussed; in particular, the need to separate the capacity to control territory and wage war from the legitimacy that often accompanies these features was identified. This approach is quite original; firstly, in looking back to early European international law to describe ISIS, this thesis looked back at an aspect of legal history that is perhaps rightly recognised as less sophisticated and inferior when compared to today's system. As the approach demonstrated, there is knowledge to be found here; particularly in how this early system took account of its limitations, excluding institutions and states it was incapable of understanding. In an era of unprecedented change, international law again finds itself confronting organisations beyond its horizon of understanding, though this time rooted in transnational threats like ISIS.

Whilst there is as yet a lack of understanding of groups like ISIS in international public law, the threat that groups like ISIS pose has been recognised. Many states have begun to find ways to deal with groups like ISIS. There are certainly options at hand to deal with the group, as the later chapters of this thesis have demonstrated. The fact that many have sought to demonstrate that the actions they are undertaking are consistent with IHL is broadly speaking positive.

In relation to the “war on terror” and ISIS, it is worth restating some of the different options discussed in the latter part of this thesis. There are, some proposed drastic changes, such as the possibility of generating a new category of armed conflict. Radical changes of this nature are however unlikely, would take time to implement, and may yet be premature, given the barely formative understanding of how unconventional armed groups like ISIS operate, and how states may go about defeating them whilst abiding by humanitarian principles. The critical problem identified was IHL's preoccupation with certain objective means of determining the existence of armed conflict and what rules should apply. Finally, it is possible to suggest that an understanding of contemporary religious conflict is consistent with some of the approaches advocated by scholars and states. Additionally, new wars approaches can shed some light on the problem. These bodies of knowledge, whilst useful do not, however, provide a solution comparable to the manner in which the Clausewitzian

approach to war²⁵ has contributed to IHL's "common sense"²⁶ approach that has been of utility in relation to more conventional instances of armed conflict. A new area of inquiry opened up in the course of this study relates to how IHL goes about balancing military necessity and humanitarian concerns, specifically in relation to how IHL goes about determining the value of military objects.²⁷ As illuminated by the ISIS case, the information needed to make value judgements about military necessity has simply not been acquired in relation to unconventional armed groups like ISIS, at least not yet.

8.2 Final statement; How can IHL ensure that appropriate protections are applied to conflicts involving unconventional armed groups of the type exemplified by ISIS?

This thesis set out with an important and original question in mind; the central aim of this thesis was to use an understanding of contemporary religious conflict to assert that a need exists to alter IHL. This was an original question to ask, as today, the notion that religious conflict is distinctive from other forms of warfare is not widely considered. The thesis has effectively addressed this aim by demonstrating the failure of IHL to understand the distinctive nature of contemporary unconventional armed groups, as exemplified by its approach to ISIS. Whilst contemporary religious warfare is just one of the myriad of potential avenues for exploring shortfalls in IHL, the example of ISIS is sufficient to question IHL's assertion of universality, particularly in its approach to understanding non-state armed groups. Naturally, this conclusion really just raises more questions; If IHL needs to change to address groups like ISIS, then what other groups pose a comparable challenge? Is the emergence of contemporary religious armed groups the only looming challenge, or are there other similar challenges that need to be addressed? Precisely what measures are called for?

²⁵ Hew Strachan and Andreas Herberg-Rothe, 'Introduction' in Hew Strachan and Andreas Herberg-Rothe (eds), *Clausewitz in the Twenty-First Century* (Oxford University Press 2008).

²⁶ David Éric, *Principes de Droit des Conflits Armés* (3rd edn, Bruylant 2002) 921–922.

²⁷ This study has adopted the position that in undertaking this balance, IHL relies upon some assumptions that limit its utility to more conventional types of war. See Nobuo Hayashi, 'Requirements of military necessity in international humanitarian law and international criminal law' (2010) 28 *Boston University International Law Journal* 39, 44.

This study is by no means the first to question the capacity for IHL and other aspects of international law to appropriately define the rules that should apply in situations of contemporary conflict that do not conform with previously established assumptions. Back in 2009, Sitaraman suggested that in some cases, the laws surrounding the conduct of armed conflict do not permit enough engagement to protect civilians, and in other cases, actively punished states engaging in counterinsurgency.²⁸ This thesis has simply reiterated this established conclusion, though going into some detail as to why modern conflicts may be so uniquely challenging, referring to the case of ISIS and the contemporary religious ideology which they embody. Neither this study the first to suggest that ISIS and similar organisations merit a new designation in international public law; recently Johnson suggested the term “Terror non-state” in this regard.²⁹ This thesis has suggested something similar to this designation, particularly in stating the need to separate legitimacy from the capacity to hold territory and wage war. Rather than contriving something new, however, this thesis instead looked back to the notion of the “uncivilised state” as a means of articulating how groups like ISIS could be understood.

Finally, it is worth mentioning another issue contended in this thesis- that the law is increasingly out of touch with the realities of armed conflict and with the states, bodies and individuals that must apply IHL in practice. This is asserted comprehensively in the recent publication “Wars of Law.”³⁰ The scholarship is, therefore, already cognizant of the questionable role of IHL in modern conflict, including the proclivity for IHL to incentivise armed groups to behave in an increasingly adverse manner.

It is, therefore, not untoward to ask what original conclusions and findings this thesis can contribute to assist in addressing the shortfall in humanitarian protections associated with groups like ISIS. It can be stated that this thesis has developed a novel way of looking at the problem, firstly by asserting the need to distinguish between religious warfare and more “rational” forms of armed conflict. Moreover, this thesis has stressed the importance of understanding today’s armed groups, and the often

²⁸ Sitaraman Ganesh, ‘Counterinsurgency, The War On Terror, And The Laws Of War’ (2009) 95 Virginia Law Review 1.

²⁹ Darin E. W. Johnson, ‘The Problem of the Terror Non-State: Rescuing International Law From Isis and Boko Haram’ (2019) 84 Brooklyn Law Review 475.

³⁰ Tanisha. M. Fazal, *Wars of Law: Unintended Consequences in the Regulation of Armed Conflict* (2018) (n10).

distinctive manner in which they are organised and go about using force. This study has been unable to assert that there is any identifiable approach to defeating groups like ISIS, let alone doing so in a humanitarian manner. This is perhaps a little troubling from a humanitarian standpoint, as it is states and their militaries who must discover a quick and effective approach to defeating such groups, not lawyers and humanitarians. It may seem wishful, but a nation-state or other actor will eventually stumble into a means of conclusively winning the war on terror; to attempt to determine what represents a humanitarian approach to groups like ISIS in the absence of a proven understanding of how such groups may be defeated is to put the cart before the horse. Until this time, IHL should be applied in a manner that serves to incentivise innovative behaviour on the part of states. Additionally, IHL has a key role in ensuring that when fighting groups like ISIS, states are not permitted to repeatedly undertake actions that expose civilians to harm, whilst failing to produce any meaningful progress in terms of ultimately ending the conflict. International lawyers should be mindful of this, particularly in relation to the strategies and actions that are generally permitted in instances of conflict involving conventional armed groups; it should by this point be apparent that in relation to groups like ISIS, such approaches are often futile, or even counterproductive.

Despite the assertion made above and the complex nature of the problem however, IHL is not operating in the dark in relation to ISIS. Based upon the manner in which ideology can influence how armed groups mobilise and organise, as well as the objectives that they pursue, an awareness of this feature can assist in better determining what actions states may undertake. The major point to be stressed is that whilst IHL has proliferated from its initial mandate to govern the conduct of interstate war to regulate non-state varieties of warfare, it has not developed an awareness of the multivariate and diverse forms armed groups can take. As such IHL is not an exercise in common sense, but in relation to unconventional armed groups, requires careful consideration in order to assess the precise nature of the threat posed, and the capacity of the group in question. As such, IHL needs to appreciate that it is unlikely that applying a single regulatory framework to non-state armed conflict in the future is perhaps not the best means for protecting civilians. Fortunately, both IHL and international law in general are much better equipped for such an exercise today than was the case in the past.

The findings of this study are significant; firstly, they suggest that IHL actually understands war in a very limited and archaic manner; whilst IHL has expanded its remit well beyond interstate war, it has not dispensed with the manner in which it initially understood war, presuming the same mechanics are common to all varieties of armed conflict. Initially, at least, this proved to be the case, as successful non-state armed groups generally mimicked the state approach to using force in a broad sense, whilst often seeking to become states themselves. Groups like ISIS demonstrate that this is no longer the case. A central assertion made by this thesis is that there is no universal basis for understanding armed conflict. The thesis suggested an approach to overcome this limitation that is fairly radical. Firstly, this thesis has derided the notion that all armed groups must mimic the state approach to using force and organising. This means that it is extremely difficult to set out any objective criteria for demonstrating that an armed group exists, and whether or not they are capable of waging armed conflict. Indeed, armed groups are perhaps incentivised to not exhibit the features that IHL generally looks for; this would entail engaging in a conventional military contest, showing that many of today's causes are not equipped to accomplish effectively. By looking at unconventional armed groups mobilised by religion, it has become apparent that using organisation and intensity as they are currently understood does not develop an accurate picture of the threat posed by groups like ISIS.

One further suggestion is truly revolutionary; the approach to warfare taken by ISIS is justified and made possible by their aims, and the distinctive religiously orientated ideological landscape which they inhabit. Therefore, IHL needs to be mindful of the capacity for the aims pursued by armed groups to dictate the rules and norms that are appropriate in armed conflicts. This is perhaps challenging as IHL is ostensibly disinterested in the reason why war is fought, traditionally asserting that the same rules should apply irrespective of the cause of conflict. This thesis would suggest that this approach is no longer viable and that disregarding the information provided by the expressed aims of armed groups is not the best means of ensuring that appropriate protections exist in contemporary situations of armed conflict. The ISIS example again demonstrates this to be the case. As a religiously mobilised armed group, ISIS has no wish to become a state, as was the case with many previous non-state groups. This, as this thesis has explored, raises issues that go deeper than the immediately apparent compliance problem. It dictates how they use force, in the case of ISIS supporting direct attacks on civilians, and possibly, defines how they may be

hurt; therefore, what actions are most effective to take in order to end the threat arising from such groups. This last point is uncertain, though it can be asserted that it is inhumane to insist that states must regard ISIS as they would a state and limit themselves to destroying whatever unambiguously military targets the group presents. This has repeatedly failed to contribute meaningful progress towards ending the conflict, therefore, perhaps, contravening IHL in principle.

Detractors will indicate the predominant focus of this study upon the single example of ISIS; this is, of course, one of the thesis's boundaries. Such critics should be mindful, however, of the wider lessons that can be extrapolated from this example. ISIS has generated a successful challenge to the international order, exceeding those that have gone before. The groups successes and failures will remain as lessons for future non state entities looking to challenge the international order, and therefore it is likely that ISIS will serve as a model for other groups to follow. Until international law develops an answer to the approach taken by ISIS, its approach will likely be revived, reimaged and repurposed well into the future. This thesis has, therefore, made an unambiguous contribution to scholarship by identifying a model of armed conflict that needs to be addressed.

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