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**THE LEGITIMACY AND
COMPATIBILITY OF USE OF FORCE
(*JUS AD BELLUM*) IN PUBLIC
INTERNATIONAL LAW AND ISLAMIC
INTERNATIONAL LAW**

M Z SABUJ

PhD

2018

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INTERNATIONAL LAW**

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requirements of the University of Northumbria
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Abstract

Despite the general prohibition of using inter-state force imposed by Article 2(4) of the United Nations Charter, force has been used under the auspices of self-defence, collective security and humanitarian crises. Such use of force has brought challenges to international law regarding its existence and efficacy. Although no state has denied the validity of such prohibition, many attempts have been made to legitimise use of such force on different grounds, namely exception, expansion and explanation.

Unlike Public international law, Islamic law of Nations (*Siyar*) does not provide for a general prohibition of use of force but recognises circumstances in which such force can be legitimately used. The compatibility of these conflicting provisions of legitimate inter-state use of force offered by these two systems are significant for the prevention of aggressive use of force. The assessment of legitimacy of these conflicting provisions shall reveal where the legitimacy lies - is it in Islamic international law or Public international law or both or none of them?

The results of the legitimacy assessment demonstrate that these two systems could sit in plural fashion by complementing each other's legitimacy-deficits. However, the legitimacy and compatibility of Public international law and Islamic international law significantly depend on the development of an underlying pluralistic legal framework of international law with a healthy dose of legitimacy. Therefore, a comparative analysis of these two systems reveals the extent to which a complementary legal framework could be compatible and legitimate.

The comparative analysis of the legitimacy of use of force in Public international law and Islamic international law includes examination of classical and contemporary sources to identify the existing legitimacy deficits of the two systems. The analysis follows on an inquiry into the compatibility of these potentially two conflicting legal systems to complement each other. In this regard, the research expands on another inquiry into how the existing legitimacy deficits of the two systems could be overcome. Generally, this thesis seeks to address three fundamental and interrelated research questions, namely -

- (1) To what extent use of force in Public international law and Islamic international law is legitimate?
- (2) How the legitimacy deficits of Public international law and Islamic international law could be overcome?
- (3) Whether use of force in Public international law and Islamic international law can be compatible in modern world to secure higher degree of legitimacy?

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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 Chair of School Research Committee on 4th July 2015.

The law presented in this thesis is correct as of 1 January 2018.

I declare that the Word Count of this Thesis is (84, 867) words.

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Date: 11/05/2018

Chapter 1

Introduction

1.1 Background

This study seeks to explore the legitimacy and compatibility of use of force in Public international law and Islamic international law. Due to frequent recourse to extra-Charter use of force by states and regional organisations and asymmetric use of force by non-state actors, the current framework has been under scrutiny. In search for legitimacy of use of force, this study discovers that legitimacy deficits in the international law arguably exist as far as use of force is concerned.¹ This study finds a vital link between Public international law and Islamic international law which can, not only overcome the legitimacy deficits but also complement each other to build up a better system of international law on the use of force with higher degree of legitimacy and justice.

International law has been a thriving field of philosophical inquiry. The central philosophical inquiry in relation to the use of force, both at inter-state and intra-state level, has focused on various phenomena including the main challenges that international law confronts. Among the challenges, the central philosophical question about international law on the use of force is its legitimacy.² This is because as far as countries try to live in relative harmony with their other counterparts, they must factor in what is legitimate and what is illegitimate internationally so that peace can be maintained.³ As such, issues of legitimacy (for instance, legitimate and illegitimate behaviour) are part and parcel of international relations, and one of the tasks of

¹ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 19; see also Gerry Simpson, *The Nature of International Law* (Dartmouth: Ashgate 2001) xxxi; Allen Buchanan and Robert O. Keohane, 'The Legitimacy of Global Governance Institutions' in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 38; Rüdiger Wolfrum, 'Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer: Heidelberg 2010) 6.

² Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 48.

³ Jean-Marc Coicaud, 'Introduction' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Faultlines of International Legitimacy* (Cambridge University Press 2010) 1.

³ Allen Buchanan, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 89.

international law – a key tool for the regulation of international affairs – is to draw a line between legitimacy and illegitimacy in international life.⁴

Does this mean that international law on the use of force is facing a crisis of legitimacy? It is apparent that the current tensions and conflicts at work internationally are the result of competitive and unresolved claims that, for most of them, are based on disputed interpretation and implementation of key international norms.⁵ It is also apparent that the conflicting values of international law and the tensions that exist about the application of these values have the potential to undermine the international system in terms of use of force.⁶ The disputed interpretation and implementation of norms together with tensions of application of necessary values to such norms have posed challenges to international law on the use of force.⁷ As a result, the stability and legitimacy of the international system are very much under stress as far as use of force is concerned.

1.2 Relevance of the Study

The philosophy of international law can be readily envisaged as a branch of Special Jurisprudence, one that encompasses both conceptual and normative questions about international law.⁸ Following the inquiry into the conceptual question whether international law is genuinely a law as distinct from a form of social morality and convention and having been satisfied with its existence and legal status,⁹ the inquiry restarted into the normative question of the legitimacy of international law on the use of force.

Legitimacy, of international law in general and use of force in particular, has not received adequate attention until the heinous attack of 9/11.¹⁰ Franck (in 1990) concluded that there should not be any question raised about the legitimacy of international law.¹¹ However, this

⁴ Jean-Marc Coicaud, 'Introduction' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Faultlines of International Legitimacy* (Cambridge University Press 2010) 1.

⁵ *Ibid.*, 4.

⁶ *Ibid.*

⁷ See chapter 2.

⁸ Samantha Besson and John Tasioulas, 'Introduction' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 2.

⁹ Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995) 6. For *contra* see section 5.1 of chapter 5.

¹⁰ Jean-Marc Coicaud, 'Introduction' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press 2010) 3; See also John Bolton, 'Address before the Federalist Society at the 2003 National Lawyers Convention' (13 November 2003) <www.fed-soc.org/doclib/20070324_bolton.pdf> accessed on 1 August 2017.

¹¹ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 19.

conclusion is obsolete in the current world. This is because, 9/11 and the United States' response to it, particularly the war in Iraq, showed a radicalisation of international politics at odds with the very *raison d'être* of the United Nations.¹² In addition, the revival of the legitimacy question of Public international law in connection with the use of force is also accounted for the more involvement of the Security Council than in the past in the management of international system and the use of democratic and human rights values as benchmarks of legitimate and illegitimate behaviours internationally.¹³ Due to these reasons, legitimacy of international system as well as that of the international organisations that comprise an integral part has come under fire.¹⁴

On the other hand, Islamic international law has been left with inadequate attention despite its potential to complement Public international law.¹⁵ As far as use of force is concerned, Islamic international law (*Siyar*) developed through the passage of time and within the guidance of Shari'a. The limits of use of force and legitimate conduct of such use of force against rebels have been a significant area of international law on the use of force where *Siyar* has developed much more advanced legal framework. In addition, Islamic international law, as developed significantly throughout the formation and development of Islamic territory since 7th Century CE, is the most tested legal system which has been subject to different challenges. These challenges arose from other legal systems which prefer human agent as the sovereign law maker rather than the divine agent. Recent challenges also include the nature of Islamic law as opposed to modernity. Therefore, understanding the nature and methodologies of Islamic law, as well as the paradigm of international relations in the period when classical Islamic law was formulated, is a prerequisite for studying the justifications for war in Islam.¹⁶

Classical Muslim jurists have paid little attention to the Islamic *jus ad bellum* (justification for resorting to war).¹⁷ The use of the word 'jihad' has been subject to various meanings and significances. Moreover, the political turmoil within the Islamic leaders particularly after the demise of the Prophet has resulted in the under-development of Islamic legal system. It is until the end of 7th and beginning of 8th Century CE when al-Shaybani has developed *Siyar*, which

¹² Ian Clark and Christian Reus-Smith, 'Preface' (2007) 44 *International Politics, Resolving Crises of International Legitimacy* 153.

¹³ Jean-Marc Coicaud, 'Introduction' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Faultlines of International Legitimacy* (Cambridge University Press 2010) 2.

¹⁴ *Ibid*, 3.

¹⁵ Eugen Ehrlich, 'The Sociology of Law' (1922) 36 *Harvard Law Review* 130, 144; see also William Twining, 'Normative Legal Pluralism: Global Perspective' (2010) 20 *Duke J. Comp. & Int'l L.* 473.

¹⁶ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 75.

¹⁷ Rudolph Peters, *Jihad in Classical and Modern Islam* (Princeton: Markus Wiener 1996) 119.

is Islamic international law.¹⁸ However, the encroachment of politics in the Islamic legal system have generated legitimacy-deficits particularly in the law of use of force.

Because both Public international law and Islamic international law in the use of force are not only suffering from legitimacy deficits but also lacking the essential characteristic of ‘internationalisation’, it is necessary that both systems accept each other, operate more widely and from a single legal framework. Furthermore, Islamic international law and its application is relevant to a very large extent to Muslim majority states. For example, invoking the notion of jihad by both Iraqi and Iranian rulers to recruit military resources during the Iraq-Iran war.¹⁹ The objective of this thesis is to find out the legal framework where both systems operate in a complemented fashion at the traditional, cultural, national, regional and international level. Although it is difficult for such a framework to be compelling or binding without its acceptance and empowerment by the willing and able political power, such difficulties can be mitigated (even to a very little extent) and ready for consideration. This can be done by the willing and able politicians when a picture of such framework is drawn after testing its potential and relevance from various aspects namely, legitimacy and compatibility.

1.3 The author’s perspective

The thesis originated from an initial interest in the law of inter-state use of force. While reviewing the existing literature I was quite fascinated to see that Sir Ian Brownlie had undertaken a PhD research at the University of Oxford in 1960s on ‘International law and the use of force by states’. His research was published in 1963. Since then he had supervised PhD researches on inter-state use of force namely, ‘Simon Chesterman’ on ‘just war and just peace’ in 1990s. Further research has been carried out by Thomas Franck²⁰, Joel Westra²¹, and Nikolas Stürchler²². All these researches dealt with the challenges of the Charter system from various perspectives, namely political, social, and economic. These researches, cumulatively, concluded the effectiveness of the Charter system to regulate use of force in consideration to the challenges posed before and after the 9/11 terrorist attack.

¹⁸ Al-Shaybani, *The Islamic Law of Nations: Shaybani’s Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press 1966) 5.

¹⁹ Ardalan Rezamand, ‘Use of Religious Doctrine and Symbolism in the Iraq-Iran War’ (2010) 9 *Journal of the Centre for Studies in Religion and Society* 83.

²⁰ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002).

²¹ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007).

²² Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007).

The use of force has since become a contentious issue in the modern world due to the increasing number of threats to national security, the power practice by the hegemons and lack of power distribution between states. This is particularly the case between the Muslim majority states and Western states. These states are often come into ideological conflict in terms of the legitimacy of their laws and actions. States which are subject to religious legal system as well as party to international treaty like the UN Charter are under state responsibility to comply with general international law.²³ However, such states might argue that in case of any inconsistency between the general international law and religious law, the latter shall prevail. This might be carried out by imposing reservations on the conflicting laws by the states as this has been done previously.²⁴ However, such reservations are unlikely to have any effect because international law is likely to have taken priority over Islamic law due to the latter's inferior status at the international level. This is not the right solution as the conflict between the two systems would continue to exist and is likely to escalate further. This is not a solution of a substantial problem. The absolutism of international law is as harmful as it is to disregard Islamic international law in determining the issues in a matter where both systems provide conflicting provisions.

The problem of denouncing Islamic international law from its supranational nature and operation at the international level is enormous since this law is being adopted and applied by a considerable group of sovereign states. Besides the fifty-seven member states of Organisation of Islamic Cooperation (OIC), there are now forty-three Muslim majority states, of which twenty-three have declared Islam as state religion.²⁵ Muslim majority states might advance the view that a Muslim state cannot be bound to an international legal obligation that contradicts Islamic law; this is in fact implied in the constitution of certain Islamic States.²⁶ In these circumstances, it is desirable to overcome the contradiction by application of legal principles which are capable of discovering the true legal concepts and complement these concepts to fit in plural fashion. This thesis endeavours to do this by applying 'legitimacy', as a legal principle, to discover the true meaning of use of force in Public international law and Islamic international law followed by the application of 'legal pluralism' theory to fit the legitimate use of force provisions in plural fashion.

²³ *Application of the Obligation to Arbitrate under Section 21 of the UN Headquarters Agreement* [1988] ICJ Rep 34, para 57.

²⁴ For example, the constitutions of Bahrain, Iran, Iraq, Kuwait, Pakistan, Saudi Arabia, United Arab Emirates, Yemen.

²⁵ Niaz A. Shah, 'The Use of Force under Islamic Law' (2013) 24 EJIL 343, 363.

²⁶ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 28; see also *supra* note 24 for the list of countries.

1.4 Architecture of the study

The following outline sets out the core objectives of the substantive chapters which, taken as a whole, aim to highlight the problems arising from the use of force at international level. It focuses on extra-Charter use of force and its legitimacy in Public international law and use of force by state and non-state actors in Islamic international law.

Chapter 2 of this thesis explores the general prohibition of use of force under article 2(4) and use of force in self-defence under article 51 of the UN Charter. This chapter also focuses on the current practices of the states and regional organisations around the UN Collective Security system. While exploring the main provisions of use of force and current state practices, this chapter recognises the current challenges which resulted in extra-Charter use of force in modern world.

Chapter 3 analyses the use of force provision of Islamic international law and its use and abuse by both state and non-state actors, at the state level and inter-state level. It demonstrates how the main provision of use of force, which is ‘jihad’, has been developed and subjected to different meanings and significances. This chapter also denotes that the development of *Siyar*, which is Islamic international law, was not only based on the Qur’an and sunna but also the intellectual efforts of Muslim jurists and exegetes, made while dealing with other states.

Chapter 4 encompasses the Islamic law of rebellion. It covers the development of the law from historical milestones. This chapter introduces the modern law of rebellion and treatment of rebels in Islamic law. There is also a section which conducts a comparative analysis of the Islamic law of rebellion and Public international law with particular focus on the former’s potential to complement the latter. Eventually, this chapter concludes by articulating the distinguishing features between jihad, rebellion and terrorism, and drawing a fine line between each of them.

Chapter 5 deals with the core question, which is the legitimacy deficits of Public international law and Islamic international law in the use of force. This chapter scrutinises the state practices, in relation to use of force, to find out if such uses of force are legitimate. Following the finding of legitimacy deficits, this chapter recommends on overcoming such legitimacy deficits including a reform of the decision-making process at the Security Council. This approach is adopted in this chapter to emphasise on the proposition that law must be legitimated before

considering the applicability of legal pluralism.²⁷ This chapter applies ‘legal pluralism’ theory to assess the overall compatibility between Public international law and Islamic international law in the use of force. Chapter 5 concludes that the barrier of Public international law on the use of force lies on its own sense of deriving its own legitimacy from its purported universality, and this barrier could be overcome by application of the cultural relativists’ approach of international law which provides for input legitimacy of the system by recognition of diverse cultural values.

Chapter 6 examines if Public international law and Islamic international law can be compatible. It scrutinises the main objective of these two systems, such as promoting peace and justice, to see if these can be reconciled. For this purpose, a section is devoted for analysing peace and justice and their interplay in promoting legitimacy. Compatibility of these two systems is also considered to see if the ‘crime of aggression’, as adopted by the International Criminal Court, is consistent to that of use of force in Islamic international law. Eventually, this chapter discusses the role of treaties, both from Islamic and Public international law perspectives, in the complementation process between these two systems. This chapter proposes for a complemented system where legitimacy, justice and peace can be promoted at the same time.

Chapter 7 concludes the thesis by demonstrating how the chapters contributed in answering the main research question, which is ‘to what extent use of force in Public international law and Islamic international law can be compatible and legitimate?’ In answering this question this chapter focuses on the research findings of the previous chapters and their implication in answering the three research questions articulated in the abstract (above).

1.5 Methodological approach

This thesis primarily deploys both doctrinal and theoretical inquiries, which include doctrinal inquiry into the UN Charter system followed by a theoretical inquiry into the legitimacy and compatibility of Public international law and Islamic international law in the use of force. In other words, a doctrinal methodological approach informed by comparative analysis to achieve the fundamental aims of the thesis, namely to develop a complementary legal framework between Public international law and Islamic international law. This method was chosen

²⁷ Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kirtzer (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805, 812.

because doctrinal analysis 'is the research process used to identify, analyse and synthesise the content of the law.'²⁸ More specifically, doctrinal analysis requires the researcher to -

Collect and then analyse a body of case law, together with any relevant legislation [...] This is quite often done from a historical perspective and may also include secondary sources such as journal articles or other written commentaries on the case law and legislation. The researcher's principle or sole aim is to describe a body of law and how it applies. In doing so, the researcher may also provide an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment.²⁹

Theory constructs a point of derivation which becomes the foundation of law even if mythical or notional in its premises. This foundation varied from theism to secularism, from God, nature and reason to the command of the sovereign or the will of the people. These theoretical constructions provide ideological context to the legal system, control legal reasoning and predetermine the outcome.³⁰ These are not internal to the legal arguments but these facilitate to overcome the rigidity of the legal arguments. It does not, however, conclude the debate because it refers to those presupposed foundations where agreement is hard to obtain and which taint with their subjectivity and the neutrality of legal rules. Hence, legal discourse receded and reclaimed the distinction between theory and doctrine, between prescription and description, as a means of preserving the distinctive nature of law.³¹ Legal professionals feel that they should engage in the study of proper law only because theory jeopardises the presumed objectivity of legal norms by extending the ambit of discord to rather abstract assertion and this is vulnerable to antagonistic constructions.³² This has been described graphically by A. M. Honoré in the following words:

²⁸ Terry Hutchinson, 'Doctrinal Research: Researching the Jury' in Dawn Watkins and Many Burton (eds), *Research Methods in Law* (Routledge 2013) 9.

²⁹ Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2010) 19.

³⁰ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 1.

³¹ *ibid.*

³² *ibid.*

Decade after decade Positivist and Natural Lawyers face one another in the final of the World Cup ... Victory goes now to one side, now to the other, but the enthusiasm of players and spectators alike ensure that the losing side will take its revenge.³³

On the contrary, doctrinal argument has also failed to provide the anticipated sense of security and clarity. There are instances where doctrinal outcomes seem either irrelevant or controversial.³⁴ The area on the use of force is an example as despite the UN Charter prohibition to use inter-state force except in self-defence to an armed attack and with the authorisation from the Security Council, there are instances of use of force where there were no justification for using inter-state force or no authorisation from the Security Council either, for instance invasion of Iraq by the coalition force of USA and UK. The argument of the proponents of such use of force was to promote anticipatory self-defence and collective security.³⁵ As a result, the doctrinal arrangement provided by Article 2(4) and 51 of the UN Charter have become irrelevant or controversial with the arguments offered by the proponents of extra-charter use of force. These proponents, therefore, resort to theory as the final arbiter by employing principles such as justice, human rights, peace and sovereignty.³⁶

This thesis endeavours to close the gap between legal or doctrinal and theoretical discourses appertaining to use of force by moulding of the doctrinal discourses through theoretical dispositions and their dialectical interplay. For example, extra-Charter use of force can be theoretically legitimate to protect national security but such use of force is not doctrinally permissible, for instance general prohibition of use of force in article 2(4) of the UN Charter. In this conflicting situation, customary international law can reconcile the theoretical and doctrinal position and facilitate their interplay. While considering the compatibility of use of force, this thesis acknowledges the multifariousness, namely legal arguments, political objectives, moral and personal values, and human or psychological factors.

In the process of developing arguments and drawing conclusions, this thesis has included international treaties and case law from international courts and tribunals, and published books

³³ A. M. Honoré, 'Groups, Laws and Obedience' in A. W. B Simpson (ed), *Oxford Essays in Jurisprudence*, Second Series (Oxford, Clarendon Press 1973) 1.

³⁴ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 1.

³⁵ William H. Taft and Todd F. Buckwald, 'Preemption, Iraq, and International Law' (2003) 93 *American Journal of International Law* 557.

³⁶ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 2.

and academic journals obtained by hard copy through local and inter-library loan and online via various legal databases such as Westlaw, LexisLibrary, HeinOnline, BAILII and online databases of other common law jurisdictions. In addition, the official websites of United Nations, International Committee of Red Cross (ICRC) and International Law Commission have also been referred throughout the thesis.

1.6 Case law

There is an emphasis on case analysis throughout this study. This approach was chosen because of the emergence of, although very few, case laws in this area. The scarcity of case laws in this area due to the lack of jurisdiction of the International Court of Justice (ICJ) to decide questions of Charter interpretation. This is because, ICJ has jurisdiction only in cases that both sides have agreed to refer to it unless a state has accepted its compulsory jurisdiction under Article 36(2) of the ICJ Statute.³⁷ Because most states have not accepted the compulsory jurisdiction of the ICJ, few cases regarding the Charter's Article 2(4) prohibition of use of force come before it.³⁸

However, these cases, although very few in numbers, provide valuable source materials in determining the meaning and significances of the Charter provisions. For example, the use of force necessary to trigger an 'armed attack' under Article 51 of the UN Charter and the definition of non-international armed conflict. Furthermore, the findings of these cases have been utilised to conduct a comparative analysis between legitimate use of force and its compatibility with Islamic international law.

1.7 Contribution to existing literature

A plethora of academic commentary and much heated debate arose during the aftermath of 9/11 terrorist attack. Some reformers claimed the legitimacy of extra-Charter use of force to deal with the current challenges of terrorism and weapons of mass destruction. Others expressed the same view taken by this thesis that the restrictions imposed, by the general prohibition of use of force except in self-defence on the occurrence of an 'armed attack', is not fit and proper any more in the modern world to deal with extensive security challenges. As L. Vincent and P. Wilson rightly claimed that:

³⁷ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 15.

³⁸ Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 65.

The current challenges and the recurring state practices turn out to be no more than a rationalisation of the existing order without any interest in its transformation.³⁹

The legitimacy-deficit of international law lies in the fact that it fails to take into account the legitimate interest of groups consisting of substantial number of world population, such as Islamic international law, seriously enough and often operates so as to threaten their welfare.⁴⁰ One has to emphasise here that the principles of Islamic international law on use of force are not an integral part of Public international law, but such principles should be considered as an integral part of the latter. This is because, Muslim majority states are parties to the Charter of the United Nations Organization.⁴¹

Respect for rule of law and justice is the basic principle of Islamic international law. It gives precedence to the rule of law over aggression, reprisals and retaliation, and exercise of excessive political power and self-interest gratification. However, this basic principle of Islamic international law and its effectiveness to promote higher degree of legitimacy on the use of force has not been given its international phase. Therefore, it is essential to incorporate Islamic international law in the process of internationalisation of Public international law on the use of force.

Internationalisation is necessary at every level whether national, regional or international by reaching to others to understand, share and assist in the development of effective international law on the use of force. In the process of internationalisation, this thesis tried to interpret and develop an international legal framework which is based on wider political, historical and systematic context. This thesis tried to show that careful theoretical analysis and systematic thinking from international perspective with respect to a crucial rule of Public international law and Islamic international law, which is the use of force, if well done, are not only compatible with each other but ultimately interdependent. This research methodology is necessary for the proper identification of the challenges and development of the effectiveness of international law on the use of force, and this thesis is aimed at making a valuable contribution to this end. Therefore, the contribution of this research includes the legitimate use of force in Islamic international law, such as jihad and rebellion, the legitimate use of force in Public international

³⁹ R. Vincent and P. Wilson, 'Beyond Non-Intervention' in I. Forbes and M. Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention* (London: Macmillan 1993) 124.

⁴⁰ Allen Buchanan, 'Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 86.

⁴¹ Farhad Malekian, 'The Canon of Love against the Use of Force in Islamic and Public International Law. Part ii: The Anatomy of Love against Violations' (2015) 15 *International Criminal Law Review* 867.

law where extra-Charter use of force is not normatively legitimate but theoretically justifiable and supported by customary international law, and the interdependency of these two systems in order to overcome the legitimacy deficits and promote peace and justice at the same time.

1.8 Ambit of the study

The author concludes that the comparative informed doctrinal method adopted in this thesis provided the most effective means of fulfilling the primary purpose of the study, which is to find out the legitimacy deficits of Public international law and Islamic international law. This thesis does not delve into or addresses the question ‘what constitutes a threat of force according to article 2(4) of the UN Charter’ and ‘on what grounds recourse to a threat of force is justified’. For the purpose of this research, this thesis treats Article 2(4) of the UN Charter as being limited to military force and imposition of economic or political sanctions is beyond its scope. In addition, this research has only focused on ‘use of force’, and reference to force does not include force used to cause threat of force except in very specific context, namely when threat of force is claimed to be capable of triggering ‘pre-emptive or anticipatory use of force in self-defence’.

Chapter 2

The Legal Status of International law on the use of force

This chapter examines the legal status of international law on the use of force as provided by the United Nations Charter. This examination includes exploring the challenges posed on the Charter framework in regulating use of force in modern world. The current challenges posed on the Charter framework include the expansion of the limitation of use of force provided by the Charter and its ineffectiveness to regulate use of force in the current world affairs. As a result, the key question to answer is ‘whether the UN Charter can effectively prevent and control armed violence in contemporary world?’ It is very important to answer this question because, the Charter framework is the peremptory norm of international law on the use of force and the legitimacy as well as effectiveness of this framework is of vital importance in order to promote peace and justice. Furthermore, answering this question would advance the thesis in answering the first part of the first research question, which is ‘to what extent use of force in Public international law is legitimate’?¹

To answer this question, examination of the Charter provisions in relation to use of force is the first port of call as these are the primary norms of international law on the use of force. While it is relevant to scrutinise Articles 2(4) and 51 of the UN Charter in this regard, it is also necessary to scrutinise the scholarly positions for justifying use of force on other grounds, namely to protect national security of states and to safeguard or restore other people’s fundamental rights or action the necessity of international order and stability. These categories include humanitarian intervention, intervention by invitation, and use of force in response to an ‘armed attack’ by non-state actors. It is also necessary to analyse the nature and extent of use of force in customary international law and its potential in the adaptation of the UN Charter from the perspective of overcoming the legitimacy deficits of the use of force. For example, use of force which is not permitted in the Charter framework but in the customary international law. This analysis would advance the thesis to discover the extent of legitimate use of force from the viewpoints of customs and the UN Charter.

¹ See the ‘abstract’ in chapter 1.

2.1 International law on the use of force in the United Nations Charter

The fundamental principles of international law on the use of force are provided in Articles 2(4) and 51 of the UN Charter. Whereas Article 2(4) provides for a general prohibition of use of inter-state force, Article 51 permits use of defensive force in response to an ‘armed attack’. However, the right of self-defence is not absolute as this right is subject to satisfaction of other conditions, namely necessity, proportionality, and last resort.² Furthermore, there are disagreements as to situations which are likely to trigger the occurrence of an ‘armed attack’ and hence legitimate defensive use of force.³ In these circumstances, the prohibition of force and the occurrence of an armed attack are subject to crucial controversies among scholars and state authorities.

2.1.1 The General Prohibition of use of force under Article 2(4) of the UN Charter

Article 2(4) of the Charter professes that -

All Members shall refrain in the international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.⁴

By prohibiting the use (or threat) of force in international relations, Article 2(4) transcends war and covers equally other uses of inter-state force (which may be regarded as ‘short of war’).⁵ The expression ‘force’ in Article 2(4) is not preceded by the adjective ‘armed’ and this means that it extends to non-armed violence.⁶ Two specific objectives, against which the use (or threat) of inter-State force is forbidden in Article 2(4), are the ‘territorial integrity’ and the ‘political

² Hans Blix, ‘Third Hersch Lauterpacht Memorial Lecture’ (24 November 2004)

<http://lcil.law.cam.ac.uk/lectures/hersch_lectures_2004.php> accessed 2 September 2017.

³ Kimberley N. Trapp, ‘Can Non-State Actors Mount an Armed Attack?’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 693-694; see also Tom Ruys, ‘Armed Attack’ and Article 51 of the UN Charter: *Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 377; Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 4; Yearbook of the International Law Commission, 2001, Vol II (2), 84, para 21 <http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p1.pdf> accessed 11 August 2017; Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff Publishers 1993) 90.

⁴ Charter of the United Nations, 1945, 9 Int. Leg., 332, Article 2(4), <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

⁵ Yoram Dinstein, *War, Aggression and Self-Defence* (fifth edn, Cambridge University Press 2011) 88.

⁶ Brigitte Reschke, ‘Use of Force’, *Prohibition of*, *A Concise Encyclopedia of the United Nations* (2nd edn, Helmut Volger, Brill: Martinus Nijhoff 2009) 842, 843.

independence' of States.⁷ These dual considerations form the centre of gravity because they create 'a residual "catch-all" provision' as the conjunctive phrase 'or in any other manner inconsistent with the Purposes of the United Nations' was added to underscore the all-embracing prohibition of force inconsistent with the purposes of the United Nations.⁸

The provisions of this article have been confirmed as the reflection of customary international law in *Nicaragua case*.⁹ As Judge Sette-Camara concluded that -

I firmly believe that the non-use of force as well as non-intervention ... are not only cardinal principles of customary international law but could in addition be recognised as peremptory rules of customary international law which impose obligations on all states.¹⁰

In addition, the prohibition of use of force has also been buttressed by International Law Commission.¹¹ However, the sweeping exclusions of recourse to inter-state force, under Article 2(4), is subject to exceptions. There are only two enduring settings, in which the Charter permits the use of inter-State force, are - (i) self-defence (Article 51); and (ii) when collective security measures are taken by fiat of the Security Council (Article 39).

2.1.2 Use of force in self-defence under Article 51 of the UN Charter

The obvious exception to the prohibition of use of force is Article 51 of the UN Charter which has given legality to resort to force on the ground of 'self-defence'. Article 51 states that "nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs."¹² The precondition to use force under the banner of self-defence is the occurrence of an 'armed attack'. This term has been used by scholars to cover a variety of attacks, but the International Court of Justice (ICJ) has clarified that not all uses of force amount to an 'armed attack'. The court added that:

The armed action has to be sufficiently sustained, using military means at a certain level of intensity. This would rule out border incidents or minor skirmishes. The attack must

⁷ Yoram Dinstein, *War, Aggression and Self-Defence* (fifth edn, Cambridge University Press 2011) 90.

⁸ Manfred Lachs, 'The Development and General Trends of International Law in Our Time' (1980) 9 *RCADI* 162 cited in Yoram Dinstein, *War, Aggression and Self-Defence* (fifth edn, Cambridge University Press 2011) 88.

⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) (*Nicaragua v. United States*) [1986] ICJ Rep.14, 99.

¹⁰ *ibid*, 199 – 200, para 90.

¹¹ Art 50, the Articles on the Responsibility of States, Report of the International Law Commission (ILC) on the work of its 53rd session, UN GAOR, 56th Sess, Supp No 10, A/56/10, ch IV.E.1.

¹² Charter of the United Nations, 1945, 9 Int. Leg., 332, Article 51, <<http://www.un.org/en/documents/charter/>> accessed 14 August 2017.

be specifically aimed at the victim state. Firing a missile at undefined targets would not meet that criterion.¹³

Therefore, the occurrence of an ‘armed attack’ is required to invoke the right of self-defence under Article 51. However, such invocation also requires satisfying the test that the action in self-defence was ‘necessary and proportionate’ to repel the ‘armed attack’. The ICJ in the *Oil Platform Case* has decided that -

Self-defence is only allowed in response to an armed attack, as specified in Article 51 of the UN Charter and customary international law, and that it has to be necessary and proportionate, and that the envisaged target must be a legitimate military target, open to attack in the exercise of self-defence.¹⁴

It is ‘necessary’ to recourse to defensive use of force when all other alternatives had been considered and proven insufficient.¹⁵ Therefore, defensive use of force is necessary only when it is used as a ‘last resort’.

The extent to which an ‘armed attack’ can be defended is determined by the necessity to repel the attack, but not to retaliate or in any way take revenge against the aggressor. In other words, defensive use of force must be used to stop or end the armed attack rather than to use excessive force to destroy the military capacity of the aggressor in initiating another attack. Scholars have claimed that the force used in accordance with the right of self-defence should be ‘proportionate’ to the actual armed attack.¹⁶ But this claim undermines the ‘necessity’ requirement of self-defence’ which allows the self-defence to be to that extent as necessary to repel the armed attack. Therefore, the word ‘proportionate’ must be interpreted considering what is ‘necessarily proportionate’ to repel the armed attack rather than what is proportionate to the actual armed attack. In the words of Marc Weller:

¹³ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States)* [1986] ICJ Rep., 14, 103.

¹⁴ *Oil Platform (Iran v. US)* Judgment, ICJ Rep 2003, para 51.

¹⁵ Raphael Steenberghe, ‘The Law of Self-Defence and the New Argumentative Landscape on the Expansionists’ Side’ (2016) 29 *Leiden Journal of International Law* 43, 61.

¹⁶ Oscar Schachter, *International Law in Theory and Practice* (Leiden: Martinus Nijhoff 1991) 152 -55; see also Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 148-53; Yoram Dinstein, *War, Aggression and Self Defence* (fifth edn, Cambridge University Press 2011) 208-10.

It would not be permissible to continue the conflict in order to diminish and degrade the military capacity of the attacking state, for instance in order to alter the military balance in a way that would make a further, future attack less likely.¹⁷

Therefore, any defensive use of force must correspond to the use of force that is ‘necessary and proportionate’ to end the armed attack, but not to correspond the extent of use of force by the aggressor. For example, if the aggressor has used three air strikes then using the same amount of force in self-defence might be proportionate but might not be necessary when only one air strike by the victim state would end the attack from reoccurrence. In this scenario, the criterion for determining the right proportion of defensive use of force is based on military necessity rather than proportionality *per se*.

2.1.2.1 Use of force by non-state actors

There are controversies on the issue “whether use of force by non-state actors can constitute an ‘armed attack’ under Article 51 of the UN Charter”. Traditionally, this question would have been answered in the ‘negative’ because up until 9/11 it was assumed that only states could mount an ‘armed attack’. However, the UN Security Council determined that the events of 11 September 2001 amounted to an ‘armed attack’ – a use of force so sustained that it triggered a right of self-defence on the part of the US.¹⁸ This is despite the International Court of Justice has repeatedly pronounced otherwise.¹⁹ Furthermore, Judge Higgins, Kooijmans, and Buergenthal (in the *Wall* advisory opinion) and Judge Kooijmans and Simma (in the *Armed activities case*) have been less reluctant than the Court and have all expressed their preference for recognising the possibility of ‘non-state actors armed attacks’ within the meaning of Article 51.²⁰

The 9/11 attack being an exceptional circumstance of heinous terrorist attack so far in the history of 21st Century, the Security Council focused on counterterrorist measures and

¹⁷ Marc Weller, ‘Introduction: International Law and the Problem of War’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 22.

¹⁸ SC Resolutions 1368 (2001) and 1373 (2001) <<http://www.un.org/Docs/scres/2001/sc2001.htm>> accessed 11 August 2017.

¹⁹ *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, General List No 131, para 138; see also *DRC v. Uganda*, 19 Dec 2005, General List No 116, para 146.

²⁰ *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion, Separate Opinion of Judge Higgins, para 33; Separate Opinion of Judge Kooijmans, para 35; Declaration of Judge Buergenthal, para 6; see also *Armed Activities on the Territory of Congo (DRC v Uganda)*, Judgment, Separate Opinion of Judge Kooijmans, paras 28 ff; Separate Opinion of Judge Simma, para 11.

acknowledged the right of self-defence in such exceptional circumstances.²¹ But this is not the general stance of international law on the use of force. Few scholars say that this was a mere positive response to the pressures for momentous and situational changes but never demonstrated the actual legal position.²² There is no conceptual or normative link between ‘armed attack by non-state actors’ and ‘automatic trigger of self-defence’.²³

However, Article 51 of the UN Charter does not specify the source of an ‘armed attack’ to trigger the right of self-defence. Hence, ‘armed attack’ by non-state actors could trigger such right of self-defence in certain circumstances. For example, where the nature of the attack is so grave that it can amount to an ‘armed attack’. The International Court of Justice (ICJ) held that ‘armed attack’ for the purpose of self-defence included:

Not merely action by regular forces across an international border, but also ‘the sending by or on behalf of a state of armed band, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to’ (inter alia) an actual armed attack conducted by irregular forces, ‘or its substantial involvement therein’.²⁴

Therefore, states are responsible for an ‘armed attack’ launched by non-state actors who are operating within their territory and attributable to those states. However, such attribution of responsibility is not automatic and clear proof of the states’ unwillingness or inability to control such armed attack is necessary. The nature and extent of the ‘attribution of responsibility’ has been discussed below.

2.1.2.1.1 State Responsibility for use of force by non-state actors

If non-state actors can mount an armed attack, even in exceptional grievousness of the attack, triggering the exercise of Article 51 self-defence²⁵, the challenge against invoking Article 51

²¹ Resolutions 1368 (Sept. 12, 2001) and 1373 (Sept. 28, 2001), respectively, recognise the right to take individual and collective measures in the aftermath of the attack by al-Qaeda on the United States.

²² Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* (Chatham House: Royal Institute of International Affairs 2005) 66; see also Christine Gray, *International Law and the Use of Force* (OUP 2008) 164; Eric Myjer and Nigel White, ‘The Twin Towers attack: An Unlimited Right to Self-Defence’ (2002) 7 *Journal of Conflict and Security Law* 5.

²³ Alexander Orakhelashvili, ‘Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 173.

²⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* Merits, ICJ Rep 1986, para 195.

²⁵ Nicholas Tsagourias, ‘Non-State Actors and the Use of Force’ in Jean d’Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Oxford: Routledge 2011) 326-41.

self-defence is that those non-state actors would most likely be based on foreign soil and this would mean that force would be used not only against emanations of the terrorist movement but also against the state on whose territory it is based.²⁶ Use of force in this circumstance would be a violation of Article 2(4) which prohibits use of extraterritorial force against the territorial integrity or political independence of any state. However, some scholars argue that states that harbour terrorists or violate the rights of their own people are no longer entitled to the sovereign prerogatives that underpin Article 2(4) of the UN Charter.²⁷

On the contrary, the General Assembly (GA) has made declaration on the inadmissibility of intervention in the domestic affairs of states and the protection of their independence and sovereignty.²⁸ In 2005 the World Summit Outcome Document reiterated the GA's determination to establish a just and lasting international peace and to refrain from the threat or use of force in international relations in conformity with the purposes and principles of the UN.²⁹ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States also provides for the duty to refrain from encouraging or organising irregular forces or terrorist acts.³⁰

This duty to refrain from interference in the domestic affairs of other states is a very critical problem in international law on the use of force because attacking the non-state actors in the territory of a state would amount to attacking that state and this is prohibited in Article 2(4). After all, many conflicts are being fought by irregular troops, giving rise to the question 'whether the actions of those groups can be attributed to the state concerned'?

In certain circumstances, extraterritorial use of force by non-state actors could amount to an 'armed attack' by one state against another and hence triggering self-defence under Article 51

²⁶ Marc Weller, 'Introduction: International Law and the Problem of War' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 24.

²⁷ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) 220; see also Juttee Brunee and Stephen Toope, 'The use of force: International law after Iraq' (2004) 53 ICLQ 785; Attorney General Lord Goldsmith, 'Statement to the House of Lords' (*Hansard*, 21 April 2004, column 370) <<https://publications.parliament.uk/pa/ld200304/ldhansrd/vo040421/text/40421-07.htm>> accessed 2 September 2017.

²⁸ A/RES/2131 (XX) (21 Dec 1965) <<http://www.un-documents.net/a20r2131.htm>> accessed 14 August 2017.

²⁹ 'World Summit Outcome Document' A/RES/60/1 (2005) para 5 <http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_60_1.pdf> accessed 15 August 2017.

³⁰ General Assembly, 'Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations' A/RES/2625 (XXV) (24 Oct 1970) Principle 1 <<http://www.un-documents.net/a25r2625.htm>> accessed 15 August 2017.

of the UN Charter.³¹ For example, when a state ‘tolerates or supports’ extraterritorial use of force by non-state actors operating within its territory, or in certain circumstances, in the territory of another state. The ICJ also considered the ‘toleration’ by a state of non-state actors who make use of that state’s territory for cross-border armed action as a violation of the prohibition of use of force.³²

The main legal controversy on the responsibility of states for the violence of non-state actors, in recent years, has crystallised around precisely the issue of ‘standard of attribution’, with ICJ in the *Nicaragua case* applying a different standard (‘effective control’ by the state³³) from the International Criminal Tribunal for the former Yugoslavia (ICTY) (endorsing the lower standard of ‘overall control’³⁴), and being able to distinguish this in terms of the situations coming before both tribunals.³⁵

The question is, which test would be applied to determine attribution of responsibility to the host state from which terrorist attacks have been carried out? Whereas ‘Effective Control’ test has been criticised for being too restrictive,³⁶ ‘Overall control’ test has been identified as too wide as it does not demonstrate a strong link between the ‘control’ of the non-state actors and ‘state responsibility’ for attack by non-state actors susceptible for attribution.³⁷

However, a strict requirement to demonstrate attribution or imputability would, after all, ‘severely limit the ability of states to take defensive action in a situation which is so urgent that it does not logically allow a state victim of an armed attack to wait to raise questions of responsibility’.³⁸ On the other hand, a wide or flexible requirement would be prone to abuse by the victim states.³⁹ In addition to this dilemma, it is very difficult to obtain evidence to prove

³¹ Article 8, International Law Commission, ‘Responsibility of States for Internationally Wrongful Acts’ (12 December 2001) <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 24 December 2017.

³² *Armed Activities on the Territory of the Congo (DRC v. Uganda)* Judgment, ICJ Rep 2005, 168, para 300.

³³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* Merits, ICJ Rep 1986, 14, para 115.

³⁴ *Prosecutor v. Dusko Tadic*, Judgment in Appeal, ICTY, Case IT-94-1-A (15 July 1999) para 162.

³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* ICJ Rep 2007, 43; see also James Crawford, *State Responsibility* (Cambridge University Press 2013) 146.

³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* Merits, Dissenting Opinion of Judge Schwebel, ICJ Rep 1986, para 155.

³⁷ James Crawford, *State Responsibility* (Cambridge University Press 2013) 152.

³⁸ Van Steenberghe, ‘Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice’, 195-6 cited in Lindsay Moir, ‘Action against Host States of Terrorist Groups’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 735.

³⁹ Elizabeth Wilmschurst, *Principles of International Law on the Use of Force by States in Self-Defence* (Chatham House: Royal Institute of International Affairs 2005) 8; see also Foreign Affairs Select Committee (2004,

the level of control, whether effective or overall, exercised by the state susceptible for attribution of responsibility due to the hidden nature of the groups and secretive contact of state officials.⁴⁰ In the words of Antonio Cassese:

How could one prove that a particular terrorist group has acted upon instructions or directions or under the specific control of a state in such manner as to imply that the state has ... directed the perpetration of individual terrorist actions? The hidden nature of those groups, their being divided up into small and closely-knit units, the secretive contacts of officials of some specific states with terrorists' groups, all this would make it virtually impossible.⁴¹

In these circumstances, the effective or overall control test does not have the potential to regulate use of force decision by states for armed attack by non-state actors. Even if it is possible to determine, whether by application of these tests or otherwise, that the armed attack carried out by non-state actors is not attributable to the state concerned, could the victim state invoke right of self-defence against those non-state actors without any consent from the host state?

The current state practices of militarily willing and able states suggest that defensive force can be used in the host state without obtaining its consent if it is 'unwilling or unable' to take effective counter measures against non-state actors 'to the satisfaction of the victim state'.⁴² These state practices indicate a strong proposition for the support of use of force in self-defence for non-state actors' 'un-attributable' attack on the victim state. As Kimberley N. Trapp aptly worded:

Although the failure to condemn such invocation of self-defence should not be viewed as indicating broad acceptance or support, given the abundant state practice of expressly condemning notified uses of defensive force in letters to the Security Council, the

para.429) <<https://publications.parliament.uk/pa/cm200304/cmselect/cmfaff/441/441.pdf>> accessed 2 September 2017.

⁴⁰ Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* (Chatham House: Royal Institute of International Affairs 2005) 9; see also Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 37.

⁴¹ Antonio Cassese, 'The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649, 654.

⁴² Albrecht Randelzhofer, 'Article 51' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (OUP 1994) 661, 673; see also Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 38; Kimberley N. Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 693-694; see also Kimberley N. Trapp, 'Back to Basics: Necessity, Proportionality, and the Right of Self-Defence against Non-State Terrorists Actors' (2007) 56 *International and Comparative Law Quarterly* 141, 147-155.

-muted reaction (most particularly of the League of Arab States and the NAM) to the US operation in Afghanistan is significant and certainly signals the beginning of the emerging consensus that uses of force specifically targeting non-state terrorist actors, in response to armed attack they launch from foreign territory, is a legitimate exercise of the right of self-defence.⁴³

If this is the case, then neither the control tests nor any other measures are likely to have any implication on the attribution of responsibility on states for use of force by non-state actors. This is because the state practices, stated above, indicate that irrespective of the nature of control of the host state over the non-state actors and their activities, an ‘unwillingness or inability’ by the host state (as perceived by the victim state) would suffice to hold it responsible for the attack carried out by non-state actors from its territory. Such practices include the 2001 Operation Enduring Freedom in Afghanistan, the 2006 Israeli/Hezbollah conflict in Lebanese territory and Israel’s response to the terrorist attack in a Haifa café by Islamic Jihad in 2003 in Syrian territory.⁴⁴

What role do the ‘control tests’ play where these are not operative in using defensive force against non-state actors in foreign territory? Attribution of an ‘armed attack’ to a state is, therefore, more relevant to the question of ‘who may be targeted’ by the defensive response than to the question of whether the victim state has been subjected to an armed attack *per se*.⁴⁵ In these circumstances, the decision to trigger use of defensive force under Article 51 is being made by a party to the conflict, such as the victim state, who is likely to be biased towards upholding its self-interest rather than complying with the legal requirement of the control tests. This decision-making process by the states is unlikely to achieve the required degree of legitimacy due to lack of accountability and deference to scrutiny by an independent international body or organisation.⁴⁶

On the one hand, international law on the use of force requires to satisfy the principle of ‘attribution of responsibility’ for an ‘armed attack’ to trigger defensive use of force under Article 51. On the other hand, state practices of the willing and able claim legitimacy of such

⁴³ Kimberley N. Trapp, ‘Can Non-State Actors Mount an Armed Attack?’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 693-694.

⁴⁴ *Ibid*, 690-692.

⁴⁵ Elizabeth Wilmschurst, *Principles of International Law on the Use of Force by States in Self-Defence* (Chatham House: Royal Institute of International Affairs 2005) 59; see also Lindsay Moir, ‘Action against Host States of Terrorist Groups’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 734.

⁴⁶ See section 6.2.2 of Chapter 6.

use of force based on unwillingness or inability of the host state to take countermeasures against the non-state actors to the satisfaction of the former. In these circumstances, the willing and able states are unwilling to obtain consent of the host state before using defensive force or to satisfy the legal requirement for attribution of responsibility.⁴⁷ Furthermore, the existence of uncertainty in the legal requirement for attribution of responsibility, as stated above, has put the willing and able states in a stronger position to claim legitimacy of defensive use of force against non-state actors without satisfying the legal requirements for attribution of responsibility on the host state. However, this course of action, although accommodates in recent state practice, conflicts with Article 51 of the UN Charter and the principles of sovereignty and state responsibility which permit use of force in self-defence only if non-state actors' attack can be attributed to the host state or it consents.⁴⁸

In this complex situation, the ICJ jurisprudence has offered a solution by adopting the position that attribution is only 'a necessary condition' for the applicability of Article 51 of the UN Charter if a use of defensive force is targeted against the state from whose territory non-state actors operate.⁴⁹ This is because it is not always necessary to use such defensive force against the host state but only against the non-state actors, and in such situation it is also not necessary to satisfy the requirement of attribution of responsibility or obtain consent of the host state.⁵⁰ As a result, the ICJ jurisprudence has facilitated use of defensive force against non-state actors rather than addressing the lack of effective legal principles for attribution of responsibility and articulating ideal legal requirement for satisfying attribution of responsibility. However, this position is likely to encourage the willing and able states to use extraterritorial force under the banner of self-defence without fulfilling the hefty burden of satisfying the required degree of legitimacy and in violation of the general prohibition of use of force provided in Article 2(4)

⁴⁷ See section 2.1.4.3 'Intervention by Invitation' of this Chapter.

⁴⁸ Antonio Tanca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff Publishers 1993) 90; see also Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 377; Helmut Phillip Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) 92.

⁴⁹ ICJ's decisions on *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) (*Nicaragua v. United States*) [1986] ICJ Rep 14, para 190 - 195; *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, General List No 131, para 33 and Separate Opinion of Judge Kooijmans, para 35; *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, ICJ Rep 2005, 168; see also Kimberley N. Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 685 – 689.

⁵⁰ Vaughan Lowe, *International Law* (Clarendon Law 2007) 22; see also Malcolm Shaw, *International Law* (6th edn, Cambridge University Press 2008) 26; Kimberley N. Trapp, 'Can Non-State Actors Mount an Armed Attack?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 689.

of the UN Charter. Examples of such use of extraterritorial force include the US and Russia's air strikes in Syria against ISIS⁵¹ and the Saudi Arabia air strikes in Yemen against the Houthi rebels.⁵²

2.1.3 Use of force in the Gap between Articles 2(4) and 51 of the UN Charter

International law permits use of force in 'law enforcement activities' if it is unavoidable, reasonable and necessary but such action may not always be legitimate especially when threat of force has been used rather than mere law enforcement.⁵³ In the *Corfu Channel case*, the UK justified its minesweeping action as a lawful measure responding to unlawful behaviour by Albania and, more specifically, as limited intervention in order to secure possession of evidence to be submitted to an international tribunal.⁵⁴ The legal argument anticipated by UK was that the Article 2(4) prohibition is subject to an exception for certain 'non-aggressive' use of force.⁵⁵

In order to satisfy the non-aggressive nature of use of force the states have to satisfy that the 'threshold' for 'armed attack' has not reached and such use of force is necessary for law enforcement purposes. Satisfaction of these requirements facilitate use of force 'short of armed attack' in the gap between Articles 2(4) and 51. Force can be used in this gap if it is a necessary action which is not to the gravity of an armed attack or which is a 'reaction' or 'response' to a non-armed attack. Use of force by way of retaliation or reprisal is generally unlawful⁵⁶ but such unlawful acts can become lawful if they constitute a reaction to the delinquency by another state.⁵⁷ However, such actions would not be legal if the only purpose was to take revenge.⁵⁸ For example, sanctions and countermeasures against a delinquent state which has used force but not to the extent of an 'armed attack' is lawful as far as such sanctions and countermeasures are necessary to enforce the law but not to take revenge against the delinquent state.

⁵¹ The Daily mail, 'US Airstrikes Destroy ISIS Targets in Syria' (4 October 2014) <<http://www.dailymail.co.uk/video/news/video-1122157/New-video-U-S-launches-airstrikes-against-ISIL-Syria.html>> accessed 21 April 2017.

⁵² BBC News Desk, 'Yemen Crisis: Who Fights Whom?' (28 March 2017) <<http://www.bbc.co.uk/news/world-middle-east-29319423>> accessed 8 August 2017.

⁵³ *Guyana v. Suriname*, Award of the Arbitral Tribunal, 17 Sept 2007, para 445.

⁵⁴ Christine Gray, 'A Policy of Force' in Karine Bannelier, Theodore Christakis, and Sarah Heathcote (eds), *The ICJ and the Evolution of International Law. The Enduring Impact of the Corfu Channel Case* (Abingdon: Routledge 2012) 234-5.

⁵⁵ Michael Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)' (1984) 78 *American Journal of International Law* 642.

⁵⁶ GA Res 2625 (XXV) of 24 Oct 1970 <<http://www.un-documents.net/a25r2625.htm>> accessed 20 August 2017.

⁵⁷ Antonio Cassese, *International Law* (2nd edn, OUP 2005) 299.

⁵⁸ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1, peace (Longman: London 1992) 395; see also Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* (OUP 2010) 70; Derek Bowett, 'Reprisals Involving Recourse to Armed Force' (1972) 66 *AJIL* 1.

The use of force, in this gap, is permissible although Article 2(4) prohibits threats or any sort of inter-state use of force against the territorial integrity and political independence of any state.⁵⁹ This is because, without this it would not be possible to carry out law enforcement activities, stated above, where necessary. For example, where the victim state has not been subject to an ‘armed attack’ but mere interference of its sovereignty, such as border incidents or minor skirmishes.⁶⁰ Therefore, non-aggressive limited use of force could be used in extreme circumstances where it is necessary. In the *Eichmann case*,⁶¹ for example, Israel’s action was considered as a violation of Argentina’s sovereignty, not as a breach of *jus contra bellum* as such. In the *Saiga case*,⁶² the International Tribunal for the Law of the Sea qualified an excessive use of force as a violation of the law of the sea, not of Article 2(4) of the Charter. The same distinction was debated in other precedents, like the *Fisheries case (Spain v. Canada)*⁶³ or the *Guyana/Suriname case*.⁶⁴

As a result, ‘necessity’ seems to be a very powerful tool to legitimate use of force in the gap between Articles 2(4) and 51 or which does not fall within the Charter system. Article 25 of the ‘International Law Commission (ILC) Articles on State Responsibility’ mentions ‘state of necessity’ as a general circumstance precluding wrongfulness.⁶⁵ However, necessity alone cannot legitimate use of force where there is an express legal requirement in place, such as the occurrence of an ‘armed attack’ in article 51 of the UN Charter.⁶⁶ Therefore, the state of necessity can only be invoked on an exceptional basis.⁶⁷ For instance, states and Regional Organisations are very much inclined to rely on self-defence according to Article 51 rather than ‘necessity’ alone. Examples include the Israeli Operation at Entebbe in 1976,⁶⁸ the unsuccessful raid to rescue hostages in Iran in 1980,⁶⁹ or the US military action against Sudan

⁵⁹ See section 2.1.1 of this chapter (above).

⁶⁰ See section 2.1.2 of this chapter (above).

⁶¹ SC Res 138 (1960) of 23 June 1960, para 1

<[http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/138\(1960\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/138(1960))> accessed 10 August 2017.

⁶² *The M/V Saiga (Saint Vincent and the Grenadines v. Guinea)* Judgment of 4 Dec 1997, ITLOS, paras 155-6.

⁶³ ICJ Rep 1998, 466, para 84.

⁶⁴ ‘Arbitral Tribunal Constituted Pursuant to Article 287, and in Accordance with Annex VII of the UN Convention on the Law of the Sea (Guyana and Suriname)’ (2007) 139 ILR 566, para 445.

⁶⁵ Annexed to GA Res 56/83 of 13 Dec 2001

<http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 10 August 2017.

⁶⁶ Yearbook of the International Law Commission, 2001, Vol II (2), 84, para 21

<http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p1.pdf> accessed 11 August 2017.

⁶⁷ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep 1997, 40, para 51.

⁶⁸ S/PV. 1939 (9 July 1976) para 115 <http://dag.un.org/bitstream/handle/11176/70153/S_PV.1939-EN.pdf?sequence=17&isAllowed=y> accessed 11 August 2017.

⁶⁹ Letter dated 25 April 1980 from the Permanent Representative of the USA to the UN addressed to the President of the Security Council, S/13908/780 (25 April 1980) <<http://repository.un.org/handle/11176/67581>> accessed 12 August 2017.

and Afghanistan in 1998.⁷⁰ The only example of an explicit and clear invocation of the state of ‘necessity’ can be found in the context of the war against Yugoslavia in 1999 where Belgium pleaded state of necessity if it had failed to plead humanitarian intervention.⁷¹ However, it is a very dangerous move by states or regional organisations to find legitimacy of the use of force solely on the basis of ‘necessity’ because such move is not only very weak but also demonstrates violation of the prohibition of use of force.

2.1.4 Use of force by the Security Council under Chapter VII of the UN Charter

The UN Charter has established a system of collective security where the Security Council has been entrusted with the responsibility to invoke collective measures in the occurrence of threat to peace, breach of peace and act of aggression.⁷² There is a wide range of measures that the Security Council could adopt to suit its needs ranging from non-forcible measures to forcible measures including using military force.⁷³ This section illuminates on the use of force in circumstances where the Security Council is responsible to do so according to the provisions of the UN Charter, such as maintenance of international peace and security.⁷⁴

2.1.4.1 Humanitarian Intervention

The precondition of state sovereignty is its responsibility to protect the people within it.⁷⁵ The 2001 report of the International Commission on Intervention and State Sovereignty (ICISS) argued that the essential nature of ‘sovereignty’ had changed from ‘state privileges and immunities’ to the ‘responsibility to protect’ people from atrocity crimes.⁷⁶ As the primary responsibility to protect the people is on the state and if it fails or loses the capacity to do so then the secondary responsibility of the Security Council comes into effect. The goal is to

⁷⁰ Letter dated 20 August 1998 from the Permanent Representative of the USA to the UN addressed to the President of the Security Council, S/1998/780 (20 Aug 1998) <<http://repository.un.org/handle/11176/46977>> accessed 12 August 2017.

⁷¹ Attila Tanzi, ‘Necessity, State of’ in Rudiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*, Vol VII (OUP 2012) 586, para 13.

⁷² UN Charter, Article 39 <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

⁷³ Thomas Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 88, 95.

⁷⁴ UN Charter, Article 39 <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

⁷⁵ Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty’ (International Development Research Centre 2001) 13-18 <<https://www.idrc.ca/en/book/responsibility-protect-report-international-commission-intervention-and-state-sovereignty>> accessed 14 August 2017.

⁷⁶ International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: International Development Research Centre for ICISS, 2001) <<http://responsibilitytoprotect.org/ICISS%20Report.pdf>> accessed 14 August 2017; see also Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 4; Thomas Franck, *Fairness in International Law and Institutions* (OUP 2002) 229.

promote human rights, protect civilian victims of humanitarian atrocities, and punish governmental perpetrators of mass crimes.⁷⁷

However, there is no legal basis under the collective security system for ‘humanitarian intervention’ by any state or regional organisation on the ground of responsibility to protect.⁷⁸ Measures on this ground only include peacekeeping, peace enforcement and military action against tyrants and oppressive governments by UN forces or by regional organisation that have been authorised to do so by the Security Council.⁷⁹ Therefore, intervention on this basis can only be carried out either by the Security Council or by its authorisation to that effect. In the World Summit Outcome the General Assembly stated that:

We are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organisations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.⁸⁰

As a result, humanitarian intervention without the authorisation of the Security Council is not legal in the Charter framework. However, such intervention has been seen to have occurred in the history to end humanitarian crises. For example, Kosovo intervention by NATO in 1999, and legitimacy of such intervention has been claimed on the basis of necessity and justice.⁸¹

2.1.4.2 Responsibility to Protect

Despite the legal requirement to obtain authorisation from Security Council before using force to promote and protect human rights and mass atrocities, states and regional organisation have

⁷⁷ Ramesh Thakur, ‘Reconfiguring the UN System of Collective Security’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 194.

⁷⁸ Thomas G. Weiss, ‘Humanitarian Action and Intervention’ in Sebastian Einsiedel, David Malone and Bruno Ugarte (eds), *The UN Security Council in 21st Century* (Lynne Rienner Publishers 2016) 231; see also David Miller, ‘The Responsibility to Protect Human Rights’ in Lukas Meyer (ed), *Legitimacy, Justice and Public International Law* (Cambridge University Press 2009) 238; Ramesh Thakur, ‘It’s Time to Redefine a ‘just war’’ *UNU Update* 27 (September – October 2003) <[update/unu.edu/archive/issue27.htm](http://update.unu.edu/archive/issue27.htm)> accessed 5 September 2017.

⁷⁹ Hans Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (London: Stevens and Sons 1950) 294; see also Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (2nd edn, OUP 2002) 590.

⁸⁰ World Summit Outcome Document (2005), paras 138 – 9 <<http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>> accessed 16 August 2017.

⁸¹ See section 2.5 of this chapter for an analysis on the use of force in customary international law.

used force without such authorisation.⁸² For example, operation to Provide Comfort in 1991, aimed at the protection of Kurds in northern Iraq, and the Shi'ites in the south, 2003 invasion of Iraq, the NATO action in Kosovo in 1999 under the name Operation Allied Force in response to the suppression of the Albanians in Kosovo by the Serbs.⁸³ Unilateral use of force by states or regional organisations has been contested as unlawful due to absence of direct link between the 'international community (through Security Council)' and 'the people to whom protection was to be afforded'.⁸⁴ The Secretary-General's Report on 'Implementing the Responsibility to Protect' also emphasised the 'decisive response by the international community through the UN' as one of the pillars of responsibility to protect.⁸⁵ Article 53 (1) of the UN Charter required regional organisations to obtain authorisation from the SC before taking any enforcement action.⁸⁶

Furthermore, authorisation from the SC itself is not sufficient for any use of force to be legitimate. For example, the UN Secretary General Ban Ki-moon has acknowledged that "Libya in 2011 demonstrated that human protection is a defining purpose of the UN but the execution of our collective responsibilities was not always perfect in Libya and some innocent lives were lost in the name of responsibility to protect."⁸⁷ NATO's operation was permitted to provide humanitarian protection but it ignored its restrictions, spurned hints of a negotiated ceasefire, and broke the arms embargo of the UN by supplying weaponry to the rebels.⁸⁸ Therefore, the Libya experience guided the international community on the notion that 'responsibility to protect' cannot provide the sole basis of legitimacy of use of force on humanitarian ground because it does not provide an independent legal basis.

⁸² Adam Roberts, 'The Use of Force' in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 136; see also Hall Gardner and Oleg Kobtzeff, 'General Introduction: Polemology' in Hall Gardner and Oleg Kobtzeff (eds), *The Ashgate Research Companion to War: Origins and Prevention* (Ashgate 2012) 12.

⁸³ Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention and International Society* (OUP 2002) 265.

⁸⁴ Haidi Willmot and Ralph Mamiya, 'Mandated to Protect: Security Council Practice on the Protection of Civilians', in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 388.

⁸⁵ Implementing the Responsibility to Protect: Report of the Secretary-General, 12 January 2009, A/63/677 and GA Res 63/308 (2009)

<<https://unispal.un.org/DPA/DPR/unispal.nsf/0/EEF9DE1F698AA70D8525755100631D7C>> accessed 16 August 2017.

⁸⁶ UN Charter, Art 53(1) <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

⁸⁷ Bank Ki-moon, 'Address to Stanley Foundation Conference on the Responsibility to Protect', New York, 18 July 2012 (UN News Centre, 18 Jan 2012)

<http://www.un.org/apps/news/infocus/sgspecches/statements_full.asp?statID=1433> accessed 14th March 2016.

⁸⁸ Ramesh Thakur, 'Reconfiguring the UN System of Collective Security' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 196.

In addition to the requirement of independent legal basis, other factors are required to be satisfied before gaining legitimacy namely, ‘good intention’ to protect the civilian and absence of any ‘ulterior intention’ to any other material gain, for instance, regime change.⁸⁹ While ‘responsibility to protect’ presupposes some underlying obligations, in itself it does not create obligations for all states, as a matter of law.⁹⁰ Therefore, inaction by bystander states is justified even at the occurrence of mass atrocities in other states because the principle of non-intervention remains a ‘formidable barrier’ for third states seeking to respond.⁹¹

2.1.4.3 Intervention by Invitation

A state can invite or give consent to another state to intervene in its affairs.⁹² Such invitation or consent includes military intervention as far as the use of force is within the parameters of the state consent.⁹³ However, there are controversies as to who can give a valid consent or invite another state to intervene. The general principle of ‘state consent’ is based on the reflection of the will of the people which is inferred from *de facto* ‘effective control’.⁹⁴ The problem with this principle lies in the fact that sometimes it is very difficult to conclude ‘who is in effective control’? For example, in 1998 the intervention into Sierra Leone by ECOMOG (Economic Community of West African States Monitoring Group) troops based on consent from its democratically elected President Ahmad Tejan Kabbah was claimed to be insufficient by the military officers who ousted Kabbah.⁹⁵

In these circumstances, it is desirable for the intervening state to seek authorisation from the Security Council which would decide on the issue of ‘effective control’.⁹⁶ The Security Council

⁸⁹ The Indian Representative to the Security Council: S/PV.6508 (30 Mar 2011)

<https://digitallibrary.un.org/record/700207/files/S_PV.6508-EN.pdf?version=1> accessed 17 August 2017.

⁹⁰ James Pattinson, ‘Assigning Humanitarian Intervention and the Responsibility to Protect’ in Hoffmann and Nollkaemper, *Responsibility to Protect*, 173 cited by Andre Nollkaemper, ‘Failures to Protect in International Law’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 445.

⁹¹ Maziar Jamnejad and Michael Wood, ‘The Principle of Non-Intervention’ (2009) 22 *Leiden Journal of International Law* 345.

⁹² *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States)* [1986] ICJ Rep 14, 199 – 200, para 246.

⁹³ *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, Judgment, ICJ Rep 2005, 168, para 42; see also Draft Article on Responsibility of States for Internationally Wrongful Acts, ‘Report of the International Law Commission on its 53rd Session, 23 April – 1 June, 2 July – 10 Aug, Art 20’ (2001) 2 *Yearbook of the International Law Commission*, vol II. <http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf> accessed 17 August 2017.

⁹⁴ David Wippman, ‘Pro-Democratic Intervention in Action’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, OUP 2015) 805; see also Louise Doswald-Beck, ‘The Legal Validity of Military Intervention by Invitation of the Government’ (1985) 56 *British Yearbook of International Law* 189.

⁹⁵ Howard French, ‘Nigerians Take Capital of Sierra Leone as Junta Flees’ *New York Times* (New York, 14 February 1998) A3.

⁹⁶ Peter Koller, ‘International Law and Global Justice’ in Lukas H. Meyer (ed), *Legitimacy, Justice and Public International Law* (Cambridge University Press 2009) 206.

may consult experts, such as Special Rapporteur, or engage independent body to make decision on its behalf, for example, ICJ.⁹⁷ However, such decision-making is likely to be very difficult due to lack of available evidence.⁹⁸ On the other hand, if the Security Council is invited to intervene into the affairs of another state then it must consult experts, as stated above, rather than jumping on to a conclusion spontaneously. For example, the invitation of the President and Prime Minister of Congo in 1960 requesting the then UN Secretary-General to intervene who then decided the situation in Congo as ‘a threat to peace and security’ under Article 39 without consulting the Security Council.⁹⁹ Therefore, the Security Council must collectively satisfy that international peace and security are at stake before intervening into any country by the latter’s invitation.¹⁰⁰ This procedural compliance is likely to promote higher degree of legitimacy of intervention by the Security Council.

2.2 Origins of the current international law system in the context of colonialism

Public international law forms a part of colonialism and the use of force legitimised at that time. Amongst many aspects of the relationship between colonialism and international law is the fact that international law legitimised colonial use of force in the project of ‘the civilising mission’.¹⁰¹ For example, use of force by European Empires since sixteenth century in general and since 1940s in particular on the emergence of colonial encounter by the non-European societies and territories.¹⁰² As a result, colonialism was central to the constitution of international law in that many of the basic principles of international law – including, most importantly, use of force – were forged out of the attempt to create a legal system that could

⁹⁷ UN Charter, Article 96 <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017; see also Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (OUP 1963) 67; Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 6.

⁹⁸ Ashley S. Deeks, ‘Consent to the Use of Force and International Law Supremacy’ (2013) 54 *Harvard International Law Journal* 1, 19.

⁹⁹ Thomas Franck, *Fairness in International Law and Institutions* (OUP 2002) 226.

¹⁰⁰ *Ibid.*, 229.

¹⁰¹ Dipesh Chakrabarty, ‘Postcoloniality and the Artifice of History: Who Speaks for “Indian” Pasts’, in Ranajit Guha (ed), *A Subaltern Studies Reader, 1986 – 1995* (University of Minnesota Press 1997) 263. For *contra* see Andrew Fitzmaurice, ‘Scepticism of the Civilising Mission in International Law’ in Martti Koskenniemi, Walter Rech and Manuel J Funesca (eds), *International Law and Empire* (OUP 2017) 359, 377.

¹⁰² Karin Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’ (1998) 16 *Wisconsin International Law Journal* 353.

account for relations between the European and non-European worlds in the colonial confrontation.¹⁰³

Colonial confrontation was central to the formation of international law and, in particular the use of force.¹⁰⁴ From the beginning of sixteenth century, international law was not exclusively concerned with the relations between states, but, and more importantly, with the relations between civilisations and peoples.¹⁰⁵ The grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilisation of Europe.¹⁰⁶ In the field of international law, the civilising mission was animated by ‘cultural difference’.¹⁰⁷ The imperial idea that fundamental cultural differences divided the European and non-European worlds was profoundly important to the civilising mission in number of ways: for example, the characterisation of non-European societies as backward and primitive legitimised European conquest of these societies and justified the measures colonial powers used to control and transform them.¹⁰⁸ It is in this way that international law extended itself horizontally, to encompass the entire globe and, once this is achieved, vertically, within each society, to ensure the emergence of civilised states.¹⁰⁹ This process of extension of international law represents a history of the incorporation of the peoples of Africa, Asia, the Americans and the Pacific into an international law which is explicitly European, and yet, universal.¹¹⁰

2.2.1 Nineteenth Century Colonialism and its role in shaping international law

By 1914, after numerous colonial wars, virtually all the territories of Asia, Africa and the Pacific were controlled by the major European states and this resulted in the assimilation of all

¹⁰³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 3.

¹⁰⁴ Henry Wheaton, *History of the Law of Nations in Europe and America from the Earliest Times to the Treaty of Washington* (Gould, Banks & Co) 54, 760; see also Rech Walter, ‘International Law, Empire, and the Relative Indeterminacy Narrative’ in Martti Koskenniemi, Walter Rech and Manuel J Fomesca (eds), *International Law and Empire* (OUP 2017) 359.

¹⁰⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) xi.

¹⁰⁶ *Ibid.*, 3.

¹⁰⁷ Luigi Nazzo, ‘Territory, Sovereignty, and the Construction of the Colonial Space’ in Martti Koskenniemi, Walter Rech and Manuel J Fomesca (eds), *International Law and Empire* (OUP 2017) 263, 266.

¹⁰⁸ *Ibid.*

¹⁰⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 4.

¹¹⁰ *Ibid.*, 6; see also Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press 2002) 61.

these non-European peoples into a system of law which was fundamentally European in that it derived from European thought and experience.¹¹¹ Although the traditional view of the discipline downplays the importance of the colonial confrontation for an understanding of the subject as a whole, it is clear that much of the international law of the nineteenth century was preoccupied with colonial problems.¹¹² Amongst the colonial problems, the most acute one was the status of the colonisers and the colonised societies. For example, international law applied only to sovereign states and asserted further that international law applied only to the sovereign states which comprised the civilised ‘family of nations’.¹¹³ This attempt to distinguish between civilised and uncivilised societies was confronting the jurists as many of the uncivilised Asiatic and African states easily met both the definition of sovereignty and the requirement of control over territory.¹¹⁴ Furthermore, in Africa, the kingdoms of Benin, Ethiopia and Mali, for instance, were sophisticated and powerful political entities which accorded the respect due to sovereigns by the European states with which they established diplomatic relations.¹¹⁵

The colonisers could hardly disregard these facts, given especially that European powers had entered into treaties with such communities.¹¹⁶ The expansion of colonial Empires was one of the defining features of the international relations of that period.¹¹⁷ The works of eighteenth and nineteenth century jurists, for instance, gave accounts of diplomatic usages in countries such as Persia, Siam, Turkey and China, analysed the negotiations that led to the making of various treaties, and included these treaties within larger collections of international treaties.¹¹⁸ Confronted with this dilemma, the colonisers resorted to the concept of society. The broad response was that Asiatic states, for example, could be formally ‘sovereign’; but unless they satisfied the criteria of membership in civilised international society, they lacked the

¹¹¹ Andrew Fitzmaurice, ‘Scepticism of the Civilising Mission in International Law’ in Martti Koskenniemi, Walter Rech and Manuel J Fonesca (eds), *International Law and Empire* (OUP 2017) 359, 360.

¹¹² J. H.W Verzijl, *International Law in Historical Perspective*, vol 10 (Leyden: A.W. Sijthoff 1968) 435.

¹¹³ Luigi Nazzo, ‘Territory, Sovereignty, and the Construction of the Colonial Space’ in Martti Koskenniemi, Walter Rech and Manuel J Fonesca (eds), *International Law and Empire* (OUP 2017) 263, 272.

¹¹⁴ C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press 1967) 14; see also Ian Brownlie, ‘The Expansion of International Society: The Consequences for the Law of Nations’ in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (New York: Oxford University Press 1984) 357.

¹¹⁵ Taslim Elias, *Africa and the Development of International Law* (Leiden: A.W. Sijthoff 1972) 6.

¹¹⁶ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 58; see also Ian Brownlie, ‘The Expansion of International Society: The Consequences for the Law of Nations’ in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (New York: Oxford University Press 1984) 361.

¹¹⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 65.

¹¹⁸ Jeremy Thomas, ‘History and International Law in Asia: A Time for Review?’ in Ronald St John Macdonald (ed), *Essays in Honour of Wang Tieya* (Dordrecht: Martinus Nijhoff 1994) 813.

comprehensive range of powers enjoyed by the European sovereigns who constituted international society.¹¹⁹ The distinction between the civilised and uncivilised was to be made, then, not in the realm of sovereignty, but of society.¹²⁰ Society and the constellation of ideas associated with it promised to enable the jurists to link a legal status to a cultural distinction.¹²¹

Thus, the colonised people remained outside the realm of international law, not so much because they lacked sovereignty, but because they were wanting in the other characteristics essential to membership of international society.¹²² As a result, despite the colonised society's participation in the treaty making process with imperial sovereign powers the latter did not recognise the former as subjects of international law. The ambivalent status of the colonised societies, outside the scope of law and yet within it, lacking in international personality and yet necessarily possessing it if any sense was to be made of the many treaties which European states relied on, was never satisfactorily defined or resolved.¹²³ As Oppenheim aptly acknowledged -

No other explanation of these and similar facts [the fact that these non-sovereign entities engaged in sovereign behaviour] can be given except that these not-full Sovereign States are in some way or another International Persons and subjects of International Law.¹²⁴

The history of sovereignty doctrine in the nineteenth century, then, is a history of the processes by which European states, by developing a complex vocabulary of cultural and racial discrimination, set about establishing and presiding over a system of authority by which they could develop the powers to determine who is and is not sovereign.¹²⁵ European states could inflict massive violence on non-European peoples, invariably justified as necessary to pacify the natives, and followed this with the project of reshaping those societies in accordance with

¹¹⁹ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1, peace (Longman: London 1992) 110.

¹²⁰ Luigi Nazzo, 'Territory, Sovereignty, and the Construction of the Colonial Space' in Martti Koskenniemi, Walter Rech and Manuel J Fonesca (eds), *International Law and Empire* (OUP 2017) 263, 272.

¹²¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 59.

¹²² Thomas J. Lawrence, *The Principles of International Law* (Ulan Press 2012) 58.

¹²³ Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Martinus Nijhoff 2012) 13; see also Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge University Press 2002) 93.

¹²⁴ Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law*, vol 1, peace (Longman: London 1992) 110.

¹²⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 100.

the European vision of the world.¹²⁶ Sovereignty was therefore, aligned with European ideas of social order, political organisation, progress and development.¹²⁷ In this way, colonies played an important role in the discipline of international law. It was through an examination of the process of sovereignty coming into being which jurist could self-consciously grasp as a mechanism, an artefact, a technology whose characteristics could be both theoretically understood and practically developed precisely through its operation in the ‘new countries’ of the colonised world.¹²⁸

2.2.2 Decolonisation and the creation of international institutions

The monolithic view of sovereignty that developed in the nineteenth century, its formalism and rigidity, were important causes of the First World War.¹²⁹ The complete complicity of international law with colonial project has led to the denunciation of an international law of imperialism.¹³⁰ Subsequent generations of international lawyers have strenuously attempted to distance the discipline from that period, in much the same way that positivists distanced themselves from naturalists.¹³¹ The efforts made by international law, from the nineteenth century onwards, to dismantle rather than promote the colonial conception of sovereignty, after all, promoted the process of decolonisation.¹³²

The mandate system of the League of Nations, in the inter-war period (1919-39), that provided the international system with a new means of managing colonial relations through the technologies developed by international institutions.¹³³ With the creation of the League, the international institution emerged as a new actor in the international system, providing international law with a new range of ambitions and techniques for the management of international relations.¹³⁴ The mandate system commences the task of promoting self-

¹²⁶ Ibid, 103.

¹²⁷ Luigi Nazzo, ‘Territory, Sovereignty, and the Construction of the Colonial Space’ in Martti Koskenniemi, Walter Rech and Manuel J Fonesca (eds), *International Law and Empire* (OUP 2017) 263, 272.

¹²⁸ John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press 1894) 134.

¹²⁹ David Kennedy, ‘International Law and the Nineteenth Century: History of an Illusion’ (1997) 12 *Quinnipiac Law Review* 99.

¹³⁰ Rech Walter, ‘International Law, Empire, and the Relative Indeterminacy Narrative’ in Martti Koskenniemi, Walter Rech and Manuel J Fonesca (eds), *International Law and Empire* (OUP 2017) 359.

¹³¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 109.

¹³² Luigi Nazzo, ‘Territory, Sovereignty, and the Construction of the Colonial Space’ in Martti Koskenniemi, Walter Rech and Manuel J Fonesca (eds), *International Law and Empire* (OUP 2017) 263, 272.

¹³³ Hersch Lauterpacht, ‘The Mandate Under International Law in the Covenant of the League of Nations’ in Hersch Lauterpacht and Elihu Lauterpacht (eds), *International Law*, vol 3 (Cambridge University Press 1970) 29.

¹³⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 115.

government among colonised peoples, and consequently can be seen as the beginning of the great project of decolonisation that was taken up and completed by the United Nations.¹³⁵ This great project facilitated the transformation of colonial territories into sovereign and independent states.¹³⁶

Formal sovereignty was very important and provided the colonised societies with a vital means of protecting and furthering their interests. However, the enduring vulnerabilities created by the processes by which colonised societies acquired sovereignty posed an ongoing challenge, not only to the colonised people, but also to international law itself.¹³⁷ The process of gaining the sovereignty status started with decolonisation which began with the colonial confrontation by resistance and rebellion by the non-European states that were colonised by the great Empires.¹³⁸ The mandate system of the League of Nations embarked upon a new universalising mission of international law through the task of liberating the colonised people.¹³⁹ In this way, the universalising mission of international law was adopted to changed circumstances and anticolonial political sentiments, and continued its task of ensuring that the Western model of law and behaviour could be seen as a natural, inevitable and inescapable.¹⁴⁰ Eventually, decolonisation supported the powerful claim that international law had finally become truly universal.¹⁴¹ With the emergence of the sovereign states of Africa and Asia, international law became universal in the more profound sense that Asian and African societies that had been excluded from the realm of sovereignty even while being subjected to the operation of international law, could now participate in that system as equal and sovereign states.¹⁴²

However, the claim of ‘universality’ of international law posed major question. Given that international law was inherently European, how could it accommodate the new states which

¹³⁵ Hersch Lauterpacht, ‘The Mandate Under International Law in the Covenant of the League of Nations’ in Hersch Lauterpacht and Elihu Lauterpacht (eds), *International Law*, vol 3 (Cambridge University Press 1970) 29.

¹³⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 115.

¹³⁶ League of Nations Covenant, article 22, para 3.

¹³⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 195.

¹³⁸ Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Martinus Nijhoff 2012) 42.

¹³⁹ Frank Furedi, *The New Ideology of Imperialism: Renewing the Moral Imperative* (London: Pluto Press 1994) 5.

¹⁴⁰ Luigi Nazzo, ‘Territory, Sovereignty, and the Construction of the Colonial Space’ in Martti Koskenniemi, Walter Rech and Manuel J Fonesca (eds), *International Law and Empire* (OUP 2017) 263, 284.

¹⁴¹ R. P. Anand, ‘Role of the “New” Asian-African Countries in The Present International Legal Order’ (1962) 56 *American Journal of International Law* 383, 390.

¹⁴² Haskell Fain, *Normative Politics and the Community of Nations* (Philadelphia: Temple University Press 1987) 99; see also J.C. Young, *Postcolonialism: An Historical Introduction* (Oxford: Blackwell 2001) 46.

belonged to very different cultural traditions?¹⁴³ Therefore, the problem of cultural difference has been crucial to the development of international law.¹⁴⁴ For example, initially Muslim majority societies were excluded from international organisation, like the League of Nations, based on their cultural differences.¹⁴⁵ The emergence of new nation-states, particularly from the abolition of *dar al-Islam* (abode of Islam), created a platform for international law to operate in a certain uniformity and inclusiveness. Due to lack of such uniformity and inclusiveness, the legitimacy of international law has been challenged, particularly in relation to use of force.

It was only in the United Nations period that the independent societies of the non-European states were able to use the newly acquired resources of sovereignty to develop their own internal politics on the one hand, and to advance their interests in the international system on the other.¹⁴⁶ However, the practices of powerful Western states in the period following the establishment of the United Nations witnessed the end of formal colonialism, but the continuation, consolidation and elaboration of imperialism.¹⁴⁷

International law is created, in part, through its confrontation with the violent and barbaric non-European ‘other’; and the construction of the ‘other’ and the initiatives to locate, sanction and transform its disrupt existing legal categories and generate new doctrines regarding, very significantly sovereignty and the use of force.¹⁴⁸ The impact of colonialism on international law is reformation of the European-led system into a universal legal framework. That means reconciliation of the interests of the new states and their cultural differences irrespective of their economic and political strength. Seen in this way, sovereignty was not only extended but also improvised out of the colonial encounter, and adopted unique forms, which differed from and destabilised given notions of European sovereignty.¹⁴⁹

¹⁴³ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 197.

¹⁴⁴ Georges M. Abi-Saab, ‘The Newly Independent States and the Rules of International Law: An Outline’ (1962) 8 *Howard Law Journal* 95; see also A. A. Fatouros, ‘International Law and the Third World’ (1964) 50 *Virginia Law Review* 783, 788.

¹⁴⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 12.

¹⁴⁶ *Ibid.*, 10.

¹⁴⁷ Luigi Nazzo, ‘Territory, Sovereignty, and the Construction of the Colonial Space’ in Martti Koskenniemi, Walter Rech and Manuel J Funesca (eds), *International Law and Empire* (OUP 2017) 263, 284.

¹⁴⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 274.

¹⁴⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 6.

2.3 The Challenges posed on the Charter framework of international law on the Use of Force

The Charter framework has been subject to challenges for being ineffective and incapable of dealing with the use of force in the modern world.¹⁵⁰ It is important to examine these challenges in order to assess the legitimacy of the arguments made by the critics. By assessing the legitimacy of these arguments, it would be possible to conclude the extent of the legitimacy of these arguments and their compatibility with Public international law and Islamic international law. This analysis of legitimacy would also demonstrate which arguments are based purely on political grounds rather than legal.

The challenges that have been posed to the general prohibition of use of inter-state force are overwhelming in nature and the extent of such challenges can be a very powerful factor in questioning the effectiveness of the Charter system as a whole. The fundamental provision of the Charter system is the prohibition of use of force and if it is questioned then the Charter system may be at high risk of failure due to being unable to effectively deal with violence in contemporary world. In the words of Nico Schrijver:

Expansive interpretation of the right of self-defence, including the claimed legality of pre-emptive and even preventive self-defence, and the invoked right to use armed force unilaterally, in cases of humanitarian emergencies, the ‘global war’ against terrorism, and the proliferation of weapons of mass destruction, do infringe, each on their own but certainly in combination, on the legal status of the prohibition on the use of force, especially when the practice of leading states frequently deviates from the general norm of the Charter.¹⁵¹

These challenges are the core concerns of Public international law on the use of force. Furthermore, the challenges posed by different ideological groups, such as realists and expansionists, are questioning the legitimacy of the Charter system. The following analysis of the realists and expansionists arguments would further advance the assessment of legitimacy of the challenges posed.

¹⁵⁰ Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Martinus Nijhoff 2012) 84.

¹⁵¹ Nico Schrijver, ‘The Ban on the Use of Force in the UN Charter’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 486.

2.3.1 Challenges posed by the Realists' attack on the prohibition of use of force

The most grievous attack to the prohibition of use of force has been made by the realists' argument that the rules on the use of force are ineffective.¹⁵² Scholars from within the international law, who do not claim themselves to be realists, have also argued that the prohibition on the use of force has been violated so often that it no longer represents international law.¹⁵³ The realists have acknowledged that states may sometimes seem to comply with the rules on the use of force, but perhaps that is only because the rules happen to coincide for the time being with the underlying geopolitical interests that really shape their behaviour.¹⁵⁴ Andreas Paulus sums up this realists' approach to international law in the following words:

When the basic interests of states are at stake, in 'high politics', international law is considered marginal to international politics. In this topic, international law is merely a superstructure, a Marxian Uberbau that masks the real forces of international law – above all, power and military capabilities. This 'search for the actual laws' in political reality, not legal norms, characterises realism. At the heart of international relations, it is power relationships that count: at the personal level, at the state level, at the interstate level.¹⁵⁵

A conflict of interest has been witnessed between 'state necessity' and 'prohibition of use of force'. The national security strategies adopted by powerful states purely focused on their national security interests rather than showing respect and compliance with the prohibition of use of force. For example, US National security strategy in support of the use of pre-emptive and even preventive self-defence.¹⁵⁶ The 'realists' have attacked, directly or indirectly, the rule-*pacta sunt servanda*, on which all else depends in international law.¹⁵⁷ They have done this in

¹⁵² Michael Glennon, 'Why the Security Council Failed' (2003) *Foreign Aff.* 16.

¹⁵³ James Crawford and R Nicholson, 'The Continued Relevance of Established Rules and Institutions Relating to the Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, OUP 2015) 97.

¹⁵⁴ James Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 *Recueil des Cours de l'Académie de Droit International*, Ch 1, cited in J Crawford and R Nicholson, 'The Continued Relevance of Established Rules and Institutions Relating to the Use of Force' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (1st edn, OUP 2015) 97.

¹⁵⁵ Andreas Paulus, 'Realism and International Law: Two Optics in Need of Each Other' (2002) 96 *American Society of International Law Proceedings* 269.

¹⁵⁶ The National Security Strategy of the United States, Washington DC, Sept 2002 <<http://www.whitehouse.gov/nsc/nss/pdf>> accessed 13 July 2017.

¹⁵⁷ Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 95.

the name of humanitarian intervention and preventive measures against terrorism, both very modern issues high on almost everyone's list of concerns which, they believe, cannot any longer be met with the old rules and processes.¹⁵⁸ In this way the realists are attacking the Charter framework of international law on the use of force.

2.3.2 Challenge posed by the 'Expansionists' on the prohibition of use of force

Another challenge has been posed on the Article 2(4) prohibition of use of force as well as its exception Article 51 by the 'expansionists'. They claim that use of defensive force after occurring an 'armed attack' is not sufficient mechanism to confront the current threats posed on states by terrorist attacks, cyber-attacks, and Weapons of Mass Destruction.¹⁵⁹ In this regard, the expansionists claim the legitimacy of using defensive force before an 'armed attack' has occurred by invoking anticipatory, pre-emptive and preventive self-defence. For example, Israel's attack on the Osirak nuclear reactor in Iraq in 1981 which the SC condemned in Resolution 487 (1981).¹⁶⁰ The Council's position at that point essentially signified the opposition of the community of states to acts such as those, with the effect that state practice leading to the relevant change in the Charter-based legal framework would be difficult to consolidate.¹⁶¹

Pre-emptive self-defence means the use of force in self-defence to halt an imminent armed attack by a state or non-state actor.¹⁶² This approach adheres to the *Caroline principle* that a state may respond to an attack before it is completed, but only where the need to respond is 'instant, overwhelming, and leaving no choice of means, and no moment for deliberation.'¹⁶³ On the other hand, anticipatory self-defence means the use of force in self-defence to halt a particular tangible course of action that the potential victim state perceives will shortly evolve

¹⁵⁸ *ibid.*

¹⁵⁹ Anne-Charlotte Martineau, 'Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force' (2016) 29 *Leiden Journal of International Law* 95, 98.

¹⁶⁰ Alexander Orakhelashvili, 'Changing Jus Cogens Through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 170.

¹⁶¹ Abdul Ghafur Hamid, 'The Legality of Anticipatory Self-Defence in the 21st Century World Order: A Reappraisal' (2007) 54 *Netherlands International Law Review* 441.

¹⁶² Ashley S. Deeks, 'Taming the Doctrine of Pre-emption' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 661.

¹⁶³ Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, British Plenipotentiary (6 Aug 1842), quoted in John Bassett Moore, '*A Digest of International Law*', vol 2 (Princeton, NJ: Princeton University Press, 1906), ss 217, at 412; see also Robert Jennings and Arthur Watts (eds), *Oppenheim's International Law* (9th edn, OUP 1992) 420.

into an armed attack against it.¹⁶⁴ The potential attack appears more distant in time than an attack forestalled by pre-emptive self-defence, but the potential victim state has good reasons to believe that the attack is likely, is near at hand, and if it takes place, will result in significant harm.¹⁶⁵ On the contrary, preventive self-defence means the use of force in self-defence to halt a serious future threat of an armed attack, without clarity about when or where the attack may emerge.¹⁶⁶

2.3.2.1 Cultural relativism and its role in developing a pluralistic framework of international law

The problem of cultural difference has been crucial to the development of international law.¹⁶⁷ The discussion on the ‘expansionists’ and ‘restrictivists’ views of international law on the use of force shows that the arguments to expand the defensive use of force beyond the Charter framework and restrict such expansion reflect their respective cultures. For example, the expansionists’ argument reflects the dominant Western cultures and conversely the restrictivists’ argument reflects the Muslim majority as well as most third world states’ cultures. As a result, the question of legitimacy of international law on the use of force becomes acute when it is addressed from these culturally diverse viewpoints.

While the arguments of the expansionists’ has been recognised, in part¹⁶⁸, by the modern international law by adopting the *Caroline principle* to reflect customary international law, this adaptation has not facilitated overcoming of the legitimacy deficits of Public international law on the use of force. This is because, this adaptation hardly considered the cultures of the restrictivists who are represented by most Muslim and third world states, and extra-Charter defensive forces are often directed against these states in the contemporary world. Moreover, the civilising mission in the colonial context is still operating in the corpus of international law on the use of force.¹⁶⁹ This mission has been operating for the continuous goal of transforming ‘the other’ into a civil state, but this task has acquired an unprecedented urgency, an imperative

¹⁶⁴ Sean D. Murphy, ‘The Doctrine of Pre-emptive Self-Defence’ (2005) 50 Villanova Law Review 699, 704.

¹⁶⁵ Ashley S. Deeks, ‘Taming the Doctrine of Pre-Emption’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 663.

¹⁶⁶ The National Security Strategy of the United States, Washington DC, Sept 2002 available at <<http://www.whitehouse.gov/nsc/nss.pdf>> accessed 16 March 2017.

¹⁶⁷ Georges M. Abi-Saab, ‘The Newly Independent States and the Rules of International Law: An Outline’ (1962) 8 Howard Law Journal 95; see also A. A. Fatouros, ‘International Law and the Third World’ (1964) 50 Virginia Law Review 783, 788.

¹⁶⁸ ‘In part’ because only pre-emptive use of force in self-defence has been recognised but not the anticipatory and preventive use of force.

¹⁶⁹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 292.

character, precisely because it is now so powerfully linked to the idea of self-defence and survival, not only of the United States but of the civilisation itself.¹⁷⁰ Within this scheme, cultural differences in themselves have become a marker of an ‘armed attack’ justified as self-defence, whether actual or pre-emptive. In this circumstance, it is necessary to bridge this gap of cultural differences in order to develop a complementary framework of Public international law on the use of force.

2.3.2.1.1 Cultural diversity and international law on the use of force

The current framework of international law is applicable to the entire world where almost every sovereign states have signed and ratified the United Nations Charter, which regulates extraterritorial use of force. The charter is composed of peremptory norms of international law on the use of force, which are universally applicable to the whole world due to their status as *jus cogens*. In other words, expansionists argue that international law is universally applicable to the whole world irrespective of the diversity of cultures, values and beliefs that exist and thereby secures equal treatment.¹⁷¹ On the other hand, the cultural relativists argue that because every society is ‘distinct’ from others, international law cannot be universally applicable to the people worldwide.¹⁷² As a result, cultural relativism questions the universal and uniform application of international law. Furthermore, cultural relativists criticise the current international law for being predominantly of Western origin and thereby primarily benefiting the Western cultures.¹⁷³ This criticism has also gained support in the third world scholarships of international law.¹⁷⁴ According to the third world scholarships, the claim of equality before international law does not take into account the cultures of the colonised people who gained their sovereignty through the process of decolonisation and are still subject to an international legal framework that are of Western origin and developed to serve mainly the Western

¹⁷⁰ See section 2.2.2 of this chapter (above).

¹⁷¹ Ashley S. Deeks, ‘Taming the Doctrine of Pre-Emption’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 663 ; see also Anne-Charlotte Martineau, ‘Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force’ (2016) 29 *Leiden Journal of International Law* 95.

¹⁷² Bret L. Billet, *Cultural Relativism in the Face of the West* (Palgrave MacMillan 2007) 2.

¹⁷³ Abdul Koroma, ‘International Law and Multiculturalism’ in Sienho Yee and Jacques-Yivan Morin (eds), *Multiculturalism and International Law. Essays in Honour of Edward McWhinney* (Brill: Martinus Nijhoff 2009) 79, 82; see also Adamantia Pollis and Peter Schwab (eds), ‘Human Rights: A Western Construct with Limited Applicability’ in Adamantia Pollis and Peter Schwab (eds), *Human rights: cultural and ideological perspectives* (Praeger 1980) 8; for *contra* see R. E. Howard and J. Donnelly, ‘Human Dignity, Human Rights and Political Regimes’ (1986) 80 *American Political Science Review* 801.

¹⁷⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 292; see also A. A. Fatouros, ‘International Law and the Third World’ (1964) 50 *Virginia Law Review* 783; R. P. Anand, ‘Role of the “New” Asian-African Countries in The Present International Legal Order’ (1962) 56 *American Journal of International Law* 383; Georges M. Abi-Saab, ‘The Newly Independent States and the Rules of International Law: An Outline’ (1962) 8 *Howard Law Journal* 95.

cultures.¹⁷⁵ These scholarships also claim that the rich variety of practices among different cultures do not make the uniform application of universal international law.¹⁷⁶

The basic conflict between current international law and the perspective of cultural relativism lies in the degree to which either should be the chief underlying consideration when dealing with the great diversity of peoples worldwide.¹⁷⁷ Whereas the cultural relativists are concerned with achieving a greater degree of understanding, in functional terms, of the diversity of cultures worldwide, current international law framework, based on the concept of universal human rights, are concerned with a preconceived notion of human nature that produces an outline of behaviours, and liberty and justice for all.¹⁷⁸ Samuel Huntington has named this conflict as ‘clash of civilisation’.¹⁷⁹ According to Huntington, the main reason for the use of force between Muslim and Western countries are nothing but a clash between these two civilisations where the former being too barbaric and hostile towards the latter.¹⁸⁰ However, classifying the conflict in this way does not provide a strong solution to this conflict.

2.3.2.1.2 Cultural relativism and the advertence of Islamic international law on the use of force

Whereas the Muslim majority states and most of the third world states have accepted the universal application of international law on the use of force by ratifying the UN Charter, it is hard to deny the universal application of the Charter framework by these states. Moreover, international human rights law, in particular, have strong basis of its claim of universality of application based on its origin in natural law theory, the theory of rationalism and human capabilities.¹⁸¹ These theories strongly promote the notion of individual reason as an internal consideration and human rights as fundamental characteristics that are inherent for being human.¹⁸² However, international law on the use of force cannot claim such strong basis of universality of application. This is because, the challenges posed on modern international law on the use of force and its deviation from the ‘just war’ theory do not suggest that such a claim

¹⁷⁵ Ibid.

¹⁷⁶ Yvonne Donders, ‘Do Cultural Diversity and Human Rights Make a Good Match?’ (2010) 61 *International Social Science Journal* 15, 16.

¹⁷⁷ Bret L. Billet, *Cultural Relativism in the Face of the West* (Palgrave MacMillan 2007) 2.

¹⁷⁸ Ibid.

¹⁷⁹ Samuel Huntington, *The Clash of Civilization and the Remaking of World Order* (New York: Simon & Schuster 1996) 81.

¹⁸⁰ Samuel Huntington, ‘The Lonely Superpower’ (1999) 78 *Foreign Affairs* 35.

¹⁸¹ Thomas Aquinas, *Summa Theologica* (Treatise on the Theological Virtues) Quest 95, Art I-II, 94; see also Federico Lenzerini, *The Culturalization of Human Rights Law* (OUP 2014) 12.

¹⁸² Federico Lenzerini, *The Culturalization of Human Rights Law* (OUP 2014) 2; see also Amartya Sen, ‘Elements of a Theory of Human Rights’ (2004) 32 *Philosophy and Public Affairs* 315.

can be validated especially for the frequent direction of use of force towards Muslim majority states in this 21st Century.¹⁸³ Therefore, the issue is not that a cultural clash exists between Muslim majority states and Western states but the legitimate basis of such cultural clash. In other words, the diverse cultural effects between Muslim majority states and Western states must conform to a legitimate basis.

It is a legitimate claim for the expansionists that use of force, as promoted and controlled by the UN Charter, is not fit for the purpose of effectively dealing with the threat of force posed on the states.¹⁸⁴ Therefore, the expansion of defensive use of force beyond the limitation of an ‘armed attack’ should be allowed within the Charter framework. Similarly, it is also a legitimate claim for the restrictivists to oppose any such extension of use of force because of the likely abuse and uncertainty of such extensive use of force. As a result, the expansionists’ argument reflects the dominant Western cultures of use of force and conversely the restrictivists’ argument reflects the Muslim majority as well as most third world states’ cultures. Both claims are being legitimate; the question is which claim is just?

The background of the claims for expansion of the defensive use of force in the current framework of international law and accordingly implementing its universal application suggest that such claims have been based on the national security of the Western states which have been the subject of imminent threat of force in the 21st Century.¹⁸⁵ On the other hand, the claim of the restrictivists is based on the same threat of being targeted by militarily powerful Western states. As a result, a common basis of both the expansionists and restrictivists is ‘national security’. However, in the course of the claims made by these scholars they have been engaged in each other’s criticism. For example, each other criticised that the expansion as well as the restriction of use of force protect the interests of the groups respectively and hence these claims are not legitimate.

The question of legitimacy of the claim is dependent on the question of bias of the respective scholars in the expansionists and restrictivists sides. In other words, legitimacy question is to be determined considering the advantages and disadvantages of the expansion and restriction of use of force. It is apparent that the advantages and disadvantages of expansion and restriction of use of force are mutually exclusive and hence do not correspond to each other’s necessity and interests. The nature and extent of national security claimed to be necessary for Western

¹⁸³ For challenges posed on UN Charter, see section 2.3 of this chapter (above).

¹⁸⁴ See section 2.3 of this chapter (above).

¹⁸⁵ Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 60.

states are not sufficiently addressed by the restrictivists and vice versa. In these circumstances, there are apparent biases on both sides in their claims to legitimate extension and restriction of defensive use of force. These biases are based on the external views of the scholars who accused each other's culture as unsuitable for integration and making a positive contribution to a universally applicable international law.

While it is true that Western states accuse Muslim majority states as backwards and hostile towards them, it is also true that there seemed to be an inherent bias in the Western cultures in that they were assumed to be superior, and that other cultures should be judged in comparison to what Western cultures find to be acceptable norms of behaviour.¹⁸⁶ This inherent bias and superiority of the Western cultures mainly reflect on an external view about the Muslim majority states and thereby prone to error and misconceptions. This is because one must be careful not to allow the values, customs, beliefs, and so on of an external culture to influence one's understanding of the culture under study or to influence one's judgement regarding the functions that various cultural practices perform.¹⁸⁷ If one fails to do this, then one will be quite tempted to impose a judgment that is derived not from the truths of the culture under study, but from one's own culture.¹⁸⁸ Therefore, any conclusion based on the values, customs, beliefs, and so on of Western cultures are likely to impose such values, customs and beliefs on the cultures of the Muslim majority states.

This approach of imposition of a foreign cultural values, customs, beliefs, and so on resembles with the 'civilising mission' that emanated from colonialism.¹⁸⁹ The refusal of sovereignty of the colonised societies by imperial states was based on non-civilised nature of the former and such status was determined on the basis of Western values, customs, beliefs and so on.¹⁹⁰ This denial of status and determination of the criteria for awarding such status were external and foreign to the colonised societies, which the modern day Muslim majority states form a part. In this way, Western cultural values, customs, beliefs, and so on were imposed on the Muslim majority states since the colonial time and this dominant position of the Western cultures are

¹⁸⁶ Alison D. Renteln, *International Human Rights: Universalism versus Relativism* (Newbury Park: CA: Sage 1990) 62; see also Lisa Wedeen, 'Beyond the Crusades: Why Huntington and Bin Laden are Wrong' (2003) *X Middle Eastern Policy* 56.

¹⁸⁷ Bret L. Billet, *Cultural Relativism in the Face of the West* (Palgrave MacMillan 2007) 9.

¹⁸⁸ Bret L. Billet, *Cultural Relativism in the Face of the West* (Palgrave MacMillan 2007) 10.

¹⁸⁹ Nathaniel Berman, *Passion and Ambivalence: Colonialism, Nationalism, and International Law* (Martinus Nijhoff 2012) 60.

¹⁹⁰ Luigi Nazzo, 'Territory, Sovereignty, and the Construction of the Colonial Space' in Martti Koskenniemi, Walter Rech and Manuel J Funesca (eds), *International Law and Empire* (OUP 2017) 263.

still operating in the corpus of international law on the use of force.¹⁹¹ The result, according to cultural relativists, can be quite damaging, because one is asserting what types of behaviours ought or should be approved or accepted by another culture based on what has been accepted or approved by one's own culture.¹⁹² For example, if the cultures of Western states believe in the expansion of defensive use of force and, therefore, suggest that cultures of Muslim majority states should share this belief, then to do so would be tantamount to condoning cultural imperialism with respect to this issue.

If one is to be judgmental, perhaps using one's own cultural standards to evaluate another culture, then it is highly unlikely that one has been value-free in one's assessment. Seen in this way, international law on the use of force has not been value-free in its assessment of the other potential legal system like Islamic international law. As a result, international law on the use of force lacks legitimacy for not including the cultural values of Muslim majority states on the one hand and consistently upholding the values of Western cultures on the other. Because legitimacy is a value system¹⁹³ and it is not possible to be entirely value-free as far as international law is concerned,¹⁹⁴ it is essential that the cultural values of the Muslim majority states be adopted in the formation and development of modern international law on the use of force together with the values of Western cultures. The concept of 'tolerance' could facilitate this process of complementation between the cultural values of these two systems as supported by cultural relativists.¹⁹⁵

The views of the expansionists and restrictivists reflect the different and competing civilisational perceptions, expectations and interpretations of even agreed norms.¹⁹⁶ Although these different and competing perceptions, expectations and interpretations posed challenges to international law on the use of force, the relevance of such cultural relativism is very important in overcoming its legitimacy deficits. The cultural relativists' approach has a very strong proposition as it is supported by the fact that application of international law is highly dependent on its application at the national level, where it is the sovereign state that has

¹⁹¹ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 312.

¹⁹² Bret L. Billet, *Cultural Relativism in the Face of the West* (Palgrave MacMillan 2007) 10.

¹⁹³ Thomas Franck, *Fairness in International Law and Institutions* (OUP 2002) 221.

¹⁹⁴ Bret L. Billet, *Cultural Relativism in the Face of the West* (Palgrave MacMillan 2007) 11.

¹⁹⁵ Bret L. Billet, *Cultural Relativism in the Face of the West* (Palgrave MacMillan 2007) 12.

¹⁹⁶ E. Wyler and A. Papaux, 'The Search for Universal Justice' in R. St. J. Macdonald and D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff 2005) 296.

absolute authority.¹⁹⁷ If a sovereign authority refuses to apply the international law on the basis that it does not reflect the culture of the people of the sovereign state then the universal application of international law is likely to suffer from legitimacy deficits due to lack of universal application. Therefore, the claim of the cultural relativists that cultures of the Muslim majority states and most third world states experience international law on the use of force differently from the way it is experienced by the Western cultures which it is currently dominated by, and on that basis have distinctive ideas and perspectives to offer in order to overcome its legitimacy deficits which lie in its claim of purported universality.

Indeed, as rightly noted by a scholar, '[a] universal application of human rights without deference to cultural traits . . . [represents] a human rights violation in itself'.¹⁹⁸ This is confirmed by the third sentence of the preamble of the two 1966 UN Covenants on Human Rights,¹⁹⁹ according to which everyone must enjoy not only his civil and political rights, but also his economic social and *cultural* rights; the latter in particular imply that all human beings are entitled to enjoy and develop their own cultural specificity. This shows that since the very beginning of its evolution, international human rights law has left some space open to cultural relativism. This space should be filled by Islamic international law (*Siyar*) so that international law on the use of force reaches the necessary degree of legitimacy and hence justice by an understanding of universality of international law which is sensitive to cultural diversity and based on common set of cultural values.

2.3.3 Challenges posed by the extra-Charter practices of powerful states

The influence of the great powers in the Security Council in upholding their geopolitical interests is a case in hand to identify the challenges posed by the powerful states of willing and able. The institutional inequality between the members of the Security Council takes the conflict of interests between states to enhanced controversy. The permanent members' rights are always prevailed over the rights of other non-permanent members by the exercise of veto power of the former.²⁰⁰ Use of force has been authorised when it is at the best interest of the great powers and often inaction by the Security Council has been witnessed when veto is

¹⁹⁷ Mashood A. Baderin, *International Human Rights and Islamic Law* (OUP 2003) 3.

¹⁹⁸ Elisabeth Reichert, 'Human Rights: An Examination of Universalism and Cultural Relativism' (2006) 22 *Journal of Comparative Social Welfare* (2006) 23.

¹⁹⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3; International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171.

²⁰⁰ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 8; see also Nico Krisch, 'The Security Council and the Great Powers' in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (OUP 2008) 136.

exercised to stop authorisation to use force which would be against the geopolitical interest of the great powers.²⁰¹

In addition, hegemony amongst the great powers also served the hegemons in the Security Council by exercising influence over other members to carry out the hegemonic goals.²⁰² It has also been witnessed that powerful states and their allies have disregarded the necessity to obtain authorisation from the Security Council before unilaterally intervening into another state.²⁰³ Examples include but not limited to the invasion of Iraq in 2003²⁰⁴ and Russia's actions in Ukraine in 2014.²⁰⁵

From practical perspective, where the powerful states' interests would be served by not complying with the prohibition of use of force then such practices of non-adherence of the Charter are likely to be witnessed very often than not. On the other hand, when the interests of the powerful states would be protected by the prohibition then they will always uphold the necessity to comply with Article 2(4). Therefore, if there is a conflict of interest between powerful and non-powerful states then the geopolitical interests of the former often prevails over the latter.²⁰⁶ Gerry Simpson explains this asymmetry by distinguishing two groups of states:

An elite group of states, commonly referred to as the 'Great Powers', and a large mass of middle and smaller powers who defer to these larger powers in the operation and constitution of international legal order. These Great Powers occupy a position of authority within each of the legal regimes that has arisen since 1815. Sometimes these regimes are constructed around loose affiliations of interested Great Powers (the Vienna Congress), at other times the role of the Great Powers is laid out in the detailed provisions of an originating document (The United Nations Charter). In each instance, these powers have policed the international order from a position of assumed cultural,

²⁰¹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Merits) (Nicaragua v. United States)* [1986] ICJ Rep., 14, 134, para 268; see also Nico Krisch, 'The Security Council and the Great Powers' in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice Since 1945* (OUP 2008) 136.

²⁰² Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press) 192; see also Aiden Warren and Ingvild Bode (eds), *Governing the Use of Force in International Relations* (Palgrave Macmillan 2014) 145.

²⁰³ *Corfu Channel (UK v. Albania)* Judgment of 9 Apr 1949, ICJ Rep 1949, 35.

²⁰⁴ William H. Taft and Todd F. Buckwald, 'Preemption, Iraq, and International Law' (2003) 93 *American Journal of International Law* 557.

²⁰⁵ Marc Weller, 'Introduction: International Law and the Problem of War' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 25.

²⁰⁶ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 8.

material and legal superiority. A key prerogative of this position has been a right to intervene in the affairs of other states in order to promote some proclaimed community goal.²⁰⁷

The powerful states are in advantageous position in terms of influencing the decision-making process at the Security Council and outside of it. The interests of the powerful states are secured by the exercise of their veto power at the Security Council and their political influence on the less powerful states. In these circumstances, the legitimacy of the Security Council and the power practice of the powerful states are at stake and is subject to further legitimacy assessments in the descriptive sense.²⁰⁸

2.3.4 The Response of the Restrictivists

The ‘restrictivists’ believe that allowing pre-emptive, anticipatory and preventive use of force will result in not only violation of the prohibition of use of force proscribed by Article 2(4) of the UN Charter but also unreasonable stretching of the Article 51 requirement of an ‘armed attack’.²⁰⁹ The unreasonableness lies in the fact that such stretching would allow the states to use aggressive force in the name of self-defence against their enemy states.²¹⁰ Furthermore, the enemy state, in this circumstance, would likely use defensive force accusing the first state to have used force in aggression. An example is Israel’s attack on Egypt in 1967, after the Egyptian government unilaterally had ordered the withdrawal of the United Nations Emergency Force, which since 1956 had served as a buffer between the two enemies, and had redeployed its own forces to occupy the buffer zone in threatening posture.²¹¹ Such situation would also result in aggressive use of force by those states who are militarily able and politically willing against their enemy states. Therefore, the current legal framework, according to restrictivists, of the UN Charter in regulating inter-state force is appropriate.²¹²

In the presence of these controversies regarding the necessity of resilience of the self-defence under Article 51, the current state practices can be a very useful point to consider. After 9/11,

²⁰⁷ Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004) 5.

²⁰⁸ Legitimacy in the descriptive sense has been discussed in section 5.2.1 of Chapter 5.

²⁰⁹ Anne-Charlotte Martineau, ‘Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force’ (2016) 29 *Leiden Journal of International Law* 95, 98.

²¹⁰ Abraham D. Sofaer, ‘On the Necessity of Pre-emption’ (2003) 14 *Eur. J. Int’l L.* 209, 211.

²¹¹ Thomas Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 88, 104.

²¹² Jörg Kammerhofer, ‘Introduction; The Future of Restrictivist Scholarship on the Use of Force’ (2016) 29 *Leiden Journal of International Law* 13; see also Anne-Charlotte Martineau, ‘Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force’ (2016) 29 *Leiden Journal of International Law* 95.

there has not been any such situation where recourse to self-defence without an ‘armed attack’ having occurred has been necessary. Although there had been few terrorist attacks that took place since 9/11, they are sporadic in nature and do not possess the ‘intensity’ to invoke pre-emptive, anticipatory or preventive self-defence.

According to the Restrictivists, under the current security and threat of force, it does not seem necessary to invoke right of self-defence without occurring an ‘armed attack’. The Restrictivists also argue that this situation can be witnessed from the massive change in the US National Security strategy in recent years. Following 9/11 terrorist attack the US National Security Strategy included the use of force in pre-emptive, anticipatory and preventive self-defence but the 2011 National Security Strategy does not discuss use of force in advance of an attack.²¹³ The 9/11 attack being the most heinous terrorist attack in history, the Expansionists’ claim for the expansion of defensive use of force have much weight. However, owing to the circumvention and mitigation of such threat of force in the contemporary world, as claimed by the Restrictivists, there is no need to such extension. This claim of the Restrictivists has been weaker in comparison to that of the Expansionists and Realists.

2.3.4.1 Minor adaptation of the Charter framework to facilitate the challenges posed by Realists and Expansionists

Despite the strength of the argument of the Restrictivists against expanding the current Charter proscription of defensive use of force, the Expansionists and Realists have triumphed over the Restrictivists on the logic behind their support for such expansion, namely threat of imminent attack from terrorist groups.²¹⁴ The challenge posed by the nature and intensity of the terrorist attacks in contemporary world has given rise to the number of claims of extension of these exceptions by the scholars²¹⁵ and the state parties²¹⁶ as well. On the other hand, there are possibilities of abuse of the self-defence system if any types of defensive force is allowed where an ‘armed attack’ has not occurred because there are immense uncertainties as to whether a

²¹³ National Security Council, the National Security Strategy of the United States of America (2011) <<https://www.whitehouse.gov/sites/default/files/microsites/2011-strategy-combat-transnational-organized-crime.pdf>> accessed 25 March 2017.

²¹⁴ See section 5.2.2 of Chapter 5.

²¹⁵ Christopher Greenwood, ‘International Law and the Pre-Emptive Use of Force’ 14 – 15 (listing Franck, Waldock, Fitzmaurice, Bowett, Schwebel, Jennings, Watts, and Higgins as supporting anticipatory self-defence) cited in Ashley S. Deeks, ‘Taming the Doctrine of Pre-Emption’, in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 665.

²¹⁶ The National Security Strategy of the United States, Washington DC, Sept 2002 <<http://www.whitehouse.gov/nsc/nss.pdf>> accessed 16 March 2017.

potential ‘armed attack’ would materialise or not?²¹⁷ Of course states, who want to use pre-emptive, anticipatory or preventive force in self-defence, would argue that there were certainties or likelihood that an ‘armed attack’ would have occurred had they taken no action in self-defence.

In these circumstances, a solution has been offered to balance the conflicting but strong views of the Restrictivists on the one hand, and Expansionists and Realists on the other. From the case-by-case interpretation by the Security Council of the prohibition of use of force except in self-defence, in practice, has qualified the meaning of ‘armed attack’ so as to include instances of imminent attack.²¹⁸ However, the International Court of Justice has been reluctant to deal with this issue despite having the opportunity to do so in *Nicaragua Case*. Whereas the ICJ has declined to opine on the lawfulness of a pre-emptive, anticipatory, or preventive self-defence,²¹⁹ the Secretary-General’s High-Level Panel on Threats, Challenges and Change has stated the possibility of pre-emptive self-defence to respond to an imminent armed attack.²²⁰ This view has also been endorsed by the secretary-general.²²¹

However, there is no basis in international law for going further than this. In particular, in so far as a right of pre-emptive (or preventive) self-defence implies a departure from the requirement of ‘imminence’ it has no basis in the law as Hans Blix said in his third Hersch Lauterpacht Memorial Lecture on 24 November 2004:

Although ‘imminence’ may be a severe time requirement, ‘a growing threat’ would be an unacceptably lax criterion and would not tally with the generally accepted position that force should be used only as a last resort.²²²

Therefore, the right to use defensive force without reference to Security Council is limited to instances of actual or imminent armed attack.²²³

²¹⁷ Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963) 259.

²¹⁸ Thomas Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (Cambridge University Press 2002) 97.

²¹⁹ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* Merits, ICJ Re 1986, 14, 102-6.

²²⁰ In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005, para. 124 <<http://www.un.org/largerfreedom/contents.htm>> accessed 17 July 2017.

²²¹ *ibid.*

²²² Hans Blix, ‘Third Hersch Lauterpacht Memorial Lecture’ (24 November 2004) <http://lcil.law.cam.ac.uk/lectures/hersch_lectures_2004.php> accessed 2 September 2017.

²²³ Thomas Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 88, 104.

However, this position is an adaptation of the Charter system by invoking the *Caroline* principle. As a result, customary international law has provided a solution to the question of legitimacy of the pre-emptive use of force by adopting it in the Charter framework. Therefore, customs have a very important role to play to promote higher degree of legitimacy of extra-Charter use of force.²²⁴

2.3.5 Failure of the Collective Security System

Another challenge posed to the collective security system is the failure of the scheme embodied in the UN Charter to function as intended. Such failure has resulted in the division among the members of the Security Council in situations like imprecise authorisation, implied mandates and failure to act.²²⁵ The ‘revival doctrine’ has been utilised by the coalition force in their search for legitimacy to invade Iraq in 2003.²²⁶ The coalition has resorted to Resolution 678 (1990) to draw their legal basis to attack Iraq but that Resolution was adopted to throw Iraq out of Kuwait. However, there was no ‘time limit’ or ‘scope of action’ specified for the effectiveness of the Resolution. Such ‘imprecise’ nature of the Resolution led the coalition force to invoke it more than 12 years after its adoption.²²⁷ This has created a dangerous legal-political legacy in international law on the use of force.²²⁸

In addition, this type of Resolution could give rise to ‘implied mandate’ for using force as claimed by NATO as the basis of its 14-week bombing campaign in response to Belgrade’s violence against the civilian population in Kosovo.²²⁹ The legal basis as claimed by participants was Resolutions 1160 (1998), 1199 (1998), and 1203 (1998) but these were all adopted under Chapter VII and condemned the use of force by Serbs and made demands on Belgrade.²³⁰ There

²²⁴ See section 2.5 of this chapter for an analysis of the role of customary international law to promote legitimacy of use of force.

²²⁵ Ian Johnstone, ‘When the Security Council is Divided: Imprecise Authorisations, Implied Mandates, and the Unreasonable Veto’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 228.

²²⁶ Attorney General Lord Goldsmith, ‘Statement to the House of Lords’ (*Hansard*, 17 March 2003, column WA3) <<https://publications.parliament.uk/pa/ld200203/ldhansrd/vo030317/text/30317w01.htm>> accessed 4 September 2017; see also Alex J. Bellamy, ‘Feature - Legality of the Use of Force Against Iraq - International Law and the War Within Iraq’ (2003) *MelbJIntLaw* 6.

²²⁷ Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (Allen Lane: Penguin Books 2005) 189-90.

²²⁸ Christian Henderson, *The Persistent Advocate and the Use of Force* (Routledge 2016) 77.

²²⁹ Ian Johnstone, ‘When the Security Council is Divided: Imprecise Authorisations, Implied Mandates, and the Unreasonable Veto’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 239.

²³⁰ Nico Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council’ (1999) 59 *Max Planck Yearbook of United Nations Law* 81.

was no express authorisation to use force for failure of the Serbs to meet those demands and therefore NATO's use of force was assumed on the basis of implied authorisation.²³¹

Furthermore, the Libyan experience²³² has been criticised by China and Russia who vetoed draft Security Council Resolutions in relation to Syria on the basis of NATO's abuse of authority in Libya in 2011.²³³ Such abuse of authority has resulted in 'inaction' by the SC in situations where protection of civilian people was necessary to restore international peace and security.²³⁴ Both China and Russia were strongly opposed to any resolution that could set the train a sequence of events leading to a Resolution 1973-type authorisation for outside military operations in Syria.²³⁵ In this regard, the Secretary-General's High Panel on Threats, Challenges and Change has aptly stated that:

For the first 44 years of the United Nations, Member States often violated [the Charter] rules and used military force literally hundreds of times, with a paralysed Security Council passing very few Chapter VII resolutions and article 51 rarely providing credible cover.²³⁶

2.4 The Effectiveness of the Charter system in regulating use of force in modern world

The incidents of intervention by foreign states in the internal affairs of another state with and without the authorisation of the Security Council have raised the question of effectiveness of the UN Charter and its role in regulating use of force.²³⁷ These interventions by foreign states have often been manipulated for their own interests rather than the reasons given for such intervention.²³⁸ In these circumstances, it is necessary to examine the legitimacy of uses of

²³¹ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 163.

²³² See section 2.1.4.2 of this chapter (above).

²³³ Zhu Wenqi and Leng Xinyu, 'China in the Security Council' and Dimitri Trenin, 'Russia in the Security Council' in Sebastian Einsiedel, David Malone and Bruno Ugarte (eds), *The UN Security Council in 21st Century* (Lynne Rienner Publishers 2016) 97, 117.

²³⁴ Ibid.

²³⁵ Ramesh Thakur, 'Syrians are paying the price of NATO excesses in Libya' e-International Relations, 2 Mar 2012 <<http://www.e-ir.info/2012/03/02/syrians-are-paying-the-price-of-nato-excesses-in-libya>> accessed on 14 March 2017.

²³⁶ Secretary-General's High-Level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', Report of the Secretary General's High-Level Panel on Threats, Challenges and Change, A/59/565 (2 Dec 2004), Para 186 <http://www.un.org/en/peacebuilding/pdf/historical/hlp_more_secure_world.pdf> accessed 17 March 2017.

²³⁷ Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (4th edn, New York: Basic Books 2006) xxi.

²³⁸ See section 2.1.3 of this chapter (above).

force which are not authorised by the Security Council. This assessment would assist in concluding whether the decision-making process at the Security Council is legitimate and effective to control illegitimate use of force in the contemporary world.

Despite a general prohibition on interstate use of force, the intervention by one state into the territorial integrity and political independence of another state by using force has contested the legitimacy of such force under the Charter system.²³⁹ It seems that war in the modern world has taken a different shape where states do not use force directly against each other but they do use force indirectly by intervention into the internal matters of another state which may amount to an international armed conflict by the back door.²⁴⁰ For example, Russia's intervention in Syria by invitation and NATO's air strikes on the basis of pre-emptive self-defence since 2014.²⁴¹

How should international law on the use of force be examined regarding its effectiveness? It can be looked at from the perspective of the actor contemplating the violation²⁴² but such method is likely to be liable to huge criticism due to the perceived bias of the contemplators in disregarding the international law norms while taking actions. As Caner Dagli has rightly said "one cannot hope to understand a law by studying the actions of those who break it."²⁴³ In these circumstances, the right approach would be to examine reasons for the violations by the contemplators as well as the function of the Charter system on the prohibition of use of force.²⁴⁴

It is impossible to predetermine the effectiveness of the prohibition of use of force in international law without examining the practical implication of this prohibition within the state practice. State practices of using force and their abstention from using such force would include either of the three phenomena, namely (a) the use of force is in accordance with the international law; (b) the use of force is not in accordance with the law because it is an attempt at normative change in the law by custom; and (c) the use of force is within the recognised exception.

²³⁹ See section 5.2.2 of chapter 5.

²⁴⁰ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 3.

²⁴¹ Brian Michael Jenkins, *The Dynamics of Syria's Civil War* (Rand Corporation 2013) 2.

²⁴² Michael J. Glennon, 'How International Rules Die' (2005) 93 *Georgetown Law Journal* 939, 987.

²⁴³ Caner Dagli, 'Jihad and the Islamic Law of War' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam* (The Islamic Strategic Studies Centre 2013) 57.

²⁴⁴ Arthur Isak Applbaum, 'Forcing a People to be Free' in Lukas H. Meyer (ed), *Legitimacy, Justice and Public International Law* (Cambridge University Press 2009) 270.

If the use of force is in accordance with international law then such state practice is not only upholding international law on the use of force but also creating examples of *jus cogens*.²⁴⁵ However, there are instances where justifications have been offered on the basis of using force in a manner which cast doubt about their validity and undermine their continuity of practice. For example, the US in Dominican Republic in 1965 (referring first to protection of nationals and then to the spreading of communist threat) and Grenada in 1983 (referring first to the invitation from the government and then to the approval by the Organisation of Eastern Caribbean States (OECS) and the need to combat the regional threat consisting in the spread of armaments).²⁴⁶

The war against Iraq in 2003 witnessed another articulation of a claim in state practice that the use of force was permitted in a pre-emptive manner.²⁴⁷ The coalition initially claimed pre-emptive self-defence against the threats caused by Iraq but later it changed its course. The legal basis, as claimed by the coalition, was the revival of the SC Resolutions 678 (1990), 687 (1991) and 1441 (2002) which never authorised use of force against Iraq in 2003.²⁴⁸ A new Resolution authorising use of force against Iraq was necessary to legalise the invasion.²⁴⁹ But without such Resolution the coalition force attacked Iraq. Such change of course is fatal to the international law on prohibition of use of force.²⁵⁰

State practices also suggest that force has been used under the banner of self-defence when it was not necessary to do so. For example, although SC Resolution 1368 (2001) and 1373 (2001) authorised attack on Afghanistan in response to 9/11 attack on US, there is no plausible evidence that has been presented by US to demonstrate that it was undertaken in response to an ‘armed attack’ under Article 51 of the UN Charter.²⁵¹ The use of force resembled more a

²⁴⁵ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 205; see also International Law Commission, ‘Responsibility of States for Internationally Wrongful Acts’ (12 December 2001) <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 25 March 2017.

²⁴⁶ Alexander Orakhelashvili, ‘Changing Jus Cogens Through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 169.

²⁴⁷ *ibid* 170.

²⁴⁸ See section 2.3.5 of this chapter (above).

²⁴⁹ Jurgen Habermas, ‘Interpreting the Fall of a Monument’ in Max Pensky (ed), *Globalising Critical Theory* (Lenham, MD: Rowman & Littlefield Publishers 2005) 21; see also Arthur Isak Applbaum, ‘Forcing a People to be Free’ in Lukas Meyer (ed), *Legitimacy, Justice and Public International Law* (Cambridge University Press 2009) 271; Troy Davis, ‘The Legitimacy of War – Toward a New Principle for Intervention, with its application to Iraq War of 2003’ in Hall Gardner and Oleg Kobtzeff (eds), *The Ashgate Research Companion to War: Origins and Prevention* (Ashgate 2012) 178.

²⁵⁰ Sean Murphy, ‘Assessing the Legality of Invading Iraq’ (2004) 92 *Georgetown Law Journal* 173.

²⁵¹ Eric Myjer and Nigel White, ‘The Twin Tower Attack: An Unlimited Right to Self-Defence?’ (2002) 7 *Journal of Conflict and Security Law* 5, 7.

reprisal than self-defence²⁵² and armed reprisals are prohibited.²⁵³ Although there are doctrinal attempts to subsume armed reprisals within self-defence, it is acknowledged that reprisals are essentially aimed at retaliating and forestalling recurrence, mostly well after the initial attack has taken place, as opposed to responding to an ongoing armed attack.²⁵⁴

In addition to the above, the use of force to protect vulnerable populations from governments that expose the people to war crimes, genocide, or crimes against humanity, or governments that refrain from protecting them from such atrocities have become a contentious issue. Such use of force under the banner of ‘Humanitarian Intervention’ and ‘Responsibility to Protect’ have been claimed to be legitimate by their perpetrators.²⁵⁵ However, such use of force turned out to be suffering from legitimacy-deficits.²⁵⁶ For example, NATO’s use of force in Kosovo to protect Kosovo Albanians in 1999 and in Libya to protect the civilian population in 2011 have been condemned by international community. NATO’s use of force in Kosovo was instantly condemned by India, China and a group of Latin American states as unlawful.²⁵⁷ The statement of the Non-Allied Movement (NAM), backed by 132 states, ‘reject[ed] the so-called “right” of humanitarian intervention, which has no legal basis in the UN Charter or in the general principles of international law.’²⁵⁸ This position shows that, no legal entitlement to humanitarian intervention or responsibility to protect has ever emerged in state practice. The following words of Alexander Orakhelashvili are the true indicators of the current legal status of the state practices:

Claims in favour of the extra-Charter exceptions have always been incoherent to constitute valid state practice for the purposes of customs-generation, and fallen far short of commanding the support of states to produce an amending peremptory norm under Article 53 VCLT. All this practice has either been fragmented and not general; or inconsistent in relation to the same state, same incident, or as between multiple states; or it has consolidated within a group of states but been rebuffed by the rest of the

²⁵² Javid Rehman and Saptarshi Ghosh, “International Law, US Foreign Policy and Post 9/11 Islamic Fundamentalism: The Legal Status of the “War on Terror”” (2008) 77 *Nordic Journal of International Law* 87, 94.

²⁵³ Art 50, ILC’s Articles on State Responsibility, ILC Report 2001, UN GOAR, 56th Sess, Supp No 10, A/56/10 <<http://www.un.org/documents/ga/docs/56/a5610.pdf>> accessed 18 August 2017.

²⁵⁴ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2011) 249.

²⁵⁵ See section 2.1.4 of this chapter (above).

²⁵⁶ See section 5.2 of chapter 5.

²⁵⁷ Statement by the Rio Group, 26 Mar 1999, A/53/884, S/1999/347. 2 <http://repository.un.org/bitstream/handle/11176/35671/A_53_884%3bS_1999_347-EN.pdf?sequence=21&isAllowed=y> accessed 18 August 2017.

²⁵⁸ Statement by the Non-Aligned States (132 states), 24 Sept 1999, cited in Ian Brownlie, *Principles of Public International Law* (OUP 2008) 744.

community of states. The whole practice in relation to anticipatory self-defence, pre-emption, humanitarian intervention, or self-defence against non-state actors has attempted to gain higher ground by professing to follow the UN Charter framework of *jus ad bellum*, and is therefore subsumable within the previous dictum from Nicaragua that unilateral claims reinterpreting the established legal framework are generally counterproductive.²⁵⁹

Furthermore, states and regional organisations have claimed the ineffectiveness of the prohibition of the use of force provision for being too strict.²⁶⁰ For example, Article 2(4) and its exceptions do not give lawful authority to intervene in humanitarian crises. However, the Security Council can authorise a humanitarian intervention under Chapter VII of the Charter but without such authorisation any unilateral intervention on any grounds would raise the question of legitimacy.²⁶¹ Hence, the question here is whether the effectiveness of the Charter is limited by the fact that intervention on humanitarian or other grounds are only permissible under Chapter VII? The limitation of legality of intervention on humanitarian grounds is in place within the Charter system to prevent unjustified and biased intervention where the sole purpose of the intervention is upholding the interests of the intervening state.²⁶² Obtaining authorisation from SC is therefore a ‘must criterion’ to avoid any contestation in terms of legitimacy of such questionable and controversial intervention.²⁶³

2.4.1 Just war and international law on the use of force

The challenges posed on the UN Charter framework regarding its effectiveness and ability to regulate use of force in international affairs are also subject to scrutiny from the perspective of ‘just war’ theory. The extra-Charter use of force and paralysis of the Security Council have raised the question of effectiveness of the Charter system as a whole. The nature of the challenges has made it necessary for the scholars to analyse if the use of force outside the charter proscriptions is consistent with ‘just war’ theory and thereby legitimate. Furthermore,

²⁵⁹ Alexander Orakhelashvili, ‘Changing *Jus Cogens* Through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 175.

²⁶⁰ William C. Banks and Evan J. Criddle, ‘Customary Constraints on the Use of Force: Article 51 with an American Accent’ (2016) 29 *Leiden Journal of International Law* 67.

²⁶¹ See sections 5.2 of chapter 5.

²⁶² Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 88; see also Michael Barnett, *The International Humanitarian Order* (Routledge 2010) 69.

²⁶³ See section 5.2.3 of chapter 5.

this analysis is also expedient because international law has been one of the major carriers of ‘just war’ tradition in the modern era.²⁶⁴

Just war theory had been followed by rulers in Classical, Middle Ages and Modern periods in making their decision to wage war justly. Just war theory provided constraints of the circumstances when war can be legitimately waged. Historically, *jus ad bellum* has been a political decision of the rulers. Commentators of early modern period considered these requirements and stipulations as expressions of natural law having universal characteristic.²⁶⁵ Theorists of international law wove the inherited just war tradition into their reasoning without questioning this conception, and the development of positive international law followed suit.²⁶⁶

To limit the total war, the just war theory evolved to limit the war. Among the limitations on when war might be fought are the following:

In order to be fought justly,

1. War must be publicly declared.
2. War must be declared by a competent authority.
3. War must be fought for just cause.
4. War must be a last resort.²⁶⁷

Public declaration of use of force is necessary by waging war under the just war theory.²⁶⁸ Although making a declaration of war before using defensive force in circumstance when an attack is imminent may result in destruction of the state susceptible to be attacked, such declaration is generally mandatory to show the right intention and competent authority.²⁶⁹ This

²⁶⁴ Mark Evans, ‘Moral Theory and the Idea of a Just War’ in Mark Evans (ed), *Just War Theory: A Reappraisal* (Edinburgh University Press 2005) 4; see also Simon Chesterman, *Just war or Just Peace* (OUP 2001) 7.

²⁶⁵ James Turner Johnson, ‘Threats, Values and Defense’ in Jean Bethke Elshtain (ed), *Just War Theory* (Blackwell 1992) 57; see also Simon Chesterman, *Just war or Just Peace* (OUP 2001) 7.

²⁶⁶ Simon Chesterman, *Just war or Just Peace* (OUP 2001) 17.

²⁶⁷ Mark Evans, ‘Moral Theory and the Idea of a Just War’ in Mark Evans (ed), *Just War Theory: A Reappraisal* (Edinburgh University Press 2005) 12; see also US Catholic Bishop’s Pastoral Letter, ‘The Challenge of Peace: God’s Promise and Our Response’ in Jean Bethke Elshtain (ed), *Just War Theory* (Blackwell 1992) 98; Douglas P. Lackey, *The Ethics of War and Peace* (Englewood Cliffs, NJ: Prentice Hall 1988) 59.

²⁶⁸ Richard Regan, *Just War: Principles and Cases* (The Catholic University of America Press 1996) 20.

²⁶⁹ Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Clarendon Press 1933) 372.

declaration must specify the cause of the war as it has to be just.²⁷⁰ Medieval authorities made a correlation between ‘competent authority’ and ‘just cause’.²⁷¹

Fighting a war with just cause is problematic and this is because what is just for one party might be unjust for other and vice versa. In the absence of common understanding of what is just and what is unjust it is inappropriate to categorise someone’s war as just and some else’s as unjust. In order to overcome this dilemma, although partially, the decision to wage war had been entrusted to more people in addition to the rulers and thereby was made a shared decision to make.²⁷² The rulers made the decision and consensus was required on the part of the advisors and the subjects.²⁷³ This, however, eventually resulted in expansion of the grounds of just war because one cannot expand the power to declare war and hope thereby to limit it.²⁷⁴ For example, in the Classical formulation of just war theory war was just if conducted to punish the evildoers, to repulse an injury in the process of being committed, and to recover property.²⁷⁵ This list is too broad to include every possible harm to respond by war.

However, in the writings of contemporary commentators and in positive international law, this list is sharply restricted, so that self-defence is recognised as the only legitimate aim in justifiable war.²⁷⁶ In the modern context the issue is resolved with the claim that only those wars that are fought in self-defence can be considered just, and then only if those wars are wars of self-defence in response to aggression.²⁷⁷ Such reduction of just cause to self-defence against aggression adds an element of objectivity to the judgment, but exactly what constitutes ‘aggression and self-defence’ remains controversial.²⁷⁸ In addition, the practice of states suggests that the defensive use of force has been stretched beyond the point at which an injury is in progress.²⁷⁹

Furthermore, war must also be waged as a last resort even in self-defence. This principle reflects the requirement that war is the only necessary means of self-defence, and if there is

²⁷⁰ Stephen Evera, *Causes of War* (Cornell University Press 1999) 121; see also Richard Regan, *Just War: Principles and Cases* (The Catholic University of America Press 1996) 17, 48.

²⁷¹ LeRoy Brandt Walters Jr., ‘Five Classic Just-War Theories: A Study in the Thought of Thomas Aquinas, Victoria, Suarez, Gentili, and Grotius’ (PhD Dissertation, Yale University 1971) 81.

²⁷² Richard Regan, *Just War: Principles and Cases* (The Catholic University of America Press 1996) 10.

²⁷³ *Ibid.*

²⁷⁴ Michael Walzer, *The Revolution of the Saints* (Cambridge: Harvard University Press 1965) 268.

²⁷⁵ Paul Ramsay, *The Just War: Force and Political Responsibility* (University Press of America 1983) 141.

²⁷⁶ Michael Walzer, *Just and Unjust War* (New York: Basic Books 1977) 80.

²⁷⁷ Bruce Russett, *The Prisoners of Insecurity* (San Francisco: Freeman 1983) 139.

²⁷⁸ Stephen E. Lammers, ‘Approaches to Limits on War in Western Just War Discourse’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 63.

²⁷⁹ See section 2.3.4.1 of this chapter (above).

other means of self-defence than war then it would be unjust.²⁸⁰ In other words, all the ‘short of war’ means must be accomplished before using defensive force. However, state practices in the contemporary world suggest that recourse to force has been the first rather than last resort.²⁸¹ There were also situations when recourse to force were necessary and just but due to the exercise of veto power no action was taken to respond to serious humanitarian crises.²⁸²

In these circumstances, the expansion of use of force beyond the proscription of the UN Charter and blocking the recourse to force action by permanent members are held to be repugnant to just war theory.²⁸³ This is because such extra-Charter use of force as well as blockage of necessary recourse to force to respond to humanitarian crises are inconsistent with the parameters prescribed by just war theory as stated above. Whereas it is true that the reasons for excessive use of force and unnecessary use of veto power by permanent members are political than legal, the states and regional organisations have failed to reconcile their political disagreements by working beyond political interrelationships.²⁸⁴ They instead reinforce the use of superior force to decide political matters to the detriment of lawful rules on force.²⁸⁵ As a result, international law on the use of force has gone beyond the reach of law and has become a focal point of politics.

2.5 Use of force in customary international law

Customary international law has a very important role to play in the development of the law relating to use of force when the codified law, such as the UN Charter, does not recognise such use of force as legal. In this way, customary international law sometimes provide for the basis of legitimacy of extra-Charter use of force. Hence, any occurrence of use of force beyond the Charter framework but within the ambit of customs is likely to be legitimate. From this viewpoint, this section would endeavour to find the compatibility of extra-Charter use of force with customary international law. This finding would advance the legitimacy argument of

²⁸⁰ Richard Regan, *Just War: Principles and Cases* (The Catholic University of America Press 1996) 64; James Turner Johnson, *Can Modern War be Just?* (Yale University Press 1984) 18.

²⁸¹ See section 2.4 of this chapter (above).

²⁸² See section 2.3.5 of this chapter (above).

²⁸³ Shawn Kaplan, ‘Punitive warfare, counterterrorism, and just ad bellum’ in Fritz Allhoff, Nicholas G. Evans and Adam Henschke (eds), *Routledge Handbook of Ethics and War: Just war theory in the twenty-first century* (Routledge 2013) 243; see also Neta C. Crawford, ‘The Justice of Preemption and Preventive War Doctrines’ in Mark Evans (ed), *Just War Theory: A Reappraisal* (Edinburgh University Press 2005) 25.

²⁸⁴ Hans Kelsen, *The Law of Nations* (London: Stevens and Sons Ltd 1951) xiii; see also Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 6.

²⁸⁵ Elizabeth Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies* (Alphen ann den Rijn: Kluwer Law International 2002) 266.

customary international law on the use of force and assist to find if such legitimacy argument can develop further to promote peace and justice.

Use of force in self-defence without an ‘armed attack’ occurring, such as, pre-emptive use of force, has been the subject of customary international law for a very long time. In the *Caroline case*, such use of force has been recognised as legitimate only where the need to respond is ‘instant, overwhelming, and leaving no choice of means, and no moment for deliberation.’²⁸⁶ This argument is compatible with the realists who argued that any instant threat of force must trigger the right to use force in self-defence when such threat is overwhelming and there is no choice of deliberation due to the imminent nature of the threat.²⁸⁷

Similarly, use of force to end humanitarian crises has been claimed to be legitimate even when such force was used without authorisation from the Security Council. For example, NATO’s intervention in Kosovo to end humanitarian crises was held to be legitimate although not legal as no authorisation was obtained before intervention.²⁸⁸ On the other hand, NATO’s intervention in Libya in 2011 was with the authorisation from the Security Council and the US and UK intervention in Iraq in 2003 was without such authorisation but these interventions were held to be illegitimate.²⁸⁹

These uses of force, as stated above, are all beyond the ambit of the UN Charter but all of these uses of force are not illegitimate in descriptive sense. Although these uses of force are representing customary international law, the transformation of these customs to legitimate uses of force has not been succeeded in respect to each of them. For example, although Kosovo intervention was held to be legitimate, the Libya and Iraq interventions were held to be illegitimate. The reason for this difference lies on the scrutiny of the customs by the descriptive legitimacy test.²⁹⁰ The descriptive legitimacy test has a vital role to play and this is because it requires acceptance of use of force by the subjects as legitimate. Therefore, any use of force in

²⁸⁶ Letter from Daniel Webster, US Secretary of State, to Lord Ashburton, British Plenipotentiary (6 Aug 1842), quoted in John Bassett Moore, ‘*A Digest of International Law*’, vol 2 (Princeton, NJ: Princeton University Press, 1906), ss 217, at 412; see also Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law* (9th edn, OUP 1992) 420.

²⁸⁷ Realists’ argument has been discussed in section 2.3.1 of this chapter.

²⁸⁸ Nico Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq, and the Security Council’ (1999) 59 *Max Planck Yearbook of United Nations Law* 81; see also Emily Schroeder, ‘The Kosovo Crisis: Humanitarian Imperative versus International Law’ (2004) 28 *Fletcher F Wld Aff* 179.

²⁸⁹ Dominic Hoerauf, ‘The Status of the Libyan Rebels under the Laws of War: A Litmus Test for the Lawfulness of NATO’s Libyan Engagement under UN Resolution 1973’ (2012) 6 *Phoenix L R* 93; see also William H. Taft and Todd F. Buckwald, ‘Preemption, Iraq, and International Law’ (2003) 93 *American Journal of International Law* 557.

²⁹⁰ See section 5.2 of chapter 5 for these conceptions of legitimacy.

customary international law does not automatically render it legitimate. As Oscar Schachter rightly observed:

The role of law is to enable decisions to be made that will be accepted as legitimate by governments and peoples concerned. To achieve that, the legal concepts of necessity, proportionality, responsibility, humanitarian norms and obligations of peaceful settlement need to be applied to the diverse situations in a way that takes full account of the particular circumstances and yet results in principled conclusions.²⁹¹

The pre-emptive use of force in response to an imminent threat of an ‘armed attack’ has provided the legitimacy of such use of force based on the customary international law. Similarly, the Kosovo intervention in 1999 secured the legitimate status of intervention without the authorisation from the Security Council when serious humanitarian crises were about to unfold. The legitimacy of these uses of force is supported by descriptive legitimacy as it focuses on output or result of the norm. On the contrary, politically motivated and biased uses of force failed the legitimacy test, and accordingly do not provide the legitimate basis of such uses of force through customary international law. These state practices, which do not pass the legitimacy test, neither obtain the status of customary law nor legitimate uses of force.²⁹² Hence, any use of force which emanates from valid customary law also requires passing the legitimacy test stated above. In the absence of the authorisation from the Security Council, legitimacy of customary international law on the use of force operates as a guiding star to determine which forces are legitimate and which are not. Therefore, finding the legitimacy of use of force is the key to prevent illegitimate use of force and advance the inquiry to the next stage, namely how the legitimacy deficits of the uses of force can be overcome to make it compatible with Islamic international law.

Conclusion

If international law tolerates extra-Charter use of force then the Charter system is likely to be under a potential threat of failure.²⁹³ Due to the acceptance or at least toleration by international legal framework of the use of force outside the Charter framework by powerful states and their

²⁹¹ Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 173.

²⁹² Alexander Orakhelashvili, ‘Changing Jus Cogens through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 173.

²⁹³ Robert W. Tucker, ‘The Interpretation of War under Present International Law’ (1951) 4 ILQ 11, 13.

political willingness to continue to do so have raised the question of the legal status of the prohibition of use of force. Its effectiveness has also been subject to constant criticism for the unilateral use of force by states and regional organisations without authorisation from the Security Council. Moreover, the inaction by the Security Council when it is necessary to use force to respond to humanitarian crises has also raised the question of capacity of the Security Council to promote and protect international peace and security which it is responsible for.²⁹⁴

In addition, the challenges posed to the Charter framework by the Realists and Expansionists by claiming pre-emptive, anticipatory, and preventive self-defence in response to serious and imminent threats could be an option for the powerful state having the military capacity to launch such attack to promote self-interest. These challenges and the resulting state practices have resulted in crucial legitimacy issues which include the capacity of international law to effectively regulate use of force in contemporary world. In these circumstances, it seems necessary to develop appropriate international legal framework for overcoming the existing legitimacy issues and obtaining the required degree of legitimacy.

Customary international law has, to certain extent, provided the platform for legitimate uses of force which are not permitted by the Charter system. However, customs themselves do not legitimate such uses of force because the degree of legitimacy that is required is not achieved without passing the test of descriptive legitimacy. As a result, it is necessary for a customary law to obtain the necessary degree of legitimacy by passing the test of descriptive legitimacy before considering it as a tool for legitimate extra-Charter use of force.

This chapter concludes that the legal status of international law on the use of force is a very important question in the modern world due to the challenges posed to the Charter system. These challenges claim to legitimate extra-Charter use of force on various justifications. However, it is necessary that such justifications are legitimate in order for the uses of force to be just and compatible with other major legal systems like, Islamic international law. As the provisions for uses of force in international law has been dealt with in this chapter, it is necessary to assess the provisions for use of force in Islamic international law so that the compatibility of these two systems can be assessed by analysing the ability of these systems to complement each other and accordingly to overcome the legitimacy deficits.

²⁹⁴ Hans Kelsen, *The Law of Nations* (London: Stevens and Sons Ltd 1951) xiii.

Chapter 3

Use of Force in Islamic International Law

This chapter advances on the conclusion of the last chapter that legitimacy of use of force in international law must achieve the degree required to promote peace and justice. In addition, such legitimacy assessment would also allow this research to further investigate the compatibility of use of force between Public international law and Islamic international law. Therefore, it is necessary to assess the legitimacy of use of force in Islamic international law. This approach would advance the study to answer the second question of the thesis, which is ‘how the legitimacy deficits could be overcome?’ This is because without identifying the legitimacy of use of force of both these legal systems it is improbable to assess the second question stated above and to find if they are compatible.

Therefore, the aim of this chapter is to examine the justification of extraterritorial use of force under Islamic international law. Unlike Public international law there is no general prohibition of use of force in Islamic international law. However, defensive use of force is permitted in Islamic international law in exceptional circumstances and as a last resort within the strict prescriptions of *Shari‘a*. In addition, Islamic international law prohibits aggression.¹ The *Shari‘a* has been subject to evolution since the first century of Islam (seventh century CE) and as a result expanded to include socio-political influences.

This chapter endeavours to define the core elements of Islamic international law on the use of force and the significance of those elements in the formation and interpretation of the most disputed term ‘*jihad*’. This chapter also examines the nature and extent of extraterritorial use of force in the practices and ideologies of state and non-state armed actors in Muslim majority states.

Finally, this chapter evaluates the findings of both Western and Muslim scholars in regards to the use of force provisions in Islamic international law followed by a critical analysis of the legal position of these findings in the core of Islamic International law, such as the *Qur‘an* and

¹ Mohammed Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff: The Hague, 1968) 180; see also C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan 1988) 147; Niaz A. Shah, ‘The Use of Force under Islamic Law’ (2013) 24 EJIL, 343, 345.

the *Hadith* (the actions and sayings of the Prophet Muhammad), the practices of the four rightly guided Caliphs, the juristic opinions of the different schools of thought (*Madhhab*, pl. *Madhahib*), and the treaties concluded between Muslims and non-Muslims.

3.1 What is Islamic international law?

Islamic international law has been introduced under the Arabic word ‘*siyar*’ which is the plural form of ‘*sirah*’.² *Sirah* is a technical term in the Islamic sciences meaning the biography of the Prophet while its plural form, *siyar*, refers to legal matters.³ The *Qur’an* and *Hadith* (also known as ‘*sunna*’) provided the framework of relationship between Muslims and non-Muslims. However, they never specified for any provision as having international legal status. Therefore, Islamic international law developed through practice of the rulers beginning from the Prophet himself up until the current world.

The development of Islamic international law began since the Prophet migrated to Medina in 622CE and formed an Islamic community. The later conquest of Mecca followed by the astonishing conquests by the Prophet and his rightly guided Caliphs developed the major practices of Islamic international law. *Siyar* or Islamic international law was later built on the orthodox practices of the early Caliphs and other Muslim rulers, arbitral awards, treaties, pacts and other conventions, official instructions commanders, admirals, ambassadors and other State officials, the internal legislation for conduct regarding foreigners and foreign relations, the custom and usages.⁴

Since the death of the Prophet Muhammad, Islamic international law has evolved over time through the work of jurists as a response to the needs created by the progress of the changing Islamic society.⁵ Therefore, Islamic international law is that part of the law and custom of the land and treaty obligations which a Muslim *de facto* or *de jure* State observes in its dealings

² Majid Khadduri, *The Islamic Law of Nations: Shaybani’s Siyar* (Baltimore: John Hopkins Press 1966) 38; See also Labeeb Ahmed Bsoul, *International Treaties (Mu’ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 1; Mohamed Badar, ‘Jus in bello under Islamic International Law’ (2013) 3 International Criminal Law Review 593, 606.

³ Ibid.

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

⁵ Sobhi Mahamassani, ‘The Principles of International Law in the Light of Islamic Doctrine’ (1966) 117 *Recueil des Cours* 205, 221 cited in Mohamed Badar, ‘Jus in bello under Islamic International Law’ (2013) 3 International Criminal Law Review, 593, 600.

with other *de facto* or *de jure* States.⁶ *Siyar* or Islamic international law is the sum total of the rules and practices of Islam's intercourse with other peoples.⁷

The practices of these Muslim states had been the subject of in depth analysis of the jurists in the second century of Islam (8th Century CE) when juristic development of Islamic international law took place. The exegetical works of these jurists resulted into different schools (*Madhhab*, pl. *Madhahib*) on the basis of different methods of interpretation (*Ijtihad*) adopted by these schools.⁸ However, the most significant in Islamic international law related matters came from the Sunni branch. The first and major classical work on *Siyar* came from a Hanafi jurist of the Sunni branch, Al-Shaybani, whose remarkable treatise *al-Siyar al-Kabir* (the Major *Siyar*) serves as a standard work of reference to date.⁹ In addition, 'Abd al-Rahman al-Awza'i, had also contributed to *Siyar* by writing a treatise on this subject which has failed to reach the modern jurists.¹⁰ However, his doctrines were primarily based on the *Sunna* of the Prophet as well as the practice of Muslims of his time including official orders, which is preserved in the works of Abu Yusuf and Al-Shaf'i.¹¹

Like Roman Law, Islamic international law used to be a 'jurist law', in the sense that it was neither a product of legislative authority or case law, but a creation of the classical jurists, who elaborated on the sacred texts.¹² Therefore, Islamic international law began its foundation surrounding the principles of *Shari'a*. That means its development had been subject to being consistent with the *Shari'a* which is based on the *Qur'an* and *Sunna*. While the Western notion of international law rests on a post-Westphalian premise of territory based nation-states who enjoy full sovereign rights and equality of status,¹³ the 'Islamic Law of Nations' or *Siyar* is a legal system based on the *Shari'a* intended to apply universally to all people in every time and place.¹⁴ However, the formation and applicability of *Siyar* has been questioned by scholars,

⁶ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press 1961) 3.

⁷ Majid Khadduri, *War and Peace in the Law of Islam* (The John Hopkins Press, Baltimore 1955) 47.

⁸ Muhammad b. 'Abd al-Karim Sharastani, *Muslim Sects and Divisions: The Section on Muslim Sects in Kitab al-Milal wa 'I-Nihal* (A.K. Kazi and J.G. Flynn tr, Kegan Paul International) 10, 18.

⁹ Mohammad T. Al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff, The Hague 1968) 33-35.

¹⁰ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: John Hopkins Press 1966) 24.

¹¹ Josepha Schacht, *Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press 1967) 34.

¹² Farooq A. Hasan, 'The Sources of Islamic Law' (1982) 76 *American Society of International Law Proceedings* 65.

¹³ 'Equality of status' of sovereign states is meant here on theoretical sense without taking into account the sovereign inequality in the decision-making process at the Security Council.

¹⁴ Shaheen S. Ali, 'Resurrecting *Siyar* through Fatwas?' in M. Cherif Bassiouni and Amna Guellali (eds.), *Jihad and its Challenges to International and Domestic Law* (The Hague Academic Press, The Hague, 2010) 116.

such as Hans Kruse, Hilmar Krüger and Jörg Manfred Mössner, as to its nature as an international legal order.¹⁵

3.1.1 The Meaning and Significance of Shari‘a

Shari‘a consists of the two core sources of Islamic international law, which are the *Qur‘an* and the *Sunna* (the actions and sayings of the Prophet Muhammad). Whereas the *Qur‘an* is the unique and authentic source of *Shari‘a*, the authenticity of the *Sunna* depends of the authenticity of the chain of transmission (*isnad*).¹⁶ Therefore, all the *Sunna* are not authentic and the disagreements among the jurists that not all of them agreed on the authenticity of transmitting such traditions, and each jurist cites only what he considers to be authentic.¹⁷ However, the chain of transmission of a sunna provides the link between a sunna’s source and its trustworthiness. The more remote the chain the more likelihood of such sunna being unauthentic. As a result, chain of transmission is the key to the legitimacy of any sunna.

Shari‘a also allows to follow the dictates of secular reason in situations where these two core sources are unable to provide answer to any question or issue.¹⁸ Islamic *Shari‘a* law, taken from the *Qur‘an*, is not in contravention of, or in opposition to, God’s cosmic *Sunna* which he made the basis for the faith of the believers and the basis for the disbelief of the unbelievers, and this is because man is free to choose for himself through examination and conviction.¹⁹ There are circumstances where the *Shari‘a* has not provided any specific guidelines. In such circumstances the *Shari‘a* permits the application of juristic interpretation (*Fiqh*).²⁰

The process of interpretation, however, requires more than simply citation of texts; it involves a search for a fit between history and present circumstance, or between approved texts and new

¹⁵ Anke Iman Bouzenita, ‘The Siyar – An Islamic Law of Nations?’ (2007) 35 Asian Journal of Social Sciences 19.

¹⁶ Muhammad ibn Jarir al-Tabari, *AL-Tabari’s Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007) 36; See also Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari‘ah in the Modern Age* (Rowman & Littlefield 2014) xxxv; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press 1982) 47.

¹⁷ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society 1991) 57; see also Majid Khadduri, *Al-Shafi’s Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 279.

¹⁸ Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (Fifth edn, OUP 2008) 10; see also M. Cherif Bassiouni, ‘Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence’ (2007) 8 Chicago Journal of International Law 119, 123.

¹⁹ Mahmud Shaltut, ‘The Qur‘an and Combat’ cited by Mohammad Hashim Kamali, ‘Introduction’ in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 6.

²⁰ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society 1991) 12; see also Majid Khadduri, *Al-Shafi’s Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 21.

contexts.²¹ This process of interpretation is known as '*Fiqh*' which literally means the scholarly interpretation of the *Shari'a*. '*Fiqh*' has made Islamic international law a living matter where the nature of the finding changes with the change of circumstances but always under the scrutiny of the *Shari'a*. In the words of Joseph Schacht, "the interpretation of a religious ideal not by legislators but by scholars, and the recognised handbooks of the several schools are not 'codes' in the Western meaning of the term. Islamic law is a 'jurists' law' par excellence: Islamic jurisprudence did not grow out of an existing law, it itself created it."²²

As a result, the '*Fiqh*' has extended the sphere of *Shari'a* following the deaths of the Prophet, his rightly guided Caliphs and companions. The Muslim scholars adopted the method of *Ijtihad* (exertion in intellectual efforts) in order to interpret the principles of *Shari'a* and also to provide Islamic solution to new issues and circumstances. This process of interpreting the Qur'an exemplifies the independence of Muslim scholars and the absence of institutionalised interpretation of the *Qur'an* in Islam.²³ It is undeniable that these scholars were influenced, throughout Islamic history, by the socio-political conditions of their times.²⁴

The *Shari'a*, *Fiqh* and Islamic international law have evolved for more than fourteen centuries, and is not entirely devoid of influences from other legal systems and the experiences of other cultures with which the Islamic *ummah* (community) has been in contact.²⁵ Even when part of the religion is believed to be from the Divine, some people still offer their own understanding of such divine material and attempt to infer the divine intention that lies behind it.²⁶ As a result, the dividing line between what is provided in the *Qur'an* and what is interpreted by a scholar about the meaning of a Qur'anic text often becomes blurred. This blurring of dividing line has also resulted in conflicting views in Islamic international law.

The sources upon which Islamic international law has been formulated that is, the incidents of warfare that took place between Muslims and their enemies during the Prophet's lifetime, and the relevant Qur'an and hadith texts, have been variously interpreted by Muslim historians,

²¹ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 125.

²² Joseph Schacht, "Fikh," Encyclopaedia of Islam' cited in Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 73.

²³ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 56.

²⁴ Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History', in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 35.

²⁵ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 13.

²⁶ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 1.

exegetes, and jurists.²⁷ In addition, the Islamic community witnessed its first splinter in the 8th Century CE when the community was divided into *Shi'a* and *Sunni* Muslims which resulted in the formation of armed groups like *Khawarij* and *Mu'tazila*.²⁸ These movements and divisions also created disputes within the community and eventually resulted in the killings of the 3rd and 4th Caliph of Islam Uthman and Ali respectively.²⁹

In the 10th Century CE the *Sunni* scholars became concerned with the influx of various new knowledge systems and their respective methods that came from other civilisations.³⁰ However, such influx was the result of expansion of Islam into Europe, Persia, Greece, Byzantine and India. In order to save the community from further splinter and save the *Shari'a* from diverse interpretation the then *Sunni* scholars³¹ declared a close to *Ijtihad* (exertion in intellectual efforts) by the end of 10th Century CE.³² The call to the 'close of *Ijtihad*' in the ninth century CE has posed an enormous challenge to the Muslim jurists in modern period because such call has adversely affected the potential contribution to the '*Fiqh*' (Islamic jurisprudence). Following the conclusion of Abbasid period by the invasion from Mongol in 10th Century CE and Seljuk in the 12th Century CE respectively, the option of *Ijtihad* had been practically closed. Since then there have been many refinements and additions to the legacy of that period.³³ However, the closing of *Ijtihad* brought about a stultification of theology with a regressive tendency that reversed the progressive tradition that existed between the ninth and twelfth centuries CE.³⁴

However, many Muslim scholars objected to such a closure of *Ijtihad* and claimed the validity of the application of *Ijtihad* to deal with contemporary challenges.³⁵ As a result diverse approaches to *Shari'a* developed following the 12th Century CE which resulted in further

²⁷ Ibid 103.

²⁸ Muhammad b. 'Abd al-Karim Sharastani, *Muslim Sects and Divisions: The Section on Muslim Sects in Kitab al-Milal wa 'I-Nihal* (A.K. Kazi and J.G. Flynn tr, Kegan Paul International) 70; see also Peter Mandaville, *Islam and Politics* (Routledge 2014) 36 – 38.

²⁹ Montgomery Watt, *The Formative Period of Islamic Thought* (Oneworld Publications 1998) 12, 40; see also Peter Mandaville, *Islam and Politics* (Routledge 2014) 34 – 36.

³⁰ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 8.

³¹ 'Ibn Taymiyya' was one of the influential Sunni scholars who supported closure of *Ijtihad*.

³² M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 8.

³³ Ibid 26.

³⁴ Ibid 28.

³⁵ Mohammed Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff: The Hague, 1968) 116.

division between *Shi'as* and *Sunnis*, namely the *Sunnis* believe the *Shari'a* is complete while the *Shi'as* consider it evolving jurisprudence.³⁶

3.2 Use of Force in Islamic international law

The political circumstances of the Islamic world following the killing of the 3rd and 4th Caliphs of Islam had an enormous influence on the development of the Islamic international law on the use of force. The power struggle encountered by the Muslim rulers and leaders in this period created further major division in the Muslim community which resulted in the *Shi'a* and *Sunni* sects. The various schools of thought developed in the second half of the ninth century CE.³⁷ The major division was followed by further sub-division within the *Shi'a* and *Sunni* sects.³⁸ Different views have been developed within the schools as far as use of force is concerned.

The majority of *Sunni* and *Shi'a* jurists have held that use of force is legitimate only in defence against aggression.³⁹ In the Classical period the four schools of *Sunni* law and at least two schools of *Shi'a* law had been evolved where most of the schools (except Shaf'i school in the *Sunni* sect) reaffirmed the Islamic position of use of force for defensive purposes only.⁴⁰ However, Imam Shaf'i and his followers had justified fighting against non-Muslims on account of their disbelief (*kufur*).⁴¹ Clearly this classical theory took the view that polytheism and unbelief are the main causes behind the hostile attitude of Muslims towards non-Muslims.⁴²

The Classical theory on the use of force was formulated in the medieval imperial world order, of which Muslim states were a part. Such theory was based on the idea of continuously expanding one's borders because 'conquest' (*fath*) provided economic, political and

³⁶ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 9.

³⁷ Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge University Press, Cambridge 2005) 153.

³⁸ Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (Fifth edn, OUP 2008) 20.

³⁹ Murtada Mutahhari Ayatullah, *Jihad and Shahadat* (The Institute for Research and Islamic Studies 1986) 103; for *Sunni* view see Mohammed Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff: The Hague, 1968) 180.

⁴⁰ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: John Hopkins Press 1966) 57; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 78.

⁴¹ Muhammad Bin Edress al-Shaf'i, *Kitab al-Umm*, vol 4 (Dar al-M'rifa. Beirut) 84 cited in Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: John Hopkins Press 1966) 58; see also Muhammad ibn Jarir al-Tabari, *AL-Tabari's Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007) 20.

⁴² Bernard Lewis, *Islam and the West* (New York: Oxford University Press 1993) 9; see also Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 91; and Muhammad ibn Jarir al-Tabari, *AL-Tabari's Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007) 41.

demographic stability.⁴³ As a result, a distinction of the world into *dar al-Islam* (abode of Islam) and *dar al-harb* (abode of war) was created. The essence of this classical exegetical theory is based on the assumption that Muslims must launch all-out war against non-Muslims because of the latter's unbelief.⁴⁴ The history of early struggle of the Muslims suggests that, this attitude of Muslims against the non-Muslims was prevalent during the second Islamic Century.

The separation of the world into the 'Abode of Islam' and the 'Abode of War' reflects the reality, brutal and unavoidable, that the world was not always governed by the universal treaties of today.⁴⁵ The terms *Dar al-Islam* and *Dar al-harb* are not terms from the *Qur'an* or from the teachings of the Prophet, but grew out of the work of jurists coming to terms with the new international profile of Islam.⁴⁶ The invention of these terms were based on *ad hoc* juristic interpretations of particularly verses 9:5 and 9:29, largely in deference to realpolitik in the Abbasid period.⁴⁷ It seems that this dichotomous classification is a product of the exertion of intellectual reasoning in understanding laws (*ijtihad*) mainly based on the attitude of the Muslim state towards its enemies and friends during the second Islamic century.⁴⁸

The medieval imperial world order, 'the Islam that conquered the northern regions was not the Islamic religion but the Islamic state ... it was *Arabianism* and not *Muhammadanism* that triumphed first'.⁴⁹ As a result, *Dar al-'Ahd* ('Abode of treaty') and *Dar al-'Sulh* ('Abode of Reconciliation') emerged during and after the eleventh and twelfth centuries CE when the Muslim states were confronted with political realities other than unabated conquest and resounding victories.⁵⁰ This change in tone and emphasis, however, was not a completely novel phenomenon for the concept of *Dar al-'Sulh* can be traced back to the treaty that the Prophet had signed with the Christian population of *Najran* when he was in Medina.⁵¹

⁴³ Philip K. Hitti, *History of the Arabs* (New York, St. Martin's Press, 1970) 145.

⁴⁴ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 91.

⁴⁵ Caner Dagli, 'Jihad and Islamic Law of War' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 72.

⁴⁶ Ibid.

⁴⁷ Asma Afsaruddin, 'Views of Jihad throughout History' (2007) 1 Religious Campus 167.

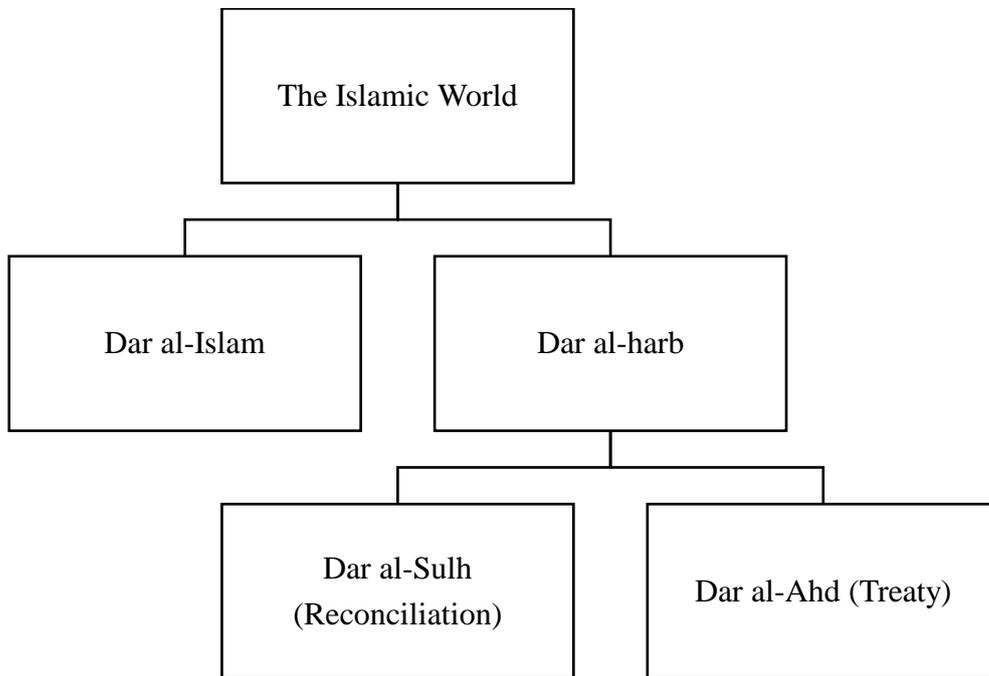
⁴⁸ Al-Shaybani, *The Islamic Law of Nations: Shaybani's Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press 1966) 194.

⁴⁹ Philip K. Hitti, *History of the Arabs* (New York, St. Martin's Press, 1970) 145.

⁵⁰ Ibrahim Kalin, 'Islam and Peace: A Survey of the Sources of Peace in the Islamic Traditions' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 235.

⁵¹ Ibid.

Figure 1: Divisions of the World in Islamic international Law



Due to a denial of the elaboration of Islamic Empire by the Christian crusaders, Tartars and Mongolian invaders, the European power emerged in the Classical Age and this resulted in the *dar al-Islam* becoming only under the rule of the Ottoman Empire till up to the twentieth century.⁵² Following the decline of the territorial expansion of *dar al-Islam* and the growing influence of colonial power in the territories under the Muslim rulers it became impracticable to further expand the territory. Therefore, the focus of the Islamic leaders was to liberate the territory from colonialism.⁵³ However, the bipolar division between *dar al-harb* and *dar al-Islam* became obsolete with the collapse of the Turkish Ottoman Empire in 1924.⁵⁴ In this period the modern Islamic jurists legitimised use of force in defensive purposes only.⁵⁵

⁵² H. J. Kissling, *The Muslim World: A Historical Survey*, (F.R.C. Bagley tr, E.J. Brill: Leiden, Netherlands 1969) 3.

⁵³ See section 2.2 of chapter 2.

⁵⁴ Giovanna Calasso, 'Introduction: Concepts, Words, Historical Realities of a "Classical" Dichotomy' in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 14.

⁵⁵ *Ibid.*

3.2.1 Formation of Islamic international law on the use of force

The use of force in Islamic international law has been formulated through the stages of fighting that the first Muslims had undertaken under the leadership of the Prophet Muhammad. There were two stages on which the Qur'an provided for use of force. These stages had been developed through the historical and political situations that the Prophet had to undertake to protect the faith from aggression at its infancy.⁵⁶

First Stage: The first set of Qur'anic verses that permit use of force is against unbelievers who had oppressed the Muslims at the very early stage of the birth of the religion.⁵⁷ The Qur'anic verses proclaim that:

Permission is granted to those who fight because they have been wronged. And Allah is truly able to help them; / those who were expelled from their homes without right, only because they said: 'Our Lord is Allah'. Were it not for Allah's causing some people to drive back others, destruction would have befallen the monasteries, and churches, and synagogues, and mosques in which Allah's Name is mentioned greatly. Assuredly Allah will help those who help Him. Allah is truly Strong, Mighty—/ those who, if We empower them in the land, maintain the prayer, and pay the alms, and enjoin decency and forbid indecency. And with Allah rests the outcome of all matters.⁵⁸

These verses discuss and justify permission for combat because the injustices the Muslims faced, and because they were expelled from their homes and forced to emigrate.⁵⁹ The imperative of meeting force with equal force in order to prevent defeat and discourage future aggression.⁶⁰

The Classical exegetes differ on whether 2:190 was the first to be revealed in regard to fighting (*qital*). It may be appropriate to consider that, as 22:39 preceded 2:190 the former constitutes permission to engage in fighting that was prohibited *ab initio*, whereas the latter clearly ordains fighting in self-defence.⁶¹ However, at this stage, fighting was allowed to fend off aggression

⁵⁶ Afzalur Rahman, *Encyclopedia of Seerah*, vol I (The Muslim School Trust: London 1985) 79.

⁵⁷ Ibn Ishaq, *The Life of Muhammad: Sirat Rasul Allah* (Alfred Guillaume tr, 1967 edn, OUP 1955) 212.

⁵⁸ Al-Qur'an 22: 39 – 41, Abu Yusuf translation.

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

⁶⁰ Joel Hayward, 'Warfare in the Qur'an' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 46.

⁶¹ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 88.

and this has been clearly exemplified in verses 2:190, 194; 4:91; 9:36; and 22:39 of the Qur'an.⁶²

Second stage: This stage is marked by the verses that directly ordered Muslims to fight those who fight them.⁶³ This is a continuation of defensive fighting that was allowed in the first stage. At this stage, pre-emptive fighting was also permitted for Muslims according to verse 4:75.⁶⁴

After the Prophet had made his migration to Medina, there were still some Muslims who remained in Mecca although they could not practice their religion, and some Meccans who wished to be Muslims but would not convert out of fear of their fellow tribesmen.⁶⁵ In both cases these difficulties were due to the weakness of these people *vis-à-vis* the polytheistic members of their own clans who sought to oppress them with threats and even torture. Therefore, verse 4:75 was revealed to call the Muslims of Medina to use force: (1) to free their brethren who were left behind in Mecca from religious oppression, and (2) to give those Meccans who desired to convert the ability to do so without fear of reprisals from the enemies of Islam.⁶⁶

3.2.2 Development of Islamic international law on the use of force

History of Islam suggests that Prophet Muhammad was not permitted to use force even for self-defence until all the other alternatives were extinguished for saving the religion in its infancy.⁶⁷ The Prophet and his companions remained in Mecca for thirteen years, advocating their faith in the face of brutal persecution and injustice.⁶⁸ Throughout this period, they were instructed by the God (Allah) to refrain from using force against their persecutors.⁶⁹ Only after the Prophet's immigration to Medina, at the beginning of the fourteenth year of his message,

⁶² Muhammad Haykal, 'al-Jihad' cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 89.

⁶³ Al Baqarah 2:191 and 194, and At Tawbah 9:36; see also Ibn Qayyim al-Jawziyya, *Zad al-Ma'ad fi Hady Khayr al-'Ibad*, vol. 2 (Cairo: al-Babi al-Halabi 1970) 45.

⁶⁴ Muhammad Haykal, *al-Jihad wa-l-qital fi al-siyasa al-shara'iyya* (Beirut: Dar al-Barayiq 1993) cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 89.

⁶⁵ Ibn Kathir, *Tafsir al-Qur'an al-'Azim*, vol.1, (Riyadh: Dar al-Salam 1998) 698.

⁶⁶ David Dakake, 'The Myth of Militant Islam' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 128.

⁶⁷ Syed Ameer Ali, *A Critical Examination of the Life and Teachings of Mohammed* (London: Williams and Norgate 1983) 76.

⁶⁸ Adil Salahi, *Muhammad: His Character and Conduct* (UK: The Islamic Foundation 2013) 214.

⁶⁹ *Ibid.*

permission to fight against oppression was given.⁷⁰ In a Qur'anic direction the God (Allah) has said:

Permission to fight is given to those against whom war is waged, because they have been wronged. Most certainly, God has the power to grant them victory. Those are the ones who have been driven from their homelands against all right for no other reason than their saying, "Our Lord is God!" Were it not that God repels some people by means of others, monasteries, churches, synagogues and mosques – in all of which God's name is abundantly extolled – would surely have been destroyed. God will most certainly succour him who succours God's cause. God is certainly Most Powerful, Almighty.⁷¹

Defensive use of force against aggression has been permitted only in Medinan verses of the *Qur'an*.⁷² This aggression includes the demonstration of unbelievers of hostility towards Islam. Reluctance to fight, in verses 2:190 – 91⁷³, which may be understood in terms of priority of the rule against killing, is overcome by the security needs of a persecuted and outnumbered community.⁷⁴ Therefore, use of force progressed from a state of patience to the use of force in self-defence followed by an obligatory *jihad* against the polytheists and People of the Book who persecuted Muslims.⁷⁵

However, from historical background of use of force by the Prophet Muhammad and his rightly guided Caliphs, it is apparent that anticipatory defensive force had been used in the infancy of Islam followed by pre-emptive defensive use of force when aggression was incumbent but had not actually occurred.⁷⁶ For example, force in anticipation had been used against the Byzantines in the battle of *Mu'tah*, against the Jews in the battle of Khaybar where the Muslims mounted a surprise attack, and against the Quraysh when the Prophet triumphed back to Mecca.⁷⁷

⁷⁰ Muhammad Husayn Haykal, *The Life of Muhammad* (Crescent Publishing, Delhi 1990) 256; see also Hilmi Zawati, *Is Jihad a Just War? War, Peace and Human Rights under Islamic and Public International Law* (Edwin Mellen 2001) 29.

⁷¹ Al-Qur'an 22:39-40, Abu Yusuf translation.

⁷² Al-Qur'an 8:39, Abu Yusuf translation; for other Medinan verses see M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence' (2007) 8 Chicago Journal of International Law 119, 127.

⁷³ "Fight in the way of Allah those who fight you, but begin not hostilities. Verily Allah loves not the aggressors" - Al-Qur'an, Abu Yusuf translation.

⁷⁴ Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History', in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 43.

⁷⁵ Niaz A. Shah, 'The Use of Force under Islamic Law' (2013) 24 EJIL, 343, 347.

⁷⁶ M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence' (2007) 8 Chicago Journal of International Law 119, 127.

⁷⁷ Hakeem O. Yusuf, 'Transitional Justice in the Middle East and North Africa' (2017) 14 Muslim World Journal of Human Rights 145, 164.

The anticipatory defensive force had been used to protect the faith from aggression from groups and tribes all around it. Such use of force in anticipation was necessary to protect the faith in its infancy and from destruction. As soon as the faith had been established in the holy land of Mecca by the Prophet's return, force had only been used on pre-emption as anticipatory defensive use of force was not necessary any longer. Prophet's *hadith* that supports this position is that - 'Now we campaign against them but are not campaigned against by them. We are going to them.'⁷⁸

Pre-emptive force had also been used against those tribes and groups which had broken the treaty provisions with the Prophet, such as Banu Mustalaq, Banu Khaybar, and Banu Ghatafan, and conspired to assassinate him. Such force had also been used against Byzantines following the killing of the Prophet's envoy by the Byzantine leader.⁷⁹ The circumstances which triggered pre-emptive use of force in self-defence were only when an enemy had the intention to cause harm, or had been planning to cause harm, or conspiring with others who were already causing harm.⁸⁰ There exists a saying in Arabic, 'When the Byzantines are not campaigned against, they campaign.' This saying advocates the reason for pre-emptive self-defence that was necessary at that point in time.

Pre-emptive use of force upon the enemy's breaking of their peace treaties with Muslims has also been authorised by the *Qur'an*.⁸¹ However, before using pre-emptive force in self-defence Islamic international law requires Muslim rulers to have clear evidence of treachery from the other side.⁸² 'It is obligatory on the part of the Muslim head of government and/or their representative to apprise the enemy beforehand of the non-existence of pacts and treaties and fighting without this previous notice is unlawful.'⁸³

3.2.2.1 Humanitarian intervention and Intervention by invitation in Islamic international law

Islamic international law permits extraterritorial use of force for humanitarian purposes. Muslim states are responsible for the elimination of any power that prevents their people from

⁷⁸ Ibn Kathir, *Tafsir al-Qur'an al-'Azim*, vol. 3, (Riyadh: Dar al-Salam 1998) 103.

⁷⁹ John Glubb, *A Short History of the Arab Peoples* (Hodder and Stoughton: London 1969) 46.

⁸⁰ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 175; see also Caner Dagli, 'Jihad and Islamic Law of War' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 70.

⁸¹ Al-Qur'an 9:12, Abu Yusuf translation.

⁸² Niaz A. Shah, 'The Use of Force under Islamic Law' (2013) 24 EJIL 343, 357.

⁸³ *Ibid*.

knowing any doctrine except that dictated to them and to liberate the people that they may freely choose the creeds they want.⁸⁴ The current situation, in which Western forces are making inroads into the territory of Islam, constitutes such a case.⁸⁵ With further citations from al-Ghazali (d. 1111), the greatest scholar of his day, al-Sulami goes on to stipulate that if a town in, say, Syria is attacked by the Franks and cannot defend itself, all the other (Muslim) cities of the region are obligated to come to its aid.⁸⁶ This stipulation also demonstrates the provision of use of force in collective self-defence among Muslim states.

Defensive war to liberate Muslims from the persecution (*fitnah*) and aggression of the unbelievers has also been commanded in the Qur'an.⁸⁷ However, the threshold for using force in the defense of oppressed and weak Muslims is that the oppression suffered must be so severe as to compel Muslims to leave their homes, for instance, genocide or torture.⁸⁸ The weak Muslims who could not flee Mecca were suffering from serious persecution. The following verses confirmed that intervention is possible to save those weak Muslims from tyranny:

Would not you fight in the way of Allah for *al-mustadafin* (the oppressed socially weak Muslims) from men, women and children who pray: Our Lord! Take us from this city of the oppressive people and appoint for us from Your side a guardian and appoint us from Your side a protector. Those who have believed fight in the way of Allah and those who disbelieve fight in the way of Satan, so fight the allies of Satan; surely the plot of Satan is weak.⁸⁹

Unless there is a valid peace treaty in existence between a Muslim state and another state which is persecuting the Muslims on their land, every Muslim state is entitled to intervene into the states which is persecuting Muslims in order to free them from persecution. This has been permitted by the Qur'an in the following Chapter:

... But if they (Muslims who have not come into exile) seek your aid in religion, it is your duty to help them, except against a people with whom you have a treaty of mutual alliance. And Allah sees all that you do.⁹⁰

⁸⁴ Abdulkadir Abdulrahim Kurdi, *The Islamic State: A Study based on the Islamic Holy Constitution* (Mansell Publishing: London 1984) 107.

⁸⁵ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 116.

⁸⁶ Ibid.

⁸⁷ Al- Qur'an 2:251, Abu Yusuf translation.

⁸⁸ Niaz A. Shah, 'The Use of Force under Islamic Law' (2013) 24 EJIL, 343, 345.

⁸⁹ Al- Qur'an 4:75-76, Abu Yusuf translation.

⁹⁰ Al- Qur'an 8:72, Abu Yusuf translation.

However, active intervention by the Muslim state to defend another Muslim state would require an invitation from the latter's ruler. This is because only a Muslim ruler can use extraterritorial use of force if another Muslim ruler seeks assistance.⁹¹ In addition, Islamic international law also permits extraterritorial use of force in the invitation of the people who are prisoners of war and this includes both Muslim and non-Muslim prisoners and *dhimmi*s (non-Muslims living under Muslim rulers).⁹²

The Qur'anic provisions and *Sunna* suggest that Islamic international law permits a step-by-step intervention process. It permits intervention in order to resolve dispute and promote peace. In case of failure to resolve the dispute and promote peace it permits use of force against the aggressor if invited to do so by the Muslim states in crisis. The *Shi'as* have also recognised the possibility of inviting neighbouring Muslim states for help where the enemy forces raise the spectre of an emergency.⁹³ Moreover, Ayatullah Murtaza Mutahhari (d. 1979) argued that at least in some cases, fighting in defence of the oppressed citizens of another country may be classified as imposed war, and seen as an even greater or higher duty than defence of one's own homeland.⁹⁴

Intervention by invitation has also taken a place in article 3 of the Islamic Republic of Iran which provides that "fostering virtue in citizens is one of the goals of the Islamic state, and that the foreign policy of the republic is devoted to the defence of Islamic values, first in the sense of maintaining its own boundaries, and second in the sense of a readiness to intervene in cases in which Islamic interests are at stake – for example, in the struggle against tyranny."⁹⁵

The Qur'anic provision, the *Sunna* of the prophet and practice of the Muslim majority states suggest that humanitarian intervention is allowed in the absence of any peace treaty irrespective of the fact that it is a Muslim or non-Muslim state. However, Islamic international law requires an invitation from the ruler of the country which needs foreign assistance on any other grounds than humanitarian. In both cases, a Muslim state must readily aid another Muslim state even in the absence of any treaty between them. On the other hand, intervention in whatever reasons into a non-Muslim state is regulated by treaty provisions rather than necessity.

⁹¹ Bukhari, *Sahih al-Bukhari*, hadith no. 2957.

⁹² Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 59.

⁹³ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 124.

⁹⁴ Ayatullah Murtaza Mutahhari, 'Jihad: The Holy War of Islam and its Legitimacy in the Qur'an' cited in John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 244.

⁹⁵ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 218.

3.2.2.2 The Role of Treaties in Islamic international law on the use of force

The treaties concluded by the Prophet Muhammad and the four rightly guided Caliphs are the foundations of Islamic international law.⁹⁶ The Prophet himself has made the status of every treaty entered into by Muslims as binding.⁹⁷ One of his hadith (*sunna*) confirms him saying that “the Muslims are bound by their obligations, except an obligation that renders the lawful unlawful, and the unlawful lawful.”⁹⁸ The binding nature of treaties has also been upheld in the Qur’an in the following chapters:

And fulfil (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning).⁹⁹

Fulfil the contracts you have made ... such are the people of truth who fear Allah.¹⁰⁰

... it is righteousness ... to fulfil the contracts which you have made ... Such are the people of truth, the Allah-fearing.¹⁰¹

A treaty is valid and takes precedence over all other laws and regulations as long as it is not inconsistent with the *Shari‘a*.¹⁰² However, even in such cases the specific prohibition has to be considered in light of the values, goals, and purposes involved and which are ascertained through application of the *Shari‘a*.¹⁰³ For example, in the Treaty of *Hudaibiyya* the Prophet entered into peace agreement with Quraysh whereby the Muslims were barred from going to pilgrimage (*hajj*) in Mecca despite the fact that the *Shari‘a* specifically requires all able Muslims to go to pilgrimage as it is one of the five pillars of Islam.¹⁰⁴ However, the Prophet agreed so in order to avoid bloodsheds and the aggression that Quraysh held towards Muslims. Therefore, it is permissible to enter into agreement against the proscriptions of *Shari‘a* but

⁹⁶ Labeeb Ahmed Bsoul, *International Treaties (Mu‘ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) x.

⁹⁷ Ibn Hisham, *Sirat al-Nabi (The Life of the Prophet)*, vol. 3 (Cairo: al-Maktaba al-Tajariyya al-Kubra, n.d.) 25.

⁹⁸ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 154.

⁹⁹ Al- Qur’an 17:34, Abu Yusuf translation.

¹⁰⁰ Al- Qur’an 5:1, Abu Yusuf translation.

¹⁰¹ Al- Qur’an 2:177, Abu Yusuf translation.

¹⁰² Labeeb Ahmed Bsoul, *International Treaties (Mu‘ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 115.

¹⁰³ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 154.

¹⁰⁴ The full text of the treaty can be found in Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961) 266 – 268.

subject to the condition that such agreement would bring greater good for the *Ummah* such as saving the community from imminent loss of life.¹⁰⁵

In order to maintain peace with the abode of war (*dar al-harb*) Islamic international law encourages entry into peace treaties.¹⁰⁶ As long as the non-Muslims do not break their oaths under the treaties they are in peace with Muslim states.¹⁰⁷ The Qur'an provides:

But if they break their oaths after [making] their pact and assail your religion, then fight the leaders of unbelief—verily they have no [binding] oaths, so that they might desist.¹⁰⁸

Therefore, Islamic international law takes breach of treaty provisions very seriously.¹⁰⁹ Muslim states are not allowed to use force on the sole ground that another state's ruler and people are non-Muslims.¹¹⁰ Sustainable peace must exist between Islamic and non-Islamic states as long as no pacts are broken, *da'wah* (call to Islamic faith) is not attacked and no obstacles are placed in the path of religion.¹¹¹ Use of force is not justified to impose Islam as a religion on unbelievers or to support a particular social regime and the Prophet only fought to repulse aggression.¹¹²

3.2.3 Fundamental Principles of Islamic international law on the use of force

The Islamic perception of use of force may be studied from the viewpoints of both Muslim States' practice and of Islamic jurisprudence.¹¹³ Unlike Public international law, Islamic

¹⁰⁵ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961) 5; see also Muhammad ibn Jarir al-Tabari, *AL-Tabari's Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007) 80; Labeeb Ahmed Bsoul, *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 109.

¹⁰⁶ Labeeb Ahmed Bsoul, *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) ix.

¹⁰⁷ *Ibid* 133.

¹⁰⁸ Al- Qur'an 9:12, Abu Yusuf translation.

¹⁰⁹ Labeeb Ahmed Bsoul, *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 127.

¹¹⁰ *Ibid* 172.

¹¹¹ Mohammed Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff: The Hague, 1968) 183; see also M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence' (2007) 8 *Chicago Journal of International Law* 119, 135; Mahmoud Shaltut, 'The Qur'an and Combat' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 13.

¹¹² Muhammad Al-Buti, *Jihad in Islam* (Munzer Adel Absi tr, Dar al-Fikr: Damascus 1995) 233; see also Muhammad Abu Zahra, *Concept of War in Islam* (Cairo: Ministry of Waqf 1961) 18; Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 40.

¹¹³ Said Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (The International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 13).

international law does not prohibit use of force in general terms. Islamic international law prohibits aggressive use of force but permits defensive use of force in certain circumstances. However, the Qur'an gives only three reasons for using force, namely fending off aggression, protecting call to the faith (*da'wah*) and safeguarding freedom of religion.¹¹⁴

Use of force for fending off an aggression and safeguarding freedom of religion are for defensive purposes and therefore these are permitted in Islamic international law.¹¹⁵ However, use of force for protecting *da'wah* has been a point of controversy in terms of 'to what extent use of force is permitted by Islamic international law for this purpose.' Some scholars (especially the fundamentalists¹¹⁶) have supported use of force for calling to the religions to a very large extent which includes aggressive use of force to expand the land under Islamic rule. On the other hand, modern scholars have only promoted and agreed peaceful calling to the religion and denied availability of use of force for *da'wah*. The modern scholars have argued that aggressive use of force for *da'wah* is unjust and likely to bring hatred to the religion which have been made forbidden by the *Qur'an*.¹¹⁷ The *Qur'an* proscribed that - "Let not your hatred of a people cause you to be unjust. You must do justice."¹¹⁸

Therefore, use of aggressive force for spreading the faith is not supported by the Qur'anic provisions and the extent to which call to the Islam is permitted is by all means peaceful. Even when freedom of religion and call to the *da'wah* are denied it is not permitted to use force which is likely to result in unjust killing of human being. As the Qur'an proclaims that - "Whosoever kills a human being for other than manslaughter or corruption in the earth, it shall be if he had killed all humanity."¹¹⁹ In such circumstances only peaceful measures to protest such denial of freedom of religion and call to the *da'wah* is permitted which is recognised in Islamic jurisprudence as 'jihad by tongue against the tyrants.'¹²⁰

¹¹⁴ Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden 1977) 55; see also Mahmoud Shaltut, 'The Qur'an and Combat' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 18.

¹¹⁵ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 175.

¹¹⁶ The term 'fundamentalists' is a contested term as it is derogatorily known in the West but not in the Muslim world.

¹¹⁷ Muhammad Al-Buti, *Jihad in Islam* (Munzer Adel Absi tr, Dar al-Fikr: Damascus 1995) 233; see also Muhammad Abu Zahra, *Concept of War in Islam* (Cairo: Ministry of Waqf 1961) 18.

¹¹⁸ Al- Qur'an 5:8, Abu Yusuf translation.

¹¹⁹ Al- Qur'an 5:32, Abu Yusuf translation.

¹²⁰ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (The Islamic Texts Society 1991) 279.

If, however, peaceful measures fail to secure peaceful co-existence between Muslim and non-Muslim states then use of force is permitted as a last resort but only for defensive purposes.¹²¹ Mahmud Shaltut (d. 1963), the then rector of al-Azhar University, was of the opinion that only defensive wars are permissible in response to external aggression.¹²² In support of this view, Shaltut has relied on the history of Islam on the circumstances under which the battle of Badr (624CE) was fought. For instance, shortly before the start of the battle the Prophet Muhammad sent a message to the Qurayesh telling them they had no reason to fight him and his companions, and that, therefore, a peace arrangement should be easily agreed upon.¹²³ Although very few of the Qurayesh leaders accepted the logic that a battle was unnecessary and tried to persuade their people to abandon the war, the hardliners were determined to go on the warpath and were soon able to drag everyone into the battle that had been fought by the Prophet and his companions to defend themselves from aggression of the Qurayesh.¹²⁴

If defensive use of force begins to fend off aggression, then the question arises when the necessity of such use of force ends under Islamic international law. The Qur'an has dictated the end of use of force as soon as the end of persecution (*fitnah*).¹²⁵ However, there has been controversy on the meaning of *fitnah* in verse 8:39. If it means unbelief in God (as interpreted by Classical exegetes) then this verse requires the Muslims to fight the unbelievers until unbelief is totally eradicated and therefore to wage a complete war against unbelievers.¹²⁶ On the other hand, if it is interpreted to mean the persecution of Muslims until they recant (as interpreted by Modern exegetes), Muslims are required to fight their persecutors until they enjoy complete freedom of worshipping God without fear or the need to hide their belief.¹²⁷ Whereas the former interpretation denotes an offensive war, the later interpretation denotes a defensive war. On the basis of the latter interpretation, defensive use of force ends as soon as persecution ends.

The Islamic *casus belli* are the prevention of aggression and religious persecution, and so fighting must cease once religious freedom is secured, and the mission to preach Islam is

¹²¹ Syed Ameer Ali, *A Critical Examination of the Life and Teachings of Mohammed* (London: Williams and Norgate 1983) 76.

¹²² Mahmud Shaltut, 'Koran and Fighting' cited in Asma Afsaruddin, 'Views of Jihad throughout History' 1 Religious Campus (2007) 169.

¹²³ Kate Zebiri, *Mahmud Shaltut and Islamic Modernism* (Oxford: Clarendon Press 1993) 45.

¹²⁴ Ibid.

¹²⁵ Al- Qur'an 8:39, Abu Yusuf translation.

¹²⁶ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 62.

¹²⁷ Ibid.

protected.¹²⁸ This suggests that the preferred interpretation of *fitnah* is ‘persecution’ rather than ‘unbelief’. Rida quotes Abduh (a modern exegetes) as saying that interpreting persecution in this verse to mean ‘unbelief’ takes the interpretation of the verse out of context.¹²⁹ The Classical Muslim jurists, who interpreted *fitnah* as unbelief, formulated the Islamic international law in a world “where war was the natural state.”¹³⁰

The historical period when Islamic international law has shaped into its primary stage suggests that the fundamental principles of use of force was based on self-defence and non-aggression. The Prophet fought to defend the religion and its adherents from persecution of non-Muslims and that was a measure taken as a last resort. Islamic international law does not permit or promote use of force in order to legitimise forced conversion to the faith as the *Qur’an* itself provides that ‘there is no compulsion in religion’.¹³¹ Moreover, the Prophet would not have wanted the non-Muslims to be subjected to the same religious persecution the Muslims had been subjected to at the infancy of the faith and God (Allah) would not have made provision in the *Qur’an* for non-Muslims to pay poll tax (*Jizyah*) instead of converting to Islam.¹³² Therefore, the fundamental principle of Islamic international law on the use of force provides for defensive use of force but only at the extinction of all other options to end religious persecution.

3.2.3.1 Who can authorise use of force in Islamic international law?

In Islamic international law ‘use of force’ decision must be declared by a legitimate leader.¹³³ Hence, no group, party or organisation has the authority to take up arms in the name of *jihad* without authorisation from lawful authorities.¹³⁴ In this way, Islamic international law has made provisions to control disorder and anarchy. A *hadith* (saying of the Prophet) has supported this stance: ‘A Muslim ruler is the shield [of his people]. A war can only be waged under him and people should seek his shelter [in war].’¹³⁵

¹²⁸ Mahmud Shaltut, ‘Al-Islam wa al-Alaqaat al-Dawliyyah’ cited in Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 68.

¹²⁹ Al-Rida, ‘Tafsir al-Qur’an al-Hakim’ cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 91.

¹³⁰ John L. Esposito, *Unholy War: Terror in the Name of Islam* (OUP 2002) 29.

¹³¹ Al- Qur’an 2:256, Abu Yusuf translation.

¹³² Al- Qur’an 9:29, Abu Yusuf translation.

¹³³ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961) 151; see also Mohammad Hashim Kamali, ‘Introduction’ in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) XIII.

¹³⁴ Ibid XIV.

¹³⁵ Bukhari, *Sahih al-Bukhari*, hadith no. 2957.

Questions about who can legitimately call for or initiate use of force as part of any *jihad*, in a world which no longer has Caliphs leading the *ummah*, are debated by Islamic scholars, with a vast majority arguing that only state leaders in Islamic (or Muslim majority) lands would be legitimately able to do so if a genuine ‘just cause’ emerged.¹³⁶ However, the two major branches of Islam, the *Sunni* and *Shi‘a*, differ sharply for doctrinal reasons on the necessary authority to wage war in the sense of *jihad*. The position established by the *Sunni* jurists was that both offensive and defensive jihad could be waged by any Muslim authority against the *dar al-harb*.¹³⁷ The *Shi‘a* position, on the other hand, has been that a divinely appointed person, the just Imam, who would unite political and religious sovereignty, is necessary for any *jihad* that is not defensive.¹³⁸ The last divine Imam, the Twelfth Imam, being not available there is no legitimate authority to use offensive force in Islam until his return from the hidden position.¹³⁹

Consequently, the eminent *Shi‘a* and *Sunni* authorities have respectively maintained that use of force, except for self-defence, is forbidden in the absence of the *ma’sum*, that is ‘the inerrant Imam’,¹⁴⁰ or the Caliph (central government).¹⁴¹ This does not give a clear message about who can legitimately declare war. However, eventually the legitimacy of the ruler must emanate from the Qur’anic provisions. A ruler who uses defensive force which is inconsistent with the Qur’anic proscriptions is not legitimate and accordingly is not authorised to make a decision on use of force under the banner of Islamic international law.¹⁴² As a result, if a head of the state or government does not use necessary force and his abstention amounts to disregard of the *Shari‘a* then such omission can give the undisputed leaders of Muslim community the authority to declare use of defensive force to protect the Muslim community. For example, the Russian invasion of Afghanistan in 1979. The Afghan leaders declared *jihad* against the

¹³⁶ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 101.

¹³⁷ Muhammad Al-Buti, *Jihad in Islam* (Munzer Adel Absi tr, Dar al-Fikr: Damascus 1995) 59; see also Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden 1977) 44.

¹³⁸ Ayatullah Murtada Mutahhari, *Jihad and Shahadat* (The Institute for Research and Islamic Studies 1986) 103; see also Abdulaziz A. Sachedina, ‘The Development of Jihad in Islamic Revelation and History’ in James Turner Johnson and John Kelsey (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 41.

¹³⁹ Muhammad b. ‘Abd al-Karim Sharastani, *Muslim Sects and Divisions: The Section on Muslim Sects in Kitab al-Milal wa ‘I-Nihal* (A.K. Kazi and J.G. Flynn tr, Kegan Paul International) 140; see also Etan Cohlberg, *Belief and Law in Imami Shaiism* (Variorum Aldershot: Great Britain 1991) 78; Mehdi Abedi and Gary Legenhausen, *Jihad and Shahadat* (The Institute for Research and Islamic Studies 1986) 15.

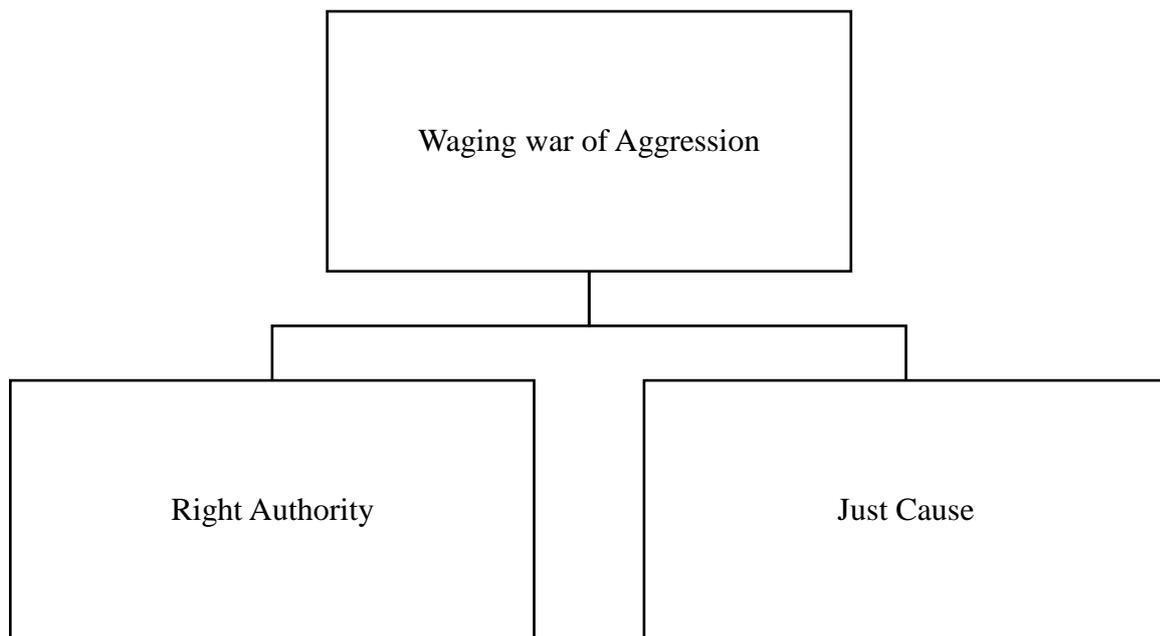
¹⁴⁰ Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (New York: Harper Collins Publishers 2004) 262.

¹⁴¹ Muhammad Hamidullah, *Muslim Conduct of State* (4th edn, Lahore: Ashraf Press, 1961) 151.

¹⁴² Majid Khadduri, *Al-Shafi‘i’s Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 112; see also Liaquat Ali Khan, ‘Jurodynamics of Islamic Law’ (2008) 31 Rutgers Law Review 231, 250.

invaders as well as the pro-communist ruler of Afghanistan. Muslims around the world joined the Afghan *jihad*. This kind of *jihad* would be considered as a war in self-defence or defensive *jihad*, although it was not declared by a Muslim ruler.¹⁴³ Further example, on the authority to wage war of aggression, includes the letter written by one hundred scholars addressing al-Baghdadi (the then leader of ISIS) which confirmed his lack of legitimate authority to use force under Islamic law as he was neither a ruler nor an undisputed leader of the Muslim world.¹⁴⁴

Figure 2: Elements of war of aggression (offensive use of force).



This difference of opinion points not only at the fundamental differences between the two schools of thought in the matter of right authority, it also demonstrates their understanding of the political history of Islam and of the connections of the Qur’anic *jihad* with that history.¹⁴⁵ Whereas the *Sunni* jurists have been influenced by the reality of war, the *Shi’a* jurists have focused on the ideal. This made the *Sunni* jurists to justify aggressive use of force based on historical conquests by Muslim rulers. They treated aggressive use of force (offensive *jihad*) as a divinely approved political tool for furthering the ‘sphere of Islam’ and keeping the ‘sphere

¹⁴³ Niaz A. Shah, ‘The Use of Force under Islamic Law’ (2013) 24 EJIL, 343, 358.

¹⁴⁴ Shawki Allam, *The Ideological Battle: Egypt’s Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 160.

¹⁴⁵ Al-Shaybani, *The Islamic Law of Nations: Shaybani’s Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press 1966) 16; see also Abdulaziz A. Sachedina, ‘The Development of Jihad in Islamic Revelation and History’, in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 41.

of war' in check.¹⁴⁶ On the other hand, the *Shi'a* jurists were able to question the legitimacy of the conquests by aggressive use of force and thereby establishing such use of force opposed to Qur'anic commands.

In the absence of a rightly guided Caliph and in the presence of different schools of thought in Islamic jurisprudence, it is very likely to be confronted with different conclusions by different rulers. As the ruler has the ultimate responsibility to protect the people, use of defensive force (as opposed to offensive force) is only subject to the decision making of a ruler.¹⁴⁷

However, such defensive use of force can be actual or pre-emptive considering the circumstances of the case. This is a decision based on knowledge and evidence available to the ruler and is not purely based on Islamic international law.¹⁴⁸ The only point that is relevant to Islamic international law is that such use of force must not be aggressive or for any other purposes than self-defence as a measure of last resort. The ruler's permission is mandatory and only then it is permissible to use force in pre-emptive self-defence.¹⁴⁹ However, by the fourth century of Islam (tenth century CE) due to the changing of the political situation especially in the Abbasid period the Caliph's duty of waging offensive armed jihad, as theorised by earlier generation, to have essentially lapsed.¹⁵⁰

Only a legitimate ruler of a Muslim state, or in the absence of a Muslim ruler the undisputed leader of the Muslim community can make a decision of use of force in self-defence.¹⁵¹ This is a very high requirement. Therefore, the leaders of any group or organisation are not eligible to make decision and declaration to use force under Islamic international law.¹⁵² These leaders of such group or organisation are not representative of the Islamic belief or behaviour and they do not have any recognised status as an authority in Islamic international law to make such decision and declaration. For example, the text of the proposed constitution for an Islamic state issued by *Hizb al-Tahrir* in 1979 stated that the leader (Caliph) has the responsibility to lead

¹⁴⁶ Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press: Baltimore 1955) 63; see also Chris Waddy, *The Muslim Mind* (Grosvenor: London 1990) 102.

¹⁴⁷ Muhammad Asad, *The Principle of State and Government in Islam* (Dar al-Andalus: Gibraltar 1985) 35.

¹⁴⁸ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 160.

¹⁴⁹ Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press: Baltimore 1955) 78; see also Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 175.

¹⁵⁰ Asma Afsaruddin, 'Views of Jihad throughout History' 1 Religious Campus (2007) 167.

¹⁵¹ Mohammad Asad, *The Principle of State and Government in Islam* (Dar al-Andalus: Gibraltar 1985) 59; see also Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 21.

¹⁵² *Ibid* 36.

the army and he also has the right to declare war.¹⁵³ The recent al-Azhar position has also confirmed that the declaration of use of force by al-Qaeda, ISIS (Islamic State in Iraq and Syria), ISIL (Islamic State in Iraq and Levant), QGIS or Al-Qa'ida Separatists in Iraq and Syria, and other similar group or organisation is not legitimate due to lack of right authority.¹⁵⁴

As soon as legitimacy of a ruler is established it is necessary to determine the cause of the use of force. The cause must be just because without 'just cause' the use of force cannot be legitimate. The justness of use of force is determined by necessity of using such force. Therefore, in addition to the circumstances under which the use of force is necessary, it is also a requirement to ensure that such circumstances are legally justified for using force in self-defence. This is a test which undertakes a theoretical analysis of justness of the use of force.

The three words (with their derivatives) used in the Qur'anic context of use of force are: *qital* (fighting, murder, killing, infanticide), *jihad* (struggle, striving) and *harb* (war).¹⁵⁵ Classical Islam developed its own just war doctrine as early as the seventh and eight centuries C.E., that is before the just war tradition of the West began to coalesce into its classical form, based on the *Qur'an* and *Hadith*.¹⁵⁶ Al-Shaybani, an Islamic Jurist in Classical period, developed a sophisticated concept of the use of force theory that governed the relationship between nations.¹⁵⁷ It is the Classical jurists who differentiated between *harb* (war) and *jihad* (struggle, effort) and the only relationship between these two concepts was overlapping. This overlap was established by the jurists by demonstrating a connection between *harb* (war) and *qital* (fighting).

The above findings suggest that the *Qur'an* permits use of force or fighting (*qital*) only in the path of God (*jihad*) in a state of war (*harb*). Just war develops when *jihad* and *harb* merge together and at that point *jihad* enters the mode of *qital*. Therefore, the following theory applies to just war in Islam:

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

¹⁵³ Suha Taji-Farouki, *A Fundamental Quest, Hizb al-Tahrir and the Search for the Islamic Caliphate* (Grey Seal: London 1996) 197.

¹⁵⁴ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 130, 134.

¹⁵⁵ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 56.

¹⁵⁶ James Turner Johnson and John Kelsey (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) xiv.

¹⁵⁷ Al-Shaybani, *The Islamic Law of Nations: Shaybani's Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press 1966) 5.

Jihad requires religious authorisation whereas *harb* requires political authorisation and direction. Therefore, *qital* (fighting) is only just when both religious and political authorisations have been given by the appropriate authorities.¹⁵⁸ Accordingly, the ‘just cause’ test is satisfied when *jihad* is approved by religious authority and use of force is approved by political authority. These authorisations do not necessarily have to emanate from the same person or origin as long as these are coming from a legitimate authority and in consistent with the *Shari‘a*. For instance, a ruler of an Islamic country can authorise defensive use of force if the population of that country is under an actual or imminent armed attack from another state or under forceful invasion or occupation by foreign power. If the political authority is responsible for the foreign invasion or occupation then the religious authority can alone authorise use of force. For example, the 1951 British invasion of Egypt with the invitation of the legitimate ruler (a political authority) Khedive Tawfiq when defensive use of force was declared by the *Ulama* (religious authority) to save the country from non-Muslim invasion.

As long as call for use of force in *jihad* is concerned, the scholars in Mardin declaration has concluded that only leaders of states can issue a call for *jihad* and that no other individual has the right to wage war against a nation or population.¹⁵⁹ Taking direct aim at contemporary jihadists and their reliance on Ibn Taymiyyah’s fatwa, the scholars declared that “anyone who seeks support from this fatwa for killing Muslims or non-Muslims has erred in his interpretation and has misapplied the revealed texts.”¹⁶⁰

Therefore, non-state actors are not allowed to recourse to extraterritorial use of force due to lack of legitimate authority under Islamic international law. The Qur’an has provided that:

...‘Our Lord, bring us forth from this town whose people are evildoers and appoint for us a protector from You, and appoint for us from You a helper’.¹⁶¹

On the other hand, non-state actors like al-Qaeda has been trying to justify their violent actions to be in accordance with Islamic international law on the basis that it justifies defensive actions against aggression by non-Muslims who constructively resort to aggression for their benefit.¹⁶²

¹⁵⁸ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 20.

¹⁵⁹ ‘The New Mardin Declaration’ (27 April 2010) <<http://iqra.ca/2010/the-new-mardin-declaration/>> accessed 30 September 2016; for contra see Yahya Michot, ‘Ibn Taymiyya’s “New Mardin Fatwa”. Is genetically modified Islam (GMI) carcinogenic?’ (2011) 101 *The Muslim World* 130, 165.

¹⁶⁰ *Ibid.*

¹⁶¹ Al- Qur’an 4:75, Abu Yusuf translation.

¹⁶² Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 119.

In addition, these groups also used force against Muslims who they accuse for assisting and even supporting the non-Muslim Western powers in their influence on the Muslim countries and as a result subjecting God's command to them.¹⁶³ However, these justifications are not free from scrutiny due to being influenced by political agenda.

3.3 Political influence in the shaping of Islamic international law

Islamic jurisprudence has always been the subject of an interplay between political context and theological doctrine in different historical periods.¹⁶⁴ Despite the *Shari'a* requirement to wage just war, use of force in Islamic international law had not been free from encroachment from political leaders who had temporal reasons to use extraterritorial force. As James Turner Johnson pointed out that "despite the invoking of religious authority of war, the causes of the wars in question were essentially temporal; despite being termed *jihad*, they were wars of the state, not wars of religion."¹⁶⁵

In the course of time, the Caliphs of Islam used defensive force (actual and pre-emptive) against external aggression which resulted in expansion of the land ruled under Islamic law.¹⁶⁶ In the wake of the phenomenal conquests achieved by Muslims during the 7th century CE, the scholars of Islam began to apply the term '*jihad*' to military action and to efforts to expand the 'sphere of Islam' (*dar al-Islam*) through the expansion of boundaries of the Islamic polity.¹⁶⁷ As a result, *jihad* became a political tool to legitimise use of force in order to achieve political goal rather than purely religious ones. Throughout the centuries, competing claimants to the *khalifa* (leadership) resorted to the doctrine of *jihad* in their struggles for power.¹⁶⁸ This doctrinal

¹⁶³ Sayyid Abul Ala Mawdudi, *Towards Understanding the Qur'an* (Zafar Ishaq Ansari tr, The Islamic Foundation 1995) 199; see also S. Khatib, 'Hakimiyyah and Jahiliyyah in the Thought of Sayyid Qutb' (2002) 38 Middle Eastern Studies 145.

¹⁶⁴ Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?' (2003) 3 Defence Studies 44, 54.

¹⁶⁵ James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania State University Press 1997) 96.

¹⁶⁶ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 175.

¹⁶⁷ Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History', in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 37.

¹⁶⁸ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 202.

extension of *jihad* to political goals has increased dramatically over the past 200 years, during which time it has come to justify political regime change and political opposition to rulers.¹⁶⁹

The conquests by Muslims rulers had not continued for long. Following the death of the last rightly guided Caliph (Ali), the Muslims were afflicted by internal and external affairs that prevented them from observing God's prescriptions and laws.¹⁷⁰ As a result, the Islamic international law has not evolved through jurisprudence comparing other major legal systems, instead it developed mostly through the doctrinal thinking of theologians. This has given rise to an almost symbiotic relationship between the ruler and the theologians where the ruler found support from theologians for his rule and the theologians found wealth and power from the ruler for having provided with him the religious support.¹⁷¹ This convenient relationship resulted in the evolution of Islamic international law as interpreting the *Shari'a* in a way that became both rigid and yet at the same time quite elastic when politics and other inducements or disincentives required it.¹⁷²

Since politics became an integral part of the development of Islamic international law on the use of force, the rulers like Ummayyad, Abbasid, Mongols, Seljuks and the Turkish Ottoman Empire entertained a broader concept of military *jihad* together with few classical jurists like al-Shaf'i and his followers. The spiritual nature of *jihad* was very rarely used by the rulers and leaders. The transformation of *jihad* from mainly spiritual to mainly military in nature resulted in the wider recognition of '*jihad*' as 'holy war' especially by the Western scholars. This is due to interpretation of the classical exegetes that *jihad* is a permanent and total war against unbelievers.

The use of *jihad* to legitimise armed struggle against colonial power became the political agenda of the Muslim leaders and rulers in the colonial period. Despite the enormous difficulties faced by Muslim scholars, leaders, merchants, and villagers in Egypt, Africa, India and other places, the *jihad* calls against the European armies did not lead to an all-out war against local non-Muslim communities. Even in cases where the Muslim population had to bear the full brunt of colonialism, extreme care was taken not to label local non-Muslims as the enemy because of their religious and cultural affiliation with European colonial powers.

¹⁶⁹ Ibid; see also M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence' (2007) 8 Chicago Journal of International Law 119, 120.

¹⁷⁰ Mahmoud Shaltut, 'The Qur'an and Combat' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), War and Peace in Islam: The Uses and Abuses of Jihad (MABDA 2013) 21.

¹⁷¹ M. Cherif Bassiouni, The Sharia and Islamic Criminal Justice in Time of War and Peace (Cambridge University Press 2014) 43.

¹⁷² Ibid.

When, for instance, the Sanusi call for ‘jihad against all unbelievers’ caused a sense of urgency among the Christians in Egypt, Muslim scholars responded by saying that *jihad* in Libya was directed at the Italian aggressors, not all Westerners or Christians.¹⁷³

After the independence from colonial power, the Muslims were divided into independent states and there was no prospect or necessity to form a unified Islamic Caliphate at that time. As a result, the bipolar distinction had been dissolved altogether. The distinction between *Dar al-Islam* and *Dar al-harb* began to fall into disuse because they no longer accurately described contemporary historical and political reality.¹⁷⁴ However, some of these components may nevertheless be deemed applicable by traditional scholars, because *fiqh* traditionalists have not evolved their thinking to consider the passage of centuries, and only a few Muslim jurists have addressed evolution of Islamic international law since the twelfth century CE.¹⁷⁵

It is apparent that, current discussion of the use of force in the Islamic context is usually oriented towards the concept of *jihad*.¹⁷⁶ Therefore, the following section of this chapter contains the meaning and significance of *jihad* from the viewpoint of Islamic international law.

3.4 Jihad: Meaning and Significance

In Islamic international law, it has been witnessed on numerous occasions that the ‘use of force’ has been demonstrated by the term ‘*jihad*’ in the scholarly works of the Muslim and non-Muslim scholars.¹⁷⁷ For this reason, ‘*jihad*’ has been at the central point in Islamic international law as far as use of force is concerned. Due to being given too much attention ‘*jihad*’ has been subjected to extensive use and as a result substantial abuse in regard to its true meaning and significance.

¹⁷³ Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton Publishers 1979) 86.

¹⁷⁴ Asma Afsaruddin, ‘Views of Jihad throughout History’ 1 *Religious Campus* (2007) 167.

¹⁷⁵ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 78.

¹⁷⁶ Said Mahmoudi, ‘The Islamic Perception of the Use of Force in the Contemporary World’ (The International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 2).

¹⁷⁷ Muhammad ibn Jarir al-Tabari, *AL-Tabari’s Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007); Muhammad Al-Buti, *Jihad in Islam* (Munzer Adel Absi tr, Dar al-Fikr: Damascus 1995); see also Ruven Firestone, *Jihad: The Origin of Holy War in Islam* (OUP 1999); Richard Bonney, *Jihad: From Qur’an to bin Laden* (New York: Palgrave 2004).

The classical laws of *jihad* assumed that the default position between states was a state of war.¹⁷⁸ This has been widely understood to mean that Muslims consider themselves obligated to wage war on all non-Muslim lands until they become part of *Dar al-Islam*. The relationship between Muslims and non-Muslims in this period was hostile in nature.¹⁷⁹ A state of war between the Muslims and, in Qur'anic terms, the idolaters/unbelievers/polytheists of Mecca was the norm until 6/628, when the armistice of al-Hudaybiyah was concluded.¹⁸⁰ The reasons for this enmity were hostility, persecution, and aggression.¹⁸¹ On the other hand, the modernists' view of *jihad* is to use force in defence of aggression and persecution of the Muslims.¹⁸² However, such defensive use of force is allowed as a last resort, that is after extinguishing all other options to end aggression and persecution.¹⁸³ The modernists also do not support armed *jihad* to expand the territory of Muslim states and to facilitate forced conversion to Islam.¹⁸⁴

There have been those who have sought, in a sense, to brush aside the whole issue and history of military *jihad* in Islam in favour of a purely spiritualised notion of 'striving' in the way of God, and there have also been those, both Muslim and non-Muslim, who have provided literal or surface readings of Qur'anic verses related to *jihad* and 'fighting' (*qitāl*) in an attempt to reduce all of Islam to military *jihad*.¹⁸⁵ For instance, the majority of classical theologians, jurists and traditionalists understood the obligation of *jihad* in a military sense while the modernisers and reformists in the nineteenth and twentieth centuries argued that *jihad* should be understood in a moral and spiritual concept.¹⁸⁶

In addition to the few Muslim scholars,¹⁸⁷ the non-Muslim scholars¹⁸⁸ notably from the West have demonstrated their endeavour to give a misconceived meaning of '*jihad*'. According to

¹⁷⁸ Muhammad Al-Buti, *Jihad in Islam* (Munzer Adel Absi tr, Dar al-Fikr: Damascus 1995) 59; see also Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden 1977) 44; Muhammad ibn Jarir al-Tabari, *AL-Tabari's Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007) 1.

¹⁷⁹ Asma Afsaruddin, *Jihad and Martyrdom in Islamic Thought and History* (OUP: USA 2016) 6; see also Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 7.

¹⁸⁰ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 48.

¹⁸¹ Ibid.

¹⁸² Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?' (2003) 3 Defence Studies 44, 53.

¹⁸³ Syed Imadoud-Din Asad, 'Islamic Humanitarian Law' cited in M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 166.

¹⁸⁴ Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?' (2003) 3 Defence Studies 44, 53.

¹⁸⁵ Richard Bonney, *Jihad: From Qur'an to bin Laden* (New York: Palgrave 2004) 21; see also David Dakake, 'The Myth of Militant Islam' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 100.

¹⁸⁶ Bernard Lewis, *The Political Language of Islam* (The University of Chicago Press 1991) 72.

¹⁸⁷ Namely, Majid Khadduri, Imam Shaf'i.

¹⁸⁸ Very few Western Scholars adopted the findings of most of the Muslim scholars e.g., Montgomery Watt.

James Turner Johnson, “between Western and Islamic culture there is possibly no other single issue at the same time as divisive or as poorly understood as that of *jihad*.”¹⁸⁹ The problem in the current state of scholarship on *jihad* in the West is ‘a practical one,’ in that there is a lack of ‘preliminary work on a vast subject.’¹⁹⁰

In order to overcome the misuse and distortion of the term ‘*jihad*’ it is important to explain what it stands for through a careful reading of the *Qur’an* and *Hadith* (the recorded words and actions of Muhammad). This is the most effective way to discover the true meaning and image of *jihad*. The *Qur’an* has directed that ‘And when you speak – speak with justice.’¹⁹¹ This analysis of the *Qur’an* and sunna would set aside the innovative meanings of *jihad* and develop its true meaning by assessing the legitimate use of force under the banner of *jihad*.

3.4.1 Meaning of Jihad

Jihad derives from the root word ‘*jahada*’ (pl. *yujahiduna*), which means to strive or to exert effort.¹⁹² The *Qur’an* refers to these two meanings in 9:79 and 24:53.¹⁹³ Due to being given to a very limited scope to its meaning, *jihad* is now commonly associated with Islamic violence by many Western as well as Muslim scholars.¹⁹⁴ Whereas the Classical meaning of *jihad* is limited to ‘armed struggle’ its meaning in modern context goes far beyond such limited scope.¹⁹⁵

Understood in its comprehensive sense, *jihad* is an inherent aspect of the human condition in facing the imperfections of this world.¹⁹⁶ The Prophet Muhammad has said that ‘the *mujahid*

¹⁸⁹ James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania State University Press 1997) 19.

¹⁹⁰ McGraw Donner, ‘The Sources of Islamic Conceptions of War’ in John Kelsay and James Turner Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western Islamic Traditions* (Greenwood Press: New York 1991) 57.

¹⁹¹ Al-Qur’an, 6:152, Abu Yusuf translation.

¹⁹² Muhammad ibn Jarir al-Tabari, *AL-Tabari’s Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007) 1; see also M. Cherif Bassiouni, ‘Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence’ (2007) 8 *Chicago Journal of International Law* 119, 122; Gerhard Bowering (ed), *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013) 273; Patrick Hugh Thomas, *Dictionary of Islam* (W.H. Allen & Co: London 1992) 243; Ian Richard Netton, *A Popular Dictionary of Islam* (Curzon Press: London 1992) 136.

¹⁹³ Al-Asfahani, ‘Mufradat Alfaz’ cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 79.

¹⁹⁴ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 198.

¹⁹⁵ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 80.

¹⁹⁶ Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press, Baltimore 1955) 56.

is one who wages a struggle against himself.’¹⁹⁷ In the Qur’anic usage, specifically military activity is consistently identified by terms other than *jihad* (e.g., *qital*), whereas *jihad* is reserved for the overall religious struggle, whether in the form of personal purification or the collective effort to establish an Islamic social order.¹⁹⁸ Therefore, the use of force in Islamic international law is ‘*jihad*’ but use of this term does not necessarily denote use of force because this term also includes other types of non-forceful struggle.¹⁹⁹

The literal meaning of the word *jihad* is ‘effort’ or struggle, and that the ‘greater’ *jihad* was defined by the Prophet as the *jihad al-nafs*, the struggle against the soul.²⁰⁰ The priority thus accorded to inward, spiritual effort over all outward endeavours must never be lost sight of in any examination of *jihad*.²⁰¹ Therefore, *jihad* should be ‘for Allah’s sake’ (*fi sabilillah*) even when it has related to fighting (*qital*).²⁰²

However, the Qur’anic term *fi sabilillah* is not as widely attached to military *jihad* as sometimes depicted by some modern Western researchers, such as Randall, Firestone and others,²⁰³ who attempt to interpret *jihad* and *jihad fi sabilillah* in the same way.²⁰⁴ It carries both military and non-military meanings and it generally refers to the way in which a believer chooses to live to please Allah.²⁰⁵ For example, spending in the cause of Allah and emigrating for fear of persecution. Therefore, *jihad* does not always denote fighting in the *Qur’an*. Every *qital* is *jihad* but not every *jihad* is *qital*.²⁰⁶

The *Qur’an* contains several references to *jihad*, some of which have the distinct meaning of war-like activities in defence of the faith.²⁰⁷ Nevertheless, the spiritual aspect of *jihad* was

¹⁹⁷ Abd al-Rahman ‘Utham (ed), *Tuhfat al-Ahwazi bi-Sharh Jami’ al-Tirmidhi* (Cairo: Maktaba’ at al-Ma’rifah) Hadith No. 1671.

¹⁹⁸ Abdulaziz A. Sachedina, ‘The Development of Jihad in Islamic Revelation and History’, in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 37.

¹⁹⁹ Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press, Baltimore 1955) 68.

²⁰⁰ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 80.

²⁰¹ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 201.

²⁰² Asma Afsaruddin, ‘Views of Jihad throughout History’ 1 Religious Campus (2007) 165.

²⁰³ Ruven Firestone, *Jihad: The Origin of Holy War in Islam* (OUP 1999); see also Richard Bonney, *Jihad: From Qur’an to bin Laden* (New York: Palgrave 2004).

²⁰⁴ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 82.

²⁰⁵ Ibid.

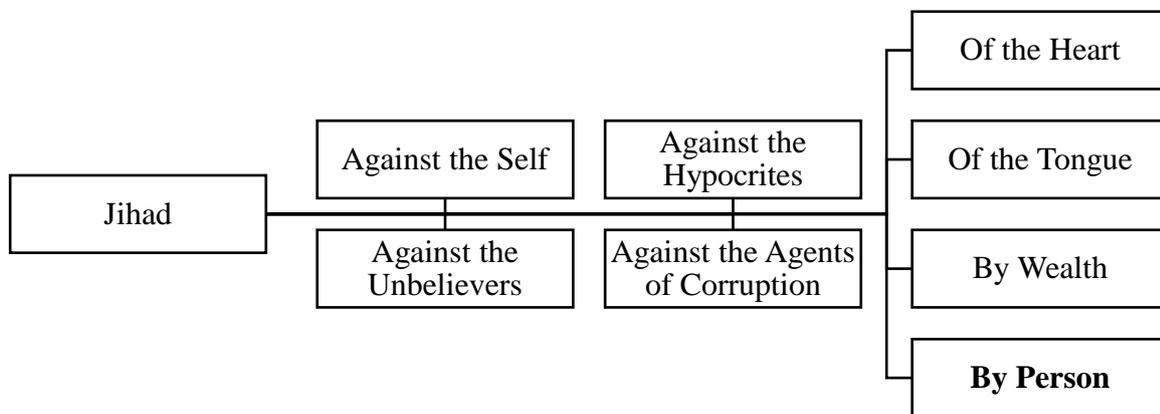
²⁰⁶ Abd al-Azim Badawi al-Khalafi cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 82.

²⁰⁷ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 205.

prevalent and predominant, particularly as practiced by the early Meccan Muslims between 611-632 CE, the period when the *Qur'an* was revealed.²⁰⁸

The Qur'an refers to *jihad* in twenty-four verses, most of which emphasise the spiritual and non-violent manifestations of *jihad*.²⁰⁹ Only few verses specifically address *jihad* as armed resistance to the enemies of Islam and in those cases resorting to use of force as part of *jihad* was always contemplated as self-defence.²¹⁰ The source evidence suggests that '*jihad*' has been divided into four main varieties, each of which has been subdivided into four types and thereby resulting into a total of sixteen varieties.²¹¹ The following diagram demonstrates the varieties:

Figure 3: Divisions and Sub-divisions of *jihad*.



Among the sixteen varieties of '*jihad*' the only four varieties when 'use of force' is permitted is consisted of the last type, which is by person. Therefore, *jihad* against the self, against the unbelievers, against the hypocrites and against the agents of corruption permits use of force by person. This is known as militant *jihad*. However, such use of force is allowed only in very limited circumstances which have been specifically circumscribed by the *Qur'an* and the *Hadith*.²¹²

²⁰⁸ Ibid 205.

²⁰⁹ M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence' (2007) 8 Chicago Journal of International Law 119, 125; see also Mohammad Hashim Kamali, 'Introduction' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) XIII.

²¹⁰ Niaz A. Shah, *Self-Defense in Islamic and International Law* (Palgrave Macmillan: UK 2008) 15.

²¹¹ <www.islamicsupremecouncil.org/legal_rulings/Jihad/jihad-withadditions.pdf> accessed 14 July 2016.

²¹² Tamara Sonn, 'Irregular Warfare and Terrorism in Islam: Asking the Right Questions' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 129.

The overriding purpose of *jihad* is the quest for peace and justice.²¹³ The *Qur'an* has obliged the Muslims to make the world aware of the divine path and required the humanity to obey the divine will manifested through the prophet of Islam.²¹⁴ This obligation establishes a relationship between 'call to the faith' and *jihad*. The *Qur'an* authorises undertaking of *jihad* for the purpose of establishing an ethical order in the world by calling to the divine path.²¹⁵ But can *jihad* be undertaken to use force in order to create such an order in the world?

The call for *jihad* has been more frequently made both by radical Islamist groups and state governments. For example, Iran's call for *jihad* to its citizen and beyond during the war against Iraq in 1980 -1988.²¹⁶ Similarly, the then President Saddam Hussain called for *jihad* to Iraqi people against the imminent attack of US in 2003.²¹⁷ However, the call for *jihad* is more frequently used by the leaders of Islamic resistance or insurgent groups than by officials of States.²¹⁸

3.4.1.1 Is Jihad a 'Holy War'?

Most of the Western scholars have described *jihad* as a 'holy war' to convert non-Muslims and to expand the territory of Islam.²¹⁹ This description of *jihad* has been the subject of huge controversy between the scholars from the West and from Muslim majority states. The scholars from inside the Muslim communities claim that the wrong description of *jihad* by the Western scholars is due to their lack of understanding of the religion and hostile attitude towards Islam.²²⁰ An outsider from the West tends to interpret and judge the religion of others through the historical, religious, and cultural experience that have formed his/her own intellect.²²¹ Furthermore, the complexity is doubled in the case of the study of the law of war in the religion

²¹³ Mohammad Hashim Kamali, 'Introduction' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) XVI.

²¹⁴ Al-Qur'an 34:27, Abu Yusuf translation. "We have sent thee not, except to mankind entire, good tidings to bear, and warning; but most men do not know it."

²¹⁵ Majid Khadduri, *War and Peace in the Law of Islam* (John Hopkins Press, Baltimore 1955) 56.

²¹⁶ Ardalan Rezamand, 'Use of Religious Doctrine and Symbolism in the Iraq-Iran War' (2010) 9 *Journal of the Centre for Studies in Religion and Society* 83.

²¹⁷ Said Mahmoudi, 'The Islamic Perception of the Use of Force in the Contemporary World' (The International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 7).

²¹⁸ *Ibid.*

²¹⁹ Bernard Lewis, *Islam in History: Ideas, Men and Events in the Middle East* (London: Alcov Press 1973); see also Ruven Firestone, *Jihad: The Origin of Holy War in Islam* (OUP 1999); Samuel Huntington, *The Clash of Civilization and the Remaking of World Order* (New York: Simon & Schuster 1996).

²²⁰ Khaled Abou El Fadl, *The Great Theft* (Harper Collins 2007) 226; see also John Esposito and Dalia Mogahed, *Who Speaks for Islam? What a Billion Muslims Really Think* (New York: Gallup Press 2007) 75.

²²¹ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 2.

of others because outsiders may find themselves to be the enemy according to the law of war they are studying.²²²

‘*Jihad*’ is translated in the Western media and scholarly writings as ‘holy war’ would in Arabic be equivalent to *al-harb al-muqaddasah*, which is totally unfamiliar and unknown to Arabic speakers.²²³ The term ‘holy war’ is relatively used lately in the West and it does not directly translate any of the regularly used Muslim terms, including central term *jihad*.²²⁴ For example, Sir Ian Brownlie has stated that *jihad* is ‘holy war’ which means ‘a war against the unfaithful’.²²⁵

Ruven Firestone claims that *jihad* in Islam is a ‘holy war’ and he supports his claim by proposing that “it was the Prophet but not the Meccan idolaters who initiated aggression against the later by berating their God’s and insulting their ancestors who died as unbelievers.”²²⁶ He also claims that the wars fought by the Prophet in his lifetime had developed into the total declaration of war against all groups who did not accept the truth of the hegemony of Islam.²²⁷ Jurists attempting to explain and legitimise these expansionist conquests divided the world into two parts: *the dar al-Islam* (abode of Islam) and *the dar al-harb* (abode of war). Increasing the former and subduing the latter was deemed to be the collective duty of the Muslim State.²²⁸ It was on this basis that *jihad* became synonymous with the notion of Holy War – a religious war aimed at the subjugation of neighbouring states with the intention of bringing them the true faith and if necessary forcing that faith upon them.²²⁹

These claims suggest that Western jurists approached Islam with a tendency to study and interpret it through the historical and religious experiences of Judaism and Christianity.²³⁰ This is not the right approach as it does not take into account the history and Qur’anic texts that address the circumstances when armed *jihad* was permitted. The right approach has been adopted by Bruce Lawrence who maintains that “the war Muhammad waged against Mecca

²²² Ibid.

²²³ Mohammad Hashim Kamali, ‘Introduction’ in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) XII.

²²⁴ James Turner Johnson, *The Holy War Idea in Western and Islamic Traditions* (Pennsylvania State University Press 1997) 25.

²²⁵ Ian Brownlie, *International Law and the Use of Force by States* (OUP 1963) 6.

²²⁶ Ruven Firestone, *Jihad: The Origin of Holy War in Islam* (OUP 1999) 106.

²²⁷ Ibid 134.

²²⁸ Major T.R. Copinger-Symes, ‘Is Osama bin Laden’s ‘Fatwa Urging Jihad Against Americans’ dated 23 February 1998 Justified by Islamic Law?’ (2003) 3 Defence Studies 44, 51.

²²⁹ Ibid.

²³⁰ Rudolph Peters, ‘Review of Jihad: The Origin of Holy War in Islam’ cited in Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 35.

was not a struggle for prestige or wealth but for the survival of God's Word and his own person."²³¹

The Constitution of Medina, recorded in Ibn Ishaq's (d. 151 AH/768 CE) *Sirat Rasul Allah* (The Biography of the Messenger of God), the most important historical account of the life of the Prophet, indicates that *jihad* was for any community willing to fight alongside the Muslims (with the exception of polytheists). Ibn Ishaq prefaces his account of the Constitution by saying:

The Prophet Muhammad composed a writing between the Emigrants and the Ansa'r,²³² in which he made a treaty and covenant with the Jews, confirmed their religion and possessions, and gave them certain rights and duties. The text of the treaty then follows-

In the Name of Allah, the Compassionate, the Merciful.

This is a writing of Muhammad the prophet between the believers and Muslims of Quraysh and Yathrib²³³ and those who follow them and are attached to them and who crusade (*ja'hada*) along with them. They are a single community distinct from other people.... Whosoever of the Jews follows us has the (same) help and support..., so long as they are not wronged [by him] and he does not help [others] against them.²³⁴

The inclusion of the Jews in this new *ummah* state and the affirmation that the Jews have the right to practice their religion and the Muslims have theirs indicate that the *ummah* state is no longer a religious community.²³⁵

In the very early period of *jihad*, Christian Arabs from tribes such as the Banu Tayyi' of Najd, the Banu al-Namir ibn Qasiu of the upper Euphrates river valley, and the Banu Lakhm participated in the *jihad* with the Muslim armies.²³⁶ In the battle of Badr, Uhud, and Hunayn and al-Taif both Jews and idolators fought with the Prophet.²³⁷ These examples mitigate against the idea that these were wars fought for the spread of a certain religion.²³⁸ Historically, *jihad* was directed against those who stood in opposition to the political authority of the Muslim

²³¹ Bruce Lawrence, *The Qur'an: A Biography* (London: Atlantic Books 2006) 42.

²³² It refers to those people of Medina who accepted the Islamic message and invited the Prophet and the emigrants to the city, giving them refuge from their situation of persecution in Mecca. For this reason, these residents of Medina were given the title of *ansa'r* of helpers, due to the fact that they gave safe haven to the Prophet and the emigrants.

²³³ This is the earlier name of Medina.

²³⁴ Montgomery Watt, *Muhammad at Medina* (OUP: Karachi 1988) 221.

²³⁵ *Ibid* 241.

²³⁶ Fred M. Donner, *The Early Islamic Conquests* (Princeton: Princeton University Press 1981) 200.

²³⁷ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 39.

²³⁸ *Ibid*.

state.²³⁹ It was not directed against a people simply because they professed a faith other than Islam.²⁴⁰ Moreover, contemporary Muslim scholars strongly advocated the Islamic permissibility of seeking the support of the non-Muslim forces for the liberation of Kuwait from the Iraqi invasion in August 1990 to February 1991.²⁴¹

In addition to describing *jihad* as an Islamic legal term mandating forced conversion to Islam, the Western scholars have also misinterpreted it by claiming that it denotes territorial expansion by use of force.²⁴² David Cook, for example, thinks that the Prophet launched campaigns during the last nine years of his life in order to conquer territories. He concludes that the aim in the battles of Badr, Uhud, the Ditch, Meccan, and Hunayn was to dominate Medina, Mecca, and al-Taif.²⁴³

Firestone has invoked the phrase *fi sabil Allah* (in the path of God) to qualify *jihad* as furthering or promoting God's kingdom on earth.²⁴⁴ However, there is no Qur'anic text which corroborates this claim made by Firestone.²⁴⁵ The phrase *fi sabil Allah* in the *Qur'an* indicates "the way of truth and justice, including all the teachings it gives on the justifications of war."²⁴⁶

Most of the Western scholars²⁴⁷ and few Muslim scholars claim that use of force in *jihad* is based on the religious belief of the non-Muslims. That means, any non-Muslims and their territories are subject to use of force by Muslims solely on the ground that they are non-Muslims. This claim is not consistent with the Qur'anic provisions because all the monotheists religion except Islam, which are Jews, Christians, Sabaeans, and Zoroastrians are referred in the Qur'an as *ahl al-kitab* (People of the Book) and accordingly are not treated as other

²³⁹ David Dakake, 'The Myth of Militant Islam' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 125.

²⁴⁰ Ibid.

²⁴¹ Yvonne Yazbeck Haddad, 'Operation Desert Shield/Desert Storm: The Islamist Perspective' in Bhyllis Bennis and Michel Moushabeck (eds), *Beyond the Storm: A Gulf Crisis Reader* (Oliver Branch Press: New York 1991) 251.

²⁴² David Cook, *Understanding Jihad* (University of California Press: Los Angeles 2005) 6.

²⁴³ Ibid.

²⁴⁴ Ruven Firestone, *Jihad: The Origin of Holy War in Islam* (OUP 1999) 17.

²⁴⁵ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 57.

²⁴⁶ Muhammad Abdel Haleem, *Understanding the Qur'an: Themes and Style* (London: Tauris 1999) 62.

²⁴⁷ Richard C. Martin, 'The Religious Foundations of War, Peace, and Statecraft in Islam' in John Kelsay and James Turner Johnson (eds), *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions* (Greenwood Press; New York 1991) 98.

religions but as itself.²⁴⁸ The only requirement that the People of the Book is bound to follow in an abode of Islam is to pay poll tax (*Jizyah*).²⁴⁹

There is not a single verse in the Qur'an that justifies war to bring about conversion to Islam, otherwise *jizyah* would not have been accepted from non-Muslims.²⁵⁰ Moreover, *jizyah* was accepted from non-Arab idolators but not from Arab idolators and this distinction proves that the justification of use of force in *jihad* is aggression, not the religious belief *per se*.²⁵¹

It is not the unbelievers, as such, who are the object of force but unbelievers who demonstrate their hostility and persecution to Islam.²⁵² There is no provision in the *Shari'a* for using force against unbelievers and this is because the Muslims were not allowed to do the same thing, such as persecution, to other religion and their followers which they were subjected to. Moreover, war and coercion are not means by which religion may be propagated because belief in a religion is only a matter of the conviction of the heart.²⁵³ Even the classical scholar *Ibn Taymiyya* had confirmed that difference in religion is not itself a justification for fighting.²⁵⁴

The study of *jihad* in most of the Western literature has been limited to distorted reading of the Qur'anic texts and the sayings of the Prophet, which creates a totally different impression according to which Muslims are transformed from fighters in just and defensive war into initiators of offensive holy war.²⁵⁵

The closing of *Ijtihad* was also amounting to closing of expansion of Islam. Had the Islamic international law meant *jihad* as 'holy war' in the sense of expansion of the religion by extraterritorial use of force then they would not have closed the gate of *Ijtihad*. This is because

²⁴⁸ Ismail R. al-Faruqi, 'Islam and Other Faiths: The World's Need for Humane Universalism' in Altaf Gauhar (ed), *The Challenge of Islam* (Islamic Council of Europe: London 1978) 108; see also C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan 1988) 86; Yohanan Friedmann, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition* (Cambridge: Cambridge University Press, 2003) 85.

²⁴⁹ Al-Qur'an 9:29, Abu Yusuf translation.

²⁵⁰ Mahmud Shaltut, 'Al-Islam wa al-Alaqaq al-Dawliyyah' cited in Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 68.

²⁵¹ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 68; see also M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence' (2007) 8 *Chicago Journal of International Law* 119, 121.

²⁵² Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden 1977) 44; see also Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History', in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 43.

²⁵³ Al-Qur'an 2:256; 10:99; 16:93; 18:29 (Abu Yusuf translation) cited in Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 78.

²⁵⁴ Ibn Taymiyya, 'Siyasat al-Shar'iyaa', cited in John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 120.

²⁵⁵ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 41.

the influx of foreign systems and methods of interpretation of the *Shari'a* by leaving the gate of *Ijtihad* open could have stimulated the propagation of Islam to non-Muslims.

3.4.2 Transformation of the meaning of Jihad

The meaning of '*Jihad*' has been evolving since the time of the Prophet often reflecting changing political realities. In the *Qur'an* the term '*jihad*' has been used to denote both spiritual and forceful dimensions. Whereas the spiritual dimension of *jihad* was predominant during Islam's first twelve years, later it came to mean the Muslims had an obligation to bear arms in self-defence of the *ummah*.²⁵⁶ This military aspect of *jihad* was subsequently redefined by state doctrine to legitimise preemptive self-defence and justify conquest.²⁵⁷ In time, the political legitimisation of force evolved into a doctrine supporting the use of force in the attainment of political goals.²⁵⁸

In the formative period, '*jihad*' meant defensive use of force against religious persecution (*fitnah*) and aggression against Muslims. In Classical Period the scholarships had been divided between aggressive and defensive use of force in *jihad*. However, in the Modern period *jihad* had been used for justifying use of force for multiple reasons, namely liberation of Muslim world from European Imperialism and unlawful foreign occupation. This is because, the one state Caliphate abode of Islam (*dar al-Islam*) had been abolished on March 3, 1924 with the extinction of the Ottoman Empire.²⁵⁹

Unlike the classical jurists, who formulated their theory in a time when a state of war already existed in the absence of a specific peace treaty, modern scholars advocate their position in a post-United Nations world.²⁶⁰ Modern Muslim scholars of Islamic international law have to deal with new circumstances, which have rendered the classical theory "inoperative or even irrelevant."²⁶¹

²⁵⁶ Abd al-Khaliq al-Nawawi, *Al-Alaqaq al-Duwaliiyya wa'l-Nuzum al-Qadaiyya (International Relations and Judicial Systems)* (Beirut: Dar-al-Kitab al-Arabi 1974) 95; see also M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 201.

²⁵⁷ M. A. Shaban, *Islamic History: A New Interpretation* (Cambridge University Press 1971) 133; see also M. Cherif Bassiouni, 'Evolving Approaches to Jihad: From Self-defense to Revolutionary and Regime-Change Political Violence' (2007) 8 *Chicago Journal of International Law* 119, 120.

²⁵⁸ Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton Publishers 1979) 131.

²⁵⁹ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 77.

²⁶⁰ *Ibid* 82; see also C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan 1988) 150.

²⁶¹ John Kelsay, *Islam and War: A Study in Comparative Ethics* (John Knox: Westminster 1993) 107.

However, despite the transformation of the nature and extent of use of force to ‘defensive only’ purposes, there has been revivals of the classical concept of use of force by the revivalists by calling Muslims to engage in individual as well as collective *jihad*. As a result, state as well as non-state actors emerged which propagated *jihad* as a call for every Muslim to fight Muslims in another state or foreign powers or an apostate leader in order to stimulate their political goal. For example, Iraq and Kuwait war and Iraq and Iran War, *jihad* against the Western power and the rulers or leaders who supported such Western domination in Muslim majority states.

3.4.2.1 Invocation of Jihad by State actors

Use of offensive force in the banner of defensive *jihad* is not relatively new in the practice of Muslim states. Such practice can be traced back to the 13th Century CE when Ibn Taymiyya had declared offensive *jihad* against the Crusaders and Mongols who threatened Islam.²⁶² Similarly, Muslim religious scholars declared *jihad* against the British during the Indian Sepoy Mutiny in 1857-8.²⁶³ In addition, when Sultan Abd al-Hamid (1878 – 1909), the Head of the Ottoman Empire, was declared Caliph of Islam, which entitled him to invoke *jihad* against European intervention or pressure, both the Sultan and rulers of the countries that were separated from the Empire after World War I, often sought to use *jihad* as a weapon against British and French domination in the Middle East and other Asiatic and African countries.²⁶⁴

Since then *jihad* had been invoked to support political goals, such as when the Ottoman Empire went to war against Britain and France in 1914, the Caliph declared *jihad* and called upon Muslims in the Middle East and India to rise up against the British and their allies.²⁶⁵ Sharif Husayn of the Hijaz (an ally of the British) counteracting the Caliph’s declaration, invoked *jihad* as an Arab ruler.²⁶⁶ Similarly, *jihad* had been used as a weapon to propagate use of force by state authorities on regular basis when they needed extraterritorial use of force. Majid Khadduri and Edmund Ghareeb have aptly noted the following occurrence of events when *jihad* had been invoked by states:

²⁶² Majid Khadduri and Edmund Ghareeb, *War in the Gulf: The Iraq-Kuwait Conflict and its implications* (OUP 1997) 230.

²⁶³ Aziz Ahmed, ‘Role of the Ulema in Indo-Muslim History’ XXXI *Studia Islamica*, 1, 10, cited in Mohammed Talaat al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (Martinus Nijhoff: The Hague, 1968) 142.

²⁶⁴ Majid Khadduri and Edmund Ghareeb, *War in the Gulf: The Iraq-Kuwait Conflict and its implications* (OUP 1997) 231.

²⁶⁵ A.J. Toynbee, *Survey of International Affairs*, vol 1 (London 1925) 43.

²⁶⁶ *Ibid* 44.

During the inter-war years, the Syrian leaders invoked *jihad* in their struggle against the French in 1920 and 1928. In 1936, the Mufti of Jerusalem invoked *jihad* against the British. In Iraq, nationalist opposition to the British in the revolt of 1920 and the military uprising in 1941 were legitimised by invocation of *jihad* in order to provide public support against foreign intervention.²⁶⁷

In 1980s Ayatollah Khomeini's revolutionary call for *jihad* shaped the attitude of Iranian people and their view of Iraq.²⁶⁸ His radical revolutionary style government in Iran had been felt as a threat by Saddam Hussain in Iraq and his Western allies.²⁶⁹ Conversely, Iraq's occupation of few territories of Iran had been the focal point for propagating *jihad* against Iraq and its supporters.²⁷⁰ This call for *jihad* also became popular among the *Shi'a* population, the Kurdish population and other secular opposition groups residing in Iraq. In addition, an Iranian-backed organisation committed to the imposition of strict Islamic rule throughout Iraq, the Supreme Assembly of Islamic Revolution in Iraq, was active from 1986 in aiming for regime change in Baghdad.²⁷¹

Iran had also facilitated extraterritorial use of force through jihadist group in Beirut, Lebanon against the American and French Military Personnel in October 1983 and in France in December of the same year.²⁷² All these attacks were carried out on the basis of liberation *jihad* against foreign interference. This had possibly given Osama bin Laden and his followers a Platform to propagate defensive *jihad* in an offensive nature but from the viewpoint of a non-state actor.

In the Iraq-Kuwait war, Iraq's invocation of *jihad* against foreign power (in this case the Security Council and the Western states and their allies) which intervened in the dispute between Iraq and Kuwait had resulted into division among the Muslim scholars. Saddam Hussein certainly sought to mobilize Islamic sentiment behind him, calling for *jihad* and placing the Islamic credo *la Allah ila Allah* ('there is no God but God') on the Iraqi flag.²⁷³

²⁶⁷ Majid Khadduri and Edmund Ghareeb, *War in the Gulf: The Iraq-Kuwait Conflict and its implications* (OUP 1997) 231.

²⁶⁸ G. Kepel, *Jihad: The Trial of Political Islam* (London: Tauris 2008) 109.

²⁶⁹ Rob Johnson, 'Mustazafin and Taughatti' in Nigel Ashton and Bryan Gibson (eds) *The Iraq-Iran War: New International Perspectives* (Routledge 2013) 59.

²⁷⁰ *Ibid* 60.

²⁷¹ *Ibid* 66.

²⁷² Pierre Razoux, 'France's Involvement in Iraq-Iran War' in Nigel Ashton and Bryan Gibson (eds) *The Iraq-Iran War: New International Perspectives* (Routledge 2013) 220.

²⁷³ Jean-Michel Dumay, 'La "guerre sainte" comme arme ideologique', *Le Monde*, 20-21 January 1991 cited by Fred Halliday, 'The Gulf War 1990-1991 and the study of international relations' (1994) 20 *Review of international studies* 109, 112.

Some supported Iraq's call of *jihad* on the ground that the foreign powers are unbelievers and their interference would deprive the Muslims of the opportunity to resolve their disputes by peaceful means in accordance with Islamic standards.²⁷⁴ On the other hand, others backed Kuwait's argument that Iraq's invasion of Kuwait was the reason for foreign intervention and Iraq was solely responsible for this.²⁷⁵

Although Iraq's call for *jihad* has been supported by few Muslim states like Algeria, Tunisia, Libya, Sudan and Yemen, Saddam Hussain's appeal to Muslims and the declaration of *jihad* was considered hypocritical, intended to create dissention among the coalition powers and to extract concessions before withdrawal from Kuwait.²⁷⁶ This situation resembles that of World War I (stated above) when the Ottoman Sultan (ally of Germany) and the ruler of Saudi Arabia (ally of Britain) declared *jihad* against each other. As a result, use of force in *jihad* has become the subject of a popular political agenda rather than purely Islamic.

3.4.2.2. Invocation of Jihad by Non-state actors

Sometimes individual responsibility for armed *jihad* has been claimed by most radical Muslim scholars and authorities even in modern period. They are known as the 'revivalists' who lean more strongly towards the expansionist doctrines stressing that the clear message of later revelations was to spread the word of God by use of force.²⁷⁷ According to them the nature of fighting is such that one might consider it analogous to the historical notion of imposed war, so that the duty to fight is in some way an individual duty.²⁷⁸ The most pressing task for revivalists is the replacement of un-Islamic regimes within Muslim countries, whose hypocrisy must be overcome before the external *jihad* can be resumed.²⁷⁹ In this respect, three examples of militant argument are instructive, namely The Neglected Duty (1981), the Charter of Hamas (1988), and the Declaration on Armed Struggle against Jews and Crusaders (1998).

²⁷⁴ Matar, 'Mawsu'at Harb al-Khalij' cited in Majid Khadduri and Edmund Ghareeb, *War in the Gulf: The Iraq-Kuwait Conflict and its implications* (OUP 1997) 237.

²⁷⁵ Ibid 238.

²⁷⁶ Majid Khadduri and Edmund Ghareeb, *War in the Gulf: The Iraq-Kuwait Conflict and its implications* (OUP 1997) 241.

²⁷⁷ Asma Afsaruddin, *Jihad and Martyrdom in Islamic Thought and History* (OUP: USA 2016) 11; see also Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?' (2003) 3 Defence Studies 53.

²⁷⁸ Asma Afsaruddin, *Jihad and Martyrdom in Islamic Thought and History* (OUP: USA 2016) 10; see also John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 128.

²⁷⁹ Major T.R. Copinger-Symes, 'Is Osama bin Laden's Fatwa Urging Jihad Against Americans' dated 23 February 1998 Justified by Islamic Law?' (2003) 3 Defence Studies 53.

‘The Neglected duty’ is a testament of the assassination of the then President of Egypt Anwar Sadat. The writer of the testament was Muhammad abd el Salam Faraj who was himself accused of this assassination. This testament appealed for a rise of militant Islam. According to al-Faraj “a well-established rule of Islamic law that the punishment of an apostate will be heavier than the punishment of someone who is by origin an unbeliever.”²⁸⁰ The background of the text is set upon the precedent set by classical ulama and the political situation posed by Sadat’s policies. Of the latter, the most important concerns were with the recognition and establishment of formal relations between Egypt and the state of Israel.²⁸¹ In addition, Sadat’s policies towards Egyptian Christians and his readiness to open Egypt to foreign investments also suggested a willingness to compromise the Islamic character of Egyptian society.²⁸²

Muhammad abd el Salam Faraj and his followers judged President Anwar Sadat an apostate who must repent or be killed. The testament promulgated that “the Rulers of this age are in apostasy from Islam ... They carry nothing from Islam but their names.”²⁸³ It also promulgated that “an apostate leader no longer has the qualification in a leader; to obey such a person is no longer obligatory, and the Muslims have the duty to revolt against him and depose him, to put a just leader in his place when they are able to do so.”²⁸⁴ As the title of the testament hints, the “neglect” of the duty to fight is itself a sin, at least of omission.²⁸⁵ This testament, therefore, focuses on the near enemy, which is the leader or ruler.

The Charter of Hamas (1988) reflects the struggles between Israelis and Palestinians where the movement established by Hamas believed that Islam is the solution of political ills. The Charter conceives armed struggle as resistance to the taking of land entrusted to the Muslim community.²⁸⁶ “The Islamic Resistance Movement believes that the land of Palestine is entrusted to the Muslims until the Day of Resurrection. It is not right to give it up in whole or in part. No Arab state ... no King or Leader ... no organisation, Palestinian or Arab, has such authority.”²⁸⁷ The Charter also stresses heavily on the responsibility of fighting by every individual in circumstances where Muslims lands have been usurped by foreign power.

²⁸⁰ Muhammad abd el Salam Faraj, *al-Faridah al-Ghaibah: The Neglected Duty* (Johannes J.G. Jansen tr, New York: Macmillan 1986) 169.

²⁸¹ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 130.

²⁸² *Ibid* 131.

²⁸³ Muhammad abd el Salam Faraj, *al-Faridah al-Ghaibah: The Neglected Duty* (Johannes J.G. Jansen tr, New York: Macmillan 1986) 169.

²⁸⁴ *Ibid* 191.

²⁸⁵ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 133.

²⁸⁶ *Ibid* 134.

²⁸⁷ ‘The Charter of Hamas, (M. Maqdsi tr, Dallas: Islamic Association for Palestine 1990) sec. 22.

According to the Charter “there is no higher peak in nationalism, no greater depth of devotion than this: When an enemy makes incursions into Muslim territory then struggle and fighting the enemy becomes an obligation incumbent upon every individual Muslim (male) and Muslimah (female).”²⁸⁸

The World Islamic Front Declaration on Armed Struggle against Jews and Crusaders (1998) was signed by 5 different militant groups from Egypt, Afghanistan, Pakistan and Bangladesh.²⁸⁹ The message sent by this declaration was that US military presence in Arabian Peninsula following the Gulf war in 1991 is an imposed war on Muslims and it is an individual duty of every Muslim to fight this war. The declaration provides that:

Ulama throughout Islamic history have unanimously agreed that armed struggle is an individual duty if the enemy destroys the Muslim countries ... The ruling to fight the Americans and their allies, civilians and military, is an individual obligation for every Muslim who can do it in any country in which it is possible to do it ... We call on every Muslim who believes in God and wishes to be rewarded to comply with God’s order to fight the Americans and plunder their money wherever and whenever they find it. We also call on Muslim ‘ulama’, leaders, youths, and soldiers to launch the raid on the adversary’s U.S. troops and the satanically inspired supporters allying with them, and to displace those who are behind them so that they may learn a lesson.²⁹⁰

This declaration focuses on the far enemy, such as the U.S. and its allies, and accordingly claims justification for both internal and extraterritorial use of force irrespective of the enemy’s presence. However, this analogy did not gain much popularity but it gained enough support to cause violence all over the world. *Shari’a* precedents cast the duty to fight in an imposed war as an individual duty but that terminology does not appear to suggest a popular uprising.²⁹¹ The arguments advanced and actions claimed to be justified by such scholars and authorities are susceptible for criticism on *Shari’a* grounds.²⁹² The authors of the testament, charter and declaration do not have the right authority to declare use of force. The cause may be just, which

²⁸⁸ Ibid sec. 12.

²⁸⁹ Said Mahmoudi, ‘The Islamic Perception of the Use of Force in the Contemporary World’ (The International Law and the Islamic World: Towards a Multipolar International Legal System, organised by Max Planck Institute for Comparative and International Public Law, Heidelberg and the Institute for Political and International Studies, Tehran, Iran, 3-5 April 2004, page 8).

²⁹⁰ <<http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>> accessed 17 September 2016.

²⁹¹ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 129.

²⁹² Ibid.

is defensive use of force against foreign usurpation, but the *Shari'a* requirement of 'just and legitimate authority' is lacking here.

As a result, the Shaykh al-Azhar has criticised 'the Neglected Duty' for causing widespread harm than good,²⁹³ Saudi scholars suggested the operations carried out in accordance with the declaration as without precedent in the history of Islam and the participants might best be judged as 'mere' suicide,²⁹⁴ and both Muslim scholars and Shaykh al-Azhar issued opinions against al-Qaeda-sponsored bombings of U.S. embassies in Kenya and Tanzania in 1998.²⁹⁵ Their action is opposed to *Shari'a* notion of honourable combat. According to *Shari'a* precedents fighting should be the last resort even in self-defence and any claim of imposed war must be responded by preaching and then diplomacy before using force.²⁹⁶ The fundamental problem with the militant versions of *Shari'a* reasoning is that they confuse their own views with those of the *Qur'an* and *sunna*.²⁹⁷

Following the presentation of "The Clash of Civilisation" theory by Samuel Huntington in 1993, the West has related the cause of terrorist attacks including the 9/11 to Islamic religious extremism and particularly to *jihād*.²⁹⁸ This claim of the West is very serious and therefore requires scholarly investigation. There have been trends among few modern exegetes who hold the classical view of *jihād*. Among these exegetes Sayyid Qutb and Abu'l A'la Mawdudi had been very influential followed by the *fatwa* given by Bin Laden in 1998. According to Mawdudi, military *jihād* as a 'perpetual revolutionary struggle' whose aim is to bring the whole world into conformity with the ideals of Islam.²⁹⁹

Sayyid Qutb rejects abrogation of non-violent verses of the Qur'an, which is a common denominator in the classical theory, and comes up with a distinctive and revolutionary vision of *jihād* as a permanent struggle.³⁰⁰ This view of Qutb is not radically different from classical

²⁹³ Ibid 133.

²⁹⁴ Ibid 140.

²⁹⁵ Ibid 142.

²⁹⁶ Ibid 147.

²⁹⁷ Khaled Abou El Fadl, *And God Knows the Soldiers: The Authoritative and the Authoritarian in Islamic Discourses* (Lanham, Md.: University Press America 2001) 37.

²⁹⁸ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 3.

²⁹⁹ Abu'l A'la Mawdudi, 'Shari'at al-Islam' cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 93.

³⁰⁰ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 99.

theory. He inclined to support offensive jihad and rejected defensive jihad and named the proponents of the latter as ‘defeatists’ and ‘apologists’.³⁰¹

On the other hand, leaders of al-Qaeda consider their *jihad* as purely defensive.³⁰² Those scholars attempting to disassociate Islam from the policies of al-Qaeda were said to be “ostensible” Muslims, lacking in conviction, untrustworthy, or unrepresentative of the faith.³⁰³ However, this claim of defensive *jihad* cannot be declared by al-Qaeda legitimately under Islamic international law because such claim is opposed to *Shari‘a*. They lack not only ‘legitimate authority’ to declare use of force but also ‘just cause’ to use such force. The Western powers did not invade any Muslim country at the time of the declaration made by al-Qaeda.

The term ‘*jihad*’ is powerful in the Muslim psyche.³⁰⁴ The classical *jihad* is still invoked by today’s extremists, such as Sayyid Qutb, Abu’l A’la Mawdudi, and Bin Laden, who insist on practising terrorism in the name of Islamic *jihad*.³⁰⁵ This interpretation of the *Qur’an* applied by some of the classical exegetes and their modern extremist followers has had its impact on the formulation of the modern Western understanding of *jihad* in Islam.³⁰⁶

Conclusion

This chapter has demonstrated the nature and extent of use of force permitted in Islamic international law. The permission to use force for defensive purposes only and as a last resort are the core provisions of Islamic international law as validated by the *Shari‘a*. However, due to the influence of politics on the ideology of Islam, the *Shari‘a* has been subject to elaboration beyond the necessity of common good. Self-interest gratification and political agenda have been the underlying motivation for abusing the ‘*Fiqh*’ which resulted into the invocation of ideologies, like *jihad*, to represent religious duty to use force against Muslims, non-Muslims and for expansion of territory. *Jihad* has also been the subject of misuse by few Muslim and most non-Muslim scholars who denote this term as synonymous to ‘holy war’. Eventually,

³⁰¹ Sayyid Qutb, ‘Zilal’ cited in Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 100.

³⁰² Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 119.

³⁰³ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 3.

³⁰⁴ M. Cherif Bassiouni, *The Sharia and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 221.

³⁰⁵ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 124.

³⁰⁶ *Ibid.*

jihad has been misleadingly promoted by both state and non-state terrorist groups to facilitate international terrorism.

The consequence of these abuse and misuse of the Islamic international law principles have resulted in severe violence in this world including mass murder by act of terrorism. After examining the nature and extent of use of force permissible in Islamic international law this chapter concludes that Islamic international law does not permit use of force beyond the necessity to defend the religion and people from persecution. In very exceptional circumstances it allows pre-emptive use of force but never permits anticipatory use of force in the contemporary modern world. However, the use of defensive force in pre-emption requires ‘right authority’ and ‘just cause’ which are lacking in the status and ideologies of non-state actors.

Islamic international law permits extraterritorial use of force by Muslim states for humanitarian purposes or if invited by another state. However, on any occasion of such use of force the treaty obligation outweighs a general obligation under Islamic international law. The general obligation is for Muslim states to be readily available to provide armed support to other Muslim states and in case of non-Muslim states either an invitation or treaty provision is necessary to provide armed support for some reasons, namely intervention by invitation or humanitarian intervention.

Although few Muslim scholars and terrorist groups have invoked the ideology of classical juristic views of permanent war against non-Muslims, this does not represent contemporary Islamic international law as the *Shari‘a* itself does not represent the dominant classical view in the modern world. *Shari‘a* is a living mechanism which evolves in the course of time but such evolution does not include invocation of any legal principle which is inconsistent with the core elements of *Shari‘a*, namely the *Qur‘an* and *Sunna*.

No aspect of Islamic religion is in the public eye and all over the media on a daily basis as much as the issue of use of force, *jihad* and terrorism.³⁰⁷ Although most of the modernists have portrayed ‘*jihad*’ as ‘defensive war’ and always strived to keep it distinct from terrorism they have not been successful. Moderate views are given less coverage than those of terrorists and extremists, which receive disproportionate amount of exposure.³⁰⁸ In these circumstances, the

³⁰⁷ Khaled Abou El Fadl, *The Great Theft* (Harper Collins 2007) 220.

³⁰⁸ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur‘anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 103.

circulation of the modernists' views is necessary by all means in order to counter the misleading ideologies of the terrorist groups and to educate the world the true position of Islamic international law as far as use of force is concerned.

This chapter, eventually, shows when use of force and by whom such use of force is legitimate in Islamic international law. These findings would set aside the illegitimate use of force from any claim of their legitimacy in Islamic international law. In addition, such illegitimate use of force can be identified to further advance the research to see if the legitimacy-deficits associated with illegitimacy could be overcome.

Chapter 4

The Islamic law of Rebellion and its potential to complement Public International Law on the Use of Force

In Chapter 3 it has been concluded that, in Islamic international law only a legitimate ruler has the authority to make decision on extraterritorial use of force and as a result non-state actors, such as rebels and terrorists, do not have such authority due to not having ‘right authority’ and ‘just cause’.¹ In other words rebels and terrorists² are not authorised, under Islamic international law, to declare neither defensive nor offensive military jihad against any external authority, which is foreign state.³ However, Islamic international law permits use of force by rebels against their rulers subject to fulfilment of certain necessary conditions. Advancing on this analysis, this chapter aims to find out the legitimacy of use of force by and against rebels in Islamic international law and the extent to which such legitimate use of force can potentially complement Public international law on the use of force. This method of analysis would also advance the study by identifying the legitimacy-deficits of use of force by and against rebels so that the second question of the thesis can be addressed, which is ‘how the legitimacy deficits could be overcome?’

Islamic international law prohibits terrorism⁴ but permits rebellion against internal authority, such as government, in order to ‘enjoin good and forbid evil’.⁵ There is also a *hadith* from the Prophet Muhammad that “if people see an oppressor and they do not enjoin him then God will punish all of them.”⁶ Whereas some scholars have used these Qur’anic and *hadith* sources to argue the right of the ruler to suppress rebellion,⁷ some other scholars used the same sources to argue rebellion as legitimate against unjust rulers.⁸ However, these arguments of Islamic scholars do not prohibit rebellion but rather provide a platform for critical analysis of this

¹ See Section 3.2.3.1 of Chapter 3.

² It is acknowledged that the terms ‘Rebels and Terrorists’ are contested and there will be an endeavour later in the chapter to define these terms in the light of Islamic international law in the use of force.

³ See Section 3.4.2.2 of Chapter 3.

⁴ For ‘terrorism’ see Section 4.4.2.3 of this Chapter.

⁵ Al-Qur’an 3:104, 9:71, 9:112, 22:41, 3:114, 7:157, 9:67, 31:17, Abu Yusuf Translation; see also Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 153.

⁶ Abi Zakariya al-Nawawi, *Riyadd al-Salihin* (Beirut: Dar al-hadith, n.d.) 109.

⁷ al-Buhuti, *Kashaf al-Qina an Matn al-Ina*, vol 6 (Riyad: Maktabat al-Nasr al-hadithah, n.d.) 158.

⁸ Ibn Hazm, *al-Muhala*, vol 11 (Beirut: al-Maktab al-Tujari, n.d.) 98.

branch of law. This platform, which has been set up by the classical Muslim jurists, has progressed further and developed as a special branch of Islamic law of rebellion.

Rebellion, in Public international law, is classified exclusively as an internal matter of a state as opposed to an external matter.⁹ This position has hindered the development of an effective legal framework in the corpus of Public international law in relation to rebellion. The enormous political support for ‘state sovereignty’¹⁰ and lack of necessary political will to recognise the right of rebellion at international level played a vital role in the hindrance. The attempts to overcome the hindrance has never been effectively successful due to the fear of the ruling authorities that recognition of the right of rebellion might provide legitimacy to their opponents and put their authority at risk.¹¹

In these circumstances, separate legal principles have developed to deal with rebellion in Public international law and Islamic international law. Whereas the former failed to develop a body of effective legal principles, the latter failed to continue the enforcement of the legal principles that were developed in its early development period. Thus, these two legal systems have created a ‘gap’ in terms of the legal principles that apply to rebels. The existence of this ‘gap’ is crucial because the subjects of these two legal systems are not regulated by the same legal framework and this difference has resulted in legitimacy-deficits of these legal frameworks for not being able to operate as a single legal framework by complementing each other. In other words, Public international law and Islamic international law do not operate at the international level in a plural fashion. Furthermore, this ‘gap’ has also created a way for terrorists to claim legitimacy of their violent use of force based on their own-invented ideologies.¹² Therefore, it is of vital importance to fill in this ‘gap’ so that these two legal frameworks can complement each other and operate as a single body of laws.

⁹ Antonio Cassese, *International Law*, 2nd edn (OUP 2005) 429; *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 127; See also Mark Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, (New York: I.B. Tauris 2013) 353, xiv, 187; see also Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 4.

¹⁰ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007) 33; see also Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 15.

¹¹ Dawn Steinhoff, ‘Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups’ (2010) 45 *Tex Int’l LJ* 297, 316; see also Anthony Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (Cambridge University Press 2010) 20; Ti-Chiang Chen, *The International Law of Recognition* (LC Green ed, New York, Praeger 1951) 371; Claudia Hoffmann, ‘Engaging Non-State Armed Groups in Humanitarian Action’ (2006) 13 *Int’l Peacekeeping* 396, 398.

¹² Shawki Allam, *The Ideological Battle: Egypt’s Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 21.

In the task of filling this ‘gap’, Islamic law has a vital role to play and this is because it has developed a far-reaching body of laws to regulate rebellion. However, the most important task is to examine the nature and extent of this ‘gap’ followed by the identification of any barrier that could potentially hinder the complementation of these two systems and finally finding out the way to overcome any such potential hindrance.

In order to examine the nature and extent of this ‘gap’ the first part of this chapter conducts a historical examination of Islamic law of rebellion following an overview of the basic laws of rebellion in Islam. The second part provides a systemic exposition of the Islamic law of rebellion and its relationship with Public international law on the use of force. The second part of this chapter also evaluates the potential barrier that is hindering the complementation of Islamic international law and Public international law of rebellion, and identifies the process of complementation. It will be seen, in the process of executing this task, that rebellion in Islam has a vital role to play in the development of Public international law as far as use of force is concerned.

4.1 Islamic law of Rebellion in relation to Use of Force

Rebellion, in Islamic law, is defined by the noun *baghy* (pl. *bughāh*) which literally means injustice or transgression.¹³ However, the word *baghy* has been used by Muslim jurists to describe a person who rebels against a ruler of which he or she is a subject.¹⁴ The word comes from the root word *baghā*, which in its various forms could mean: (i) to desire or seek something; (ii) to fornicate or cause corruption; or (iii) to envy or commit injustice.¹⁵ These forms indicate that *baghy* is a person who recourses to violence with the desire to overthrow the ruler, secede from his rule, or refuse to comply with an obligation.¹⁶ A *baghy* is distinguished from a criminal on the basis that he or she has a just cause for resorting to force against the ruler even though such cause is believed to be unjust by the ruling authority.¹⁷ Therefore, as long as a *baghy* believes that the cause for using force is just he or she must not be categorised as a criminal.

¹³ Abu al-Fadl Muhammad Ibn Manzur, *Lisan al-Arab* (Cairo: Dar al-Ma‘arif n.d.) 11: 816; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 150.

¹⁴ Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 5.

¹⁵ *Ibid.*

¹⁶ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 150.

¹⁷ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 155.

The word *bughat* is referred to a group of people who commit a *khuruj* (an act of rebellion) with a *ta'wil* (interpretation or reason).¹⁸ There is no agreement on the number of people required for the formation of a *bughat* (a group of rebels). However, the general proposition is that use of force by a single person or only very few people is unlikely to be from a *bughat* and thereby illegitimate.¹⁹ This is best viewed as a control factor; the *ta'wil* of a single person or very few people against the ruler is unlikely to be just as it is inconsistent with *ijma* (consensus of opinion) which is a source of Islamic law.²⁰ Therefore, in order to qualify for the status of *bughat* there must be a considerable number of *bughāh* (rebels) who have agreed on a common interpretation or reason (*taw'il*).²¹ Seen in this way, the practical consideration of the concept of *baghy* and *bughat* is that the former can be treated as a criminal when his or her *ta'wil* has not gained consensus or support to form a group of rebels and hence illegitimate whereas, the latter cannot be treated as criminals because the *ta'wil* has gained consensus among a group of rebels and hence legitimate. Modern scholars have used *bughat* and *bughāh* interchangeably to describe a group of Muslim rebels. In this thesis, these terms have been used accordingly.

Unlike the common belief among the vast majority of Muslim scholars at present, surprisingly the term *bughāh* does not carry any derogatory or negative connotations, as maintained by the Shaf'i jurists,²² nor does the act of rebellion constitute a sin, as believed by Ibn Taymiyyah (d. 1328).²³ But the jurists used the term *bughāh* for rebels because it referred to one of the conflicting parties in the Qur'anic text addressing the law of rebellion. The jurists of the four schools of Islamic law define rebels as:

A group of Muslims that possesses some power and organisation (*shawkah, man'ah, fay'ah*) and that gathers, under the command of a leader, to fight against a just ruler

¹⁸ Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 155.

¹⁹ Ibn Hazm, *al-Muhala*, vol 11 (Beirut: Dar al-hadith, n.d.) 98.

²⁰ Ibn Qudamah, *al-Mughni*, vol 8 (Cairo: al-Sa'adah 1324Hijra) 536; see also al-Bayhaqi, *al-Sunan al-Kubra*, vol 8 (India: Da'erat al Ma'aref 1304 Hijra) 172.

²¹ Ibid.

²² Muḥammad al-Khaṭīb al-Shirbīnī, *Mughnī al-Muḥtāj ilā Ma'rifah Ma'ānī Alfāz al-Minhāj*, vol 4 (Beirut: Dār al-Fikr, n.d.) 124; Muḥammad ibn Abī al-'Abbās Aḥmad ibn Ḥamzah al-Ramlī, *Nihāyah al-Muḥtāj ilā Sharḥ al-Minhāj*, vol 7 (Beirut: Dār al-Fikr 1984) 402.

²³ Ahmad Ibn Taymiyyah, *Al-Khilāfah wa al-Mulk, Min Rasā'il Shaykh al-Islām Ibn Taymiyyah* in Ḥammād Salāmah and Muḥammad 'Iwīḍah (eds), (2nd edn, Al-Zarqā', Jordan: Maktabah al-Manār 1994) 89.

claiming, whether rightly or wrongly, that they have a *ta'wīl* (just cause, plausible interpretation) for their rebellion, secession or non-compliance with an obligation.²⁴

Despite the fact that the justification for rebellion is invalid from the perspective of the majority of Muslims, classical Muslim jurists explain that the *bughāh* are excused because, from the perspective of the *bughāh*, they think that their actions are justified.²⁵ Whereas Ibn Taymiyyah has claimed that the term *bughāh* does not mean that rebels have committed a sin but fighting against them is permitted in order to prevent their harm to security and stability²⁶, the Hanafi position maintained that the rebels are sinners.²⁷ There are also disagreements among Muslim jurists about whether anyone would qualify for their status as *bughāh* for rebellion against a just ruler or unjust ruler.²⁸ This uncertainty has also worked well for rulers in refusing to recognise the status of rebels in Islamic law.²⁹ However, this uncertainty does not have any significant role to play in identifying the rebels because both rebels and rulers are keen to justify themselves as just and legitimate in one hand and accuse their opponents as unjustified and illegitimate on the other.³⁰ Hence, as long as the rulers and rebels believe that they are just and legitimate respectively then they are entitled to use force against each other.³¹

The law of rebellion (*ahkam al-bughāh*) in Islamic law is constructed on the doctrinal and historical precedents which must be understood through a historical continuum.³² Therefore, it is important to review such precedents in historical context out of which the law has been formulated. The historical precedents displayed by Caliph Ali during his time as the 4th Caliph

²⁴ Ahmed Al-Dawoody, *The Islamic Law of War* (Palgrave Macmillan 2011) 150; see also 'Abd al-Qādir 'Awdah, *Criminal Law of Islam*, vol I (Zakir Aijaz tr, New Delhi: Kitab Bhavan, reprint 2005) 113; F.A. Klein, *The Religion of Islam* (1st paperback edn, London: Curzon Press, 1985) 182.

²⁵ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011)150; see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 158.

²⁶ Ahmad Ibn Taymiyyah, *Al-Khalifah wa al-Mulk* (Jordan: Makhtab al-Manar 1994) 89. This position has also been supported by Hanbal'i jurists.

²⁷ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 238.

²⁸ Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 156; Abu al-Hasan al-Mawardi, *al-Hawi al-Kabir Sharh Mukhtasar al-Muzani* (Beirut: Dar al-Kutub al-Ilmiyya 1994) XIII: 97; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 151.

²⁹ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 52.

³⁰ Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 ICLQ 369; see also Orla Marie Buckley, 'Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara' (2012) 37 NCJ Int'l L & Com Reg 793, 804.

³¹ Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 158.

³² Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2006) 33.

of Islam have been recognised as the best by numerous sources.³³ Conversely, the conducts of A'isha bint Abu Bakr (d. 58/678), 'Uthman b. 'Affan (d. 35/656), or Mu'awiya b. Abu Sufyan (d. 60/680) were mostly excluded or not cited.³⁴ It has also been reported that Ali was purportedly acting in compliance with the divine command.³⁵ These precedents, in the course of time, are selected, co-opted and channelled in order to develop a body of laws which regulate the right of rebellion and the treatment of rebels in Islam.³⁶

In addition to these historical precedents, the scriptural basis for the Islamic law of rebellion reads:

And if two parties of the believers fight each other, then bring reconciliation between them. And if one of them transgresses against the other, then fight against the one who transgresses until it returns to the ordinance of Allah. But if it returns, then bring reconciliation between them according to the dictates of justice and be fair. Indeed Allah loves those who are fair.³⁷

The above discussion suggests that historical precedents and the Qur'anic text together has formed the foundation of Islamic law of rebellion. In this foundation, the Qur'anic verse (49:9) dictates to adopt peaceful approach in resolving conflicts with rebels and the precedents show how the Muslim rulers especially the 4th Caliph Ali approached the rebels in resolving conflicts during his reign.³⁸

³³ Ahmad al-Rahbi Al-Simnani, *Rawdat al-udah wa Tariq al-Najah* (Beirut: Mu'assasat al-Risala 1984) 11:1214; see also Al-Muwaffaq al-Makki, *Manaqib Abi Hanifa* (Beirut: Dar al-Kitab al-'Arabi 1981) 345; Abu al-Hasan al-Marghinani, *al-Hidaya Sharh Bidayat al-Mubtadi* (Cairo: Mustafa al-Babi al-Halabi n.d.) 11:171; Abu Muhammad Mahmud al-Ayni, *al-Binaya fi Sharh al-Hidaya* (Beirut: Dar al-Fikr 1990) VI: 735; Abu Muhammad al-Husayn al-Baghawi, *Sharh al-Sunna* (Beirut: Dar al-Fikr 1994) VI: 169; Abu al-Hasan al-Mawardi, *al-Hawi al-Kabir Sharh Mukhtasar al-Muzani* (Beirut: Dar al-Kutub al-Ilmiyya 1994) XIII: 104; see also Muhammad Hasan al-Najafi, *Jawahir al-Kalam fi Sharh Shari'a al-Islam* (Tehran: Dar al-Kutub al-Islamiyya 1377 AH) XXI: 335; Muhammad al-Hurr al-'Amili, *Wasa'il al-Shi'a ila Tahsil Masa'il al-Shari'a* (Beirut: Dar Ihya' al-Turath al-'Arabi n.d.) XI: 58; Abu Bakr al-San'ani, *al-Musannaf* (Riyadh: al-Majlis al-'Ilmi n.d.) X:124.

³⁴ Abu 'Umar Khalifa Ibn Khayyat, *Ta'rikh Ibn Khayyat* (Najaf: Matba'at al-Adab 1967) I:146; Abu Ja'far Muhammad Al-Tabari, *Ta'rikh al-Umam wa al-Muluk* (Beirut: Mu'assasat 'Izz al-Din 1987) IV: 547; Abu Bakr al-San'ani, *al-Musannaf* (Riyadh: al-Majlis al-'Ilmi n.d.) V:462; Abu al-Walid Muhammad Ibn Rushd I, *al-Bayan wa al-Sharh wa al-Tahsil wa al-Sharh wa al-Tawjih wa al-Ta'lil fi al-Masa'il al-Mustakhraja* (Beirut: Dar al-Gharb al-Islami 1988) XVII: 559.

³⁵ Abu al-Faraj Ibn al-Jawzi, *Sirat wa Manaqib 'Umar b. Abd al-'Aziz al-Khalifa al-Zahid* (Beirut: Dar al-Kutub al-Ilmiyya 1984) 95.

³⁶ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 78.

³⁷ Al-Qur'an 49:9, Abu Yusuf tr.

³⁸ Ahmad Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 163; see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 151.

4.2 Historical overview of rebellion in Islam

Rebellion in Islamic law has been dealt with in different ways by different classical jurists. For example, whereas the Mālikī and Hanbalī schools of thought treated rebellion under the chapter of *Hudūd* (prescribed punishments)³⁹ the Hanafī school of thought dealt with the subject under the chapter of *Siyar*⁴⁰ (or jihad). The position adopted by Shafī school is that, *the baghi* is the one who refuses to obey *al-Imam al-'adel* (the just ruler).⁴¹ However, Ibn Taymiyya (d. 728/1327-28) has accused Shafī and the jurists of Kufa (the jurists of Kufa eventually developed into Hanafi school of law) of inventing the law of rebellion as he insisted that neither the Qur'an nor any *Sunna* of the Prophet has expressly authorised use of force against rebels.⁴² Equally, he claims that the Hanafi jurists have confused fighting *Muharibun*⁴³, apostates and hypocrites with fighting the rebels.⁴⁴ He also argued that, law of rebellion (*ahkam al-Bughāh*) was invented when, among other things, the Hanbali jurist al-Khiraqi (d. 334/945-46) relied on or borrowed from the Shafī jurist al-Muzani (d. 263/877-78), and al Muzani relied on the Hanafī jurist Muhammad b. al-Hasan al-Shaybani (d. 189/804).⁴⁵ It was entirely reasonable for Ibn Taymiyya to suspect that the discourse developed through a process of juristic borrowing.⁴⁶ However, law often develops through a process of borrowing or transplanting but this does not make the legal discourse artificial or any less authentic.⁴⁷

On the contrary, Shi'a School focused on the legitimacy or justness of the ruler in contrast to or in relation to the legitimacy or justness of the cause espoused by the rebels: therefore, much

³⁹ Ahmad al-Qarāfī, *Al-Dhakhīrah*, Vol. 12 (Beirut: Dar al-Gharb al-Islami 1994) 206; see also Muhammad Ibn Yusuf, al-'Abdarī, *Al-Tāj wa al- Iklīl: Sharh Mukhtasar Khalīl*, Vol. 6 (2nd edn, Beirut: Dar al-Fikr 1977) 229; Muhammad Ibn al-Hattāb, *Mawāhib al-Jalīl li-Sharh Mukhtasar Khalīl*, Vol. 6 (Beirut: Dar al-Fikr 1977) 323; Ahmad al-Dardīr, *Al-Sharh al-Kabīr*, vol 4 (Beirut: Dar al-Fikr n.d.) 237; see also Ali Ibn Sulayman al-Mirdāwī, *Al-Insāf fi Ma'rifah al-Rjih min al-Khilaf 'ala Madhhab al-Imam Ahmad Ibn Hanbal*, Vol. 10 (Beirut: Dar Ihya al-Turath al-Arabi n.d.) 150; Mansur Ibn al-Buhūti, *Kashshāf al-Qinā' 'an Matn al-Iqna'*, Vol. 6 (Beirut: Dar al-Fikr 1981) 66; Mustafa al-Rahaybānī, *Matālib Uli al-Nuha fi Sharh Ghayah al-Muntaha*, Vol. 6 (Damascus: Al-Maktab al-Islami 1961) 158.

⁴⁰ The meaning of *Siyar* as Islamic International law has been discussed in Chapter 3; see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 155.

⁴¹ Muhammad Bin Edress al-Shafī, *Kitab al-Umm*, vol 4 (Beirut: Dar al-M'rifa 1973) 81.

⁴² Abu al-'Abbas Ibn Taymiyya, *Majmu' al-Fatawa* (Riyadh: n.p. n.d.) IV: 450.

⁴³ There are disagreements between scholars in regards to the accurate meaning of '*Muharibun*'. Some scholars prefer 'terrorists' over 'bandits and brigands' and vice versa. However, this thesis adopted 'terrorists' due to the similarities between '*hirāba*' and modern day terrorism.

⁴⁴ Abu al-'Abbas Ibn Taymiyya, *Majmu' al-Fatawa* (Riyadh: n.p. n.d.) IV: 451.

⁴⁵ Ibid, IV: 452.

⁴⁶ Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* (2nd edn, Edinburgh University Press 2011) 161; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 63.

⁴⁷ Alan Watson, *Legal Transplants* (Charlottesville: University of Virginia Press 1974) 21.

of their discourse focused on a qualitative assessment of the substantive base of the rebels' claims.⁴⁸ Abu Ja'far al-Tusi (d. 460/1067), one of the most important Shi'a jurists of the fifth/eleventh century, emphasised the imperative of obeying the ruler and the prohibition against dissenting from the *Jama'a* (community).⁴⁹ In addition he also supported the view that who rebels against a just ruler is an unbeliever.⁵⁰ In this way the Shi'a School has divided the legitimacy of rebellion on the basis of justness of the ruler. However, the Shi'a discourses on the treatment of rebels are substantially similar to Sunni doctrines.⁵¹ The Shi'a position has eventually become practically indistinguishable from Sunni discourses on the subject.⁵²

The above juristic positions suggest that, despite the accusation of invention by Ibn Taymiyya of the law of rebellion, among the positions of the schools of thought the best position has been developed by Sunni school. This is because the position is consistent with the divine guidance provided in the Qur'an and *Sunna* and thus ensures higher degree of source legitimacy. Whereas the Kharijites⁵³ preferred to cut off the head of the Islamic body politic rather than tolerate a deviant leader, the Sunni orthodox settled for a religiously sanctioned realpolitik.⁵⁴ In other words, although the Kharijites chose to lead the Muslim community into social unrest and possible anarchy rather than compromise their pursuing ideology, the Sunni orthodox opted for accommodation and social stability.⁵⁵ The social image of the Kharijites was that they were incapable of living alongside anyone whose beliefs differed from their own.⁵⁶ Sunnis, by contrast, made diversity of views a doctrine of faith: "Difference of opinion in the community is a token of divine mercy."⁵⁷ This view has also been recognised by the Qur'an itself in the following verse:

O Mankind, we have created you male and female, and have made you nations and tribes that you may know one another.⁵⁸

⁴⁸ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 210.

⁴⁹ Abu Ja'far al-Tusi, *Al-Mabsut fi FIqh al-Imamiyya* (Tehran: al-Maktabah al-Murtadawiyya 1387 AH) VII:263.

⁵⁰ Ibid, VII:264; see also Abu al-Qasim 'Ali Al-Murtada, *Al-Intisar* (Beirut: Dar-al-Adwa 1985) 233.

⁵¹ Abu al-Qasim 'Ali Al-Murtada, *Al-Intisar* (Beirut: Dar-al-Adwa 1985) 232.

⁵² Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 229.

⁵³ 'Kharjiites' is discussed in section 4.2.1 (below).

⁵⁴ Hamid Dabashi, *Authority in Islam: From the Rise of the Muhammad to the Establishment of the Umayyads* (New Brunswick, N.J. 1989) 32.

⁵⁵ Ibid, 125.

⁵⁶ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 171.

⁵⁷ A.J. Wensinck, *The Muslim Creed* (London: Frank Cass 1965) 104; see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 163.

⁵⁸ Al-Qur'an 49:13, Abu Yusuf tr.

In this way, the Sunni sect has been successful in distinguishing between orthodoxy and heterodoxy and in dissuading the public from associating and sympathising Kharijite rebellion.⁵⁹ As suggested above, other schools of thought have mostly agreed to the law of rebellion developed by Sunnis and eminent jurists like Shaf'i had borrowed Sunni principles of dealing with rebels. Eventually, Islamic law has developed the law of rebellion based on the process of *ijtihad* (exertion of intellectual efforts)⁶⁰ in the classical *fiqh* (Islamic Jurisprudence)⁶¹ thought.⁶²

4.2.1 Development of the Islamic law of Rebellion

Rebellion (*bughāh*) in Islamic law regulates the circumstances in which use of force is allowed against the rulers of a Muslim state and the treatment of rebels by the rulers in such circumstances. In addition to the Qur'anic and *Sunna* resources referred above, Islamic scholars have argued legitimacy of rebellion against unjust rulers on the basis of their own exegesis.⁶³ They have come to this conclusion on the basis that 'whereas it is obligatory for every Muslim to obey their rulers⁶⁴ as they have the duty to maintain stability⁶⁵ and order in the state, such obligation ceases and the Muslims have the right to disregard the rulers and fight them who give sinful commands to its people.⁶⁶ These scholars also emphasise that the right to rebel

⁵⁹ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 37.

⁶⁰ *Ijtihad* has been discussed in Chapter 3, see section 3.1.1.

⁶¹ *Fiqh* has been discussed in Chapter 3, see section 3.1.1.

⁶² Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 153; Sherman A. Jackson, "Domestic Terrorism in the Islamic Legal Tradition" (2001) 91 *The Muslim World* 295.

⁶³ Ahmad Ibn Taymiyyah, *Al-Khalifah wa al-Mulk* (Jordan: Makhtab al-Manar 1994) 12; Mohammad Rashid Rida, *Tafsir al-Manar*, vol 6 (Cairo: Matba'ah al-Manar 1923) 367; Muhammad Abu Zahrah, *Al-Jarimah wa al-Qqubah fi al-Fiqh al-Islami* (Cairo: Dar al-Fikr al-Arabi 1998) 130; Zahiri Ibn Hazm, *al-Muhala*, vol 11 (Beirut: al-Maktab al-Tujari n.d.) 98; see also James Turner Johnson and John Kelsey (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 151.

⁶⁴ Al-Qur'an 4:59, Abu Yusuf translation; See also Ahmed Al-Dawood, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 148; Muhammad Hamidullah, *Muslim Conduct of State* (5th edn, Lahore: Ashraf Press 1968) 184; Majid Khadduri, *War and Peace in Islam* (John Hopkins Press: Baltimore 1990) 78; Abdulrahman Alsumaih, "The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought", PhD thesis, University of Newcastle Upon Tyne (1998) 91.

⁶⁵ Al-Qur'an 49:9-10. Abu Yusuf translation; see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 152.

⁶⁶ Ahmad Ibn Taymiyyah, *Al-Khalifah wa al-Mulk* (Jordan: Makhtab al-Manar 1994) 12; Mohammad Rashid Rida, *Tafsir al-Manar*, vol 6 (Cairo: Matba'ah al-Manar 1923) 367; Muhammad Abu Zahrah, *Al-Jarimah wa al-Qqubah fi al-Fiqh al-Islami* (Cairo: Dar al-Fikr al-Arabi 1998) 130; Zahiri Ibn Hazm, *al-Muhala*, vol 11 (Beirut: al-Maktab al-Tujari n.d.) 98; See also Muhammad Hamidullah, *Muslim Conduct of State* (5th edn, Lahore: Ashraf Press 1968) 184; Bernard Lewis, *Islam in History: Ideas, Men and Events in the Middle East* (London: Alcov Press 1973) 256; Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, vol 36 (OUP 1981) 313; Khaled Abou El Fadl, 'Political Crime in Islamic Jurisprudence and Western Legal History' (1998) 4 *U.C. Davis Journal of International Law and Policy* 11, 14.

emanates from the Qur’anic command to ‘enjoin good and forbid evil’⁶⁷ and this right has also been established in a Prophet’s *sunna* where he is reported to have said that:

To hear and obey the ruler is obligatory, so long as one is not commanded to disobey Allah for if one is commanded to disobey Allah, he shall not hear or obey.⁶⁸

From the exegetical point of view, Islamic law of rebellion is founded and developed on the Qur’anic text as well as the *Sunna* of the Prophet. However, history of rebellion in Islam suggests that it began following the death of the Prophet Muhammad in 632CE.⁶⁹ Therefore, the law of rebellion in Islam has been developed in precedents of the Caliphs, rulers and rebellions that took place during the early Islamic history.⁷⁰

The significance of historical events on the development of the law of rebellion is that these historical events have been constructed by Muslim jurists as precedents for their discourse on rebellion.⁷¹ The actions of the Kharijites against the Caliphs of Islam and vice versa are the most important source of historical events in matters of rebellion. The Kharijites emerged out of the period of Islamic history known as the first civil war or *fitna* (656 – 661 CE), a time marked by the murders of the third and fourth Caliphs, ‘Uthman and ‘Ali, the first killed by (Egyptian) Muslims disaffected with his socio-economic reforms and the second by a Kharijite seeking revenge.⁷² Historically, the importance of the Kharijites lies in the challenge they posed to Muslim ruling authorities throughout the Umayyad period and into the ‘Abbasid and in the political and theological debates to which the movement gave rise.⁷³

⁶⁷ Al-Qur’an 3:104, 9:71, 9:112, 22:41, 3:114, 7:157, 9:67, 31:17, Abu Yusuf tr; see also Ahmad Ibn Taymiyyah, *Enjoining Good and Forbidding Evil* (Salim Abdullah Ibn Morgan tr, Al-Furqan: Fortress Publications Series 2000) 11; Roel Meijer, ‘Commanding Right and Forbidding Wrong as a Principle of Social Action: The case of the Egyptian al-Jama‘a al-Islamiyya’ in Roel Meijer (ed), *Global Salafism: Islam’s New Religious Movement* (London and New York: Columbia University Press 2005) 196; Mohammad Hashim Kamali, *Freedom of Expression in Islam* (Islamic Texts Society: Cambridge 2010) 28 for the concept of *Hisbah* see Mohamed Badar and Noelle Higgins, ‘Discussion Interrupted: The Discussion and Protection of Cultural Property Under International Law and Islamic Law the case of Prosecutor v Al-Mahdi’ (2017) 17 ICLR 11.

⁶⁸ Ibn Hajar al-Asqallani, *Fath al-Bari*, vol 13 (Beirut: Dar al-Ma‘aref, n.d.) 121.

⁶⁹ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 147.

⁷⁰ Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’*: *Sharḥ al-Muhadhdhab* in Maḥmūd Maṭrajī (ed), vol 20 (Beirut: Dār al-Fikr, 2000) 337; ‘Alī ibn Muḥammad ibn Ḥabīb al-Māwardī, *Al-Ḥāwī al-Kabīr: Fī Fiqh Madhhab al-Imām al-Shāfi’ī Raḍī Allah ‘anh wa huwa Sharḥ Mukhtaṣar al-Muznī* in ‘Alī Muḥammad Mu‘awwad and ‘Ādil Aḥmad ‘Abd al-Mawjūd (eds), vol 13 (Beirut: Dār al-Kutub al-‘Ilmiyyah 1999) 104; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 149.

⁷¹ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 35.

⁷² Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* (2nd edn, Edinburgh University Press 2011) 16; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 4; Nelly Lahoud, *Political Thought in Islam: A Study in Intellectual Boundaries* (Routledge 2005) 58; Montgomery Watt, *The Formative Period of Islamic Thought* (Oneworld Publications 1998) 13.

⁷³ Gerhard Bowering (ed), *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013) 294; Antony Black, *The History of Islamic Political Thought: From the Prophet to the Present* (2nd edn,

In the medieval period the label Kharijite could be applied to anyone who rebelled against the legitimate leader whether or not an Islamist.⁷⁴ This is because the symbol of Kharijites is firmly rooted in the Islamic past where both Muslims and non-Muslims resided and Kharijites were the only known rebels who took arms and killed the fourth Caliph of Islam for political reasons.⁷⁵ They also began to commit a series of bloody attacks against fellow Muslims who refused to demonstrate agreement with their views.⁷⁶ They, hold, too, that those who commit grave sins are unbelievers (*Kufr*), and that rebellion against an imam who opposes *Sunna* is a duty and an obligation.⁷⁷ This position was based in part on a loose reading of a number of verses in the Qur'an, such as 5:48, which reads:

Whosoever judges not according to what Allah has sent down, they are the unbelievers.⁷⁸

Until the mid-second/eighth century there was no jurisprudence on rebellion, but only reports which constitute primitive, undeveloped attempts at jurisprudence; however, they lack the systematic argumentation of jurisprudence.⁷⁹ They make a point but do not explore the implications of the point, and they do not categorise or classify acts according to a consistent or coherent scheme.⁸⁰ In many ways, reports are raw materials that is co-opted and constructed in the service of jurisprudence.⁸¹ Abu Bakr al-Shaybani has quoted an array of reports attributed to the Prophet on the necessity of obeying those in power and a genre of these reports counsels that a Muslim should obey whosoever in power, even if the one in power is a “mutilated Abyssinian or Ethiopian slave.”⁸² A typical form for this genre is the following:

Edinburgh University Press 2011) 18; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 4.

⁷⁴ Emmanuel Sivan, *Radical Islam* (Yale University Press 1990) x.

⁷⁵ Nelly Lahoud, *Political Thought in Islam: A Study in Intellectual Boundaries* (Routledge 2005) 60; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 21.

⁷⁶ Montgomery Watt, *The Formative Period of Islamic Thought* (Oneworld Publications 1998) 19; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 22.

⁷⁷ Muhammad b. ‘Abd al-Karim Shahrastani, *Kitab al-Milal wa ‘I-Nihal: Muslim Sects and Divisions* (A.K. Kazi and J.G. Flynn tr, Kegan Paul International 1984) 7.

⁷⁸ Al-Qur’an 5:48, Abu Yusuf tr; see also Abdur-Rahmaan Ibn Salih al-Mahmood, *Man Made Laws vs Shari‘ah: Ruling by Laws Other than What Allah Revealed* (Nasiruddin al-Khattab tr, International Islamic Publishing House 2003) 59; Naahah Ibrahim, Asim Abdul Maajid and Esaam-ud-Deen Darbaalah, *In Pursuit of Allah’s Pleasure* (Al-Firdous Ltd: London 1997) 93.

⁷⁹ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 111.

⁸⁰ *ibid.*

⁸¹ Shams al-Din Muhammad Al-Dhahabi, *Siyar A‘lam al-Nubala* (Beirut: Mu‘assasat al-Risala 1996) X: 23; see also Al-Muwaffaq Ahmad al-Makki, *Manaqib Abi Hanifa* (Beirut: Dar al-Kitab al-‘Arabi 1981) 350.

⁸² Abu Bakr al-Shaybani, *Kitab al-Sunnah* (Beirut: al-Maktab al-Islami 1993) 29.

It is reported that the Prophet said, ‘listen and obey, in hardship and in good, in what is pleasant or unpleasant, and prefer them [the rulers] over yourself even if they usurp your wealth, or strike your backs’.⁸³

On the contrary, regarding the right of rebellion against rulers, while the Qur’an does not explicitly command rebellion against unjust rulers, the following Qur’anic verse creates a powerful symbolic construct to justify rebellion:

Would not you fight in the way of Allah for *al-mustadafin* (the oppressed socially weak Muslims) from men, women and children who pray: Our Lord! Take us from this city of the oppressive people and appoint for us from Your side a guardian and appoint us from Your side a protector.⁸⁴

In addition to the Qur’anic support for rebellion stated above, there are practice and conduct of many of the Prophet’s companions and several of the early jurists who took part, supported or sympathised with a variety of rebellions. These counter-traditions represent tendencies or trends in early legal opinions but are not developed systematic positions.⁸⁵ For example, some versions of these traditions stated that a ruler should be obeyed as long as he implements the book of God, in some versions, as long as he leads Muslims in accordance with the book of God.⁸⁶ Other reports make the duty of blind obedience applicable only in the time of the Prophet.⁸⁷ A set of widely cited traditions explicitly states that a ruler should not be obeyed if he commands a sin, or that he should be obeyed only to the extent that he commands what is good and just.⁸⁸ These traditions promote or encourage resistance to rulers in one form or another. A common form of this genre states that the best form of jihad is a word of truth spoken before an unjust ruler.⁸⁹ Moreover, Caliph Ali reportedly to have said that if the

⁸³ Ibid, 478; see also Ahmad Ibn Hanbal, *Musnad* (Beirut: al-Maktab al-Islami 1993) II:501; Muhyi al-Din al-Nawawi, *Al-Majmu’ Sharh al-Muhadhdhab* (Beirut: Dar al-Fikr n.d.) XII: 480.

⁸⁴ Al-Qur’an 4:75, Abu Yusuf tr.

⁸⁵ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 120.

⁸⁶ Abu Bakr al Shaybani, *Kitab al-Sunnah* (Beirut: al-Maktab al-Islami 1993) 492; Ahmad Ibn Hanbal, *Musnad* (Beirut: al-Maktab al-Islami 1993) VI:451; Abu al-Husayn Muslim b. al-Hajjaj, *Al-Fami’ al-Sahih* (Beirut: Dar al-Ma’rifa, n.d.) VI: 15; ‘Abu Abd Muhammad Ibn Maja, *Sunan* (Beirut: Dar Ihya’ al-Kutub al-‘Arabiyya, n.d.) II:955; Abu al-‘Abbas al-Qastalani, *Irshad al-Sari Sharh Sahih al-Bukhari* (Cairo: Dar al-Fikr 1304 AH) X:170; see also Aksi Muhyi al-Din al-Nawawi, *Al-Majmu’ Sharh al-Muhadhdhab* (Beirut: Dar al-Fikr n.d.) XII: 468.

⁸⁷ Ahmad Ibn Hanbal, *Musnad* (Beirut: al-Maktab al-Islami 1993) II:279.

⁸⁸ Sulayman Abu Dawud, *Sunan* (Cairo: Dar al-Hadith 1988) IV: 94; Abu Bakr Ahmad al-Bazzar, *Al-Bahr al-Zakhkhar* (Medina: Maktabat al-‘Ulum wa al-Hikam 1988) II:204; Abu al-Husayn Muslim b. al-Hajjaj, *Al-Fami’ al-Sahih* (Beirut: Dar al-Ma’rifa, n.d.) VI:15; ‘Abu Abd Muhammad Ibn Maja, *Sunan* (Beirut: Dar Ihya’ al-Kutub al-‘Arabiyya, n.d.) II:956.

⁸⁹ Abu Isa Muhammad al-Tirmidhi, *al-Fami’ al-Sahih* (Cairo: Dar al-Hadith 1987) IV: 409.

Kharijites rebel against an unjust ruler then Muslims should not fight them because in this situation they may have a legitimate cause of action.⁹⁰

In contrast to the reports emphasising on obeying the rulers, oppression or persecution (*fitna*) has been one of the fundamental principles of use of force in Islamic law.⁹¹ In chapter 3 it has been concluded that *fitna* means ‘oppression or persecution’ rather than ‘unbelief’. Thus, it is incumbent on Muslims to fight any oppression or persecution. As spreading *fitna* is prohibited in Islam,⁹² any rebellion which has the potential of causing *fitna* within the community is prohibited and this is consistent with the prohibition of rebellion against the rulers.

The prohibition against *fitna* suggests that, it is not limited to particular conflicts that took place in Islamic history, but extends to prohibit any situation that might result in a *fitna*.⁹³ Likewise, it is not the Kharijites, as a specific historical entity, that is reprehensible, but any other group that follows in its footsteps.⁹⁴ This principle justifies use of force to end oppression or persecution caused by rebellion.⁹⁵ However, if the ruler spreads *fitna* then it is incumbent on Muslims to end that *fitna*, if necessary, by rebellion. Furthermore, from the Qur’anic exegetical viewpoint ‘use of force’ is allowed to end persecution⁹⁶ and such persecution can come from the ruler as well as the rebels. Therefore, in Islam both the rebels and rulers have reciprocal right to use force to end oppression or persecution.

The above findings suggest that Islamic law of rebellion is structured in accordance with the juristic discourses based on the Qur’anic text and the precedents that took place during the reign of the fourth Caliph. As stated above, as there was no rebellion in the lifetime of the Prophet, the *Sunna* referred above by the scholars, rulers and Kharijites are not directly related to any incidence of rebellion. Moreover, there are controversies among the scholars about the authenticity and relevance of the *Sunna* to be a part of the juridical discourse of Islamic law of

⁹⁰ ‘Abd Allah Muhammad Ibn Abi-Shayba, *Al-Musannaf fi al-Ahadith wa al-Athar* (Beirut: Dar al-Fikr 1989) VIII: 737; see also Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 157.

⁹¹ ‘*Fitna*’ has been discussed in Chapter 3, see section 3.2.3.

⁹² ‘Abd Allah Muhammad Ibn Abi-Shayba, *Al-Musannaf fi al-Ahadith wa al-Athar* (Beirut: Dar al-Fikr 1989) VIII: 622; see also Abu Bakr al Shaybani, *Kitab al-Sunnah* (Beirut: al-Maktab al-Islami 1993) 507.

⁹³ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2006) 118.

⁹⁴ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 31; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2006) 118.

⁹⁵ Hasan Isma‘il al-Hudaybi, *Du‘ah..la qudah* (Cairo: Dar al-Tiba‘a wa’l-Nashr al-Islamiyya 1977) 58.

⁹⁶ See Chapter 3, section 3.2.3.

rebellion. Therefore, it is the Qur’anic textual guidance and the precedents are the key sources of the Islamic law of rebellion.

4.2.2 Expansion of use of force by rebels

Prior to its usage by the Kharijites, the term “unbelief” (*Kufr*) was reserved for non-Muslims who lay outside the boundaries of the Muslim community.⁹⁷ By pronouncing ‘Ali and the Umayyad caliphs unbelievers (*takfir*), the Kharijites introduced this notion into the discourse and social life of early Islam.⁹⁸ In this way the Kharijites have extended the scope of use of force in rebellion to Islamic rulers on the basis of the latter’s ‘unbelief’. Therefore, it is reasonable to call the Kharijites as the expansionists of the notion of unbelief (*Kufr*) and declaration of such unbelievers (*Takfir*) in Islam. However, this expansion is not recognised in Islamic law and the Hanafi jurists have specifically prohibited *takfir*.⁹⁹

For a group of Muslims to be legally identified as rebels, they must use actual force against the state (*khurūj*), according to the majority of the jurists.¹⁰⁰ But for Abū Hanīfa, a group of Muslims could be treated as rebels once they assemble to use force against the state, because – practically speaking, Abū Hanīfa argues that – if the state waited until actual force is used then it would not be able to mount a defence.¹⁰¹ However, according to the practice of the Caliph Ali rebels cannot be attacked before they started attacking first.¹⁰² The interesting point here is that any non-violent opposition to the state cannot be identified as rebellion.¹⁰³ Hence, Abu Hanifa’s point of view is similar to that of the expansionists in international law who are claiming the expansion of use of force beyond the stipulations of Article 51 of United Nations

⁹⁷ William Montgomery Watt, *The Formative Period of Islamic Thought* (Oneworld Publications 1998) 19; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 34.

⁹⁸ Gerhard Bowering (ed), *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013) 295; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 34.

⁹⁹ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 281.

¹⁰⁰ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 155; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 24; Sherman A. Jackson, ‘Domestic Terrorism in the Islamic Legal Tradition’ (2001) 91 *The Muslim World* 302; M Cherif Bassiouni, *The Shari’a and Islamic Criminal Justice* (Cambridge University Press 2014) 214.

¹⁰¹ Gerhard Bowering (ed), *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013) 14.

¹⁰² ‘Abd Allah Ibn Abi Shayba, *Al-Musannaf fi al-Ahadith wa al-Athar* (Beirut: Dar al-Fikr 1989) VII: 732; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 34.

¹⁰³ Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’*: *Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī, vol 20 (Beirut: Dār al-Fikr 2000) 337; Abd al-Qadir ‘Udah, *Al-Tashri ‘al-Jina’I al-Islam* (Beirut: Dar al-Kitab al-‘Arabi n.d.) 687; see also Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 161.

Charter.¹⁰⁴ However, like international law, although such view has strong support it lacks a legal basis in Islamic law on the use of force.

The above discussion suggests that both the Kharijites and the scholars like Abu Hanifa have endeavoured to extend the Islamic law of rebellion by stretching the scope of use of force by and against rebels. These endeavours have resulted in the occurrences for violent use of force by both the rebels and rulers which is opposed to Islamic law. The rebels have often labelled the rulers as ‘oppressors’ when the latter used excessive force and denied the basic rights of rebels. For example – the arrests, execution and prosecution of the members of Muslim Brothers in Egypt in 1960s and following the assassination of President Anwar Sadat.¹⁰⁵ Similarly, the rulers have often labelled the rebels as ‘terrorists’ who used violence against the rulers and even civilians and on that basis, they were denied any rights which were otherwise available to rebels. For example, The Ottoman Empire’s description of Wahhabis as the Kharijites of the modern age¹⁰⁶, and the description of Muslim Brothers as Kharijites by consecutive Egyptian governments.¹⁰⁷

It has also been evidenced in the history that the rebellion which eventually became the ruling power denied the rights of rebels under Islamic law despite their claim of the same right at the time of their rebellion. For example, a Mu‘tazila leader al-Ma‘mun denied such rights to ‘Abbasid rebels.¹⁰⁸ As a result, the controversy that exists between the rebels and the rulers is not related to legal or theological uncertainties but a conflict of interest which is mainly based on political gain, which is to be able to gain political power and authority. Whereas political wars (which is likely to result in *fitna*) are prohibited in Islam, theological wars are legal and even recommended.¹⁰⁹

Had the Islamic law of rebellion been politicised there would not have been any law of rebellion as the rulers would never have wanted to recognise the basic rights of rebels in Islamic law by giving up their political interests. Caliph Ali had given up his biased political interest and used political power to recognise the basic rights of his opponents, such as rebels, under Islamic law. Therefore, it is necessary to keep politics out of religion as long as development of legal norms are concerned. However, this separation is not always possible especially when the person

¹⁰⁴ Expansion of use of force has been discussed in Chapter 2, see section 2.3.2.

¹⁰⁵ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 141, 150.

¹⁰⁶ H.A.R. Gibb and J.H. Kramers (eds), *Shorter Encyclopedia of Islam* (Leiden: E.J. Brill 1991) 618.

¹⁰⁷ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 106.

¹⁰⁸ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 90.

¹⁰⁹ *Ibid*, 63.

(rulers or rebels) and body of persons (government or group of rebels) who can contribute in the establishment or development of legal norms are unwilling to give up their purely political agenda. For example, rebels and governments are unwilling to give up their political aim to gain the governmental authority in Syria.¹¹⁰

From the above discussion, it can be concluded that, rebellion in Islamic law arose out of the context of the persistent rebellions in the first two centuries of Islam.¹¹¹ Muslim jurists selectively treated historical and textual precedents to construct the discourse on rebellion.¹¹² While Muslim jurists were not willing to endorse or legitimate all rebellions without limits, they also were not willing to give rulers unfettered discretion in dealing with rebels.¹¹³

4.3 The potential of Islamic law of Rebellion to complement Public international law on the use of force

Political interest in territorial integrity and state sovereignty has always been to the fore in decisions made by governments faced with those who rebel.¹¹⁴ Thus, rebellion has been placed as an integral part of internal armed conflict rather than expanding it as part of external or international armed conflict. In this way, Public international law has not only limited the scope of application of international legal framework but also failed to provide an effective framework for rebels who are not categorised as a party to international armed conflict.

Despite several attempts to regulate use of force by and against rebels by international legal framework,¹¹⁵ it has not been successful to provide an effective legal framework so that rebels can exercise their right on the one hand and are bound by the respective legal responsibilities on the other. The political interests based on ‘state sovereignty’ were unable to take a course towards providing an effective solution to the use of force issues on rebellion. The political power has always triumphed over the necessity to recognise the right of rebellion and this has resulted in the under-development of this area of law. Furthermore, the rebels have denied their

¹¹⁰ Lucy Rodgers, David Gritten, James Offer and Patrick Asare, ‘Syria: The Storey of the Conflict’ (*BBC World News*, 11 March 2016) <<http://www.bbc.co.uk/news/world-middle-east-26116868>> accessed 10 March 2017; see also Gerhard Bowering (ed), *The Princeton Encyclopedia of Islamic Political Thought* (Princeton University Press 2013) 538.

¹¹¹ William Montgomery Watt, *The Formative Period of Islamic Thought* (Oneworld Publications 1998) 20.

¹¹² Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 230.

¹¹³ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 157.

¹¹⁴ Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, ‘The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹¹⁵ See Section 4.3.3 of this Chapter (below).

accountability for asymmetrical use of force against state authorities based on their disadvantageous position under international law on the use of force.¹¹⁶ This unequal position between rebels and state authorities has created a ‘gap’ in the current legal framework provided by Public international law.

In order to scrutinise the issues identified above, it is expedient to examine the application of the current international legal framework applicable to rebellion. In the process of the examination this section focuses on the international law provisions which regulate the right of rebellion and the treatment of rebels by the ruling authorities and their effectiveness in dealing with rebellion. Furthermore, this section also endeavours to identify the barriers that international legal framework is facing in its way to providing an effective legal framework.

4.3.1 Historical overview of Rebellion in Public international law

The right of revolution was accepted by several societies from ancient Greece and Rome and was also accepted by early international law scholars such as Grotius and Vattel.¹¹⁷ The issue of rebellion gained further attention from the Second Scholastica.¹¹⁸ One of the strongest proponents of the right of rebellion was the Spanish theologian Fr Jean de Mariana. Indeed, as is seen in his work *De Rege et Regis Institutione*¹¹⁹, Mariana was in favour of tyrannicide in situations of political repression.¹²⁰ The use of force to overthrow tyranny could be considered a type of ‘Just War’, or justifiable war.¹²¹ Thomas Aquinas stated that there is no sedition in disturbing a government which is not directed towards the common good.¹²² While multifarious examples of what constituted a ‘Just War’ have been propounded from the Early Christian period onwards,¹²³ Aquinas, in the 13th century in his work *Summa Theologiae* proposed a number of just war criteria. According to this criteria, a war was just if (1) it was

¹¹⁶ Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 141-142.

¹¹⁷ Jordan J. Paust, ‘The Human Right to Participate in Armed Revolution and Related Norms of Social Violence: Testing the Limits of Permissibility’ (1983) 32 Emory LJ 561.

¹¹⁸ R. Ariew and D. Gabbay, ‘The scholastic background’ in D. Garber and M. Ayers (eds), *Cambridge History of Seventeenth Century Philosophy*, ed. (Cambridge University Press 1998) 15.

¹¹⁹ This text is available at:

https://books.google.ie/books?id=Whk8AAAACAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false accessed 14 March 2017.

¹²⁰ Johannes Dillinger, ‘Tyrannicide from Ancient Greece and Roman to the Crisis of the Seventeenth Century in Randall D Law (ed), *The Routledge History of Terrorism* (Routledge 2015)15; see also Harald E. Braun, *Juan de Mariana and Early Spanish Political Thought* (Aldershot, England; Burlington, VT: Ashgate: 2007) 44.

¹²¹ Thomas Aquinas, *Selected Political Writings* (J.G. Dawson tr, Oxford: Basil Blackwell 1948) 159.

¹²² Thomas Aquinas, *Summa Theologica* (Treatise on the Theological Virtues) Quest 42, Art 2; see also James Turner Johnson, ‘Historical Tradition and Moral Judgment: The Case of Just War Tradition’ in Alex J. Bellamy (ed), *War: Critical Concepts in Political Science*, vol IV (Routledge 2009) 23.

¹²³ Inis L. Claude Jr, ‘Just Wars: Doctrine and Institutions’ (1980) 95 Political Science Quarterly 83, 87.

waged under a proper authority, (2) it had a just cause, and (3) the belligerents had the right intention, which is that they must intend to promote good and subdue evil.¹²⁴ Historically, however, international law was slow and hesitant to engage with the issue of rebellion.¹²⁵

This, more positive, view of rebellion gained more support with the rise of the sovereign state system, in tandem with the emergence of the theories of the social contract and natural law.¹²⁶ For example, Locke, proposes an argument for legitimate rebellion in his work *Second Treatise of Government*.¹²⁷ Locke distinguished between legitimate governments, who seek to promote and preserve the rights of their citizens and illegitimate governments who do not. Legitimate governments, therefore, deserve that their citizens behave well and remain peaceful. Because illegitimate governments violate the rights of their citizens they put themselves in a state of nature and a state of war with its citizens. In this situation rebellion is legitimate.¹²⁸

Concerning this right of revolution, United States' President Lincoln stated:

This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their constitutional right of amending, or their revolutionary right to dismember or overthrow it.¹²⁹

¹²⁴ St Thomas Aquinas, *Summa Theologica* (Treatise on the Theological Virtues) Quest 42, Art 2; Just War Theory, Internet Encyclopedia of Philosophy <<http://www.iep.utm.edu/justwar/>> accessed 14 March 2017; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 158.

¹²⁵ Ignacio De La Rasilla Del Moral, 'Medieval International Law' in *Oxford Bibliographies in International Law*, available at: <<http://dx.doi.org/10.1093/obo/9780199796953-0112>> accessed 14 March 2017.

¹²⁶ Hall Gardner and Oleg Kobtzeff, 'General Introduction: Polemology' in Hall Gardner and Oleg Kobtzeff (eds), *The Ashgate Research Companion to War: Origins and Prevention* (Ashgate 2012) 7; see also Laura Perna, *The Formation of the Treaty Law of Non-International Armed Conflicts* (Leiden; Boston: M. Nijhoff Publishers, 2006) 9.

¹²⁷ This text is available at: <<https://www.gutenberg.org/files/7370/7370-h/7370-h.htm>> accessed 14 March 2017.

¹²⁸ John Locke, *The Second Treatise of Government*, available at: <<https://www.gutenberg.org/files/7370/7370-h/7370-h.htm>> accessed 14 March 2017; see also Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, 'The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse' in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹²⁹ Abraham Lincoln, *First Inaugural Address* (March 4, 1861) - quoted in Henry J. Paust, 'The Human Right to Participate in Armed Revolution and Related Norms of Social Violence: Testing the Limits of Permissibility' (1983) Emory LJ 547-8. This is similar to Jean Jacques Rousseau's discussion of the State having a 'social contract' with its people - see *Social Contract* from 1762, translated by G.D.H. Cole, is available at: <<http://www.constitution.org/jjr/socon.htm>, last accessed 25/06/2014> accessed 14 March 2017. Many other political philosophers also considered the idea of the right of revolution - see, e.g. John Locke, *Second Treatise on Government* 1690, available at: <http://press-pubs.uchicago.edu/founders/print_documents/v1ch3s2.html, last accessed 25/06/2014> accessed on 14 March 2017.

The principle ignited by the American Revolution spread throughout Europe during the late 18th and 19th centuries¹³⁰ as a revamped version of the ‘Just War’ theory,¹³¹ whereby it was claimed that a state that denied the rights of the peoples it purported to rule was not fit to rule, and that certain actions of the state could give its citizens a just cause to revolt.¹³² States continued, in the nineteenth and twentieth century, to use the rhetoric of justice and justness when they went to use force against rebels but the justification produced no legal reverberations.¹³³ The newly borne states following imperialism and colonialism were confronted with the challenge of legitimate government who govern the people for common good. The people were often subject to tyranny and denial of their rights by the government. In these circumstances, the right to rebellion was at its highest pick.¹³⁴ On the other hand, the governments were also claiming their right to suppress rebellion on the basis of their sovereign power and legitimate authority.¹³⁵

4.3.2 The Modern legal framework of rebellion: The Post-Charter arrangements of international law

Following the collapse of the League of Nations and the end of the Second World War, the UN Charter took the leading position to promote and protect international peace and security.¹³⁶ The first post-Charter provision which officially recognised the right of rebellion is the Universal Declaration of Human Rights, adopted by the General Assembly in 1948. It states that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rules of law”.¹³⁷ This position of right of rebellion on the basis of human rights was further developed during the 1960s and 1970s.¹³⁸ The issues of colonialism and self-determination were linked together

¹³⁰ Theodore S. Woolsey, ‘Self-Determination’ (1919) 13 AJIL 302.

¹³¹ Joachim von Elbe, ‘The Evolution of the Concept of the Just War in International Law’ (1939) 33 AJIL 665; see also Michael Walzer, *Just and Unjust War* (New York: Basic Books 2000) 5.

¹³² Henry J. Paust, ‘The Human Right to Participate in Armed Revolution and Related Norms of Social Violence: Testing the Limits of Permissibility’ (1983) Emory LJ 547 cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, ‘The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹³³ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2011) 69.

¹³⁴ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 1; see also Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 5.

¹³⁵ Mark Jarrett, *The Congress of Vienna and Its Legacy: War and Great Power Diplomacy after Napoleon*, (New York: I.B. Tauris 2013) 187.

¹³⁶ Bruno Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 EJIL 1, 5.

¹³⁷ Preamble, Universal Declaration of Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III), 1948; see also Oscar Schachter, ‘Just War and Human Rights’ (1989) 1 PYIL 8.

¹³⁸ Michael Walzer, *Just and Unjust War* (New York: Basic Books 2000) 2; see also Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge University Press 2011) 93.

at the fore of the UN's agenda, with both the General Assembly and Security Council adopting various resolutions on the topic, both general and country-specific in nature.¹³⁹ However, this type of Resolution is too ambiguous to gain consensus.¹⁴⁰ The types of constructive ambiguity in Resolutions are also evident in other UN resolutions on the issue of self-determination.¹⁴¹

While, on one hand, General Assembly instruments do not go so far as to legalise the use of force by rebels, the Western powers always voted against such resolutions¹⁴² and so their value as a valid interpretation of international law is doubtful, as the votes against would hamper the creation of customary international law, on the other hand.¹⁴³ It should be emphasised that while the right of a tyrant ruler was in serious denial in the international legal framework, the right to use force to halt that tyrant ruler, in the form of a right of rebellion, has not been universally accepted.¹⁴⁴ While the use of force to overthrow tyranny has utilised a 'Just War' argument to support their claims and their wars, such use of violence has regularly been condemned by Western states.¹⁴⁵ Therefore, it is difficult to state unequivocally that, in international law, rebels have a right to use force to overthrow a tyrannical or despotic government.¹⁴⁶

While support for the right of revolution under international law has waxed and waned over the years, it has never been fully and definitively codified as a legal principle.¹⁴⁷ In some contexts there is support for the legitimate use of force in rebellion in the context of fighting tyranny or serious human rights abuses and in furtherance of the right to self-determination.¹⁴⁸ However,

¹³⁹ United Nations General Assembly Resolution 2105 (XX), 1965; see also R.E. Gorelick, 'Wars of National Liberation: Jus ad Bellum' (1979) 11 CaseWRJIL 71.

¹⁴⁰ Christine Gray, *International Law and the Use of Force* (2nd edn, Oxford University Press 2004) 53.

¹⁴¹ See Resolutions reaffirming Resolution 2105: Resolution 2189 (XXI), 1966, 76:7:20; Resolution 2326 (XXII), 1967, 86:6:17; Resolution 2446 (XXIII), 1968, 83:5:28; Resolution 2465 (XXIII), 1968, 87:7:17; Resolution 2548 (XXIV), 1969, 78:5:16; Resolution 2383 (XXIII), 1968, 86:9:19; Resolution 2508 (XXIV), 1969, 83:7:20 on Southern Rhodesia; Resolution 2395 (XXIII), 1968, 85:3:15 on South Africa; Resolution 2547(XXIV) A, 1969, 87:1:23 on South Africa and Resolution 2403 (XXIII), 1968, 96:2:16 on Namibia. See also General Assembly Resolution 2708 XXV), 1970, 73:5:22; 2707 (XXV), 1970, 94:6:16, 2652 (XXV), 1970, 79:10:14.

¹⁴² Voting records can be accessed at:

<http://unbisnet.un.org:8080/ipac20/ipac.jsp?session=14895302KP9F6.25787&profile=voting&menu=search&aspect=history&histedit=last> last accessed 14 March 2017.

¹⁴³ Nico Krisch, 'More Equal Than the Rest? Hierarchy, Equality and U.S. Predominance in International Law', in M. Byers and G. Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge University Press 2003) 135.

¹⁴⁴ Michael Akehurst, *A Modern Introduction to International Law* (London: George Allen and Unwin 1984) 240.

¹⁴⁵ Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press 1988) 103.

¹⁴⁶ Antonio Cassese, *International Law* (2nd edn, OUP 2005) 433.

¹⁴⁷ Heather Wilson, *International Law and the Use of Force by National Liberation Movements* (Oxford: Clarendon Press 1988) 22 cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, 'The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse' in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹⁴⁸ John Rawls, *A Theory of Justice* (Harvard University Press 1971) 377.

these have never been fully endorsed by the international community by means of a legal instrument, although there are, as evidenced above, some scholarship and state practice to support this view. Therefore, the issue of *jus ad bellum* about rebellion is filled with uncertainty¹⁴⁹, and indeed, the rights and protections which attach to those who seek to rebel against the government were, as we shall see below, vague and amorphous.

4.3.3 The status of rebels in Public international law

Rebellion involves mere sporadic and isolated challenges to the government. The criteria of rebellion are vague and uncertain and the term can cover many instances of minor violence within the borders of a state from violent protests to an easily quelled uprising.¹⁵⁰ Assistance from a third state is regarded as unlawful intervention and a third state is bound to respect the measures taken by the parent state for the suppression of the seditious party, such as prohibition on the importation of war material bound for the rebels.¹⁵¹ Rebellions fall within the exclusive remit of the sovereign state and no rights or duties accrue to the rebels who can legally be treated as criminals under domestic law and do not enjoy prisoners of war status if captured.¹⁵²

International Humanitarian Law (IHL), which is a special branch of Public international law, deals with rebellion. This branch of law regulates the treatment of rebels from an international perspective and determines the extent of the right of the ruling authorities to use force to suppress rebellion. The following section makes an endeavour to examine the efficiency of this special branch of law in regulating rebellion.

4.3.3.1 The Status of rebels under the Geneva Conventions and Additional Protocols

International Humanitarian Law distinguishes between international and non-international armed conflicts and a different protective regime applies to each.¹⁵³ Common Article 3 of the

¹⁴⁹ James Turner Johnson, 'Ideology and the Jus ad Bellum: Justice in the Initiation of War' in Alex J. Bellamy (ed), *War: Critical Concepts in Political Science*, vol IV (Routledge 2009) 157.

¹⁵⁰ Bert V.A. Röling, 'The Legal Status of Rebels and Rebellion' (1976) 13 J. Peace Res 149; see also Philip C. Jessup, 'The Spanish Rebellion and International Law' (1936-7) 15 Foreign Affairs 260.

¹⁵¹ Antonio Cassese, *International Law* (2nd ed, OUP 2005) 127.

¹⁵² Richard A. Falk, 'Janus Tormented: The International Law of Internal War' in James N. Rosenau (ed), *International Aspects of Civil Strife* (New Jersey: Princeton University Press 1974) 185; see also Jean D'Aspremont, 'Rebellion and State Responsibility: Wrongdoing by Democratically Elected Insurgents' (2009) 58 (2) *ICLQ* 427.

¹⁵³ Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002) 247; see also Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 2; Andrea Binachi and Yasmin Naqvi, *International Humanitarian Law and Terrorism* (Hart Publishing 2011) 24; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 32.

Geneva Conventions 1949 is the only provision of the Conventions which deals with non-international armed conflicts.¹⁵⁴ This provision ‘marked a fundamental change in that the automatic applicability of the legal protection for rebels has been recognised by international legal framework.’¹⁵⁵ This is because prior to the adoption of Geneva Conventions, rebellions were defined by their limited duration and domestic suppression, without resort to military intervention.¹⁵⁶ This protective regime of International Humanitarian Law concerning non-international armed conflicts was further extended in the form of Additional Protocol II.¹⁵⁷

However, the protection offered by Common Article 3 and Additional Protocol II are not sufficient for the protection of rebels. Moreover, these provisions have created a ‘gap’ in the legal protection for rebels involved in any conflict which does not meet the requirement of an ‘armed conflict’.¹⁵⁸ The ‘gap’ that has been created by these legal provisions is outlined below.

It is quite apparent that Common Article 3 has provided international bodies like ICRC with a right to intervene in situations of non-international armed conflict but the rights and obligations of the parties involved in the armed conflict, such as the state authority and the rebels, are very limited.¹⁵⁹ There has been no change in the rights and status of the rebels provided by Common Article 3 which is commonly regarded as the price demanded by the delegates for the Article’s adoption, easing the fear that a government’s capacity to suppress internal revolt would be interfered with.¹⁶⁰ Moreover, the application of the Article does not therefore constitute any

¹⁵⁴ D. Elder, ‘The Historical Background of Common Article 3 of the Geneva Convention of 1949’ (1979) 37 *Case W Res J Int’l L* 11; see also Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 2; Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (OUP 2012) 50.

¹⁵⁵ Hitoshi Nasu, ‘Status of Rebels in Non-International Armed Conflict’ ANU College of Law Research Paper No. 10-71 (2009) 8 cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, ‘The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹⁵⁶ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 9.

¹⁵⁷ Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) 30 *International and Comparative Law Quarterly* 416.

¹⁵⁸ Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, ‘The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹⁵⁹ Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) 30 *International and Comparative Law Quarterly* 419.

¹⁶⁰ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press 2002) 65; see also J. K. Kleffner, ‘From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities – On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference’ (2007) *LIV NILR* 315.

recognition by the government that the rebels have any authority, and rebellions may be suppressed and tried accordingly.¹⁶¹

Another weak point of Common Article 3 is that neither the means of warfare nor the conduct of hostilities are limited.¹⁶² In the absence of such limitation, it is difficult to ascertain at what level of violence this Article will trigger application and the extent of such application.¹⁶³ The ICRC's Commentary states that Common Article 3 should be applied as widely as possible,¹⁶⁴ but the level of violence needed to trigger the application of the provisions is still unsettled.¹⁶⁵ In this situation, it is very unlikely that this Article will trigger to violence which does not meet the requirement for 'armed conflict'.¹⁶⁶ For example, People caught up in incidents of violent and sustained riots, may fall outside of the protection remit of IHL. This issue has been identified in *Prosecutor v Tadić* where the International Criminal Tribunal for the Former Yugoslavia has aptly emphasised:

The low threshold of violence required to trigger Common Article 3 was underscored by the Inter-American Commission on Human Rights in the *La Tablada* case (*Juan Carlos Abella v Argentina* (Case 11.137, 18 November 1997), at paras 155-156), where the Commission affirmed the applicability of Common Article 3 in situations of attacks

¹⁶¹ Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge: Cambridge University Press 2002) 65; see also Commentary to Additional Protocol II, 1331, paras 4395-401.

¹⁶² D. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949' (1979) 37 *Case W Res J Int'l L* 11; see also Jean-Marie Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) 87 *IRRC* 175, 188.

¹⁶³ Jelena Pejic, 'The protective scope of Common Article 3: more than meets the eye' (2011) 93 *IRRC* 189 cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, 'The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse' in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹⁶⁴ Geneva Conventions 1949 Common Article 3(2); see also Jean Pictet, 'The Principles of International Humanitarian Law' in Jean Pictet (ed), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC, Geneva 1952) 50; The ICRC has recently (March 2016) launched the first part of its new commentary on the Geneva Conventions, see at: <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument> accessed 15 March 2017.

¹⁶⁵ Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press 2002) 268 cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, 'The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse' in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹⁶⁶ Orla Marie Buckley, 'Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara' (2012) 37 *NCJ Int'l & Com Reg* 793, 794; Elizabeth Holland, 'The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflict?' (2011) 34 *Suffolk Transnat'l L Rev* 145, 155; see also Asbjørn Eide, Allan Rosas and Theodor Meron, 'Combating Lawlessness through Gray Zone Conflicts through Minimum Humanitarian Standards' (1995) 89 *AJIL* 89 215.

by an armed group on Argentine military personnel, despite the very brief duration of the attacks. Rather, the Commission focused on the extensive planning behind the attacks and the nature of the violence. In determining that the armed confrontation at the *La Tablada* base and its recapture by the Argentinian army constituted an internal armed conflict and not mere ‘internal disturbance or tensions’ the Commission excluded the following situations from the definition of armed conflict as they fall below the threshold: riots, that is to say, all disturbances *which from the start are not directed by a leader and have no concerted intent*; isolated and sporadic acts of violence, *as distinct from military operations carried out by armed forces or organised armed groups*; other acts of a similar nature which incur, in particular, mass arrests of persons because of their behaviour or political opinion.¹⁶⁷

This ‘gap’ has been identified later and in the Turku Declaration on Minimum Humanitarian Standards was adopted in 1990 it has been decided that a document containing minimum humanitarian standards, applicable to people in all situations of violence, regardless of threshold, should be drafted.¹⁶⁸ However, this Declaration is not binding and has not had a significant impact on the treatment of individuals in situations of violence. Since its adoption follow-up work has been undertaken in the United Nations on this issue but no binding instrument on the issue has been drafted as yet.¹⁶⁹

Since the adoption of Geneva Conventions in 1949, the face of conflict changed over time and non-international armed conflicts began to increase in number it was realised that the laws of war were in need of review and revitalisation.¹⁷⁰ Negotiations on how to amend International Humanitarian Law took place during the Diplomatic Conference for the Reaffirmation and Development of IHL Applicable in Armed Conflicts which was convened between 1974 and

¹⁶⁷ *Prosecutor v Tadić* (Jurisdiction) (Appeals) 105 ILR 453, at para 70.

¹⁶⁸ Declaration of Humanitarian Standards, reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, UN Doc E/CN.4/1995/116 (Jan 31, 1995).

¹⁶⁹ Theodor Meron, ‘Towards a Humanitarian Declaration on Internal Strife’ (1984) 78 AJIL 859; see also Theodor Meron, ‘On the Inadequate Reach of Humanitarian and Human Rights law and the Need for a New Instrument’ (1983) 77 AJIL 589; Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, ‘The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

¹⁷⁰ Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, ‘The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

1977.¹⁷¹ During drafting negotiations of Additional Protocol II, it was clear that States did not want to grant status and rights to rebels who were threatening their authority. Indeed, Cassese comments that:

To grant rebels international rights and duties means that the divide between insurgents and the legal government has reached such a point that the former has a standing, albeit limited, in the international community.¹⁷²

To acknowledge that rebels are entitled to invoke international rules implies that they are outside both the physical and legal control of the national authorities. By contrast, to suggest that insurgents cannot rely on international law means that the only body of law applicable to them is domestic criminal law and consequently that the government in power is free from international constraint and can treat them as it thinks best.¹⁷³ Similarly, as correctly argued in the Commentary to the Additional Protocols-

Governments are reluctant to assume treaty obligations which require them to extend a licence to domestic enemies to commit acts of violence against their personnel and objects which could be described as military objectives.¹⁷⁴

From the above discussion, it is apparent that despite having identified the ‘gap’ the Additional Protocol II has not only failed to reduce it but also made it wider, and thereby made the matter worse. This is because the threshold to trigger Protocol II was further raised up rather than taking it down. During the Geneva Conference, it was decided that the threshold of Protocol II should actually be raised from that of Common Article 3 because of a fear of an infringement on state sovereignty.¹⁷⁵ The Protocol only applies if the dissidents control some territory and if they have the ability to implement the Protocol.¹⁷⁶ If, during the conflict, the rebels lose this control or ability, the Protocol is no longer applicable.¹⁷⁷ In this way, Protocol II provides for

¹⁷¹ Ibid.

¹⁷² Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) 30 *International and Comparative Law Quarterly* 417, 430.

¹⁷³ Ibid.

¹⁷⁴ Michael Bothe, Karl Joseph Partsch and Waldemar Solf (eds), *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Dordrecht: Martinus Nijhoff 1982) 244, para. 2.1.

¹⁷⁵ Dietrich Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979) 163 *Recueil des Cours* 148; see also Zakaria Daboné, ‘International Law: armed groups in a state-centric system’ (2011) 93 *IRRC* 395; see also Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 83.

¹⁷⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977) 1125 UNTS 609, Article 1.

¹⁷⁷ Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 97.

the very unsatisfactory position that ‘the question of applicability of Protocol II might be answered varyingly, according to the prevailing circumstances.’¹⁷⁸

In addition, Protocol II does not clearly state how much territory must be under the control of the non-government party to the conflict or what constitutes ‘implementation’ of the Protocol by the rebel forces.¹⁷⁹ It is clear that ‘much is left up to the discretion of the State, which is not a very acceptable position as states will be reluctant to compromise their state sovereignty, even for serious humanitarian concerns.’¹⁸⁰ As observed by Leslie Green, Protocol II ‘has a threshold that is so high...that it would exclude most revolutions and rebellions, and would probably not operate in a civil war until rebels were well established and had set up some form of *de facto* government’.¹⁸¹ In this respect, it must also be noted that Additional Protocol II does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being ‘armed conflict’.”¹⁸²

Unlike Protocol I, Protocol II does not confer either combatant or prisoner of war status on rebels. The Commentary to the Additional Protocol clarifies why this is the case:

It seems unrealistic to establish combatant status for persons who have participated in hostilities and have been captured in non-international armed conflicts. In fact, such status would be incompatible, first, with respect for the principles of sovereignty of States, and secondly, with national legislation which makes rebellion a crime.¹⁸³

Consequently, government authorities can still prosecute and sentence anyone who is found guilty of any offence which relates to the conflict, leading Rwelamira to comment:

Protocol II has in effect restated the general rule of international law relating to the status of belligerency. Before a situation assumes such a status, the conflict is to be considered

¹⁷⁸ Dietrich Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979) 163 *Recueil des Cours* 148.

¹⁷⁹ Michelle Mack and Jelena Pejic, ‘Increasing Respect for International Humanitarian Law in Non-international Armed Conflicts’ (ICRC, Geneva 2008) 11 available at <www.icrc.org/eng/assets/files/other/icrc_002_0923.pdf> accessed on 10 March 2017; see also David McDonough, ‘From Guerrillas to Government: Post-Conflict Stability in Liberia, Uganda and Rwanda’ (2008) 29 *Third World Q* 357.

¹⁸⁰ Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (The Hague: Martinus Nijhoff, 2010) 104; see also Medard R. Rwelamira, ‘The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949’ in Christophe Swinarski (ed), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge - en honneur de Jean Pictet* (The Hague: Martinus Nijhoff 1984) 227.

¹⁸¹ Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edn, Manchester: Manchester University Press 2008) 83.

¹⁸² Additional Protocol II, Article 1(2).

¹⁸³ Sandoz, Swinarski and Zimmerman (eds), *Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949* (JCRC, Geneva 1949) 1331-1333.

as a purely domestic affair. The fighters are not regarded as combatants and they are not entitled to the prisoner of wars status if they fall into the hands of the enemy.¹⁸⁴

From the above discussion it is apparent that ‘there is arguably little in the nature of the protections accompanying combatants and prisoners of war status that can be applied to participants in non-international armed conflicts.’¹⁸⁵ There have been valiant efforts of International Tribunals by providing extended interpretation and application of the Article and Protocol II,¹⁸⁶ National Governments by granting amnesties to those involved in non-international armed conflicts and indeed in situations of violence which do not reach the threshold of ‘armed conflict’,¹⁸⁷ and ICRC¹⁸⁸ by extending the protective regime of IHL applicable to international armed conflicts to non-international armed conflicts. Despite these efforts, there was not enough provisions and arrangements to form the basis of uniform combatant immunity for all persons who participate in non-international armed conflicts.¹⁸⁹

¹⁸⁴ Medard R. Rwelamira, ‘The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949’ in Christopher Swinarski (ed), *Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge, en honneur de Jean Pictet* (Martinus Nijhoff 1984) 234.

¹⁸⁵ This view is opposite to that of Emily Crawford who is satisfied that the Protocol has covered the participants in the non-international armed conflict to a very large extent. See Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 76.

¹⁸⁶ *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 127; See also Sylvain Vité, ‘Typology of armed conflicts in international humanitarian law: legal concepts and actual situations’ (2009) 91 *IRRC* 69; Marco Sassòli and Yuval Shany, ‘Should the obligations of states and armed groups under international humanitarian law really be equal?’ (2011) 93 *IRRC* 425; René Provost, ‘The move to substantive equality in international humanitarian law: a rejoinder to Marco Sassòli and Yuval Shany’ (2011) 93 *IRRC* 437; William Abresch, ‘A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya’ (2005) 13 *EJIL* 741; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Geneva: ICRC 2005) 63; Hitoshi Nasu, ‘Status of Rebels in Non-International Armed Conflict’ ANU College of Law Research Paper No. 10-71 (2009) 12.

¹⁸⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Geneva: ICRC 2005) 611, Rule 159, Practice Relating to Amnesty; see also Antonio Cassese, ‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’ (1981) 30 *ICLQ* 416, 427; Additional Protocol II 1977 Article 6(5).

¹⁸⁸ ‘Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law. Adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009’ (2009) *IRRC* 90; see also Jelena Pejic, ‘Conflict Classification and the Law Applicable to Detention and the Use of Force’ in Elizabeth Wilmhurst (ed), *International Law and the Classification of Conflicts* (2012) 80-116; see also The ICRC is currently leading a consultation process on how to strengthen legal protection for persons deprived of their liberty in non-international armed conflicts. See: <<https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>> accessed 5 March 2017.

¹⁸⁹ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 77; see also Dominic Hoerauf, ‘The Status of the Libyan Rebels under the Laws of War: A Litmus Test for the Lawfulness of NATO’s Libyan Engagement under UN Resolution 1973’ (2012) 6 *Phoenix L R* 93; see also *Prosecutor v Tadić*, IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 126; Kenneth Watkin, ‘Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance’ (2010) 42 *Int’l L & P* 641; W. Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities Study: No Mandate, No Expertise and Legally Incorrect’ (2010) 42 *L & P* 7 68; Dapo Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in

The ‘gap’ that has been created by the IHL framework itself has been widened rather than filling it. In a modern world where rebellion is so frequent that it is likely to affect international peace and security, the post-Charter framework has failed to deal with it effectively. Moreover, the ‘gap’ has awarded the state authorities to use force and prosecute the rebels as they think best, and without any accountability. By allocating rebellion within the sole authority of the state the rebels have been put in jeopardy in terms of their rights and treatment in the hands of their opponents without any measures for oversight or accountability.¹⁹⁰ In addition to be subjected to use of excessive force by the governments, the rebels are susceptible to face prosecutions for their use of force against the former but the same is not the case for the governments and this has put the rebels in a more disadvantageous position. In consequence, the current legal position is favouring the state authority at the expense of the legitimate right of rebels to challenge tyrannical and despotic governments.

4.3.3.2. The categorisation of rebels as combatants, non-combatants, and unlawful combatants

A recent trend among the state authorities has been witnessed whereby they tend to invent a new category of the parties in hostilities, such as unlawful combatant.¹⁹¹ Whereas International Humanitarian Law only categorised participants of warfare as either combatants or non-combatants, this invention of state authorities or governments have put the rebels in further jeopardy. The key point of determination between combatant and non-combatant has been the ‘direct participation in the hostilities’ which denotes that any civilian who do not participate directly in the hostilities must not be targeted.¹⁹² However, in recent non-international armed conflicts it has been witnessed that many civilians have been killed by state authorities and in order to justify such killings the latter have argued that those who are killed lost the civilian (non-combatant) status when they took arms in the disguise of civilians.¹⁹³ That means, the

Hostilities’ (2009) *EJIL: Talk!*, June 4 2009, available at: <<http://www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/>> accessed 21 February 2017.

¹⁹⁰ Orla Marie Buckley, ‘Unregulated Armed Conflict: Non-State Armed Groups, International Humanitarian Law, and Violence in Western Sahara’ (2012) 37 *NCJ Int’l & Com Reg* 793, 827; see also Antonio Cassese, *International Law* (OUP 2004) 420.

¹⁹¹ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 69.

¹⁹² Nils Melzer, *International Committee of the Red Cross: Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC, Geneva 2009) 41.

¹⁹³ Louie Doswald-Beck, ‘The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?’ (2006) 88 *Int’l Rev of Red Cross* 881; for killing of civilians by Syrian government force see also Bethan McKernan, ‘Pro-Government forces slaughter at least 82 while closing in on Syrian city Aleppo, UN says’ (13 December 2016) <<http://www.independent.co.uk/news/world/middle-east/aleppo-latest-battle-un-syrian-army-forces-government-regime-kill-civilians-massacre-assad-russia-a7471416.html>> accessed 14 March 2017.

governments are treating them as neither combatant nor non-combatant but ‘unlawful-combatants’ in order to justify their killings of civilians. The problem with this argument by the governments is that there is no evidence in support to uphold that the victims of the governments’ use of force were using counter force while enjoying the status of non-combatant.¹⁹⁴

The analysis and evidence of the nature and extent of use of force by governments against rebels suggest that the categorisation of ‘unlawful combatant’ has been unilaterally benefiting the governments.¹⁹⁵ This is because it has been a difficult but not impossible task for the government forces to identify the rebels who tend to take the disguise of civilians and carry on surprise attacks.¹⁹⁶ In order to respond to this kind of threat from the rebels and to ease their task of identification of rebels, the government forces have resorted to use of indiscriminate force against civilians on the basis of their own assessment of such threat. The problem with such use of indiscriminate force is that the governments are not accountable for their action and this has resulted in rising number of civilian casualties in internal armed conflict. Moreover, in the existence of a legal framework where the government forces are not accountable for using excessive force against their opponents, such as rebels, the invocation of an invented category of ‘unlawful combatant’ by the former without any interference from international legal framework is likely to further widen the ‘gap’ between the legal position of the governments and the rebels as far as use of force is concerned.

4.3.4 The Status and Treatment of rebels in Islamic law in contrast to Public international law

As indicated in the Qur’anic text regulating armed rebellion and the precedents set by the fourth Caliph, a series of peaceful conflict resolution mechanisms must be followed before the state uses force against the rebels. The head of the Muslim state is to send an envoy to the rebels to listen to their justifications for the use of force and if their justification is found to be valid, then the state is to fulfil their demands.¹⁹⁷ If the envoy finds that their justifications are not valid, then he should explain to them the validity of their justifications and remove any

¹⁹⁴ Tamar Meisels, ‘Combatants – Lawful and Unlawful’ (2007) 26 Law and Philosophy 31.

¹⁹⁵ Theodor Meron, ‘The Humanisation of Humanitarian Law’ (2000) 94 AJIL 239; see also K. Dormann, ‘The Legal Situation of Unlawful/Unprivileged Combatants’ (2003) 85 IRRC 849.

¹⁹⁶ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 166.

¹⁹⁷ Intisar A. Rabb, ‘Negotiating Speech in Islamic Law and Politics: Flipped Traditions of Expressions’ in Anver M. Emon, Mark Ellis and Benjamin Glahn (eds), *Islamic Law and International Human Rights Law* (OUP 2012) 153.

misunderstanding that they have regarding the positions and/or decisions taken by the Muslim state.¹⁹⁸ If these discussions fail, then the rebels should be called – according to some jurists – to a *munāẓarah* (public debate) between them and the state authorities so that the public can judge the justness of their cause.¹⁹⁹

If all these peaceful mechanisms, stated above, of resolving the conflict fail, then the rebels should be advised or warned to renounce their plans for the use of force.²⁰⁰ If the rebels still insist and start using actual force against the state authorities, then specific rules of engagement apply in this category of internal armed conflict.²⁰¹ On the contrary, no such mechanism exists under customary international law, under which states are under no obligation to engage in any level of discussion with rebels, and can treat them as mere criminals, depending on the intensity of their challenge. This is an important aspect of Islamic law, a type of ‘preventive diplomacy’ which, if implemented generally, could help to avoid violent clashes between rebel groups and government forces.

The Islamic law of rebellion guarantees a privileged status for the rebels during and, no less importantly, after the cessation of hostilities.²⁰² At the outset, it is interesting to note that the rules of engagement put both the conflicting parties, the state army and the rebels, on equal footing and thus the same rules apply to both.²⁰³ This means that both of them are to be held equally responsible for any violation of the rules of engagement of this specific category of internal armed conflict. As a rule, the jurists make it clear that on the part of the state army

¹⁹⁸ Nahla Yassine-Hamdan and Fredric S. Pearson, *Arab Approaches to Conflict Resolution: Mediation, Negotiation and Settlement of Political Disputes* (Routledge 2014) 133; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 157.

¹⁹⁹ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 162.

²⁰⁰ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 161.

²⁰¹ Muhammad Bin Edress al-Shāfi‘ī, *Kitab Al-Umm*, Vol. 4 (Beirut: Dar al-M‘arifa 1973) 218; ‘Alā al-Dīn al-Kāsānī, *Badā‘i’ al-Ṣanā‘i’ fi Tartīb al-Sharā‘i*, vol 7 (2nd edn, Beirut: Dār al-Kitāb al-‘Arabī 1982) 140; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū’*: *Sharḥ al-Muḥadhdhab*, ed. Maḥmūd Maṭrajī, vol 20 (Beirut: Dār al-Fikr 2000) 349; Muḥammad al-Khaṭīb al-Shirbīnī, *Al-Iqnā’ fi Hall Alfaz Abi Shuja*, Vol. 2 (Beirut: Dar al-Fikr 1994) 549; Ahmad al-Qarāfi, *Al-Dhakhīrah*, Vol. 12 (Beirut: Dar al-Gharb al-Islami 1994) 7; Ahmad Ibn Taymiyyah, *Al-Khalīfah wa al-Mulk* (Jordan: Makhtab al-Manar 1994) 65; see also Khaled Abou El Fadl, ‘Political Crime in Islamic Jurisprudence and Western Legal History’ (1998) 4 U.C. Davis Journal of International Law and Policy 15; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 152.

²⁰² M. Cherif Bassiouni, *The Shari‘a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 249; see also John Kelsay, ‘Muslim Discourse on Rebellion’ (2013) 27 Ethics and International Affairs 379; C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (Palgrave Macmillan 1998) 136; Otto Kirchheimer, *Political Justice* (Princeton University Press 1961) 398.

²⁰³ Majid Khadduri, *War and Peace in Islam* (John Hopkins Press: Baltimore 1990) 72; see also Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, vol 36 (OUP 1981) 211.

soldier, the aim of fighting is merely to force the rebels to stop their attack, *rad'ihim* (to stop them) and not to kill them.²⁰⁴ In other words, the state army must not deliberately attempt to kill any of the rebels. By the same token, this means, on the part of the rebels, that their attack must be directed at, and limited to, achieving the objectives of their rebellion.

In addition to recognition of Prisoners of War (POW) status and the prohibition of the use of indiscriminate weapons, among other protections guaranteed in international armed conflicts, there are a number of rules of engagement that apply particularly in the fighting against the rebels which include: 1) The rebels 'could not be pursued if in rout'²⁰⁵ or when they are escaping from the battlefield.²⁰⁶ 2) The rebels' property could not be taken as spoils of war.²⁰⁷ 3) Their women and children cannot be enslaved.²⁰⁸ 4) Their wounded cannot be killed.²⁰⁹ The instruction of the fourth Caliph reads:

When you defeat them [rebels], do not kill their wounded, do not behead the prisoners, do not pursue those who return and retreat, do not enslave their women, do not mutilate their dead, do not uncover what is to remain covered, do not approach their property except what you find in their camp of weapons, beasts, male or female slaves: all the rest is to be inherited by their heirs according to the Writ of God.²¹⁰

²⁰⁴ John Kelsay, 'Muslim Discourse on Rebellion' (2013) 27 *Ethics and International Affairs* 379; see also Muḥammad 'Abd Allah wild Muḥammadān, 'Manhaj al-Sharī'ah al-Islāmiyyah fī Muwājahah al-Ḥurūb al-Ahliyyah: Dirāsah Taṭbiqiyyah 'alā al-Ḥarb al-Ahliyyah fī al-Ṣūmāl', MA Thesis, Naif Arab University for Security Sciences (2006) 188; Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 153.

²⁰⁵ Sohail H. Hashmi, 'Islam, Sunni', *Encyclopedia of Religion and War* (New York: Routledge 2004) 219; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 163.

²⁰⁶ Zayn al-Din 'Umar Ibn al-Wardi, *Ta'rikh Ibn al-Wardi* (Beirut: Dar al-Kutub al-'Ilmiyya 1996) I:150.

²⁰⁷ Abu al-Hasan Ibn al-Athir, *al-Kamil fī al-Ta'rikh* (Beirut: Dar al-Kutub al-'Ilmiyya 1987) III: 130; 'Izz al-Din Ibn Abi al-Hadid, *Sharh Nahj al-Balagha* (Beirut: Dar al-Jil 1987) IV: 25.

²⁰⁸ Muhammad Abu Ibn Qutayba, *al-Imama wa al-Siyasa* (Cairo: Mustafa al-Babi al-Halabi 1969) 77; Ahmad Ibn Hajar al-'Asqalani, *Fath al-Bari bi Sharh Sahih al-Bukhari* (Beirut: Dar al-Fikr 1993) XIV: 559; Abu Ja'far Muhammad Al-Tabari, *Ta'rikh al-Umam wa al-Muluk* (Beirut: Mu'assasat 'Izz al-Din 1987) IV: 581.

²⁰⁹ Muhammad Bin Edress al-Shāfi'ī, *Kitab Al-Umm*, Vol. 4 (Beirut: Dar al-M'arifa 1973) 218; Muḥyī al-Dīn ibn Sharaf al-Nawawī, *Al-Majmū'*: *Sharḥ al-Muhadhdhab*, ed. Maḥmūd Maṭrajī, vol 20 (Beirut: Dār al-Fikr 2000) 343; Yūsuf ibn 'Abd al-Barr, *Al-Kāfi fī Fiqh Ahl al-Madīnah* (Beirut: Dār al-Kutub al-'Ilmiyyah 1986) 222; see also Nik Rahim Nik Wajis, 'The Crime of *Hirāba* in Islamic Law' (PhD thesis, Glasgow Caledonian University 1996) 153; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 152, 160; Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011)163; see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 162.

²¹⁰ Muhammad Hamidullah, *Muslim Conduct of State* (5th edn, Lahore: Ashraf Press 1968) 181.

Furthermore, weapons confiscated from the rebels in the battlefield cannot be used by the state army in the fighting against the rebels unless in case of military necessity²¹¹ and after the cessation of hostilities all confiscated weapons must be returned to the rebels.²¹² More importantly, the vast majority of the Muslim jurists agree that captured rebels must be set free²¹³, but they disagree on whether they are to be released during or after the cessation of hostilities, or after the rebels no longer constitute a danger to the state.²¹⁴ In addition to that, both rebels and state army soldiers are equally not liable for the destruction of life and property during the hostilities²¹⁵ provided that, as referred to above, this was dictated by military necessity and was directed at, and limited to, achieving the objectives of using force in this category of internal conflict, as shown above.²¹⁶ This proves without a doubt that rebels are not criminals and that there is no punishment for them under Islamic law.²¹⁷ Moreover, the Islamic law of rebellion gives legal recognition to the rebels or secessionists for the sentences they pass and the executions they carry out during their control of a certain territory of the Muslim state provided that these sentences do not contradict Islamic law.²¹⁸

The existing legal regime offered by IHL is lacking in clarity and preciseness. The paucity of provisions in the Geneva Conventions dealing with non-state actors is a witness to the primacy

²¹¹ Muḥammad ibn al-Ḥasan al-Shaybānī, *Al-Siyar* (Majid Khadduri tr, Beirut: Al-Dār al-Muttaḥidah 1975) 229; Ahmad Ibn Idris al-Qarāfī, *Al-Dhakhīrah*, Vol. 12 (Beirut: Dar al-Gharb al-Islami 1994) 11; Ibn Qudāmah, *Al-Mughnī: Fi Fiqh al-Imam Ahmad Ibn Hanbal al-Shaybani*, vol 9 (Beirut: Dar al-Fikr 1984) 11; see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 166.

²¹² Majid Khadduri, *War and Peace in Islam* (John Hopkins Press: Baltimore 1990) 72; see also Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, vol 36 (OUP 1981) 211; for similar Shi'a position see Al-Qadi Abu Hanifa al-Nu'man, *Da'a'im al-Islam wa Dhikr al-Halal wa al-Haram wa al-Qadaya wa al-Ahkam* (Cairo: Dar al-Ma'rifa n.d.) I:251.

²¹³ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 176.

²¹⁴ 'Abd al-Qādir 'Awdah, *Criminal Law of Islam*, vol I (Zakir Aijaz tr, New Delhi: Kitab Bhavan, reprint 2005) 118; Nik Rahim Nik Wajis, 'The Crime of *Ḥirāba* in Islamic Law' (PhD thesis, Glasgow Caledonian University 1996) 153; Sherman A. Jackson, 'Domestic Terrorism in the Islamic Legal Tradition' (2001) 91 *The Muslim World* 302.

²¹⁵ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 77.

²¹⁶ 'Abd Allh b. 'Abd al-Rahman Ibn Abi Zayd, *Al-Nawadir wa al-Ziyadat 'ala ma fi al-Mudawwana min Ghayriha min al-Ummahat* (Beirut: Dar al-Gharb al-Islam 1999) XIV:543; see also 'Abd al-Qādir 'Awdah, *Criminal Law of Islam*, vol I (Zakir Aijaz tr, New Delhi: Kitab Bhavan, reprint 2005) 118; Nik Rahim Nik Wajis, 'The Crime of *Ḥirāba* in Islamic Law' (PhD thesis, Glasgow Caledonian University 1996) 153; also Khaled Abou El Fadl, 'Political Crime in Islamic Jurisprudence and Western Legal History' (1998) 4 *U.C. Davis Journal of International Law and Policy* 21.

²¹⁷ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 166; John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster John Knox 1993) 93. see also Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 164.

²¹⁸ Muḥammad ibn al-Ḥasan Al-Shaybani, *The Islamic Law of Nations: Shaybani's Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press 1966) 243; see also Muhammad Hamidullah, *Muslim Conduct of State* (5th edn, Lahore: Ashraf Press 1968) 79.

of state sovereignty over humanitarianism. The state sovereignty issue also impeded the extension of the IHL regime to non-state actors during the Diplomatic Conference 1974-1977. While some states may argue that granting rebels status would fuel and legitimise terrorism campaigns²¹⁹ and while others may point to the problems that non-state actors would face in trying to implement treaty burdens which were created for states,²²⁰ the main argument behind the extension of the IHL regime concerning combatant and prisoners of war status both during the conference and since is that of 'state sovereignty'. However, an effective solution of this 'state sovereignty' problem has been proffered by Islamic law which does not distinguish between international and non-international armed conflict rather it makes universal application of the rights and status of rebels in the equal footing with the rights and duties of the rulers.²²¹

Furthermore, in practice a trend has emerged among both states and non-state actors to apply IHL provisions unofficially or voluntarily during a conflict, thus avoiding armed conflict categorisation issues.²²² For example, Conventions on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention/Treaty).²²³ Indeed, this very notion arguably underscores the international obligations held by States, playing a dual role in inducing adherence and providing contractarian validation.²²⁴ This does not also affect 'state sovereignty' as non-state actors are not given official recognition and so is an acceptable compromise. However, the legal quality of the largely voluntary and unofficial initiatives is prone to uncertainty, given that armed groups could, at any point stop unofficial application or breach their agreements without facing formal legal consequences.²²⁵

²¹⁹ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 74; see also Douglas J. Feith, 'Law in the Service of Terror' (1985) 1 *National Interest* 36.

²²⁰ Emily Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict* (OUP 2010) 74-76.

²²¹ Etim E. Okon, 'Islam, War and International Humanitarian Law' (2014) 10 *European Scientific Journal* 100, 106; This has also been argued by Emmerich de Vattel, *The Law of Nations: Or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (1758) cited in Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 133.

²²² Such agreements between non-state actors and states are generally known as 'triangular agreements'. See Michel Veuthey, 'Guerrilla Warfare and Humanitarian Law' (1983) 23 *Int'l Rev Red Cross* 115; Michel Veuthey, 'Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-international Armed Conflicts: The Role of the International Committee of the Red Cross' (1983) 33 *Am U L Rev* 83.

²²³ (18 September 1997) 2056 UNTS 211; see also Claudia Hoffmann, 'Engaging Non-State Armed Groups in Humanitarian Action' (2006) 13 *Int'l Peacekeeping* 396, 476.

²²⁴ Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 129.

²²⁵ *Ibid.*

While the question of the permissibility of rebellion under Islamic law seems to be unsettled, the issue of combatant and prisoner of war status under the Islamic system²²⁶ seems to be much more protective of captured rebels than international customary law and IHL and could inform judicial interpretations of the status of those captured in a rebellion situation. Furthermore, the Islamic law of rebellion guarantees the right of political opposition to tyranny or the violations of the rule of law by the regimes and provides a series of mechanisms to resolve the conflict peacefully through discussions, negotiations and arbitration. No less importantly, the strict rules on the use of force peculiar to armed rebellion equally applicable to both the rebels and the state army soldiers considerably humanise this kind of internal armed conflict.

In fact, protection of peaceful opposition to the regimes in most of the Muslim countries is lacking at present, let alone the resort to armed rebellion. No Muslim country at present applies the Islamic law of rebellion no matter how much these regimes claim adherence to Islamic law.²²⁷ For example, both Saudi Arabia and Sudan, which claim to apply Islamic law as a whole, adopted the laws of banditry and apostasy into their legal systems but omitted, without comment, law of rebellion.²²⁸ Obviously for the regimes in the Muslim world the application of *ahkām al-bughāh* (law of treatment of rebels) will be impractical, excessively lenient and give a green light to every opposition group to take up arms against the state. But what is indeed regrettable here is that Muslim countries do not develop Islamic modalities of post-conflict justice²²⁹; they even do not adopt the Islamic conflict resolution mechanisms in the case of armed rebellion as pointed out in the Qur’anic text 49:9 and developed by the classical Muslim jurists over thirteen centuries ago.²³⁰

This is to conclude here that the recent violence committed in the Arab world either by the state against innocent civilians during peaceful demonstrations, or by insurgents against both the state authorities and/or innocent civilians, is in stark contradiction to Islamic law. This Islamic law of rebellion has been largely compromised by the political authorities in the Arab world. The incursions of politics into the development and implementation of the Islamic law of

²²⁶ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 243.

²²⁷ Khaled Abou El Fadl, ‘Political Crime in Islamic Jurisprudence and Western Legal History’ (1998) 4 U.C. Davis Journal of International Law and Policy 27; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 337.

²²⁸ Lawyers Committee for Human Rights, *Best by Contradiction: Islamisation, Legal Reform and Human Rights for Sudan* (New York: Lawyers Committee for Human Rights 1996) 62; see also John Kelsay, ‘Muslim Discourse on Rebellion’ (2013) 27 Ethics and International Affairs 379, 389.

²²⁹ M. Cherif Bassiouni, *The Shari‘a and Islamic Criminal Justice in Time of War and Peace* (Cambridge University Press 2014) 249.

²³⁰ Ahmed Al-Dawoody, ‘Conflict Resolution in Civil Wars under Classical Islamic Law’ (2015) 27 Peace Review 280.

rebellion has been witnessed by the current practice of the governments which often accused rebels for treason, terrorism and crime, and such accusation are opposed to Islamic law of rebellion.²³¹

The nature of rebellion is an opposition to political abuse of power and this should have received more attention and treatment by international law but it has not been the case.²³² The above examination of the legal framework of Public international law suggests that it does not put the rebels and the governments in equal footing but instead favours the already powerful governments against their opponents, such as rebels. If the right of rebels are not recognised and the powers of governments for using force against rebels are not effectively regulated then the latter is likely to recourse asymmetrical methods of warfare against their opponents as they are in a much better position in the current legal framework.²³³ Therefore, if the rebels and governments are not in the equal footing in terms of accountability and legal protection the use of excessive and asymmetrical force is likely to carry on by both parties to the conflict, with the rebels knowing the fact that they will either be killed or prosecuted by their opponents who will not be held accountable in any way.

In contrast, Islamic law has made a platform where the rulers and rebels are in equal footing. While Islamic law of rebellion is not endorsing or legitimating rebellions without limits, it is not also giving rulers unfettered discretion in dealing with rebels. In other words, Islamic law allowed rebellion if it is legitimate to use force against an unjust ruler and it has provided the criteria when a ruler can be classified as unjust and on the other hand it sets out the limitation on the use of force by the rulers against rebels. Therefore, it can be concluded that the status and protection offered by Islamic international law to rebels are much organised and advanced than what offered by Public international law. Hence, Islamic law has the potential to make a positive contribution in the development of Public international law in providing an effective legal framework to deal with rebellion which is an oft-occurring situation in modern world.

²³¹ See section 4.4 of this chapter (below).

²³² Richard R. Baxter, 'Some Existing Problems of Humanitarian Law' (1975) 14 *Mil L & L War Rev* 279, 298; see also UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (OUP 2004) 384; M. Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98 *J Crim L & Criminology* 711, 781.

²³³ Cedric Ryngaert, 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (ed), *Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 289.

4.4 The dividing line between jihad, rebellion, and terrorism

If the state practices, of both Islamic and non-Islamic countries,²³⁴ do not endorse the Islamic law in the treatment of rebels then a serious question arises that is ‘on what basis the Public international law would be benefited in adopting it’. In other words, why Public international law would adopt certain principles of law which are not only alien to it but also declined or abandoned by those states which should be regulated by it, such as Muslim majority states. Whereas based on theoretical analysis Islamic law has the potential to complement Public international law by filling an existing grey-hole,²³⁵ in practice it is difficult to see the legal support and political willingness in such complementation process. Theoretically recognised of the ‘common benefit’ aside, there is no plausible state practice from Muslim countries. In these circumstances, Islamic law of rebellion can, at the very least, play a vital role by defining the fine line between the highly-contested terms jihad, rebellion and terrorism. The distinction between these terms will not only configure a groups’ identity but also their treatment by state authorities and post-conflict justice especially in Muslim countries.

As discussed above, despite the heavy emphasis on the prohibition against rebellion, the Islamic traditional trend does not criminalise the act of rebellion. The early traditions did not clearly distinguish between rebellion and terrorism.²³⁶ Furthermore, the modern jurists have confused jihad with rebellion and terrorism. Jihad has also been identified as the reason behind most use of force including rebellion and terrorism.

Both scholars and state authorities have used these terms, which have different meaning and significances, in similar words and in such a way that all sounded the same. The early juristic culture was searching for concepts that would distinguish the treatment of rebels from other elements who violated the law, but that culture was insufficiently developed to be able to do so with systematic precision.²³⁷ This lack of precision in the use of the terminology reflects on the fact that legal discourses, at that time, had not yet fully co-opted terms and rendered them into technical terms of art. In fact, the full co-optation of the terms did not take place until well

²³⁴ In this thesis, the use of the term ‘Islamic or Muslim Countries’ does not make the proposition that those countries are governed by either Islamic Law or Shari‘a but only denotes that majority of the population of such countries are Muslims. The same principle applies for the term ‘non-Islamic or non-Muslim countries’.

²³⁵ This has been discussed in section 4.3 of this chapter (above).

²³⁶ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 135.

²³⁷ George Makdisi, *The Rise of Colleges: Institutions of Learning in Islam and the West* (Edinburgh University Press 1981) 34; see also Christopher Melchert, *The Formation of the Sunni Schools of Law; 9th – 10th Centuries* (Leiden: E.J. Brill 1997) 47, Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 35.

after the fourth/tenth century, and in a few sources, the lapsing and confusing of ‘*hiraba*’ with ‘*baghy*’ continues up to the ninth/fifteenth century.²³⁸ Since then, as the confusion became fairly settled, the linguistic practices and formulas of the field were consistently repeated in Islamic juridical discourses.

4.4.1 The role of 9/11 terrorist attacks in stimulating the confusion between jihad, rebellion and terrorism

Since the 9/11 terrorist attacks almost every action, at domestic and international level, based on religious ideology, has been categorised as terrorism without giving appropriate account of such categorisation.²³⁹ As a result, this has created a barrier which is hindering to demonstrate the Islamic law of rebellion from a broader perspective. For example, a rebellion based on religious ideology is being conveniently identified as a potential terrorist threat rather than a political matter with its likely effect at international level. In this way, this matter is not being given the necessary consideration in order to secure long-term resolution but being dealt with as a short-term fix.²⁴⁰ Therefore, it is expedient to understand the dividing line between jihad, terrorism and rebellion so that both the root causes of terrorism and the position of Islamic law to deal with it can be understood.²⁴¹ Furthermore, in the absence of any legal definition of terrorism²⁴², the drawing of a dividing line between jihad, rebellion and terrorism is likely to be of paramount assistance at the task of identifying terrorism from other similarities.²⁴³ Drawing such dividing line from the viewpoint of Islamic law is ideal because a comparative

²³⁸ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 135.

²³⁹ Tony Blair, ‘A Battle for the Global Values’ (2007) *Foreign Affairs* 79, 82; see also Lisa Wedeen, ‘Beyond the Crusades: Why Huntington and Bin Laden are Wrong’ (2003) *X Middle Eastern Policy* 56.

²⁴⁰ John L. Esposito and Dalia Mogahed, *Who Speaks for Islam?: What a Billion Muslims Really Think, Based on Gallup’s Poll – The Largest Study of its Kind* (New York: Gallup Press 2007) 136; see also David Ryan, ‘Framing September 11: Rhetorical Device and Photographic Opinion’ (2004) *European Journal of American Culture* 19; Abdeen Jabara, ‘September 11: Doesn’t it Have a Political and Historical Context?’ (2001) *58 Guild Practitioner* 136.

²⁴¹ Fawaz A. Gerges, *The Far Enemy: Why Jihad Went Global* (Cambridge University Press 2005) 9; see also Fawaz A. Gerges, ‘Understanding the Many Faces of Islamism and Jihadism’ (2007) *61 Nieman Reports* 7; Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 186.

²⁴² C. L. Lim, ‘The Question of a generic definition of terrorism under general international law’ in Victor V. Ramraj (ed), *Global Anti-Terrorism Law and Policy* (Cambridge University Press 2005) 38; H. H. A. Cooper, ‘Terrorism: The Problem of Definition Revisited’ in Sue Mahan and Pamala Griset (eds), *Terrorism in Perspectives* (2nd edn, Sage Publications 2008) 15; see also Antonio Cassese, ‘The Multifaceted Criminal Notion of Terrorism’ (2006) *4 Journal of International Criminal Studies* 937; T. Wiegand, ‘The Universal Terrorist: The International Community Grappling with a Definition’ (2006) *4 Journal of International Criminal Justice* 914; D. Blöcher, ‘Terrorism as an international crime: the definitional problem’ (2012) *8 Eyes on the ICC* 107; Helen Duffy, *The War on Terror and the Framework of International Law* (2nd edn, Cambridge University Press 2015) 33.

²⁴³ Sherman A. Jackson, ‘Domestic Terrorism in the Islamic Legal Tradition’ (2001) *91 The Muslim World* 293; see also Frank E. Vogel, ‘The Trial of Terrorists under Classical Islamic Law’ (2000) *43 Harvard International Law Journal* 53.

study of terrorism in international law and Islamic law suggests that there are similarities between terrorism and *hirāba* (banditry, highway robbery, piracy).²⁴⁴

Confusing rebels with terrorists is a major mistake, regrettably found in many examples of classical and modern literature.²⁴⁵ Certainly the legal recognition and status guaranteed for the rebels under Islamic law would be unthinkable for the terrorists. The rules of engagement with rebels do not apply in the fighting against terrorists. During the hostilities, state forces could aim to kill terrorists and follow them even when they are escaping. More importantly, after they are captured, the severest punishments under Islamic law await convicted terrorists. Therefore, it is expedient to draw the fine line between Jihad, rebellion and terrorism. Furthermore, the dividing line is necessary because the rebels are to receive treatment different from terrorists both during and, more importantly, after the cessation of fighting.²⁴⁶ But the aim is to regulate the recourse to use of force among Muslims by ensuring that there are specific legitimate grounds and not to give a blank check for any citizen to use force against the government.²⁴⁷

4.4.2 The distinguishing features of jihad, rebellion and terrorism

4.4.2.1 Jihad

‘Jihad’ is a dynamic term which may denote a plethora of meaning and significances depending on the circumstances in which it is invoked.²⁴⁸ ‘Jihad’ can very conveniently be applied to any use of force by a person or group of persons and this is very likely to happen when such

²⁴⁴ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 190.

²⁴⁵ Majid Khadduri, *War and Peace in Islam* (John Hopkins Press: Baltimore 1990) 63; Chris Waddy, *The Muslim Mind* (Grosvenor: London 1990) 102; See also Sobhi Mahamassani, *The Principles of International Law in the Light of Islamic Doctrine*, vol 117 (Recueil des Cours 1966) 221; Rudolph Peters, *Djihad: War of Aggression or Defence* (Gottingen, August 1974) 286; John Esposito, *Unholy War: Terror in the Name of Islam* (OUP 2002) 65; Ahmed Yamani, ‘Humanitarian International Law in Islam: A General Outlook’ (1985) 7 Michigan Yearbook of International Legal Studies 189, 215; Abdulrahman Alsumaih, ‘The Sunni Concept of Jihad in Classical Fiqh and Modern Islamic Thought’, PhD thesis, University of Newcastle Upon Tyne (1998) 273; Sharifuddin Pirzada, ‘Islam and International Law’ in Altaf Gauhar (ed), *The Challenge of Islam* (London: Islamic Council of Europe 1978) 203; Radwan Masmoudi, ‘Struggles Behind Words: Shariah, “Sunnism and Jihad”’ (2001) XXI SAIS Review 19, 23; Yassin EL-Ayouty, ‘International Terrorism and the Law’ (1999) 5 Journal of International and Comparative Law 485, 489; Ali Ghanbarpour-Dizboni, ‘Islam and War: Disparity between the Technological-Normative Evolution of Modern War and the Doctrine of Jihad’, PhD thesis, University of Montreal (2000) 14; Malik al-Mubarak, ‘Warfare in Early Islam’, PhD thesis, University of Glasgow (1997) 171; Jamal Badawi, ‘Muslim/Non-Muslim Relations: Reflections of some Qur’anic Texts’ (2005) 6 Scientific Review of the European Council for Fatwa and Research 258, 269; Suheil Laher, ‘Indiscriminate Killing in Light of Islamic Sacred Texts’, in Aftab Ahmad Malik (ed), *The State We Are in: Identity, Terror and the Law of Jihad* (Amal Press: Bristol 2006) 48.

²⁴⁶ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 158.

²⁴⁷ Ibid.

²⁴⁸ The definition of ‘Jihad’ has been examined from different perspectives in Chapter 3. See section 3.4 of Chapter 3.

application is made without giving the necessary considerations as to the context and circumstances of the use of force.²⁴⁹ The dynamic nature of the term ‘jihad’ has also been found in its application for use of force against unbelievers and a total war against non-Muslim territories.²⁵⁰ Jihad provides the Qur’anic basis of legitimate use of force and for this reason its invocation by both state and non-state actors alike is very tempting and frequent.²⁵¹ The only point where jihad and rebellion overlap is that both of them are collective duty as far as use of force is concerned. However, the main characteristic of jihad which is unique to its distinctiveness is that it must be for the God’s sake (*fi sabilillah*) even when it comes to use of force.²⁵²

4.4.2.2 Rebellion

Unlike jihad, rebellion does not have a direct Qur’anic basis of use of force. The only verse that the scholars refer to from the Qur’an in order to demonstrate the right and treatment of rebels is 49:9, and it has been argued that this verse was not actually revealed to denote rebellion. The exegetes agree that the occasion of revelation of this verse is related to either one of two small quarrels or brawls between a few individual Muslims over family and non-political issues which resulted in no casualties.²⁵³ It is arguable that the Islamic law of rebellion has developed from the spirit of the Qur’an and *Sunna* of the Prophet but the focal point of its development has been indebted to the practices of the Caliphs and Muslim leaders.²⁵⁴

While use of force in jihad does not have to be against a tyrant or unjust ruler who ignores Islamic law while ruling the state, at the same time jihad can be against such ruler as well. So, what is the difference between jihad and rebellion? In other words, under what circumstances use of force would trigger jihad and rebellion? Rebellion, in Islamic law, has developed a special branch of law which regulates the relationship between the ruler and the ruled.²⁵⁵ The origin of the term ‘Kharijite’ and its use by state and general Muslim population has also a very

²⁴⁹ See Section 3.4.1 of Chapter 3.

²⁵⁰ See Section 3.4.2 of Chapter 3.

²⁵¹ See Sections 3.4.2.1 and 3.4.2.2 of Chapter 3.

²⁵² See Section 3.4.1 of Chapter 3.

²⁵³ Muḥammad ibn Jarīr al-Ṭabarī, *Jāmi’ al-Bayān ‘an Ta’wīl Āy al-Qur’ān*, vol 26 (Beirut: Dār al-Fikr 1984) 127; Muḥammad ibn Aḥmad al-Anṣārī al-Qurṭubī, *Al-Jāmi’ li-Aḥkām al-Qur’ān*, vol 16 (Cairo: Dār al-Sha’b n.d.) 315; Ismā’īl ibn ‘Umar ibn Kathīr, *Tafsīr al-Qur’ān al-‘Azīm*, vol 4 (Beirut: Dār al-Fikr 1980) 212; Jalāl al-Dīn al-Suyūfī, *Al-Durr al-Manthūr*, vol 7 (Beirut: Dār al-Fikr 1993) 560; ‘Abd al-Rāziq ibn Hammām al-Ṣana’ānī, *Tafsīr al-Qur’ān*, ed. Muṣṭafā Muslim Muḥammad, vol 3 (Riyadh: Maktabah al-Rushd 1980) 232; Aḥmad Muṣṭafā al-Marāghī, *Tafsīr al-Marāghī*, vol 26 (Cairo: Muṣṭafā al-Bābī al-Ḥalabī 1946) 130; Amān Allah Muḥammad Ṣiddīq, ‘Aḥkām al-Bughāh fī al-Sharī‘ah al-Islāmiyyah’, MA Thesis, Imām Muḥammad ibn Su’ūd Islamic University (1976) 49.

²⁵⁴ See section 4.2.1 of this chapter (above).

²⁵⁵ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 33, 288.

special significance in the law of rebellion. It is the special nature of this branch of Islamic law that distinguishes itself from jihad. The status of rebels is protected in this special branch of law as they are not criminals and should not be punished under the criminal code.²⁵⁶

4.4.2.3 Terrorism

The use of violence in Islamic law has been divided into three categories. The first category is known as *hurūb al-riddah* (apostasy wars) which refers to a series of battles waged after the Prophet's demise by the first caliph Abū Bakr (r. 632-634) against several Arab tribes who refused to pay *zakāh* (compulsory religious dues) or renounced Islam.²⁵⁷ The second category is the war against *al-khawārij* (roughly, violent religious fanatics), a group of Muslims who emerged during the reign of the fourth caliph, 'Alī ibn Abī Ṭālib (r. 656-661).²⁵⁸ The third category of internal hostilities treated by classical Muslim jurists is the crime of *ḥirābah* (banditry, highway robbery, piracy). The importance of identifying the elements of this crime, at least for the purpose of this chapter, is that these are the elements which distinguish terrorism from armed rebellion.²⁵⁹

4.4.2.3.1 The *hirāba*-terrorism relationship

The *hirāba*-terrorism relationship has a vital role to play in determining the nature and identity of the third category mentioned above. This relationship is very complex and as such requires further clarification in order to determine the nature and extent of the relationship in terms of use of force. There are differences among the Muslim jurists as to whether terrorism corresponds to *hirāba*.²⁶⁰ The common question emanates from such differences is that, to what extent terrorism is attributable to *hirāba* in terms of use of force?

²⁵⁶ Khaled Abou El-Fadl, 'Political Crime in Islamic Jurisprudence and Western Legal History' (1998) 4 U.C. Davis Journal of International Law and Policy 11, 21.

²⁵⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Geneva: ICRC, 2005) 611, Rule 159, Practice Relating to Amnesty cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, 'The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse' in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

²⁵⁸ 'Abd al-Laṭīf 'Abd al-Qādir al-Ḥifzī, *Ta'thīr al-Mu'tazilah fī al-Khawārij wa al-Shī'ah: Asbābuh wa Mazāhīruh* (Beirut: Dar al-Fikr 1980) 305 cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, 'The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse' in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

²⁵⁹ For a recent discussion of the crime of *ḥirābah* and its applicability in the Nigerian crisis see Mohamed Elewa Badar, ElSayed Amin and Noelle Higgins, 'The International Criminal Court and the Nigerian Crisis: An Inquiry into the Boko Haram Ideology and Practices from an Islamic Law Perspective' (2014) 3 IHRLR 29, 52.

²⁶⁰ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 6.

There are two main approaches to the *hirāba*-terrorism relationship. One view is that modern terrorism corresponds in its most salient features to *hirāba*.²⁶¹ The other view is that there is little or no relationship between modern terrorism and *hirāba*.²⁶² In the circumstance of this disagreement, this section scrutinises the definition of *hirāba* followed by the juristic positions held by different schools of thought to assess any similarities and dissimilarities of the elements of *hirāba* to that of different positions held by Muslim jurists.

Hirāba is derived from the words *haraba* (to despoil someone's wealth or property) and *harb* (war).²⁶³ The Qur'an refers to both words in 2:279 and 5:33.²⁶⁴ Whereas 2:279 refers to 'fighting those who deal in usury (*riba*) and keep its outstanding dues', 5:33 refers to 'disobedience when they rebel against ordinances of Allah and His Prophet'.²⁶⁵ Thus, the lexical meanings of *hirāba* refers to disbelief, banditry, striking terror among the passers-by and spreading corruption in the land.²⁶⁶

In addition to the etymological meanings of *hirāba*, Muslim exegetes have also considered the legal meanings of *hirāba* in order for discharging their role as the conveyors of the overall meaning of the Qur'anic text.²⁶⁷ This preference of the exegetes lies on the fact that the Qur'an does not contain either the word *hirāba* nor the root verb *haraba*²⁶⁸, and this has given rise to the necessity to recourse into other resources, such as juristic or legal meaning of *hirāba*. The legal meaning, as opposed to spiritual meaning, of *hirāba* is based on 5:33 rather than 2:279.²⁶⁹ The Qur'an, in 5:33, provides that-

²⁶¹ Ahmad Ibn Sulayman Salih al-Rubaysh, *Jara'im al-Irham wa Tatbiqatuba al-Fiqhiyyah al-Mu'asirah* (Riyadh: Matabi' Akadimiyyat Nayif al-Arabiyyah li al-'Ulum al-Amniyyah 2003) 132; see also Khaled Abou El Fadl, *The Great Theft* (Harper Collins 2007) 243; Nik Rahim Nik Wajis, 'The Crime of *Hirāba* in Islamic Law' (PhD thesis, Glasgow Caledonian University 1996) 165.

²⁶² Haytham 'Abd al-Salam Muhammad, *Mafhun al-Irhab fi al-Shari'ah al-Islamiyyah* (Beirut: Dar al-Kutub al-'Ilmiyyah 2005) 173; Sa'id 'Abdullah Harib, *Al-Ta'assub wa al-'Unf: Fikran wa Sulukan* (Kuwait: Wazarat al-Awqaf wa al-Shu'un al-Islamiyyah, al-Markaz al-'Alami li al-Wasatiyyah 2006) 11.

²⁶³ Jamal al-Din Muhammad bin Makram ibn Manzur, *Lisan al-'Arab*, vol 1 (6th edn, Beirut: Dar Sadir 1997) 302; see also Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 132.

²⁶⁴ See Al-Qur'an 2:279 and 5:33, Abu Yusuf tr.

²⁶⁵ Al-Sayyid Mahm-d al-Alusi, *Ruh al-Ma'ani fi Tafsir al-Qur'an al-'Azim wa al-Sab' al-Mathani*, vol 3 (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.) 53; see also Muhammad Ibn 'Abdullah al-Umayri, *Musqitat Hadd al-Hirabah wa Tatbiqatiha fi al-Mamlakah al-'Arabiyyah al-Su'udiyyah* (Riyadh: Akadimiyyat Nayif al-'Arabiyyah li al-'Ulum al-Amniyyah 1999) 16.

²⁶⁶ Muhammad 'Atris, *Al-Mu'jam al-Wafi li-Kalimat al-Qur'an al-Karim* (Cairo: Maktabat al-Adab 2006) 950.

²⁶⁷ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 134.

²⁶⁸ Ibid.

²⁶⁹ Muhammad 'Abdullah al-Samman, *Al-Islam wa al-Dima'* (Cairo: Al-Maktab al-Fanni li al-Nashr, n.d.) 45; see also Al-Sayyid Mahm-d al-Alusi, *Ruh al-Ma'ani fi Tafsir al-Qur'an al-'Azim wa al-Sab' al-Mathani*, vol 3 (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.) 53; Muhammad Ibn 'Abdullah al-Umayri, *Musqitat Hadd al-Hirabah*

Those who wage war against Allah and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land.²⁷⁰

The above Qur'anic provision provides for two elements of *hirāba* namely, waging war and spreading corruption. These two elements must be present in order to impose punishment for *hirāba* because these two elements are combined by the conjunction 'and'.²⁷¹ However, mere presence of these two elements does not satisfy the imposition of punishment for *hirāba* because these elements will have to satisfy an additional caveat, which is against Allah and His Messenger. Therefore, punishment for *hirāba* cannot be imposed merely by waging war against anyone except Allah and the Prophet.²⁷² This Qur'anic requirement has paved the way for the special branch of rebellion which is distinct from *hirāba*. This is because the Qur'anic requirement has allowed use of force against anyone except 'Allah and the Prophet' and on this basis use of force against the Caliphs as well as other rulers has been allowed. This position supports legitimacy of use of force by rebels because, as stated above, rebellion only began after the death of the Prophet²⁷³ and following Prophet's demise use of force against any rulers could not amount to *hirāba*.²⁷⁴ That means, rebellion and *hirāba* are not same but two separate branches of Islamic law. As a result, rebels cannot be punished for *hirāba* crimes.

If *hirāba* and rebellion are not in the same category, as stated above, then the nature and extent of the relationship between *hirāba* and terrorism depend on the implication of *hirāba* verse, which is 5:33, in modern day terrorism. From the above discussion, it is apparent that although punishment for *hirāba* is unlikely to be imposed after the prophet's demise, however, there is still a scope where such punishment can be imposed on those who wage war against Allah and spreads corruption in the land. This is because the prophet has died in 632CE but Allah's existence and status, as proclaimed in the Qur'an and unequivocally believed by all Muslims, is still a Qur'anic requirement and the Qur'an itself reflects on the status of Allah and the divine

wa Tatbiqatiha fi al-Mamlakah al-'Arabiyyah al-Su'udiyah (Riyadh: Akadimiyyat Nayif al-'Arabiyyah li al-'Ulum al-Amniyyah 1999) 16.

²⁷⁰ Al-Qur'an 5:33, Abu Yusuf tr.

²⁷¹ 'Abd al-Rahman ibn al-Kamal Jalal al-Din al-Suyuti, *Al-Durr al-Manthur fi al-Tafsir bi al-Ma'thur*, vol 3 (Beirut: Dar al-Fikr 1993) 68; see also Al-Sayyid Mahm-d al-Alusi, *Ruh al-Ma'ani fi Tafsir al-Qur'an al-'Azim wa al-Sab' al-Mathani*, vol 6 (Beirut: Dar Ihya' al-Turath al-'Arabi, n.d.) 120.

²⁷² Muhammad Sa'id al-'Ashmawi, *Usul al-Shari'ah* (4th edn, Cairo: Madbuli al-Saghir 1996) 128.

²⁷³ See section 4.2.1 (above).

²⁷⁴ Muhammad ibn Jarir ibn Yazid ibn Khalid al-Tabari, *Jami' al-Bayan 'an Ta'wil Ay al-Qur'an*, vol 6 (Beirut: Dar al-Fikr 1984) 208; see also Muhammad Rashid Rida, *Tafsir al-Qur'an al-Hakim: Al-Mushtahir bi ism Tafsir al-Manar*, vol 6 (2nd edn, Cairo: Dar al-Manar 1947) 354.

revelations which provide for source-oriented legitimacy.²⁷⁵ In other words, *hirāba* punishment can be imposed on those who use force in opposition to the Qur’anic proscriptions which specifically prohibits such use of force.²⁷⁶ For example, non-state actors cannot recourse to extraterritorial use of force due to lack of both ‘right authority’ and ‘just cause’ which are Qur’anic requirement of waging war against another state.²⁷⁷ Therefore, extraterritorial use of force by non-state actors is punishable under *hirāba* punishment.

From the Qur’anic requirement stated above, *hirāba* punishment can be imposed on those who spread corruption in the land by opposing the Qur’an and its rule. The circumstances that satisfy this requirement and as such trigger the imposition of *hirāba* punishment are described by Muslim jurists in different terms. The Hanafi jurists have described *hirāba* as highway robbery and the great theft (*al-Sariah al-Kubra*).²⁷⁸ On the other hand, the Shaf’i jurists emphasised on the requirement of a ‘communal act’ as opposed to an ‘individual act’ and referred them as ‘corrupt people’.²⁷⁹ The latter view provides a similarity between *hirāba* and modern day terrorism as it emphasises on the gravity and serious consequences of the act.²⁸⁰ Furthermore, the Hanbali jurists differ in their positions as to the crime of *hirāba*. Whereas Ibn Qudamah restricts *hirāba* to acts committed in isolated areas than cities²⁸¹, al-Buhuti stresses that it does not matter whether the act of *hirāba* is committed in isolated areas or in cities.²⁸² These see-saw position of Hanbali jurists do not bear any similarities between *hirāba* and terrorism. However, the Maliki jurists have identified an act of *hirāba* when it spreads corruption and violates sanctity what Allah made unlawful.²⁸³ This Maliki position corresponds not only to

²⁷⁵ Source-oriented legitimacy is discussed in section 5.3.1 of chapter 5.

²⁷⁶ Muhammad Mutawalli al-Sha’rawi, *Tafsir al-Shar’awi*, vol 15 (Cairo: Akhbar al-Yawm 1991) 9331; see also Al-Sayyid Mahm-d al-Alusi, *Ruh al-Ma’ani fi Tafsir al-Qur’an al-‘Azim wa al-Sab’ al-Mathani*, vol 29 (Beirut: Dar Ihya’ al-Turath al-‘Arabi, n.d.) 60; Muhammad Fu’ad ‘Abd al-Baqi, *Al-Mu’jam al-Mufahras li Alfaz al-Qur’an al-Karim* (Cairo: Dar al-Hadith 1988) 166.

²⁷⁷ See section 3.2.3.1 of Chapter 3.

²⁷⁸ Ala’ al-Dain al-Kasani, *Bada’i al-Sana’i fi Tartib al-Shara’i*, vol 7 (Beirut: Dar al-Kitab al-‘Arabi 1982) 90; Muhammad Amin ibn ‘Umar Ibn Abidin, Hashiyat Radd al-Muhtar ‘ala al-Durr al-Mukhtar: Sharh Tanwir al-Absar, vol 4 (Beirut: Dar al-Fikr 2000) 113; see also Muhammad ibn Ahmed ibn Abi Sahl al-Sarakhsi, *Kitab al-Mabsut*, vol 9 (Beirut: Dar al-Ma’rifah, n.d.) 195.

²⁷⁹ Muhammad Bin Edress al-Shaf’i, *Kitab al-Umm*, vol 4 (Beirut: Dar al-M’rifa 1973) 152; see also ‘Ali bin Muhammad Habib al-Basri Al-Mawardi, *Al-Ahkam al-Sultaniyyah wa al-Wilayat al-Diniyyah* (Cairo: Dar al-Fikr li al-Tiba’ah wa al-Nashr wa al-Tawzi’ 1983) 56.

²⁸⁰ Mawil Izzi Dien, ‘Hiraba (Highway Robbery)’ in Ian Richard Netton (ed), *Encyclopedia of Islamic Civilisation and Religion* (Routledge 2008) 239; see also Nik Rahim Nik Wajis, ‘The Crime of *Hirāba* in Islamic Law’ (PhD thesis, Glasgow Caledonian University 1996) 64.

²⁸¹ Muwaffaq al-Din ‘Abdallah ibn Ahmad ibn Qudamah, *Al-Mughni: fi Fiqh al-Imam Ahmad Ibn Hanbal al-Shaybani*, vol 9 (Beirut: Dar al-Fikr 1984) 124.

²⁸² Mansur ibn Yunus ibn Idris al-Buhuti, *Kashshaf al-Qina’ ‘an Matn al-Iqna’*, vol 6 (Beirut: Dar al-Fikr 1981) 150.

²⁸³ Malik ibn Anas, *Al-Mudawwanah al-Kubra*, vol 4 (Beirut: Dar al-Kutub al-‘Ilmiyyah 1994) 552; see also Abu ‘Umar Yusuf ibn ‘Abdullah ibn Muhammad al-Namiri ibn ‘Abd al-Barr, *Al-Kafi fi Fiqh Ahl al-Madinah*

the Qur'anic requirement stated above, such as spread corruption in the land by opposing the Qur'an and its rule, but also broadens, unlike other schools of thought stated above, the concept of *hirāba* to include all acts that lead to terrorising people. Therefore, the Maliki position is the most comprehensive, among the schools of thought, in corresponding *hirāba* with terrorism.²⁸⁴ However, the Qur'anic requirement, stated above, is common in the all four schools of Sunni jurisprudence.²⁸⁵

A comparison between the exegeses of 5:33 and legal definition of *hirāba* reveals that all classical and modern exegetes cite the various juristic definitions of *hirāba* without presenting new or adapted definitions providing any additional guidance to the extent that can be said to have been added or taken away from the classical definitions.²⁸⁶ This approach has resulted in the lack of effective legal framework to deal with modern day terrorism by Islamic law. Therefore, it is expedient to widen the concept of *hirāba* beyond the limitation of classical theory.²⁸⁷ In the classical theory, terrorising people and spreading corruption are the common denominators of both *hirāba* and terrorism.²⁸⁸

In addition to the classical theory, there is a modern element of terrorism which distinguishes it from *hirāba* and that is the link between the perpetrators and the victims of terrorism. In modern day terrorism, there is a very little or no link between the perpetrators and the victims as the former does not commit an act of terror to gain anything directly or indirectly from the latter. In the course of terrorising people, the perpetrators do not have any dispute or cause with the victims but with the people who are holding responsible positions for the victims, such as

(2nd end, Beirut: Dar al-Kutub al-'Ilmiyyah 1992) 582; Abdur-Rahmaan Ibn Salih al-Mahmood, *Man Made Laws vs Shari'ah: Ruling by Laws Other than What Allah Revealed* (Nasiruddin al-Khattab tr, International Islamic Publishing House 2003) 119.

²⁸⁴ 'Abd al-Hamid Ibrahim Al-Majali, *Al-Tatbiqat al-Mu'asirah li Jarimat al-Hirabah* (Amman: Dar Jarir 2005) 21; see also Muhammad bin 'Abdullah al-'Umayri, *Musqitat Hadd al-Hirabah wa Tatbiqatiha fi al-Mamlakah al-'Arabiyyah al-Su'udiyah* (Riyadh: Akadimiyyat Nayef al-'arabiyyah li al-'Ulum al-Amniyyah 1999) 19.

²⁸⁵ 'Abd al-Fattah Muhammad Qa'id, *Al-Hirabah fi al-Fiqh al-Islami: Dirasah Muqaranah* (Cairo: Dar al-Tiba'ah al-Muhammadiyah 1987) 12; see also Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 138; Khaled Abou El Fadl, *The Great Theft* (Harper Collins 2007) 242.

²⁸⁶ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur'anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 134; see also Sherman A. Jackson, 'Domestic Terrorism in the Islamic Legal Tradition' (2001) 91 *Muslim World* 303.

²⁸⁷ Muhammad bin 'Abdullah al-'Umayri, *Musqitat Hadd al-Hirabah wa Tatbiqatiha fi al-Mamlakah al-'Arabiyyah al-Su'udiyah* (Riyadh: Akadimiyyat Nayef al-'arabiyyah li al-'Ulum al-Amniyyah 1999) 19; see also Muhammad Tal'at al-Ghunaymi, *Qanun al-Salam fi al-Islam* (Alexandria, Egypt: Munasha'at al-Ma 'arif 2007) 815.

²⁸⁸ 'Ali 'Abd al-Qadir Al-Qaralah, *Al-Muqawamah wa al-Irhab min Manz-r Islami* (Amman: Dar 'Alam al-Thaqafah li al-Nashr wa al-Tawzi' 2005) 48; see also Sherman A. Jackson, 'Domestic Terrorism in the Islamic Legal Tradition' (2001) 91 *Muslim World* 295.

governments.²⁸⁹ The use of force by terrorists is usually associated with political or ideological aims as opposed to material gains.²⁹⁰ There are differences between a criminal (*mujrim*) and a terrorist (*irhābi*). For example, criminals usually commit their crimes out of personal interest whereas terrorists commit their actions primarily for political reasons, with the aim of subduing a more powerful authority.²⁹¹ Therefore, *hirāba* and terrorism are similar but not the same thing as Khaled Abou El Fadl maintains that:

Some scholars have invited me to adopt the word ‘terrorism’ as a faithful translation of the term *hirāba*. I decline to do so largely because I believe this to be an anachronism. Terrorism, as a concept, accompanied the emergence of the notions of political crime and national liberation in the modern age. Although *hirāba* does share many similarities with contemporary conceptions of terrorism, but in order to preserve the historical flavour of this work, I have used the terms bandits and brigands as synonymous with *hirāba*.²⁹²

The above scholarly positions suggest that terrorism is more of a political crime recognised by the state authorities and conversely acts to stimulate national liberation movement as claimed by the perpetrators. Furthermore, terrorism is a modern term of art which denotes many similarities with historical *hirāba* but very sharply differs from it.²⁹³ Historically, *hirāba* is the key provision of Islamic law to punish the *muhāribun* who are found guilty of *hirāba* but it does not carry the same legal implications as terrorism does. Terrorism is a species of political crimes which have become a serious problem in modern world due to its destructive effects on the victims. Because of such destructive effects, the political nature of the crime always remains overlooked and the use of force, whether justified or unjustified and proportionate or excessive, by the authorities and governments become more necessary and appears legitimate at least in its face value.

²⁸⁹ Muhammad Mutawalli al-Sha‘rawi, *Tafsir al-Shar‘awi*, vol 15 (Cairo: Akhbar al-Yawm 1991) 3091.

²⁹⁰ Sa‘id ‘Abdullah Harib, *Al-Ta‘assub wa al-‘Unf: Fikram wa Sulukan* (Kuwait: Al-Markaz al-‘Alami li al-Wasatiyyah 2006) 13; see also Haytham ‘Abd al-Salam Muhammad, *Mafhun al-Irhab fi al-Shari‘ah al-Islamiyyah* (Beirut: Dar al-Kutub al-‘Ilmiyyah 2005) 173.

²⁹¹ Elsayed M.A. Amin, *Reclaiming Jihad: A Qur’anic Critique of Terrorism* (The Islamic Foundation, UK: 2014) 128.

²⁹² Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 6.

²⁹³ Salwa Muhammad Al-‘Awwa, *Al-Jama‘ah al-Islamiyyah al-Musallahah fi Misr 1974 – 2004* (Cairo: Muktabat al-Shuruq al-Dawliyyah 2006) 33; see also Muhammad Fathi, *Waqi‘ al-Irhab fi al-Watan al-‘Arabi* (Riyadh: Akadimiyyat Nayif al-‘Arabiyyah li al-‘Ulum al-Amniyyah 1999) 94; Ahmad bin Sulayman Salih Al-Rubaysh, *Jara‘im al-Irhab wa Tatbiqatuha al-Fiqhiyyah al-Mu‘asirah* (Riyadh: Matabi‘ Akadimiyyat Nayef al-‘Arabiyyah li al-‘Ulum al-Amniyyah 2003) 30.

4.4.2.3.2 The distinguishing features of terrorism in Islamic law

According to some jurists, terrorism, in Islamic law does not solely depend on the basis of ‘right authority’ and ‘just cause’ but to a certain extent the means and methods of use of such force.²⁹⁴ For example, whereas the majority of Muslim jurists agreed that Kharijites had the ‘just cause’ to rebel against the 4th Caliph Ali, a few jurists also argued that since they advocated the indiscriminate slaughter of Muslims they were apostates rather than rebels.²⁹⁵ For their violent use of unjustified force the Qur’an has also provided for harsh treatment of terrorists.²⁹⁶ The Qur’an prescribes:

Indeed, the retribution for those who *yuharibun* (make war upon) Allah and His Messenger and strive to make *fasad* (destruction, damage) in the land is that they be killed or gibbeted or have their hands and feet amputated from opposite sides or they be banished from the land.²⁹⁷

There is also a hadith which reportedly have stated that:

There will come a time when zealots with little understanding of the religion will shed the blood of Muslims. If they are found, the reports assert, they must be killed wherever they may be found.²⁹⁸

However, the problem with this approach is that the rebels often adopt identical means and methods of using force as terrorists and this has made it difficult for the jurists to distinguish between these two on the basis of means only.²⁹⁹ For example, Kharijites are categorised as

²⁹⁴ Zayd al-Din Ibn Najim, *Al-Bahr al-Ra’iq Sharh Kanz al-Daqa’iq*, vol 5 (2nd edn, Beirut: Dar al-Ma’rifah n.d.) 105; Muhammad Abu Zahrah, *Al-Jarimah wa al-Qqubah fi al-Fiqh al-Islami* (Cairo: Dar al-Fikr al-Arabi 1998) 126; see also Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 158.

²⁹⁵ Ahmad Ibn Taymiyya, *Minhaj al-Sunna*, vol 2 (Beirut: Dar al-Kutub al-ilmiyah n.d.) 232; see also Ibn Abidin, *Hashiyat Radd al-Muhtar*, vol 4 (Cairo: al-Halabi 1996) 262; al-Buhuti, *Kashaf al-Qina an Matn al-Ina*, vol 6 (Riyad: Maktabat al-Nasr al-hadithah, n.d.) 161.

²⁹⁶ Ahmad b. Muhammad Al-Sawi, *Hashiyat al-‘Allama al-Sawi’ala Tafsir al-Jalalayn* (Beirut: Dar Ihya’ al-Turath al-‘Arab n.d.) III: 307; see also Patricia Crones and Martin Hinds, *God’s Caliph: Religious Authority in the First Centuries of Islam* (Cambridge: University of Cambridge Oriental Publications 1986) 24. 80.

²⁹⁷ Al-Qur’an 5:36, Abu Yusuf tr.

²⁹⁸ Abu Bakr b. Makhlad al-Shaybani, *Kitab al-Sunnah* (Beirut: al-Maktab al-Islami 1993) 424; Abu ‘Abd Allah al-Bukhari, *Sahih al-Bukhari* (Cairo: Dar Ihya’ al-Turath al-Arabiyya n.d.) IV:197; Sa’id b. Manasur Ibn Shu’ba, *Sunan* (Beirut: Dar al-Kutub al-‘Ilmiyya n.d.) II:322; Abu Muhammad al-Darimi, *Sunan* (Beirut: Dar al-Kitab al-‘Arabi 1987) II:281; Abu Bakr Ahmad al-Bazzar, *al-Bahr al-Zakhkhar* (Medina: Maktabat al-‘Ulum wa al-Hikam 1988) II:187.

²⁹⁹ Shams al-Din al-Ramli, *Fatawa al-Ramli* (Beirut: Dar-al Kutub al-‘Ilmiyya 1983) IV: 124; Ahmad Ibn Hajar, *Fath al-Jawad Sharh al-Irshad* (Cairo: Mustafa al-Babi al-Halabi 1971) II:296; Sulayman al-Jamal, *Hashiyat al-Jamal ‘ala Sharh al-Manhaj* (Beirut: Dar Ihya’ al-Turath al-‘Arabi n.d.) V:115; Sharaf al-Din Ibn al-Muqri, *Ikhlas al-Nawi* (Cairo: Lajnat Ihya’ al-Turath al-Islami 1989) IV:128; Muhammad Amin Ibn ‘Abidin, *Hashiyat Radd al-Muhtar ‘ala al-Durr al-Mukhtar* (Beirut: Dar al-Kutub al-‘Ilmiyya 1994) VII:188; Ahmad Ibn Hajar al-Haytami,

rebels despite they targeted civilians, adopted non-conventional means of warfare and spread terror.³⁰⁰ This is because rebels, in Islamic law, are identified by their cause which they believe to be just in Islam.³⁰¹ In other words, the justness of the cause of rebellion is based on theology. Therefore, the means test is not likely to be a deciding factor between rebellion and terrorism. However, the ends test can be of assistance here.³⁰²

It is one thing to rebel based on theological belief and another thing to fight for overthrowing the state authority. The former is based on theology and the latter is based on political and material gain. Whereas the former uses force to alter the foundation of law and order upon which state authority is established, the latter challenges the state authority itself irrespective of its legal foundation. Therefore, the key difference between rebellion and terrorism is not the means they use but the basis of their use of force. Where the basis of the use of force is solely founded on political gain rather than theological belief then such use of force is terrorism.³⁰³ On the other hand, where the basis of the use of force is founded on theological belief rather than political then such use of force is rebellion.³⁰⁴ Hence, Mongols who invaded ‘Abbasid caliphate and committed indiscriminate slaughter are categorised as ‘terrorists’ rather than rebels despite their conversion to Islam.³⁰⁵ This is because, Mongols desired to achieve certain political objectives, such as overthrowing the caliphate, which, unlike Kharijites, are not theologically motivated. That means, politically motivated use of force in the name of rebellion is terrorism because such use of force is *fitna*. Whereas political wars (*fitna*) are prohibited in

Fath al-Bari bi Sharh Sahih al-Bukhari (Beirut: Dar al-Fikr 1993) II:314; Sharaf al-Din Ibn al-Muqri, *Kitab al-Tamshiyya bi Sharh Irshad al-Ghawi fi Masalik al-Hawi* (Cairo: Dar al-Huda n.d.) III:429; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 133.

³⁰⁰ W. Montgomery Watt, *The Formative Period of Islamic Thought* (Oneworld Publications 1998) 18; see also Abu al-Fath al-Shahrastani, *al-Milal wa al-Nihal* (Beirut: Dar al-Ma‘rifa 1992) I:132; ‘Ala al-Din Al-Kasani, *Kitab Bada’I al-Sana’I fi Tartib al-Shara’I* (Beirut: Dar al-Kutub al-‘Ilmiyya 1986) VII:140; Muhammad Al-Wazir, *al-‘Awasim wa al-Qawasim fi al-Dhabb ‘an Sunnat abi -Qasim* (Beirut: Mu’assasat al-Risala 1992) IV 369.

³⁰¹ See section 4.1 of this chapter for ‘just cause’ of rebellion in Islam.

³⁰² Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 163.

³⁰³ Al-Shaybani, *The Islamic Law of Nations: Shaybani’s Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press 1966) 250; see also Ahmad Ibn Taymiyya, *Majmu‘al-Fatawa* (Riyadh: n.p. n.d) IV: 450; Ahmad Ibn Taymiyya, *al-Fatawa al-Kubra* (Cairo: Dar al-Rayyan li al-Turath 1988) III:444; Ahmad Ibn Taymiyya, *Minhaj al-Sunna al-Nabawiyya* (Beirut: al-Maktaba al-‘Ilmiyya n.d.) II: 233.

³⁰⁴ Ibn Taymiyya, *Majmu‘ al-Fatawa*, IV: 450; Ibn Taymiyya, *al-Fatawa*, III:444; Ibn Taymiyya, *Minhaj*, II: 233 cited in Mohamed Badar, Ahmed al-Dawoody and Noelle Higgins, ‘The Origins and Evolutions of Islamic Law of Rebellion: Its Significance to the Current International Humanitarian Law Discourse’ in Ignacio de la Rasilla and Ayesha Shahid (eds), *International Law and Islam – Historical Explorations* (Brill: 2018, forthcoming) xx.

³⁰⁵ Shams al-Din Ibn Muflih, *Kitab al-Furu‘* (Beirut: ‘Alam al-Kutab 1985) VI: 162; Ahmad Ibn Taymiyya, *al-Siyasa al-Shar‘iyyah fi Islah al-Ra‘i wa al-Ra‘iyya* (Beirut: Dar al-Afaq 1983) 71.

Islam, theological wars (rebellion) are legal and even recommended.³⁰⁶ However, it is difficult, if not impossible, to evaluate whether a rebellion is based on theological ground or political. To ease this difficulty, the application of a ‘purpose test’ and ‘social factor’ can be useful.

In certain circumstances, both the political and theological basis in the use of force can exist.³⁰⁷ For example, where the use of force is to alter the legal foundation of the ruling authority but in doing so it would ultimately result in the change of regime due to the unwillingness of the ruling authority to alter or amend the legal foundation. In such circumstance, the task of drawing the dividing line between terrorism and rebellion can be huge and problematic. In such situation, the best option would be to apply the ‘primary purpose’ test, namely ‘if the primary purpose of such use of force is political or material gain then it is terrorism but if the primary purpose is not so then it is rebellion.’³⁰⁸ This is one of the situations when Islamic law and politics cannot be completely separated from each other.

Another factor that could play a key role in drawing the dividing line between terrorism and rebellion especially in situations where the political and theological purposes cannot be separated, namely the social factor of ‘hatred’.³⁰⁹ This factor makes a substantial difference between use of force by terrorists and rebels. The use of force by terrorists is often carried out from hatred against their opponent, such as Al-Qaeda’s hatred against Western authorities.³¹⁰ On the other hand, use of force by rebels is carried out with an aim to alter the ideological basis

³⁰⁶ See section 3.2.3 of Chapter 3; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 63.

³⁰⁷ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 158.

³⁰⁸ Muhammad al-Khatib al-Shirbini, *Mughni al-Muhtaj ila Ma‘rifat Ma‘am Alfaz al-Minhaj* (Cairo: Mustafa al-Babi al-Halabi 1958) IV: 124; Zakariyya Al-Ansari, *Fath al-Wahhab bi-Sharh Minhaj al-Tullab* (Cairo: Mustafa al-Babi al-Halabi 1948) V:153; Abu ‘Abd Allah Al-Khirshi, *Sharh Mukhtasar Sayyidi Khalil* (Beirut: Dar Sadir n.d.) VIII:103.

³⁰⁹ John Horgan, ‘Understanding Terrorism: Old Assumptions, New Assertions and Challenges for Research’ in Jeff Victoroff (ed), *Tangled Roots: Social and Psychological Factors in the Genesis of Terrorism* (IOS Press 2006) 74; German Bula, ‘Terrorism or Non-Violent Resistance in Asymmetric Conflict: Reflections on Spinoza, Emotions and Morality’ in Jalil Roshandel and Nathan Lean (eds), *The Moral Philosophy of Terrorism: Implications for Security* (Cambridge Scholars Publishing 2013) 52; Clive Walker, *Terrorism and the Law* (OUP 2011) 382; see also HM Government, *Review of Counter Terrorism and Security Powers: Review, Findings and Recommendations* (The Stationary Office 2011) 29; Clark McCauley, ‘Psychological Issues in Understanding Terrorism and the Response to Terrorism’ in Chris E. Stout (ed), *Psychology of Terrorism: Coping with the Continuing Threat* (Praeger Publisher 2003) 37.

³¹⁰ Donald Holbrook, *The al-Qaeda Doctrine: The Framing and Evolution of the Leadership’s Public Discourse* (Bloomsbury 2014) 63; Beverley Milton-Edwards, *Islamic Fundamentalism since 1945* (2nd edn, Routledge 2014) 129; see also Mohammad-Mahmoud Ould Mohamedou, *Understanding al-Qaeda: The Transformation of War* (Pluto Press 2006) 63; see also Sue Mahan and Pamela L Griset, ‘International Terrorism’ in Sue Mahan and Pamala Griset (eds), *Terrorism in Perspectives* (2nd edn, Sage Publications 2008) 93.

on which the authority is ruling.³¹¹ The rebellion ends as soon as the ruling authority adopts the ideology of the rebels unless the former has an ulterior motive of overthrowing the ruling authority in which case it would be terrorism as stated above.³¹² However, the act of terrorism does not end when the ruling authority accepts the demands of the terrorists or when they gain power by overthrowing the ruling authority but such act of terrorism escalates and stimulates.³¹³ This is because unlike rebellion, the social factor, hatred, is instinctively attached to terrorism.³¹⁴

If acts of terrorism are motivated by enmity or a contest over power or government, the offenders are not to be treated as rebels but are to be held liable for their crimes under the regular criminal laws.³¹⁵ On the contrary, few Muslim jurists, who had the benefit of French education, tried to Islamise the French doctrine of political crime by claiming that law of rebellion (*ahkam al-bughah*) is the equivalent of political crime in Europe.³¹⁶ In this way these jurists have endeavoured to protect rebels from being responsible for their politically motivated violence, namely terrorism. These Muslim jurists have defined political crime as the non-violent or violent opposition to a government as long as the motivation is political and the target of the crime is governmental.³¹⁷ As shown above, the targets of terrorists are not only government personnel but also civilians.³¹⁸ Therefore, political crime and terrorism are similar in effect but different in nature. For instance, disseminating fear and alarm among people is a

³¹¹ See section 4.2 (above).

³¹² See this section 4.4.2.3.2 (above).

³¹³ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 173.

³¹⁴ John Calvert, 'The Roots of Islamism and Islamic Violence' in Randall D Law (ed), *The Routledge History of Terrorism* (Routledge 2015) 258; see also Tamara Kiknadze, 'Terrorism and Social Reality' in Suleyman Ozeren, Ismail Dincer Gunes and Diab M Al-Badayneh (eds), *Understanding Terrorism: Analysis of Sociological and Psychological Aspects* (IOS Press 2007) 51; Martha Crenshaw, 'The Logic of Terrorism: Terrorist Behaviour as a Product of Strategic Choice in Sue Mahan and Pamala L Griset (eds), *Terrorism in Perspectives* (2nd edn, Sage Publications 2008) 24.

³¹⁵ Muhyi al-Din Yahya Al-Nawawi, *Rawdat al-Talibin* (Beirut: Dar al-Kutub al-'Ilmiyya 1992) VII:364; Ahmad b. Muhammad Al-Sawi, *Bulghat al-Salik li Aqrab al-Masalik ila Madhhab al-Imam Malik 'ala al-Sharh al-Saghir* (Cairo: Mustafa al-Babi al-Halabi 1954) II:435; Shams al-Din Muhammad Al-Dusuqi, *Hashiyat al-Dusuqi 'ala al-Sharh al-Kabir* (Beirut: Dar Ihya' al-Kitab al-'Arabi, n.d.) VI: 348.

³¹⁶ Khaled Abu El Fadl, 'Political Crime in Islamic Jurisprudence and Western Legal History' (1998) 4 U.C. Davis Journal of International Law and Policy 27; see also Barton Ingraham, *Political Crime in Europe: A Comparative Study of France, Germany and England* (University of California Press 1979) 26.

³¹⁷ 'Abd al-Qadir 'Udah, *Al-Tashri' al-Jina'i al-Islam*, vol I (Beirut: Dar al-Kitab al-'Arabi 1994) 100; Najati Sayiid Sanad, *Nazariyyat al-Jarima al-Siyasiyyat fi al-Qawanin al-Wad'iyya al-Muqarana wa fi al-Shari'a al-Islamiyya* (Cairo: Top Guy n.d.) 96; Khaled Abu El-Fadl, *Jarima* (Dar al-Fikr al-Arabi 1998) 69.

³¹⁸ See section 4.4.2.3.2 (above).

feature common to both political crime and terrorism but the targets are different.³¹⁹ ‘Abd al-Qadir ‘Udah has rightly observed that:

The difference between political crime and terrorism is the targets and victims of the crime. Although political crimes are committed against political persons or body of persons, acts of terrorism are committed against anyone irrespective of their non-involvement, personal or derivative, with the rulers or governments whom the terrorists aim to subdue.³²⁰

Islamic law does not permit use of force by state or non-state actors to terrorise.³²¹ Any act of violence to terrorise the people or to achieve personal or collective interests of any group, party or organisation are prohibited. Muhammad Sayyid Tantawi, Shaykh of al-Azhar, has condemned the terrorist act of September 11, 2001 in the United States.³²² The Chief Mufti of Saudi Arabia, Abdulaziz bin Abdullah Al al-Shykh, similarly declared in 2004 that:

You must know Islam’s firm position against all these terrible crimes. The World must know that Islam is a religion of peace ... justice and guidance ... Islam forbids the hijacking of airplanes, ships and other means of transport, and it forbids all acts that undermine the security of the innocent.³²³

Furthermore, Seyyed Hussein Nasr also added that:

Those who carry out terrorism in the West or elsewhere in the name of jihad are vilifying an originally sacred term, and their efforts have not been accepted by established and mainstream religious authorities as jihad.³²⁴

³¹⁹ Muhammad ‘Awad al-Tarturi and Aghadir ‘Arafat Guwayhān, *‘Ilm al-Irhāb: Al-’Usus al-Fikriyyah wa al-Nafsiyyah wa al-Ijtimā’iyyah wa al-Tarbawiyah li Dirāsāt al-Irhāb* (Amman: Dār al-Hamid li al-Nashr wa al-Tawzi‘ 2006) 64.

³²⁰ ‘Abd al-Qadir ‘Udah, *Al-Tashri‘ al-Jina’i al-Islam*, vol I (Beirut: Dar al-Kitab al-‘Arabi 1994) 110; ‘Abd al-Qadir ‘Udah, *Criminal Law of Islam*, vol 1 (S. Zakir Aijaz tr, New Delhi: Kitab Bhavan 1999) 90.

³²¹ ‘Abd al-Salam Sahnun, *Al-Mudawwana al-Kubra* (Beirut: Dar al-Fikr 1986) IV:428.

³²² Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (New York: Harper Collins Publishers 2004) 263.

³²³ Anicee Van Engeland-Nourai, ‘The Challenge of Fragmentation of International Humanitarian Law’ in M Cherif Bassiouni and Amna Guellali (eds), *Jihad and its Challenges to International Law and Domestic Law* (Hague Academic Press 2010) 263.

³²⁴ Seyyed Hossein Nasr, *The Heart of Islam: Enduring Values for Humanity* (New York: Harper Collins Publishers 2004) 263.

Therefore, the primary legal element that distinguishes terrorism from rebellion and jihad is that terrorists spread terror and render their victims helpless by denying them the possibility of rescue.³²⁵

As stated above, the lifeblood of terrorism is hatred; and this hatred is often in turn the disfigured expression of grievance—a grievance that may be legitimate. In the present day, few doubt that the ongoing injustices in Palestine and other parts of the Muslim world give rise to legitimate grievances, but there is nothing in Islam that justifies the killing or injuring of civilians, nor of perpetrating any excess as a result of hatred, even if that hatred is based on legitimate grievances.³²⁶ The pursuit of justice must be conducted in accordance with justice; as the Qur’an proscribes -

O ye who believe, be upright for God, witnesses in justice; and let not hatred of a people cause you to be unjust. Be just—that is closer to piety.³²⁷

The distinguishing features of jihad, rebellion and terrorism are articulated in the following table:

Jihad	Rebellion	Terrorism
Killing and attacking people by surprise is prohibited in jihad.	Rebels can kill and attack people by surprise as long as in the course of rebellion and not primarily for political or material gain.	Terrorists kill and attack people by surprise.
Jihad does not require mere submission of bodies to Islam but the real surrender of hearts.	As rebellion is purely in opposition to Muslim rulers, forced conversion is not an issue here.	Terrorism promotes forced conversion if it is necessary to terrorise the non-Muslims
Jihad forbids killing of civilians including women and children.	Civilians must not be attacked by rebels unless	Terrorism does not exclude anyone from killing including Muslims.

³²⁵ Abu Ja’far al-Tusi, *Al-Mabsut fi FIqh al-Imamiyya* (Tehran: al-Maktabah al-Murtadawiyya 1387 AH) VIII: 50.

³²⁶ Reza Shah-Kazemi, ‘The Spirit of Jihad’, in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 144.

³²⁷ Al-Qur’an 5:8, Abu Yusuf tr.

	attacked in the course of rebellion.	
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Table 1: Distinguishing features of jihad, rebellion and terrorism.

The above discussion suggests that, terrorism does not come close to fulfilling any of the many conditions which are necessary for a just jihad or legitimate rebellion. Moreover, rebels have potential just cause and some degree of popular support and these differentiate rebels from terrorists.³²⁸ Such popular support was recognised by Al-Shaybani who stood strongly against an ‘Abbasid caliph Harun al-Rashid. Al-Shaybani challenged the Caliph’s accusation of one of his political opponent (al-Daylami) for treason and distinguished his action and behaviour from that of terrorists.³²⁹ However, despite having some degree of popular supports among Muslims for the expressed motives of revolutionary movements, terrorist activity remains opposed to both the spirit and the letter of Islam.³³⁰

Confusion between jihad, rebellion and terrorism has played a vital role in hindering the development of Islamic law.³³¹ Therefore, it was necessary to clearly draw the dividing line between these closely identical terms which are prone to abuse by the users of these terms in order to serve their own purposes. Islamic law has provided specific meaning and significances of these contested terms and stipulated guidelines for drawing dividing lines between them. These dividing lines, enshrined with distinguishing features between these contested but closely identical terms, shall be able to protect just jihad or legitimate rebellion from the negative impact of terrorism and promote Islamic law’s potential complementary role to international legal framework. Blurring the dividing lines between jihad, rebellion and terrorism from Islamic legal viewpoint is a serious mistake that in itself could lead to catastrophic consequences, especially in a world that is becoming increasingly interconnected and interdependent. This mistake may also endanger the relationship between Islam and the West.

³²⁸ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 168.

³²⁹ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 81.

³³⁰ Tamara Sonn, ‘Irregular Warfare and Terrorism in Islam: Asking the Right Questions’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 130.

³³¹ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 176.

4.4.3 The criminalisation of rebels in Islamic law

Historically, different groups fought against their rulers and in doing so few groups had used violence against the civilians in order to terrorise the rulers and the population.³³² The rulers had also very conveniently labelled them as terrorists or Kharijites due to the nature and violent consequences of their action. For example, there is evidence that the Umayyads and early ‘Abbasids attempted to invoke the *hirāba* verse in the context of dealing with rebels.³³³ From majority classical exegetical point of view, as most of the Muslim jurists have maintained that a group must be recognised as rebels even if they fight against the ruler and his army as well as Muslims and civilians³³⁴, such group must not be categorised as terrorists to deny their rights as rebels.

However, in practice they have not been recognised as rebels but as terrorists and had been tried under respective criminal laws.³³⁵ For example, the trial and sentence to death of those accused of assassination of President Anwar Sadat were in accordance with the Egyptian Criminal Code without considering Article 2 of the Constitution which has made such sentencing unconstitutional.³³⁶ In 1982, the attorneys representing those accused of assassinating President Anwar Sadat argued that according to Article 2 (as amended on 22 May 1980) of the Egyptian Constitution, a sentence pronouncing the death sentence on political criminals would be unconstitutional.³³⁷ The argument was that those who assassinated

³³² ‘Abd Allah al-Qayrawani Ibn Abi Zayd, *al-Nawadir wa al-Ziyadat ‘ala ma fi al-Mudawwana min Ghayriha min al-Ummahat* (Beirut: Dar al-Gharb al-Islami 1999) XIV: 541;

³³³ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 27; see also Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 78, 230.

³³⁴ Zayd al-Dīn ibn Najīm, *Al-Bahr al-Rā’iq Sharh Kanz al-Daqā’iq*, vol 5 (2nd ed, Beirut: Dār al-Ma’rifah, n.d.) 151; Muhammad Amin Ibn ‘Ābidīn, *Hāshiyah Radd al-Muhtār*, Vol. 4 (Beirut: Dar al-Kutub al-‘Ilmiyya 1994) 262; Zakariyyā ibn Muhammad ibn Ahmad ibn Zakariyyā al-Ansārī, *Manhaj al-Tullāb* (Beirut: Dār al-Kutub al-‘Ilmiyyah, 1997-8/1418) 123; ‘Alī ibn Sulaymān al-Mirdāwī, *Al-Insāf fī Ma’rifah al-Rājihmin al-Khilāf ‘alā Madhhab al-Imām Ahmad Ibn Hanbal*, vol 10 (Beirut: Dār Ihyā’ al-Turāth al-‘Arabī n.d.) 310; Muwaffaq al-Dīn ‘Abd Allah ibn Ahmad ibn Qudāmāh, *Al-Mughnī: fī Fiqh al-Imām Ahmad Ibn Hanbal al-Shaybānī*, vol 9 (Beirut: Dār al-Fikr 1984) 3; ‘Alī ibn Ahmad ibn Sa’īd ibn Hazm, *Al-Muḥallā*, vol 11 (Beirut: Dār al-Āfāq al-Jadīdah n.d.) 97; Muhammad Abu Zahrah, *Al-Jarimah wa al-Qqubah fī al-Fiqh al-Islami* (Cairo: Dar al-Fikr al-Arabi 1998) 126; see also Muhammad Hamidullah, *Muslim Conduct of State* (5th edn, Lahore: Ashraf Press 1968) 177; Tamara Sonn, ‘Irregular Warfare and Terrorism in Islam: Asking the Right Questions’, in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood 1990) 135; Donna Arzt, ‘Heroes or Heretics: Religious Dissidents under Islamic Law’ (1996) 14 Wisconsin International Law Journal 349, 376; Muhammad Hashim Kamali, *Freedom of Expression in Islam* (rev. ed, Cambridge: Islamic Texts Society 1997) 19; John Esposito, *Unholy War: Terror in the Name of Islam* (OUP 2002) 41.

³³⁵ Mark Irving Lichbach, *The Rebel’s Dilemma* (University of Michigan Press 1998) 40; see also William Montgomery Watt, *The Formative Period of Islamic Thought* (Oneworld Publications 1998) 22; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 27.

³³⁶ Case no. 7 for the year 1981, High Military Court for National Security cited by Shawqī Khaled, *Muhakamat Fir’aun* (Cairo: Sina Lil Nashr 1986) 48; see also Omar Abd al-Rahman, *Kalimat Haq* (Cairo: Dar al-itisam, n.d.) 32.

³³⁷ Ibid.

President Sadat were *bugha*, and since Article 2 provides that “the principles of the Shari‘a are the main source of legislation in the Arab Republic of Egypt” the court could not assess the death penalty without contravening the Shari‘a.³³⁸ However, the military tribunal ignored this argument in passing the death sentence on certain defendants.³³⁹ Furthermore, the Egyptian Criminal Code does not use the term *bugha* to adopt the meaning emphasised in Islamic law; article 101 describes those who conspire or plot to overthrow the government as *bugha*, but otherwise no substantive aspect of law of rebellion is adopted.³⁴⁰

Similarly, several defendants accused of terrorism were denied their status as rebels under Islamic law and tried as well as sentenced under Kuwaiti Criminal Code in 1989.³⁴¹ The attorney for the defendants argued to the court that according to Islamic law his clients were *bugha* and therefore should not receive death sentence.³⁴² After pronouncing death sentence on several of the defendants, the judge chided the attorney for arguing outside his brief; then the judge noted that he was bound by the Kuwaiti Criminal Code and not Islamic law.³⁴³ Of course, this course of actions is inconsistent with the classical juridical position but few modern Muslim jurists have supported this. At this point, classical Islam comes into clash with modern Islam.

The language, symbolism, and boundaries of the two categories (crime and rebellion) were often diluted and mixed, not just in historical practice, but in legal discourse as well.³⁴⁴ Therefore, it is expedient to settle the disagreement between the modern and the classical jurists about the status of rebels in Islamic law. As stated earlier, both the classical and modern jurists have been divided on this point as both maintain that rebels are criminals on the one hand and not on the other.³⁴⁵ If fine lines can be drawn between jihad, rebellion and terrorism then why this disagreement cannot be settled in the light of these fine lines.

³³⁸ Omar Abd al-Rahman, *Kalimat Haq* (Cairo: Dar al-itisam, n.d.) 32.

³³⁹ Shawqi Khaled, *Muhakamat Fir‘aun* (Cairo: Sina Lil Nashr 1986) 48.

³⁴⁰ Khalid Rashid al-Jamali, *Ahkam al-Bughah wa al-Muharibin fi al-Shari‘a al-Islamiyya waq al-Qanun* (Baghdad: Dar al-Hurriyya 1977) I:308; see also Mahmud Mustafa, *Sharh Qanun al-‘Uqubat: al-Qism al-‘Amm* (Cairo: n.p. 1964) 48; Ahmad As‘ad, *Qanun al-‘Uqubat al-Misri* (Cairo: n.p. 1964) 161.

³⁴¹ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 168.

³⁴² *Ibid.*

³⁴³ *Ibid.*

³⁴⁴ Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 56.

³⁴⁵ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 167.

Certain jurists insist that *baghy* is an offence that results in the greatest corruption because it results in the destruction of life and property.³⁴⁶ Maliki and Hanbali jurists have maintained rebels as criminals and advocated imposition of *hudud* (capital) punishment.³⁴⁷ Hanafi and Shaf'i schools have maintained that rebels are not criminals³⁴⁸ and so did Ibn Taymiyyah.³⁴⁹ In addition, majority of the modern Muslim jurists have maintained that rebels are not criminals.³⁵⁰ On the contrary, very few modern Muslim jurists have maintained that rebels are criminals and should be punished for crimes committed by them.³⁵¹

Maliki and Hanbali schools have failed to draw a dividing line between rebellion and terrorism and have focused more on the superior right of the ruler to suppress disorder (*fitna*) and maintenance of stability in the state. So did the Shaf'i School as it focused on the legitimacy of the ruler rather than the rebellion. This is due to the circumstances during classical period where conflict of interests between the rulers and the ruled were very acute than ever. On the other hand, Hanafi School has maintained a two-phased stance where it recognised the right of rebels and the rulers to use force.³⁵² Furthermore, where some other Hanbali jurists and Ibn Taymiyyah have maintained that rebellion is not a sinful act and some Shaf'i jurists argued that it is not a derogatory term and it makes the position of the right of the rebellion stronger than the right of the ruler to suppress rebellion.

On this account, it can be concluded that, the majority scholarly view, both classical and modern, recognises the right of rebellion and in opposition to criminalisation of any actions carried out in the course of rebellion.³⁵³

³⁴⁶ Ahmad Al-Sawi, *Bulghat al-Salik li Aqrab al-Masalik ila Madhhab al-Imam Malik 'ala al-Sharh al-Saghir* (Cairo: Mustafa al-Babi al-Halabi 1954) 11:414.

³⁴⁷ Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 152.

³⁴⁸ See section 4.1 of this chapter (above).

³⁴⁹ Ahmad Ibn Taymiyyah, *Al-Khalifah wa al-Mulk* (Jordan: Makhtab al-Manar 1994) 89.

³⁵⁰ Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 5, 8, 20; Khaled Abou El-Fadl, 'Political Crime in Islamic Jurisprudence and Western Legal History' (1998) 4 U.C. Davis Journal of International Law and Policy 2; Muhammad Hamidullah, *Muslim Conduct of State* (5th edn, Lahore: Ashraf Press 1968) 179; Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory: The Jurists*, vol 36 (OUP 1981) 210.

³⁵¹ Fazlur Rahman, 'The Law of Rebellion in Islam', in Jill Raitt ed., *Islam in the Modern World* (University of Missouri-Columbia, n.d.) 1; see also John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster John Knox 1993) 88.

³⁵² Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 234.

³⁵³ Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 162.

4.4.3.1 The Assassination of political leaders by rebels

As stated above, politically motivated use of force with a desire for private gain³⁵⁴ rather than religiously motivated act with a desire for ideological gain is likely to be a crime. The extension of the nature and scope of use of force in rebellion by certain non-state armed actors in Muslim countries have triggered the criminalisation of such use of force.³⁵⁵ It was their extended use of force which is not allowed in Islam. Caliph Umar al-Khattab executed six or seven men who killed someone through *ghila* (by deception or stealth which could be an assassination) as he tried these men for the crime they committed.³⁵⁶ Effectively, Murder through *ghila* is considered an aggravated crime which necessitates that the offender be executed, and that the option of blood money or pardon is not be allowed.³⁵⁷

The majority Muslim jurists have also held the view that political assassination is an act of terrorism and the perpetrator should be punished for committing crime.³⁵⁸ Shayakh Abu Zahrah (1898-1974) has suggested that assassination of political leaders is terrorism.³⁵⁹ Moreover, Ibn Taymiyya noted that a political assassin should be treated as a terrorist because of the public corruption that such a person carries.³⁶⁰ Ghanim has also linked President Sadat's assassination with political gain and suggested that the killing of Sadat was an act of terrorism that had its roots in the sectarian splits that marked early Islamic political history, specifically the bloody conflict between the factions of 'Ali and Mu'awiya.³⁶¹

The above scholarly positions suggest that the scholars denote assassination of political figures as terrorism due to the nature of the act. However, Islamic law draws the dividing line between terrorism and rebellion on the basis of contextual circumstances rather than on the nature of the act.³⁶² Like terrorism, rebellion could take the form of an assassination attempt against a

³⁵⁴ Al-Shaybani, *The Islamic Law of Nations: Shaybani's Siyar* (Majid Khadduri tr, Baltimore: John Hopkins Press 1966) 250.

³⁵⁵ See section 4.2.2 (above).

³⁵⁶ Abu 'Abd Malik b. Anas, *Al-Muwatta'* (Beirut: Mu'assasat al-Risala 1993) 487; see also Abu Ja'far al-Tusi, *Al-Mabsut fi FIqh al-Imamiyya* (Tehran: al-Maktabah al-Murtadawiyya 1387 AH) VII:270.

³⁵⁷ Abu Ja'far Muhammad Al-Tabari, *Jami' al-Bayan fi Tafsir al-Qur'an* (Beirut: Dar al-Ma'rifa 1989) V:136; see also 'Abd Allh b. 'Abd al-Rahman Ibn Abi Zayd, *Al-Nawadir wa al-Ziyadat 'ala ma fi al-Mudawwana min Ghayriha min al-Ummahat* (Beirut: Dar al-Gharb al-Islam 1999) XIV:475; J.N.D Anderson, 'Homicide in Islamic Law' (1951) 13 Bulletin of School of Oriental and African Studies 811, 812.

³⁵⁸ Khaled Abou El Fadl, 'Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam' in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 166.

³⁵⁹ Muhammad Abu Zahrah, *Al-Uqubah* (Dar-al-Fikr-al-Arabi n.d.)147.

³⁶⁰ Ahmad Ibn Taymiyya, *al-Siyasa al-Shar'iyyah fi Islah al-Ra'i wa al-Ra'iyya* (Beirut: Dar al-Afaq 1983) 74.

³⁶¹ Fathi Ghanim, *Wazarat al-Awqaf* (Dirasat fi-al-Islam no. 243: Oktober 1981) 21, 28 Sept 198.

³⁶² Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 4; see also Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (Palgrave Macmillan 2011) 192.

famous religious or political figure.³⁶³ But Islamic contextual treatment of the criminality of an act would appear to show that the dividing line between terrorism and rebellion can be drawn on consideration of the context and circumstances in which it is committed. As shown above, if the context is solely political or material gain then it is likely to be an act of terrorism. On the contrary, if the context is solely ideological or a mixed of both political and ideological but the primary purpose was the former than the latter then it is likely to be an act carried out in the course of rebellion.³⁶⁴ For this reason, the assassination of the then Egyptian President Anwar Sadat by “jama’a al-Islamiya” was an act of terrorism rather than rebellion.

4.4.4 The Criminalisation of rebels in the West

Throughout the history, rebels in the West were treated as criminals because they were seen as a threat to the political order and stability.³⁶⁵ The pre-nineteenth century Western world treated rebels with extreme hostility.³⁶⁶ Only after the French Revolution, and under the influence of theorists such as Francois Guizot, did political rebels become entitled to preferred treatment as a special brand of ‘honourable’ criminals.³⁶⁷

In the Western systems rebels are also often viewed as traitor in the eyes of law which showed little tolerance for those who defied the political order. For example, The Qing Code has classified rebellion as one of the ten great wrongs (Article 2(1)) and no distinction has been made between rebellion and treason (Article 255).³⁶⁸ The customary law of Scotland denotes that rebellion against the King is treason.³⁶⁹ Treason was later extended to include conspiracy and rebellion against the nation’s sovereign and city councils.³⁷⁰ In England, an aggravated punishment applied to traitors until 1790s.³⁷¹

The above examples show that the labelling of rebels as criminals and trying them under criminal law had been a universal practice in the Western legal systems. Public international

³⁶³ Ibid.

³⁶⁴ Khaled Abou El Fadl, ‘Ahkam al-Bughat: Irregular Warfare and the Law of Rebellion in Islam’ in James Turner Johnson and John Kelsay (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (Greenwood Press 1990) 162.

³⁶⁵ John Kelsay, *Islam and War: A Study in Comparative Ethics* (Louisville, KY: Westminster John Knox 1993) 78.

³⁶⁶ Robert Ferrari, ‘Political Crime’ (1920) 20 Columbia Law Review 311.

³⁶⁷ B.L. Ingraham and Kazuhiko Tokor, ‘Political Crime in the United States and Japan: A Comparative Study’ (1969) 4 Issues of Criminology 145.

³⁶⁸ William C. Jones, *The Great Qing Code* (Oxford: Clarendon Press 1994) 35, 237.

³⁶⁹ Rupert Bursell, *Liturgy, Order and the Law* ((Oxford: Clarendon Press 1996) 201.

³⁷⁰ Wolfgang Schild, ‘History of Criminal Law and Procedure’ in John Fosberry tr, *Criminal Justice through the Ages* (Roghenburg: Mittelalterliches Kriminalmuseum 1981) 130.

³⁷¹ V.A.C. Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (OUP 1994) 281.

law is primarily based on the Western system of laws and thus the law of rebellion has not been developed in the light of Islamic law. Another reason for its underdevelopment is the lack of state practice in the Muslim states. In an international legal framework, which itself does not distinguish the rights of rebellion, and in the absence of state practices from Muslim countries in this respect have immensely contributed to the underdevelopment of this special branch of law.

However, Public international law has not only denied its scope of application to rebels, as discussed above, but also has become a barrier for Islamic law to complement it. This is because in Islamic law rebels are not held criminally responsible for any killings or destruction of property directly linked to the rebellion³⁷² but Public international law does not interfere if a state holds the rebels criminally responsible for their action. This barrier has resulted into denial of legitimate rights of rebels especially in the territory where majority of the populations are Muslims. Such denial of legitimate rights has also resulted in giving rise to a ‘just cause’ argument for rebels to commit violence. For example, arbitrary arrests and execution of the members of Muslim Brothers in Egypt in 1960s.³⁷³ In addition, state practice of inventing new categories of parties to armed conflict like ‘unlawful combatant’ has also given rise to unjustified treatment of rebels.³⁷⁴

It has been argued by some scholars that rebels can bind themselves, by Public international law in general and International Humanitarian Law in particular, through commitments in the policy statements, codes of conduct and unilateral declarations.³⁷⁵ For example, the rebel group ‘Popular Front for the Liberation of Saguia el-Hamra and Rio de Oro (Polisario) made a unilateral declaration on 21 June 2015 to become an adherent of the Geneva Conventions 1949

³⁷² Ya‘qub b. Ibrahim Abu Yusuf, *Kitab al-Kharaj* (Beirut: Dar al-Ma‘rifa n.d.) 214; see also Khaled Abou El-Fadl, ‘Political Crime in Islamic Jurisprudence and Western Legal History’ (1998) 4 U.C. Davis Journal of International Law and Policy 17, 21; Khaled Abou El-Fadl, *Rebellion and Violence in Islamic Law* (Cambridge University Press 2001) 238; Sherman A. Jackson, ‘Domestic Terrorism in the Islamic Legal Tradition’ (2001) 91 Muslim World 302.

³⁷³ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 150.

³⁷⁴ See section 4.3.3.2 (above).

³⁷⁵ Dieter Fleck, ‘The Law of Non-International Armed Conflicts’ in Dieter Fleck (ed), *Handbook of International Humanitarian Law* (3rd edn, OUP 2013) 597; see also Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 241.

and its Additional Protocol I.³⁷⁶ However, these statements, codes and declarations are voluntary in nature and weak in effect.³⁷⁷ The ICRC has faced challenges of rejection from rebels and other non-state armed actors in terms of extracting compliance of previously agreed IHL provisions.³⁷⁸ Furthermore, there are notable examples of rebel groups' outright rejection of any obligation of IHL provisions. For example, the express rejection by the Algerian group Front de Liberation Nationale (FLN) to be bound by Geneva Conventions in terms of protection of war victims³⁷⁹, the refusal of NLM of Vietnam to apply Common Article 3³⁸⁰, and the refutation of any binding effect of any treaty by the Colombian Group Fuerzas Armadas Revolucionarias de Colombia (FARC) in which it was not a party.³⁸¹ These examples suggest that Public international law has been unsuccessful in becoming an effective legal framework to deal with rebellion as opposed to Islamic law which, albeit theoretically, have developed legal principles to recognise the right of rebellion in the one hand and the treatment of rebels in the other.

Conclusion

The political unwillingness of state authorities to recognise the right of rebellion and use of force by rebels have resulted in the lack of effective international legal framework to deal with rebellion. UN Charter encompassed internal armed conflict as 'international peace and security' issue but failed to deal with this issue by providing effective legal framework.³⁸² The existing legal framework of international law, namely the Geneva Conventions and its Additional

³⁷⁶ Catharine Fortin, 'Unilateral Declaration by Polisario under API accepted by Swiss Federal Council' (2 September 2015) <<https://armedgroups-internationallaw.org/2015/09/02/unilateral-declaration-by-polisario-under-api-accepted-by-swiss-federal-council/>> accessed 10 May 2017; See also <<https://casebook.icrc.org/case-study/conflict-western-sahara>> accessed 11 May 2017; Lindsay Moir, 'The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949' (1998) 47 Int'l & Comp. L.Q. 337.

³⁷⁷ Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002) 14; see also Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 141.

³⁷⁸ See <<https://casebook.icrc.org/case-study/icrc-international-humanitarian-law-and-challenges-contemporary-armed-conflicts-2015>> (accessed 12 May 2017).

³⁷⁹ Letter from the Chef de la Representation Permanente du FLN du Sud-Vietnam en URSS to Representative of the ICRC (16 October 1965) ICRC Archives BAG 202, 223-005 cited and translated in Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (OUP 2012) 562.

³⁸⁰ ICRC, 'External Activities: Viet Nam' (1965) 5 Int'l Rev Red Cross 634, 636 cited in Lee McConnell, *Extracting Accountability from Non-State actors in International Law* (Routledge 2017) 141.

³⁸¹ 'Reaperece Cano' Cambino No 704 (Bogota, 8-15 November, 1999) cited in Daniel Garcia-Pena Jaramillo, 'Humanitarian Protection in Non-International Conflicts: A Case Study of Colombia' (2000) 30 Isr YB Hum Rts 179, 189 – 90.

³⁸² See section 2.1.4 of chapter 2.

Protocols, is not effective to meet the challenges posed by the nature of the conflict between the rebels and the rulers.³⁸³ This framework provides illegitimate advantage to state authorities over rebels in the recognition of right of rebelling and the treatment of rebels. This has resulted in an imbalanced platform of law and politics. This imbalanced platform has raised the question of legitimacy of Public international law which has not only widened the ‘gap’ between the legal protections of rulers and rebels but also failed to effectively regulate rebellion. In addition, this legitimacy question has also been raised in regard to the use of force by the authorities of Muslim states who are constantly ignoring the rights and status of rebels as recognised in Islamic law.

Politically motivated use of force by rebels or rulers without taking into account the principles of Islamic law is likely to suffer from legitimacy-deficit. Due to the lack of legitimacy in such use of force, the rulers and rebels will fall within the category of tyrant or unjust rulers and terrorists respectively. The existence of necessary degree of legitimacy is a vital factor for determining the validity of use of force in any circumstance or context. The necessary legal standard required by legitimacy and the threshold that any legal principles must satisfy in order to obtain such standard are the issues for determination in the next chapter.

³⁸³ See section 4.3 (above).

Chapter 5

The Legitimacy of International law and Islamic law in the use of force

Some 30 years ago, Thomas Franck observed that no one seemed to be asking fundamental questions about the legitimacy of international law.¹ He concluded that the legitimacy of international law is based on its voluntary pull of compliance.² His observation, as referred in the first sentence, no longer holds true because currently international law's legitimacy has become a central concern.³ In any society, but especially among states, the compliance pull of law is based on the expectation of each participant that most others, most of the time, will obey the law – all of it, not just some subsets, and not only when it is in their immediate interest to do so.⁴ The presence of so many crises in the regulation of use of force has inspired a great deal of reflection on the legitimacy of international actors, international norms and international legal system as a whole, particularly following such events as the NATO Bombing of Kosovo in 1999, the invasion of Iraq in 2003, the intervention in Libya in 2011 and the paralysis of the Security Council to take action in Syria.⁵

Furthermore, since the United States and the United Kingdom embarked on their war on terror, dragging along various allies with them and pressing the United Nations to grant their actions credibility, the balance between what is legal and what is legitimate has been affected.⁶ If during the nineteen eighties and up to the mid-nineties the legitimacy of use of force was reliant on standards of legality, especially since 2001, the relation has been reversed: what is presented as legitimate or justifiable in relation to the use of force becomes tolerated or implicitly legalised by international law, in spite of doubts about legality, as the cases of Kosovo and Iraq

¹ Thomas Franck, 'Why a Quest for Legitimacy?' (1987) 21 UC Davis L Rev 535.

² Thomas Franck, *The Power of Legitimacy Among nations* (OUP 1990) 24.

³ Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907.

⁴ Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 91.

⁵ Brian Michael Jenkins, *The Dynamics of Syria's Civil War* (Rand Corporation 2013) 2; see also Christine Gray, 'A Crisis of Legitimacy for UN Collective Security System' (2007) 56 *ICLQ* 157; Robert Kagan, 'America's Crisis of Legitimacy' (2004) 83 *Foreign Affairs* 65; A. Claire Gutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organisation: A Crisis of Legitimacy' (2001) 27 *Rev Int'l Stud* 133.

⁶ See sections 2.3 and 2.4 of chapter 2.

demonstrate.⁷ The upshot of this appears to be that legitimacy is currently more important than legality in the international arena when it comes to applying force.⁸

The above position suggests that, the claim that rule-based interaction exists among states is now being seriously debated, much to the surprise of those who had prematurely celebrated international law's arrival at a post-ontological moment.⁹ In recent decades, the term 'legitimacy' has featured heavily in debates about international law and international institutions.¹⁰ Yet the concept of legitimacy, mercurial as it is, has remained under-scrutinised, leading to confusion and misuse.¹¹ Justifications for the exercise of power in the international sphere, however, remain under-explored and under-scrutinised.¹²

This chapter's overarching theme concerns the articulation and defence of the legitimacy of international law on the use of force. The concerns, stated above, guide the assessment and development of international law towards a philosophical inquiry about legitimacy of the law on the use of force in descriptive sense. This inquiry addresses the question 'is international law on the use of force facing a legitimacy crisis?'¹³ In the process of addressing this question, this chapter introduces the meaning and significance of legitimacy of international law on the use of force followed by an analysis of the legitimacy-deficits of the law in terms of its norms and the institutions which are entrusted with the governance of use of force.

This chapter also focuses on the legitimacy of Islamic law on the use of force based on its shortcomings. The philosophical inquiry in this part is based on analysis of the nature and extent of the legitimacy deficits inherent in this legal system followed by an assessment on how these deficits can be overcome in the best possible ways. This assessment leads the chapter to draw a conclusion on the comparative position of Islamic law and Public international law on the use of force in terms of complementing each other through a recognition of the value of a pluralistic approach. This conclusion would lead the way to overcome the barrier of Public international legal system's self-description of itself as universal, objective, and neutral. This

⁷ Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010) 272.

⁸ Natalia Molinero, 'Legality and Legitimacy in the use of force' (2008) *Foundations for International Relations and Foreign Dialogue* 1.

⁹ Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995) 4.

¹⁰ Christopher Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 *Oxford Journal of Legal Studies* 729.

¹¹ *ibid.*

¹² *ibid.*, 730.

¹³ See 'abstract' (at the beginning of this thesis).

finding would enable the thesis to answer the third question, namely whether Public international law and Islamic international law can be compatible in modern world.

5.1 The meaning and significance of legitimacy of Public international law on the use of force

Legitimacy develops a ‘belief’ within an action, rule, actor or system that such action, rule actor or system is morally and legally legitimate.¹⁴ Legality, as opposed to legitimacy, is obtained when the legal requirements have been complied with by an action, rule, actor or system.¹⁵ This is because, the formal fact of legal validity engenders an obligation to obey the law on the basis of its legality, but not necessarily of its legitimacy.¹⁶ Seen in this way, legitimacy does not make a normative commitment to any relationship of power; it treats legitimacy as a social fact, not a normative goal.¹⁷ Therefore, legitimacy is specifically concerned with what forms of power people believe to be justified.¹⁸ Those beliefs generally emanate from their cultural and religious values. For example, whereas the Western cultural values do not believe that the Security Council may retain its legitimacy when it struggles to confront threat of force directed to the West, the Muslim majority states and most third world states believe that the Security Council may retain its legitimacy by effectively regulating use of force as provided by the UN Charter, for instance all uses of force, whether individual or collection, must be authorised by the Security Council.¹⁹ As a result, an internal disconnection has occurred between the legitimacy of use of force between Public international law and Islamic international law. This disconnection has posed challenges to Public international law for its self-description of itself universal, objective, and neutral. This position of Public international law has questioned its input legitimacy for lack of inclusive approach of other major legal system, namely Islamic international law.

Legitimacy, in this thesis, means to include the cultural and religious diversity of the subjects of international law. Seen in this way, legitimacy is based on the application of cultural values

¹⁴ Ian Hurd, *After Anarchy: Legitimacy and Power in the United Nations Security Council* (Princeton University Press 2007) 7.

¹⁵ Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010) 53.

¹⁶ Thomas Franck, *Fairness in International Law and Instructions* (OUP 1995) 26; see also Christopher Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *Oxford Journal of Legal Studies* 729, 736.

¹⁷ Christopher Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *Oxford Journal of Legal Studies* 729, 741.

¹⁸ *ibid.*

¹⁹ *ibid.*, 746.

of different societies in relation to use of force. On this basis, ‘legitimacy’ is a threshold value which provides higher standard of legitimacy to international law when it is inclusive of cultural diversity.²⁰ Therefore, legitimacy denotes the inclusion of the perceptions of the subjects of international law not only about its binding nature but also its general acceptability, and going beyond conformity to rules, such as conformity to the ‘spirit’ as opposed to the ‘letter’ of the law.²¹ In this sense, use of force is legitimate when the cultural values of the subjects have been represented in the law-making process and the decision-making process has been transparent, in particular when those affected have had a chance to have their say.²² The point is, however, that the spirit of the law is incorporated in the international law on the use of force. From this perspective, legitimacy’s focal point of scrutiny, in this thesis, is an inquiry into the descriptive legitimacy of international law on the use of force.

Legitimacy, in the descriptive sense, denotes the fact that a norm or an institutional arrangement is legitimate if it finds the approval of those who are supposed to live in this group.²³ Legitimacy in this sense is simply the fact that the subjects of the norm or institutional arrangement believe that norm or arrangement to be legitimate.²⁴ Therefore, legitimacy of use of force is primarily a question about how an actor is perceived as having a right to use such force.²⁵

5.2 Legitimacy deficits of Public international law on the use of force

There are presently many active debates about what may constitute legitimate use of force.²⁶ The current challenges that international law on the use of force have been subject to are

²⁰ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 19; see also Gerry Simpson, *The Nature of International Law* (Dartmouth: Ashgate 2001) xxxi; Allen Buchanan and Robert O. Keohane, ‘The Legitimacy of Global Governance Institutions’ in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 38; Rüdiger Wolfrum, ‘Legitimacy in International Law from a Legal Perspective: Some Introductory Considerations’ in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Springer: Heidelberg 2010) 6.

²¹ Carlo Focarelli, *International Law as a Social Construct* (OUP 2012) 245.

²² *Ibid.*

²³ Max Weber, *Economy and Society: An Outline of Interpretive Sociology* in G. Roth and C. Wittich (eds), 3 vols. (New York: Bedminster Press 1968) 941.

²⁴ Lukas Meyer and Pranay Sanklecha, ‘Introduction’ in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 2.

²⁵ Allen Buchanan, ‘The Legitimacy of International Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 80.

²⁶ Christopher Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *Oxford Journal of Legal Studies* 729, 730.

responsible for this debate.²⁷ Whereas legitimacy can overcome the challenges by implementing its power,²⁸ it is not an easy task to determine how legitimacy can play this difficult role at its best. This is because, the disconnection between the cultural values of the subjects of international law leads the legal system towards a state where it not only lacks inclusiveness but also rejects the potential connectedness of such diverse values. In fact, these diverse values are intimately connected to each other. Although in short term these values operate independently, in the long run they operate through legal, moral, economic, social and cultural links between them to ensure that what affects one will often affect another.²⁹ As a result, recourse to force, whether by a state or regional organisation, based on their self-declared legitimacy and universal application is subject to scrutiny as it is likely to affect the cultural values of others who do not perceive such recourse to force as legitimate and accordingly denies their claim of universality as fake and materialistic.

Current international law on the use of force is articulated in the United Nations Charter and the practices prevalent among states under the Charter system.³⁰ An overview of the Charter system and the state practices under this system suggest that international law on the use of force is suffering from significant legitimacy-deficits, namely in the descriptive sense.³¹ This section of the chapter scrutinises legitimacy of certain acts or omissions of use of force, by state and non-state actors, the norm providing general prohibition of use of force, and the decision-making process of the Security Council.

5.2.1 Legitimacy deficits in the descriptive sense

Legitimacy, in the descriptive sense, is based on the belief of the subjects that the recourse to force is legitimate.³² However, this belief must be correct in order to profess such legitimacy. The correctness of the belief lies on the issue ‘whether a norm or institutional arrangement, pertaining to use of force, satisfies certain specified conditions for possessing legitimacy’.³³ Therefore, the focal point of legitimacy of international law on the use of force is the legitimacy of the rule itself, such as the index-legitimacy of the rule. In this regard, the inquiry would

²⁷ See section 2.3 of chapter 2; see also Samantha Besson and John Tasioulas, ‘Introduction’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 4.

²⁸ See section 5.1 of this chapter (above).

²⁹ Christopher Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *Oxford Journal of Legal Studies* 729, 746.

³⁰ See sections 2.1.1 and 2.1.2 of chapter 2.

³¹ See section 5.2.1 of this chapter (below).

³² See section 5.1 of this chapter (above).

³³ Lukas Meyer and Pranay Sanklecha, ‘Introduction’ in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 2.

include the challenges posed to the use of force provision of the UN Charter.³⁴ The inquiry is advanced by scrutinising the legitimacy of the United Nations Security Council (UNSC) which is the central international institution entrusted with the responsibility of regulating use of force.³⁵

5.2.2 Index legitimacy deficit of International law on the use of force

The use of defensive force in response to an armed attack has been claimed to be insufficient by the realists and expansionists.³⁶ This is because it is unreasonable for a state to wait until being attacked first in order for using defensive force.³⁷ Moreover, the nature and extent of the attack can be so severe that the attacked state might not get the chance to use defensive force due to being devastated by the attack.³⁸ On this basis, the combined provisions of Articles 2(4) and 51 do not provide for the self-preservation of states which are under threat of an imminent armed attack. This is known as ‘index legitimacy deficit’ of international law on the use of force.³⁹

The problem that persists with the ‘index legitimacy deficit’ is that for the rule being indeterminate the normative standards not only make it harder to know what conformity is expected, but also make it easier to justify non-compliance.⁴⁰ Although some rules are more determinate than others,⁴¹ the degree of a determinacy of a rule directly affects the degree of its perceived legitimacy.⁴² The higher the degree of determinacy the higher the degree of legitimacy, and hence higher degree of rule-conforming behaviour.

Index legitimacy deficit is an inherent problem of the law as it questions the effectiveness of the law in dealing with contemporary challenges of use of force.⁴³ One way of overcoming this legitimacy deficit is by ascertaining and agreeing on the types of attack, in scale and effect, that

³⁴ See section 2.3 of chapter 2.

³⁵ See section 5.2.3 of this chapter (below).

³⁶ See section 2.3.1 and 2.3.2 of chapter 2.

³⁷ Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010) 292.

³⁸ See section 2.3.4.1 of chapter 2.

³⁹ Thomas Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 705, 712.

⁴⁰ *ibid*, 714.

⁴¹ Duncan Kennedy, ‘Toward a Critical Phenomenology of Judging’ (1986) 36 *J. Legal EDUC* 518; for *contra* see Ludwig Wittgenstein, *Philosophical Investigations* (G.E. Anscombe trans, 1953) 81.

⁴² Thomas Franck, ‘Legitimacy in the International System’ (1988) 82 *American Journal of International Law* 705, 716.

⁴³ See section 2.3 of chapter 2.

can be categorised as ‘armed attack’.⁴⁴ This could be done by ICJ through active involvement in its decision-making process. For instance, defining the term ‘armed attack’ when opportunity comes before it rather than being reluctant to do so.⁴⁵ The development of an efficient and consistent jurisprudence in the ICJ is necessary to overcome the indeterminacy that exists in the categorisation of situations triggering ‘armed attack’ under Article 51.

Although another way of overcoming this legitimacy deficit has been addressed by recognising pre-emptive self-defence within the Charter system in case of imminent armed attack⁴⁶, the decision to determine if such an armed attack is imminent is left in the hands of the states. The problem with this approach is that states are prone to abuse this option against their opponents if there is no provision for scrutiny by an independent body.⁴⁷ For example, the decision of the coalition force to attack Iraq in 2003 on their own assessment of imminent threat of Weapons of Mass Destruction (WMD).⁴⁸ In these circumstances, who or what institution, what judge or jury, should decide whether the norm’s requisites for pre-emptive action have been met.⁴⁹

In order to resolve this issue, the high-level panel has rendered a real service in drawing a distinction between an imminent threat, as to which states may take proportionate pre-emptive action when there remains no viable alternative, and what it described as non-imminent or non-proximate threats, which may still be very serious and as to which action may, indeed, highly desirable but must be fully justified by the claimant before the Security Council acting as a global jury.⁵⁰ However, this solution has not been very effective so far.⁵¹

⁴⁴ Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010) 293; see also Dominic Raab, ‘Armed Attack after the Oil Platforms Case’ (2004) 17 *Leiden Journal of International Law* 719.

⁴⁵ Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 88; see also Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 262; Thomas Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 88, 101.

⁴⁶ See section 2.3.4.1 of chapter 2.

⁴⁷ David Miller, ‘The Responsibility to Protect Human Rights’ in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 247.

⁴⁸ George W. Bush, Address before a Joint Session of the Congress on the State of the Union (Jan. 28, 2003) 39 *Weekly Comp. Press. Doc.* 109 (Feb. 3, 2003); see also Ex-Inspector (David Kay) Again Says Forbidden Arms Probably Didn’t Exist, *Wash. Post*, Jan. 29, 2004, A1; see also Glorai Borger, A Vice President Unbound, *U.S. News & World Rep.*, June 28, 2004, 34.

⁴⁹ Thomas Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 88, 102.

⁵⁰ A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 63, para 189 (2004) <<http://www.un.org/secureworld/report.pdf>> accessed 17 July 2017.

⁵¹ Christine Gray, ‘The Charter Limitation on the Use of Force: Theory and Practice’ in Vaughan Lowe, Adam Roberts, Jennifer Welsh and Dominik Zaum (eds), *The United Nations Security Council and War* (OUP 2008) 96; Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press

To secure higher degree of legitimacy, it is necessary that international law be amended to include an implied undertaking by states that ‘if they recourse to force in self-defence in response to an imminent armed attack then they will be automatically accountable to the Security Council for scrutiny’.⁵² The Security Council may be able to refer the task of scrutinising the recourse to force to an independent body or institution, namely ICJ or ICC.⁵³ This measure of accountability is likely to control the use of force in an effective manner and hence promote legitimacy, both before and after using such force. This legitimacy can even achieve a higher degree if such undertaking includes criminal responsibility for abusing the state authority of using defensive force against imminent attack.⁵⁴

5.2.3 Procedural or Process Legitimacy deficits

International law on the use of force is constituted not only by its substantive rules but also by those institutional processes that implement the rules.⁵⁵ Procedural legitimacy is concerned with the mechanisms by which power is conferred and exercised.⁵⁶ It prioritises the formal validity of power, focusing on secondary rules about the making, changing and destruction of laws.⁵⁷ For example, the process to be followed in the Security Council for authorisation of use of force.⁵⁸ As a result, the legitimacy of a rule, or of a rule-making or rule-applying institutions, is a function of the perception of those in the community concerned that the rule, or the

2010) 320; Sebastian Einsiedel, David Malone and Bruno Ugarte (eds), *The UN Security Council in the 21st Century* (Lynne Rienner Publishers 2016) 363.

⁵² Secretary-General’s High-Level Panel on Threats, Challenges and Change, ‘A More Secure World: Our Shared Responsibility’, Report of the Secretary General’s High-Level Panel on Threats, Challenges and Change, A/59/565 (2 Dec 2004), para 189, available at <<http://www.un.org.secureworld/report.pdf>> accessed 17 July 2017.

⁵³ Ian Johnstone, ‘Legal Deliberation and Argumentation in International Decision Making’ in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press 2010) 180; see also Steven Wheatley, *The Democratic Legitimacy of International Law* (Hart Publishing 2010) 264.

⁵⁴ A possibility for ICC to prosecute persons responsible for ‘aggression’ for using excessive force in violation of article 51 of the UN Charter has been discussed by academics in the Nineteenth Summer School organised by Slazburg Law School, ‘Between Codification and Progressive Development: International Criminal Law after Rome and Kampala’ (30 July-9 August 2017) <http://sls.sbg.ac.at/data/archive/SLS_2017_Academic_Programme.pdf> accessed 12 August 2017.

⁵⁵ Thomas Franck, ‘The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium’ (2006) 100 *American Journal of International Law* 88, 102; see also Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010) 95.

⁵⁶ Lawrence Friedman, *Law and Society – An Introduction* (Prentice Hall 1977) 139.

⁵⁷ Christopher Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *Oxford Journal of Legal Studies* 729, 750.

⁵⁸ See section 2.1.4 of chapter 2.

institution, has come into being endowed with legitimacy, which is in accordance with right process.⁵⁹

Legitimacy of international institutions derives from the procedures they follow in making decisions.⁶⁰ The design and operation of international institution like the Security Council are often dominated by more powerful states and used to serve their ends, thereby resulting in injustice and making it difficult to claim that the institutions were legitimate.⁶¹ For example, the domination of the permanent members at the Security Council by exercise or threat to exercise their veto power.⁶²

The decision to use force, at the international level, is entrusted to the Security Council which is an international institution established by the UN Charter to protect and promote international peace and security.⁶³ Decision making at the international level by the Security Council lacks any direct electoral foundation since they have no direct source-oriented legitimacy.⁶⁴ For this reason, the functioning of the Security Council in terms of making decision to use force is often generally considered to be illegitimate.⁶⁵ In this lack of direct source-oriented legitimacy, the legitimacy of Security Council has been classically addressed through the way in which the functions were exercised, namely the decision-making process.⁶⁶

The UN Charter has recognised the principle of sovereign equality of its members.⁶⁷ This principle has been implemented by the rule that each member state of the General Assembly shall have one vote.⁶⁸ However, this principle has not been so implemented in the decision-

⁵⁹ Thomas Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705, 711; for *contra* see Alan Hyde, 'The Concept of Legitimacy in the Sociology of Law' (1983) *Wis. L. Rev.* 379.

⁶⁰ Samantha Besson, 'Institutional Global democracy' in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 58; see also Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010) 95.

⁶¹ Lukas Meyer and Pranay Sanklecha, 'Introduction' in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 4.

⁶² See section 2.3.3 of chapter 2.

⁶³ See 'conclusion' to Chapter 2.

⁶⁴ Jean d'Aspremont and Eric De Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2010) 34 *Fordham Int'l L.J.* 190, 216.

⁶⁵ Daniel Esty, 'Good Governance at the Supranational Scale: Globalising Administrative Law' (2006) 115 *Yale L. J.* 1490; see also Steven Ratner, 'Do International Institutions Play Favorites?' in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 141; see also Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law* (Cambridge University Press 2010) 317.

⁶⁶ Erika De Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart Publishing 2004) 251; see also Jan Klabbers, *An Introduction to International Institutional Law* (2nd ed, Cambridge University Press 2009) 221.

⁶⁷ Article 2(1) UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

⁶⁸ Article 18 UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

making process of the Security Council.⁶⁹ Most substantive decisions of the Security Council require not only the support of a majority of nine members but the concurring votes of the permanent members.⁷⁰ This is known as the ‘veto’ system which has apparently disregarded the principle of sovereign equality and thereby undermined the consistency in the decision-making process at the Security Council. Therefore, the legitimacy deficit is prevalent in the decision-making process of the Security Council.⁷¹ Such deficit is likely to decline the necessary pull of compliance of any decision made or not made within the Security Council due to ‘veto system’.

The legitimacy of the ‘veto’ system is questioned due to inconsistency of this system with the power of other member states. But the legitimacy of this system could be claimed as valid if a case could be made for such power to be rationally coherent.⁷² Such case of coherence has been made on the ground that the permanent members should have a greater say in the decision-making process of the Security Council because they bear most of the costs of the organisation and are expected to assume the military as well as fiscal responsibilities for carrying out the Charter’s mandate.⁷³ In addition, the power-five (permanent) member states could not be compelled in reality to any decision against their will.⁷⁴

This case of coherence could be a valid claim in past but does not seem to have a real prospect of persuasiveness in the current world. This is because most the peacekeeping and peace enforcement measures taken by the UN are supported by military and fiscal support of non-permanent members like northern Europe and third world countries.⁷⁵ All the permanent members do not represent the powerful states in the world community any more. The emerging powers in the world community like Germany, Japan, India, Brazil and Nigeria now have a very good claim of being preferred states on economic, military, geographic and demographic grounds.⁷⁶

⁶⁹ See section 2.3.3 of chapter 2.

⁷⁰ Article 27 UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

⁷¹ Martin Binder and Monika Heupel, ‘The Legitimacy of the UN Security Council: Evidence from Recent General Assembly Debates’ (2015) 59 *International Studies Quarterly* 238.

⁷² See section 5.1.1.3 of this chapter (above).

⁷³ Thomas Franck, *The Power of Legitimacy Among nations* (OUP 1990) 176.

⁷⁴ *Ibid.*

⁷⁵ Jean-Marc Coicaud, ‘The Evolution of International Order and Fault Lines of International Legitimacy’ in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press 2010) 107.

⁷⁶ Thomas Franck, *The Power of Legitimacy Among nations* (OUP 1990) 177.

It appears that the permanent members have focused on strengthening the military ability of their national or regional force rather than that of the United Nations.⁷⁷ In addition, the way the veto power has been exercised by the permanent members does not reflect what has been agreed during the drafting negotiations. The permanent members agreed to exercise veto only in situations having the most serious impact on their basic interests.⁷⁸ They also agreed that when the Security Council was considering measures for peaceful settlement of disputes they would abstain.⁷⁹ But the veto power has been used in convenience of the permanent members than sparingly as agreed.⁸⁰ For instance, The US did not abstain from vetoing a 1986 resolution calling on it to execute the International Court of Justice judgment on a case brought by Nicaragua.⁸¹ Therefore, the case of coherence to exercise veto power by permanent members is not persuasive in the current world.

Furthermore, the nature of the Security Council could be defended on impartial utilitarian-type grounds by arguing that it would be paralysed with a large membership, or that the veto promotes stability and peace.⁸² This justification is based on the benefits of such a composition of the Security Council would generate (in theory) for all countries, namely the preservation of international peace and security. For instance, peace, stability and collective security are promoted when the states with power stand behind a resolution of the Security Council and weakened without that endorsement.⁸³ However, if this justification is examined from non-ideal institutional principle (practical perspective) aiming to create a fair political framework then the authority of the Security Council ought to aim at legitimacy.

The question of whether a decision is made in conformity with the UN Charter and principles of international law, such as whether a decision is legitimate from the perspective of the exercise of functions, is incrementally being complemented by the question of whether the Security Council as an institution has the necessary legitimacy to make certain decisions.⁸⁴

⁷⁷ Jean-Marc Coicaud, 'The Evolution of International Order and Fault Lines of International Legitimacy' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press 2010) 105.

⁷⁸ 'Basic Documents of the United Nations' (1982) 45-49.

⁷⁹ Article 27 UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 August 2017.

⁸⁰ United States Mission to the United Nations, 'List of Vetoes Cast in Public Meetings of the Security Council (unpub. Mimeo)' cited in Thomas Franck, *The Power of Legitimacy Among nations* (OUP 1990) 279, note 409.

⁸¹ 41 U.N. Security Council (2704th mtg.), U.N. Doc. S/PV. 2704 (prov. Ed. 1986), reprinted in 25 Int'l Legal Mat. 1353, 1363 (1986).

⁸² Steven Ratner, 'Do International Institutions Play Favourites?' in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 144.

⁸³ Ibid.

⁸⁴ Jarrett Taubman, 'Towards a Theory of Democratic Compliance: Security Council Legitimacy and Effectiveness after Iraq' (2004) 37 N.Y.U.J. Int'l L. & Pol. 161, 192.

This interplay between process legitimacy and source-oriented legitimacy is relevant due to the impact of the decision of the Security Council on the world population.⁸⁵ Former UN Secretary General Kofi Annan criticised the lack of legitimacy of origin of the Security Council by stating that:

The Security Council has increasingly asserted its authority and, especially since the end of the cold war, has enjoyed greater unity of purpose among its permanent members but has seen that authority questioned on the grounds that its composition is anachronistic or insufficiently representative.⁸⁶

Therefore, the Secretary-General suggested to make the Security Council more broadly representative of the international community as a whole.⁸⁷

5.2.3.1 Involving Regional Organisation

Where the primarily responsible international institution, namely the Security Council, for the maintenance of peace and security fails to carry out its responsibilities then the international community can legitimately adopt different procedures which could enable them to restore such peace and security.⁸⁸ Where a state fails to fulfil its responsibility to protect its people within its territory and the Security Council is paralysed then the regional organisation could be given the responsibility to restore peace and security within the region.⁸⁹ The responsibility should be allocated in ascending order, which is the state, the regional organisation and finally the Security Council.

In this way, a link can be established between state and the Security Council through the process of 'regional integration'.⁹⁰ This integration process provides the states with an opportunity to participate in the use of force action through regional organisation. This integration process shall include, in the regional organisation, not only geographically proximate states but also states which are religiously and culturally proximate.⁹¹ For example,

⁸⁵ James Crawford, 'The Problems of Legitimacy – Speak' (2004) 98 ASIL 273.

⁸⁶ U.N. Secretary General, In Larger Freedom: Towards Development, Security and Human Rights for All: Rep. of the Secretary-General, U.N. Doc. A/59/2005 (Mar. 21, 2005) 165.

⁸⁷ Ibid 169.

⁸⁸ David Miller, 'The Responsibility to Protect Human Rights' in in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 239.

⁸⁹ Nigel White and Özlem Ölgem, 'The Security Council and the Decentralised Military Option: Constitutionality and Function' (1997) 44 Netherlands International Law Review 388.

⁹⁰ Alexander Orakhelashvili, 'The Legal Framework of Peace Operations by Regional Organisations' (2007) 11 International Peacekeeping 136.

⁹¹ Mansoor Moaddel, 'The Study of Islamic Culture and Politics: An Overview and Assessment' (2002) 28 Annual Review of Sociology 359.

Bangladesh and Pakistan are members of the Organisation of Islamic Cooperation (OIC) despite being geographically distant from the other members of the organisation. The integration between the states is very strong within the regional organisation.⁹² This is because such organisation tends to operate with small numbers and higher levels of interaction than global organisations, and is more likely to involve member states in the decision-making process.⁹³

If the state fails to fulfil its state responsibility to protect then the regional organisation can be given the option to legitimately intervene failing other alternatives to restore peace and security within the state territory.⁹⁴ Although the principle of sovereign equality is not implemented in the decision-making process of the Security Council,⁹⁵ there is nothing that could prevent this from being implemented at the regional level. This is because, achieving sovereign equality of every member state of the Security Council is not feasible,⁹⁶ but equal representation by regional organisations is feasible. There should not be any option to exercise veto power at the regional organisation level as far as use of force is concerned. In addition, the regional organisation should be able to legitimately intervene, when necessary, into the territory of its member state without prior authorisation from the Security Council in circumstances when waiting for such authorisation would likely to result, in the decision of the regional organisation, serious consequences, such as genocide or severe human rights catastrophe.⁹⁷ In such urgent situation, it is necessary that any intervention must be subject to later scrutiny by the Security Council or any other body referred by it.⁹⁸

However, this approach is not free from criticism as some of the most crisis-prone regions have no or only underdeveloped and underfunded capabilities and the regional organisation is but

⁹² Bassam Tibi, 'Jihadism and Intercivilisational Conflict: Conflicting Images of the Self and of the Other' in Shahram Akbarzadeh and Fethi Mansouri (eds), *Islam and Political Violence: Muslim Diaspora and Radicalism in the West* (Tauris Academic Studies 2007) 55; see also Jean-Marc Coicaud, 'Deconstructing International Legitimacy' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge University Press 2010) 53.

⁹³ Kong Qingjiang, 'Construction of the Discourse on Legitimacy of International Institutions' in Rüdiger Wolfrum and Volker Röben (eds), *Legitimacy in International Law* (Heidelberg: Springer 2010) 378.

⁹⁴ Similar arrangement has been provided in Article 4(j) of the AU Constitutive Act of 2000, available at <http://au.int/en/about/constitutive_act> accessed 14 August 2017.

⁹⁵ See section 5.2.3 of this chapter.

⁹⁶ Lukas Meyer and Pranay Sanklecha, 'Introduction' in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 290.

⁹⁷ Similar arrangement has been provided in Article 4(h) of the AU Constitutive Act of 2000, available at <http://au.int/en/about/constitutive_act> accessed 14 August 2017.

⁹⁸ See section 5.2.3 of this chapter (above).

little trusted by minorities or governments in that part of the world.⁹⁹ For example, in 2011 the Security Council had authorised the peace enforcement operation to NATO in Libya. There had been evidence that NATO was involved in supplying arms and ammunitions to rebel forces to facilitate regime change thus violating the mandate of the Security Council.¹⁰⁰ Further example includes the intervention by African Union (AU) in Somalia in 2007 to support the weak Transitional Federal Government met with disapproval from many Somalis who regarded it as illegitimate on the basis that power state, which is Ethiopia, was directly shaping the AU's position on the conflict to uphold their self-interest.¹⁰¹ In these circumstances, the legitimacy crisis can be overcome by ensuring accountability of the regional organisation involved in the use of force as suggested above.¹⁰²

Finally, the veto power in the Security Council should be abolished by agreement between the permanent members and a new veto system should be established.¹⁰³ In the new system, a regional organisation should be empowered to exercise the veto only regarding any decision to use force within the territory of any member states of that regional organisation. For example, a majority decision taken in the Security Council to use force to restore peace and security within the territory of a state which is a member of the League of Arab States must go ahead unless vetoed by the regional organisation, which is 'the League of Arab States'. However, exercising the veto power by the regional organisation should not prevent it from using force by itself within the territory of the member state.¹⁰⁴ In this way, a more legitimate hierarchy can be created in the international legal framework on the basis of coherence.¹⁰⁵

The states which are unable to deal with the breach or threat to peace situation within its territory must seek assistance from the regional organisation first and then from the Security

⁹⁹ Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 100.

¹⁰⁰ See section 2.1.4.2 of chapter 2.

¹⁰¹ Nigel White and Özlem Ölgen, 'The Security Council and the Decentralised Military Option: Constitutionality and Function' (1997) 44 *Netherlands International Law Review* 388; see also Suyash Paliwal, 'The Primacy of Regional Organisations in International Peacekeeping: the African Example' (2011) 51 *Virginia Journal of International Law* 185.

¹⁰² See section 5.2.3 of this chapter (above).

¹⁰³ John Tasioulas, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 102; see also Thomas Franck, 'The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium' (2006) 100 *American Journal of International Law* 88, 101

¹⁰⁴ This has occurred during the civil war in Darfur where the government of Sudan was unwilling to consent to the presence of UN Personnel on the territory but consented to the AU Mission in Sudan – see Erica De Wet, 'Regional Organisations and Arrangements: Authorisation, Ratification, or Independent Action' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 314.

¹⁰⁵ For 'coherence' see section 5.2.3 of this chapter (above).

Council. The Security Council should be able to refer breach of peace and threat to peace circumstances to the regional organisation for consideration and should be able to require explanation from the latter for any action taken in this regard. The Security Council shall only be able to intervene in the territory of the member state of a regional organisation only in the following circumstances:

- (a) when the regional organisation concerned invites the Security Council; or
- (b) when the majority of the members of the Security Council decide that the regional organisation has failed to fulfil its responsibility to protect; or
- (c) in circumstances which have been previously agreed by the regional organisation by treaty.

If the regional organisation needs assistance, it must request other regional organisations through the Security Council. The Security Council should offer its resources to the regional organisation first rather than any state unless the Security Council decides by majority that the state has not been legitimately intervened by the regional organisation.¹⁰⁶ However, in such situation the Security Council should promote dispute settlement mechanism between the state and the regional organisation. If it fails in resolving the dispute then it can intervene in the territory of the state directly by military forces, for example by peacekeeping or peace enforcement operations.¹⁰⁷

By adhering to the above procedure in the use of force decision making process at the regional organisation and the Security Council, a considerably higher degree of legitimacy will be achieved and accordingly a higher pull of compliance among the states.

5.3 Legitimacy deficits of Islamic international law on the use of force

Legitimacy plays a vital role in Islamic international law on the use of force. This is because, it not only validates the rule but also makes provisions for accountability of the rulers and their

¹⁰⁶ Military and logistic supports had been provided by the Security Council in several occasions to the African Union during its use of force in Burundi, Darfur and Somalia – see Erica De Wet, ‘Regional Organisations and Arrangements: Authorisation, Ratification, or Independent Action’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 323.

¹⁰⁷ Samantha Besson and John Tasioulas, ‘Introduction’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 12.

right to rule. Therefore, legitimacy works as an assessment tool for scrutinising if any interpretation of law is Islamic and if the ruler is ruling in accordance with Islamic law.¹⁰⁸

Legitimacy in Islamic law includes both source-oriented and process legitimacy. Source-oriented legitimacy is synchronic as it is based on already completed sources of the Qur'an and Sunna. On the other hand, process legitimacy is diachronic which is based on the sources, namely Qur'an, Sunna, Ijmā and Qiyās, through which the law may be derived following the processes required and hence on rule-justification. The legitimacy analysis in this section is confined to these sources. This is because, although there are alternative methods of reasoning based on considerations of juristic preference (istihsān) or public welfare and interest (istislāh), these were of limited validity and were not infrequently the subject of controversy.¹⁰⁹

The legitimacy of Islamic law on the use of force is mainly source-oriented.¹¹⁰ Unlike international law, Islamic law's legitimacy has always been determined by Shari'a which consisted of the Qur'an and Sunna.¹¹¹ The principles of law have primarily derived from Shari'a.¹¹² Therefore, Shari'a has been operating as a touchstone or guiding star in Islamic jurisprudence (*usūl al-fiqh*). Shari'a has been formed and developed from the Qur'anic provisions and Sunna during the lifetime of the Prophet. Sunna being 'the actions and sayings of the Prophet' its development continued following the death of the Prophet when his companions validated the Sunna through the chain of transmission (*isnād*).¹¹³ The compilation and validation of Sunna continued until 1000 CE, which is 4 centuries after the death of the Prophet.¹¹⁴ As soon as the compilation of Sunna had been completed, the formation of the Shari'a had also been completed.

However, the development of the Shari'a did not stop there. This is because, Shari'a had not provided guidance for each and every circumstances which, human being in general and

¹⁰⁸ Frank Griffel, 'Introduction' in Abbas Amanat and Frank Griffel (eds), *Islamic Law in the Contemporary Context* (Stanford University Press 2007) 2; see also Gamal M. Badr, 'A Survey of Islamic International Law' (1982) 12 *American Society of International Law* 12; Abdullahi Ahmed An-Na'im, 'Islamic Law, International Relations and Human Rights: Challenge and Response' (1987) 20 *Cornell International Law Journal* 317.

¹⁰⁹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) 245; see also Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 1; John Makdisi, 'Legal Logic and Equity in Islamic Law' (1985) 33 *American Journal of Comparative Law* 63; John Makdisi, 'Hard Cases and Human Judgment in Islamic and Common Law' (1991) 2 *Indiana International and Comparative Law Review* 197.

¹¹⁰ See section 3.1 of Chapter 3.

¹¹¹ Shari'a has been discussed in Section 3.1.1 of chapter 3.

¹¹² Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 1.

¹¹³ See Section 3.1.1 of Chapter 3.

¹¹⁴ Vernon Egger, *A History of the Muslim World to 1405* (Upper Saddle River, NJ: Pearson Education, INC. 2004) 115

Muslims in particular, would encounter so long the world exists.¹¹⁵ As a result, there are circumstances when Muslims have to go beyond the periphery of Shari‘a to find out the solution of the issues but this action of ‘going beyond’ had to be within the spirit of or, in other words, consistent with, Shari‘a in order to be legitimate.¹¹⁶ Hence, the development of Shari‘a has been continuing through sources which represent either consensus of juristic opinion (*Ijmā*) or analogy (*Qiyās*).¹¹⁷

Consensus of juristic opinion (*Ijmā*) is a process whereby the creative jurists, the *mujtahids*, representing the community at large, are considered to have reached an agreement, on a technical legal ruling, thereby rendering it as conclusive and as epistemologically certain as any verse of the Qur’an.¹¹⁸ On the other hand, analogy (*Qiyās*) involves a process whereby the *mujtahids* decide legal cases on the basis of similar legal cases together with its rulings which had been adjudicated earlier by Shari‘a or *Ijmā*. As a result, in both *Ijmā* and *Qiyās*, the *mujtahids*, authorised by divine revelation, are thus capable of transforming a ruling reached through human legal reasoning into a textual source by the very fact of their agreement on its validity.¹¹⁹ However, the overriding objective is to utilise the methods of interpretation and reasoning while maintaining the fundamental position that the law derives from the divine will.¹²⁰

By following these processes, the *mujtahids* have developed an Islamic jurisprudence which require a process legitimacy for any interpretation or view, to have legal effect, and to gain legitimacy. The legitimacy, in Islamic law, is decided on an affirmative or negative, which is either legitimate or illegitimate. In other words, legitimacy in Islamic law, unlike international law, is based on absolute value.

¹¹⁵ See Section 3.1.1 of Chapter 3.

¹¹⁶ Majid Khadduri, *Al-Shafi’s Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 21; see also Muqtedar Khan, ‘Reason and Individual Reasoning’ in John J. Donohue and John L. Esposito (eds), *Islam in Transition: Muslim Perspectives* (2nd edn, OUP 2007) 501; N. M. Goolam, ‘*Ijtihad* and its Significance for Islamic Legal Interpretation’ (2006) Michigan State Law Review 1443.

¹¹⁷ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) 168, 197; see also Onder Bakircioglu, *Islam and Warfare* (Routledge 2014) 27.

¹¹⁸ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 1.

¹¹⁹ *ibid.*

¹²⁰ Majid Khadduri, *Al-Shafi’s Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 179; see also Mohammad Hashim Kamali, ‘Methodological Issues in Islamic Jurisprudence’ (1996) 11 Arab Law Quarterly 3.

Juristic interpretation has been the key features of development of Islamic law on the use of force.¹²¹ This is because, since the closure of *Ijtihād*, only juristic interpretation has maintained its development in the course of time.¹²² However, the negative impact of this development is that diverse interpretations have developed in this subject area without any formal scrutiny to legitimate such interpretations.¹²³ In this way, Islamic law in the use of force has not been free from legitimacy deficits. These deficits created by diverse interpretations have given rise to conflicting interpretations of not only the Qur'an and Sunna but also the juristic sources of Islamic law namely *Ijmā* and *Qiyās*.

Islamic law on the use of force is heavily relied on authoritative interpretation and legal reasoning.¹²⁴ Whereas the Qur'an and Sunna provide the generality of the law, juristic interpretations (*Ijtihād*) represent its speciality.¹²⁵ In contradistinction to the first type of knowledge whose apprehension and performance is incumbent upon all Muslims, the second type entails duties for only a few.¹²⁶ These few are *mujtahids* (jurisconsults) who are responsible to fulfil their duties to follow the appropriate process of interpretation and legal reasoning on behalf of their community.¹²⁷ However, when the texts provide only indications and signs, the jurists then must attempt to find out the divine intention, although there is no guarantee that the ruling he reaches will be identical with that which is lodged in God's mind.¹²⁸ But such ruling must be accepted as legitimate in so far the appropriate process of interpretation is followed by a qualified person, such as *mujtahid*. In a field in which commentaries and interpretations are the norm, only the qualified jurists have the right authority to undertake such actions.¹²⁹

Mujtahids are under an obligation to determine the legal values governing their conduct, values that are hidden in the language of the texts.¹³⁰ Although it is possible that consensus transmitted

¹²¹ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) 86; see also Ali Khan, 'The Reopening of the Islamic Code: The Second Era of *Ijtihad*' (2003)1 University of St. Thomas Law Journal 341.

¹²² See section 3.1.1 of Chapter 3.

¹²³ See section 3.1.1 of Chapter 3.

¹²⁴ See section 3.2 of chapter 3.

¹²⁵ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 26.

¹²⁶ *Ibid*, 27.

¹²⁷ Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 154.

¹²⁸ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 28.

¹²⁹ Wilfred C. Smith, *On Understanding Islam: Selected Studies* (The Hague: Mouton Publishers 1981) 84; see also see also Onder Bakircioglu, *Islam and Warfare* (Routledge 2014) 29.

¹³⁰ Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 16.

or ruling arrived at by means of ijtihād by a Mujtahid are susceptible to error, it is objectionable to maintain on this possibility of error that no such transmission or ijtihād should be undertaken.¹³¹

5.3.1 Source-oriented legitimacy deficit

In the later part of the antiquity and during the Middle Ages the Islamic law, although not in the specific name of *Siyar*, governed the relationship between Islamic and non-Islamic states.¹³² The Qur’anic provisions and Sunna of the Prophet had been at the apex of all rules as far as use of force is concerned.¹³³ The divine law or natural law could not be altered but it had been possible to interpret the law by overtly ambitious politics with an expansive meaning.¹³⁴ The politics ambitioned to expand the Islamic Empire and considered the rest of the world as abode of war (Dar al-Harb) until the whole world would become under the Islamic rule (Dar al-Islam).¹³⁵ In other words, the politics had ambitioned to Islamic Empire (Caliphate) consisting of the whole world.¹³⁶ However, this ambition is inconsistent with the scriptures of the Qur’an.¹³⁷ No Qur’anic provision has recognised such an Islamic Empire. On the contrary, it has specifically emphasised about the diverse nature of the world population.

Following the death of the rightly guided Caliphs, the later Caliphs, including the Umayyads, considered themselves the deputies of God on earth, and thus claimed to have the right authority of interpretation from Shari‘a.¹³⁸ However, the juristic authority of later Caliphs is in doubt as since the demise of the Prophet and rightly guided Caliphs the political and juristic authorities have been separated.¹³⁹ That means, unlike the Prophet and rightly guided Caliphs, the later Caliphs were not entitled to exercise both political and juristic authorities but the political authority alone.¹⁴⁰ For example, the Umayyad Caliph Umar II (99-101/717-19) is said to have

¹³¹ See section 3.2.2 of Chapter 3 for supporting explanation.

¹³² See section 3.2 of Chapter 3.

¹³³ Jean Allain, ‘Acculturation through the Middle Ages: The Islamic Law of Nations and its place in the History of International Law’ in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing 2011) 404.

¹³⁴ See sections 3.3 of chapter 3 and section 4.2 of Chapter 4.

¹³⁵ See section 3.3 of Chapter 3.

¹³⁶ Peter Mandaville, *Islam and Politics* (Routledge 2014) 57; see also Neely Lahoud, *Political Thought in Islam: A Study of Intellectual Boundaries* (Routledge 2005) 51.

¹³⁷ See section 4.2 of chapter 4.

¹³⁸ Patricia Crone and Martin Hinds, *God’s Caliphs: Religious Authority in the First Centuries of Islam* (Cambridge University Press 1986) 56.

¹³⁹ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 16.

¹⁴⁰ See section 3.1 of Chapter 3.

resorted to the judges and jurists who were adept in knowledge (*ilm*) of Islamic law when in doubt.¹⁴¹

Non-Mujtahids (muqallid; pl. muqallidūn) started interpreting and giving conflicting views on the Qur'anic provisions and Sunna.¹⁴² For example, in the process of providing a religious legitimisation for the territorial expansionism of the Muslim rulers, they preferred on many occasions to overlook those passages of the Qur'an that point toward moral justifications for the jihad.¹⁴³ Consequently, their rationalisation of the jihad as the means by which the world might be converted to the 'sphere of Islam' obscures the distinction between the Qur'anic concept of a 'just war' fought to stop aggression and a 'holy war' aimed at conversion to Islam.¹⁴⁴ This method of interpretation by unauthorised person, such as non-mujtahids, are often identified as *istihsān* due its nature as juristic preference based on free human reasoning and without any textual basis.¹⁴⁵ According to Imam Shaf'i, *istihsān* is a method of reasoning that is based merely on free human reasoning guided by personal interests and whims which amounts to indulging in base-pleasures.¹⁴⁶

It has been seen that the source-oriented legitimacy deficits of Islamic law in the use of force lie on the non-Shari'a based interpretation of the Qur'an and Sunna as well as the influx of politics in the course of such interpretation.¹⁴⁷ The only way to overcome these deficits is to restrict legitimate interpretation of the Qur'an and Sunna by qualified Mujtahids. This is because only Mujtahids are qualified to resolve any ambiguities of the Qur'an and Sunna whether textual or contextual.¹⁴⁸

For instance, in 8:39 of the Qur'an, the term '*fitnah*' is utterly ambiguous as it could refer to a variety of meaning, such as 'persecution' or 'unbelief'.¹⁴⁹ Whereas, interpreting the word by adopting 'unbelief' promotes a perpetual 'holy war' against non-Muslims, 'persecution'

¹⁴¹ G.H.A. Juynboll, *Muslim Tradition: Studies in Chronology, Provenance and Authorship of Early Hadith* (Cambridge University Press 1983) 36.

¹⁴² Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) 125.

¹⁴³ See section 3.4 of Chapter 3.

¹⁴⁴ See section 3.4.1 of Chapter 3; see also Abdulaziz A. Sachedina, 'The Development of Jihad in Islamic Revelation and History', in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 36.

¹⁴⁵ Joseph Schacht, *The Origins of Muhammad Jurisprudence* (Oxford Clarendon Press 1950) 70.

¹⁴⁶ Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 219; see also Muhammad Idris al-Shaf'i, *Kital al-Umm* (vol 7, Cairo: al-Matba'a al-Kubra al-Amiriyya 1907) 267.

¹⁴⁷ See section 5.3 of this chapter (above).

¹⁴⁸ Wael B. Hallaq, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad' (1986) 63 *Studia Islamica* 129.

¹⁴⁹ See section 3.2.3 of Chapter 3.

denotes legitimacy of use of force until such persecution ends.¹⁵⁰ The adoption of ‘persecution’ is consistent with the underlying principle of Islamic law on the use of force, which is defensive war.¹⁵¹ In this way ‘persecution’ outweighs ‘unbelief’ by virtue of supporting evidence which is consistent with the fundamental principles of Islamic law on the use of force.¹⁵²

Furthermore, ambiguity is the result not only of the uses of vague language, as evidenced in the aforementioned verse, but also of homonymous noun the meaning of which is so general that they need to be particularised if they are to yield any legal content.¹⁵³ For example, the difficulty in identifying the meaning of Jihad without the context.¹⁵⁴ Jihad equally refers to use of force, struggle against one’s soul and other non-violent or spiritual manifestations.¹⁵⁵ In this circumstance, it is necessary to particularise the true meaning of jihad and this is not possible without taking into account of the context the word has been used in the Qur’an and Sunna.¹⁵⁶ This identification and application of the right context is the task of Mujtahids who possess the necessary knowledge and expertise not only in Arabic but also in the rules of interpretation.¹⁵⁷

5.3.2 Process legitimacy deficit

Ever since the formation of the geographical schools of law took shape during the first half of the 8th Century, the idea of consensus (*ijmā*) had played a significant role in sanctioning the doctrines developed by *mujtahids*.¹⁵⁸ Consensus extended in theory to all countries, but in practice it had a local character.¹⁵⁹ Once a doctrine became subject to consensus it was considered by those who were party to it, final and immune from error.¹⁶⁰ However, although consensus, in one form or another, had always been part of the make-up of the geographical schools of law, there was no attempt at first to anchor it in any authoritative text. With the growth in the body of hadīth and with the concurrently increasing tendency to ground all law

¹⁵⁰ See section 3.2.3 of Chapter 3.

¹⁵¹ See section 3.2 of Chapter 3.

¹⁵² Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 45.

¹⁵³ *Ibid.*

¹⁵⁴ See section 3.4 of chapter 3.

¹⁵⁵ See section 3.4.1 of chapter 3 (particularly figure 3).

¹⁵⁶ See section 3.4.2 of chapter 3.

¹⁵⁷ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) 86.

¹⁵⁸ Meir Max Bravmann, *The Spiritual Background of Early Islam* (Leiden: E.J. Brill 1972) 194.

¹⁵⁹ Vernon Egger, *A History of the Muslim World to 1405* (Upper Saddle River, NJ: Pearson Education, INC. 2004) 116.

¹⁶⁰ Joseph Schacht, *The Origins of Muhammad Jurisprudence* (Oxford Clarendon Press 1950) 82.

in the Sunna of the Prophet and the Qur'anic text, there were attempts at the end of the 8th Century to justify consensus based on Prophetic reports as well as the Qur'an.¹⁶¹

The attempts to justify consensus, as stated above, were not free from controversies. Whereas the traditionalists advanced the thesis that nothing that the Muslim community says or does should escape the sanction of the Qur'an and Sunna, the rationalists maintained that the scriptures cannot be the exclusive foundation of the law.¹⁶² These controversies further developed with the closure of Ijtihād as diverse interpretations had been emerging since then.¹⁶³ This diversity gave birth to different schools of jurisprudence, namely Hanafī, Shafī, Malīkī and Hanbalī.¹⁶⁴

The closure of Ijtihād was a dangerous move which failed to serve the purpose of the closure, which was to prevent influx of other cultural and religious principles and practices into Islam.¹⁶⁵ It could have been better to control rather than completely close the Ijtihād.¹⁶⁶ This is because, in this way the development of Islamic law could have continued in a controlled manner, such as interpretation and legal reasoning by qualified people only. However, the closure of Ijtihād did not completely stop the development of the law but only stagnated it. The practice of Ijtihād continued in an uncontrolled manner where both Mujtahids and non-Mujtahids were participating in the intellectual efforts. As a result, the prescribed process of interpretation had not been universally adhered.

Therefore, the process legitimacy deficits lie in the fact that the interpretation are offered by those who are not sufficiently qualified and if they are qualified to interpret they do not follow the right process of deciding on ijtihād. For example, ijmā represented consensus by scholars sanctioning authority which guaranteed the infallibility of those positive legal rulings and methodological principles.¹⁶⁷ Therefore, it is a technical matter and laymen have no say in any

¹⁶¹ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 20.

¹⁶² Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 42.

¹⁶³ See section 3.1.1 of chapter 3; see also Wael B. Hallaq, 'Was the Gate of Ijtihād Closed?' (1984) 16 *International Journal of Middle Eastern Studies* 41; Wael B. Hallaq, 'On the Origins of the Controversy about the Existence of Mujtahids and the Gate of Ijtihad' (1986) 63 *Studia Islamica* 129.

¹⁶⁴ See section 3.1 of chapter 3; see also Irmgard Marboe, 'Promoting the Rule of Law' in Marie-Luisa Frick and Andrea Th. Müller (eds), *Islam and International Law: Engaging Self-Criticism from a Plurality of Perspectives* (Leiden: Martinus Nijhoff 2013) 190.

¹⁶⁵ John L. Esposito, *Islam: The Straight Path* (Oxford: Oxford University Press 1994) 13; see also Mansoor Moaddel, 'The Study of Islamic Culture and Politics: An Overview and Assessment' (2002) 28 *Annual Review of Sociology* 359.

¹⁶⁶ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) xvii.

¹⁶⁷ Wael B. Hallaq, *a History of Islamic Legal Theories* (Cambridge University Press 1997) 75.

consensus reached.¹⁶⁸ On the other hand, Qiyās represented by a case that is not directly covered by the text and hence there is a need for human agency to transpose the explicit degree in the texts to that case.¹⁶⁹ Both Ijmā and Qiyas lead to juristic knowledge and hence require necessary qualification of the jurists.¹⁷⁰ In addition, it is also necessary to follow the right process of interpretation and legal reasoning by those who are qualified jurists.¹⁷¹ Therefore, the process legitimacy deficits of Islamic law on the use of force can be overcome by specifying the qualities necessary for intellectuals to participate in the interpretation and the process that those intellectuals will have to follow.

The jurists or jurisconsults who are capable of practicing Ijtihād is known as the Mujtahids.¹⁷² The qualities of Mujtahids are categorised as legal and moral.¹⁷³ This is because these qualities are necessary to undertake the task of verification of a particular case in the law.¹⁷⁴ In terms of legal qualities, Mujtahids must have knowledge of the Arabic language, of the legal contents of the Book, of its particular and general language, and of the theory of abrogation (nāskh), the Prophetic Sunna, thorough knowledge of the cases that have become subject to consensus, knowledge and understanding of the entire range of the procedures of inferential reasoning.¹⁷⁵ The moral qualities include but not limited to just and trustworthy character, firm belief in God and Muslim faith.¹⁷⁶ These criteria constitute a safeguard against arbitrary interpretation of law. If a person meets all these requirements, then it is his obligation to issue a legal opinion (fatwā; pl. fatawā).¹⁷⁷

¹⁶⁸ Ibid.

¹⁶⁹ F. A. Hassan, 'The Sources of Islamic Law' (1982) 76 American Society of International Law Proceedings 65, 67.

¹⁷⁰ Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 307.

¹⁷¹ Onder Bakircioglu, *Islam and Warfare* (Routledge 2014) 16, 29; see also John L. Esposito, *Islam: The Straight Path* (Oxford: Oxford University Press 1994) 13; Wael B. Hallaq, 'On the Authoritativeness of Sunni Consensus' (1986) *International Journal of Middle East Studies* 427, 428.

¹⁷² Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 365.

¹⁷³ Wilfred Cantwell Smith, *On Understanding Islam: Selected Studies* (The Hague: Mouton Publishers 1981) 84; see also Fethullah Gülen, 'İnsanlığın İftihar Tablosu, Sonsuz Nur-2' (The Messenger of God: Muhammad) 63 cited by Mustafa Erdil, 'M. FETHULLAH GÜLEN'S UNDERSTANDING OF SUNNAH' (PhD Thesis, Australian Catholic University 2016) 163.

¹⁷⁴ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 82.

¹⁷⁵ Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 141, 211.

¹⁷⁶ Fethullah Gülen, 'İnsanlığın İftihar Tablosu, Sonsuz Nur-2' (The Messenger of God: Muhammad) 63 cited by Mustafa Erdil, 'M. FETHULLAH GÜLEN'S UNDERSTANDING OF SUNNAH' (PhD Thesis, Australian Catholic University 2016) 163.

¹⁷⁷ Shaheen Sardar Ali, 'Resurrecting Siyar through Fatwas? (Re)Constructing Islamic International Law in a Post-(Iraq) Invasion World' in M. Cherif Bassiouni and Amna Guellali (eds), *Jihad and its Challenges to International and Domestic Law* (The Hague: Hague Academic Press 2010) 107.

The process that the Mujtahids will have to follow is known as Ijtihād.¹⁷⁸ Thus, Ijmā and Qiyās must be consistent with the Qur'an and Sunna.¹⁷⁹ That means, to achieve process legitimacy, it is also essential to ensure that source-oriented legitimacy has not been sacrificed. Both Qur'an and Sunna provide evidence for the authoritativeness of consensus.¹⁸⁰ Therefore, it is essential that knowledge of the existence of consensus on a particular case is determined by looking to the past and by observing that the mujtahids were unanimous with regard to the solution of that case.¹⁸¹ Armed with knowledge of hermeneutical principles, legal epistemology and governing rules of consensus, the mujtahids are ready to undertake the task of inferring rules.¹⁸² However, before embarking on inferential reasoning, the mujtahids must verify the meaning of the text they employ, and must ascertain that it was not abrogated by another text or repugnant to an established consensus.¹⁸³

The archetypal example overcoming the process legitimacy is the case of 'jihād', 'qitāl' and 'harb'. These are the properties of use of force in Islamic law. Whereas, the Qur'anic word 'jihad' denotes different meaning in different contexts, its meaning denotes that of use of force in a state of war (harb).¹⁸⁴ Therefore, 'jihad' can only be used to recourse to force (qitāl) in the context of war (harb). All these properties must create a chain to legitimate use of force in Islamic law. In this process of legitimation, the true meaning of jihad in terms of use of force is obtained through the application of the chain of legitimacy, which is justified by the revealed sources and their immediate product (consensus) whose authoritativeness is agreed.¹⁸⁵ The great majority of Sunni jurists held the view that the evidence of the two primary sources, together with consensus, proves that this method (Ijtihād) is authoritative with certainty because the Qur'an, together with Sunna and consensus, the process sanctions and confirms the need for it.¹⁸⁶

Eventually, this can be said that the ideologies of the IS and al-Qaeda are not only lacking the qualities of fatāwās given by Mujtahids but also the required process to be followed. The

¹⁷⁸ Majid Khadduri, *Al-Shafi's Risala: Treatise on the Foundations of Islamic Jurisprudence* (2nd edn, the Islamic Texts Society 1961) 365; see also Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) 169.

¹⁷⁹ Joseph Schacht, *An Introduction to Islamic Law* (OUP 1982) 17; see also Wael B. Hallaq, 'On the Authoritativeness of Sunni Consensus' (1986) *International Journal of Middle East Studies* 427, 428.

¹⁸⁰ *ibid.*

¹⁸¹ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 77.

¹⁸² *Ibid.*, 82.

¹⁸³ Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society: Cambridge 1991) 149, 168.

¹⁸⁴ See section 3.2.3.1 of Chapter 3.

¹⁸⁵ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 105.

¹⁸⁶ *Ibid.*, 104.

fatāwās given by the leaders of IS, al-Qaeda and similar non-state armed actors cannot attain the rank of Mujtahid and hence are not eligible to participate in interpretation and legal reasoning.¹⁸⁷ These interpretations and legal reasoning emanates from people who are not only unqualified but also being dictated by personal desires and therefore leads to illegitimate results which have no place in the legal system.¹⁸⁸

5.3.3 Legitimacy of Islamic law of Rebellion

Following the fall of Abbasid caliphate, the scholars of Islamic international law were forced to adapt their theories to the changing realities which resulted in the trend towards decentralisation of Islamic religious authority.¹⁸⁹ As a result, the rulers of nation-states were under pressure for accepting the repoliticisation of Islam by accepting its sole religious authority. But such repoliticisation led the rulers to a desperate attempt to prevent the separation of religion and politics.¹⁹⁰ This has developed a system where both Islamic and secular system of rules were meshed together. Therefore, both political and religious principles in the use of force were operating. The lack of willingness of the rulers to develop a solely Islamic religious authority within the nation-states led self-constituted groups, such as Kharijites (al-Khawarij), Nizari Isma'ilis (the infamous "Assassins") and Wahhabi movement in Arabia in 18th century to use force within and beyond the nation-states.¹⁹¹

These movements and the way they have been dealt with by Muslim rulers have developed Islamic law of rebellion.¹⁹² This is a very special branch of Islamic law which is based on the question of a ruler's right to rule.¹⁹³ Rebels are not allowed to use extraterritorial force in Islamic law.¹⁹⁴ However, they are allowed to use force, in controlled manner, against a ruler

¹⁸⁷ Nurcholish Madjid, 'Ibn Taymiyya on *Kalam* and *Falsafa*: A Problem of Reason and Revelation in Islam' (PhD thesis, University of Chicago 1984) 235.

¹⁸⁸ Shaheen Sardar Ali, 'Resurrecting *Siyar* through *Fatwas*? (Re)Constructing Islamic International Law in a Post-(Iraq) Invasion World' in M. Cherif Bassiouni and Amna Guellali (eds), *Jihad and its Challenges to International and Domestic Law* (The Hague: Hague Academic Press 2010) 107; see also Wael B. Hallaq, 'From *Fatwas* to *Furu*: Growth and Change in Islamic Substantive Law' (1994) 1 *Islamic Law and Society* 29.

¹⁸⁹ Amira K. Bennison, *The Great Caliphs: The Golden Age of the Abbasid Empire* (London: I.B. Tauris 2009) 113; see also Tamara Sonn, *Irregular Warfare and Terrorism in Islam: Asking the Right Questions* in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 131.

¹⁹⁰ Tamara Sonn, *Between Qur'an and Crown: The Challenge of Political Legitimacy in the Arab World* (Boulder, CO and London: Westview Press 1990) 133.

¹⁹¹ Tamara Sonn, *Irregular Warfare and Terrorism in Islam: Asking the Right Questions* in James Turner Johnson and John Kelsay (eds), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990) 135.

¹⁹² See section 4.2.1 of Chapter 4.

¹⁹³ See chapter 4.

¹⁹⁴ See section 3.2.2 of Chapter 3.

who persecutes them.¹⁹⁵ Likewise, the ruler is allowed to use force that is necessary to restore peace and stability.¹⁹⁶ The focal point here is that the rebels and the rulers often recourse to asymmetrical and unnecessary use of force respectively against each other.¹⁹⁷ Moreover, the conflict between rebels and rulers also results in labelling rebels as terrorists and rulers as tyrants.¹⁹⁸ In these circumstances, politics play a vital role in determining the rebels' right to rebel and the rulers' right to rule.¹⁹⁹ The influx of political reasons for using force gives rise to legitimacy deficits in the use of force by rebels and the rulers.

From the perspective of nature and extent of use of force by rebels, legitimacy deficits of Islamic law of rebellion are twofold, namely inter-state use of force and intra-state use of force.²⁰⁰ Islamic law does not recognise extraterritorial use of force as a legitimate means of using force by rebels. This is because rebels do not have the authority to do so.²⁰¹ However, rebels have been claiming legitimacy of extraterritorial use of force based on *Takfir* (declaration of unbelief) by accusing the ruler of *Kufr* (unbelief).²⁰² This accusation emanates from the very notion that the ruler has become a *Kafir* (unbeliever) for liaising with non-Muslim rulers.²⁰³ This accusation often turned into violence resulting from conflict of interests between modern Islamic scholars, religious leaders, rebels and sometime terrorist groups.²⁰⁴

The religious leaders who supported centralised Islamic political authority claimed legitimacy of use of force against those Muslims and non-Muslims who pose a threat to the existence and expansion of Islamic centralised states.²⁰⁵ This movement later was focused on expansion rather than existence.²⁰⁶ On the other hand, the modern Islamic scholars who supported contemporary political and modern religious authority regarded that use of force can only be justified as a last resort and as a response to external military attack.²⁰⁷ The latter interpretation of use of force had been criticised on the basis that this interpretation does not represent an

¹⁹⁵ See section 3.2.1 of Chapter 3.

¹⁹⁶ See section 3.2.1 of Chapter 3.

¹⁹⁷ See section 3.4 of Chapter 3.

¹⁹⁸ See section 3.4.3 of Chapter 3.

¹⁹⁹ See section 3.4.2 of Chapter 3.

²⁰⁰ See section 5.3.3 of this chapter.

²⁰¹ See section 3.2.3.1 of Chapter 3.

²⁰² See section 4.2.2 of Chapter 4.

²⁰³ See section 4.2.2 of Chapter 4.

²⁰⁴ Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton Publishers 1979) 4.

²⁰⁵ See section 4.3.3 of chapter 4.

²⁰⁶ See section 3.4.2 of chapter 3.

²⁰⁷ See section 3.3 of chapter 3; see also Syed Ameer Ali, *A Critical Examination of the Life and Teachings of Mohammed* (London: Williams and Norgate 1983) 76.

authentic hadith (Sunna) of the Prophet and represents a deliberate attempt to weaken the will of Muslims in the struggle against European colonisers.²⁰⁸ The expansionists of Islamic nation-states, however, intended to establish an Islamic world order.

Islamic law could not establish a complete legal framework based solely on Islamic law but resulted in a mixed system composed of politically motivated secular state and religiously motivated Islamic state.²⁰⁹ This has eventually developed a conflict between the Muslim states in an international framework that includes numerous states claiming to be Islamic societies yet acknowledging no universal common authority and often engaging in conflict with one another.²¹⁰ This conflict is often escalated in the method of rebellion against a non-Islamic government or ruler. For example, the Pakistani originated political group Jamaat-e-Islami's rebellion against secular government in Bangladesh since the latter's liberation from Pakistan in 1971.²¹¹ In these circumstances, the legitimacy-deficits can be overcome by recourse to Islamic law of rebellion which recognises the right to rebel against a government or ruler which is tyrant or unjust and reciprocal right to use force by the rulers to maintain peace and stability.²¹² In this way, Islamic law of rebellion will be implemented in its true potential and sovereignty of the lawgiver will be submitted to God,²¹³ as the Qur'an aptly proclaims:

They ask: "have we also got some authority?" Say: "all authority belongs to God alone."²¹⁴

The above discussion suggests that legitimacy of Islamic law is dependent not only on the source of the law *per se* but also how that law has come into being. In other words, for a law to be legitimate Islamic jurisprudence looks not only into the law but also into the interpreter. That means, a rule will only be legitimate in Islamic law if it is either written in the Qur'an or established in the Sunna of the Prophet or developed through juristic interpretation or analogy of those who are authorised to do so, such as *mujtahids*.

²⁰⁸ Rudolph Peters, *Islam and Colonialism: The Doctrine of Jihad in Modern History* (The Hague: Mouton Press 1980) 193.

²⁰⁹ See section 3.3 of chapter 3.

²¹⁰ Tamara Sonn, 'Irregular Warfare and Terrorism in Islam: Asking the Right Questions' in James Turner Johnson and John Kelsey (eds), *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press 1990) 130.

²¹¹ Maidul Islam, *Limits of Islamism: Jamaat-e-Islami in Contemporary India and Bangladesh* (Cambridge University Press 2015) 170.

²¹² See sections 4.2.2 and 4.3 of Chapter 4.

²¹³ Abul 'Ala Mawdūdī, 'Political Theory of Islam' in John J. Donohue and John L. Esposito (eds), *Islam in Transition* (2nd edn, OUP 2007) 264.

²¹⁴ Al-Qur'an 3:154, Abu Yusuf tr.

5.4 The process of complementation: a proposal for overcoming the legitimacy deficits of Public international Law and Islamic international Law

The prohibition of use of force, as contained within the UN Charter, is an agreement based on consent between the major power and the less powerful states not to use armed force to alter or to overturn the existing international order.²¹⁵ However, the multilateral nature of this agreement has resulted in various interpretations and challenges to regulate use of force in the current world affairs.²¹⁶ This thesis introduces a series of interpretations and state practices that demonstrate the legitimacy crisis of Public international law on the use of force.²¹⁷ These interpretations and state practices lean on each other through conceptually similar but contextually conflicting provisions of international law, namely prohibition of use of force and self-defence in the UN Charter, the principle of non-intervention and sovereignty, the necessity to prevail justice and peace. These legal provisions are necessary to secure justice in an ideal world. But due to the dynamic nature of this world where people of different races, colours, languages, nationalities, ethnicities and religious beliefs live, represent their own identities and follow their own laws it is a very common scenario that the laws are often come into conflict when these people interact with each other at the international level. In these circumstances, a pluralistic legal system can only overcome the legitimacy deficits of international law on the use of force.²¹⁸

Islamic international law has often been labelled as a non-adaptive system and hence opposed to be effective in modern world.²¹⁹ However, this contention is not based on strong evidence and scholarly findings. The intrinsic flexibility of Shari‘a has readily permitted Muslim states to adapt to the modern state system, characterised by sovereign territorial states, and to significantly revise their national laws and practices, and international policies pursuant to the

²¹⁵ Robert. G. Gilpin, *War & Change in World Politics* (Cambridge University Press 1981) 42; see also Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 1995) 3; see also articles 25 and 103 of the UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 December 2017.

²¹⁶ See section 2.3 of chapter 2.

²¹⁷ See section 5.2 of chapter 5.

²¹⁸ William W. Burke-White, ‘International Legal Pluralism’ (2004) 25 *Michigan Journal of International Law* 963; for *contra* see Jonathan I. Charney, ‘Is International Law Threatened by Multiple International Tribunals?’ (1998) 271 *RECUEIL DES COURS* 105, 125.

²¹⁹ Ebrahim Moosa, ‘Colonialism and Islamic Law’ in: Muhammad Masud, Armando Salvatore and Martin Bruinessen (eds), *Islam and Modernity: Key Issues and Debates* (Edinburgh University Press 2009) 158.

stipulations of the UN Charter.²²⁰ Moreover, enduring peace hinges, inter alia, on equitable participation of each civilisation in the governance of global matters.²²¹ Muslims, who constitute about 23 per cent of the world population,²²² should have a significant position to participate in the formation and development of international law particularly on the use of force.

5.4.1 The Power of Legal Pluralism in the complementation process

Although legal pluralism comes in many guises, it seems to have found a whole new spirit within the realm of Public international law.²²³ Whereas empirical accounts of ‘legal pluralism’ consist of descriptive analysis of dual or multiple laws or legal systems in particular areas of the world, it has been identified and studied in relation to colonial and postcolonial societies where it is common for an imposed legal system to co-exist and interconnected with customary, indigenous and religious laws.²²⁴ In a modern world of sovereign states, it is also apparent that a single state-based legal system also interconnected with customary, indigenous and religious laws.²²⁵ As a result, when it comes to international law on the use of force it is also essential to develop a legal framework based on the diverse and pluralistic states and their legal framework.

Legal pluralism illustrates the dynamic interconnections between normative orders and therefore reflects on disciplinary developments in politics, sociology and law as well as a greater sensitivity to globalisation.²²⁶ It also poses a challenge to positive conceptions of law which traditionally emphasise on the effectiveness and legitimacy of international law on the basis of its enforcement power.²²⁷ It denies the influence of hegemonic power and its influence in the decision making process on the use of force.²²⁸ Legal pluralism provides the structure for a coherent legal system at the international level without compromising the necessity of

²²⁰ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 178; for *contra* see Tom De Boer, ‘The Limits of Legal Pluralism’ (2012) 25 *Leiden Journal of International Law* 543, 555.

²²¹ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 180.

²²² Pasquale Ferrara, *Global Religious an International Relations* (New York: Palgrave 2014) 82.

²²³ D. Halberstam, ‘Local, Global, and Plural Constitutionalism: Europe Meets the World’ in J.H.H. Weiler and G. De Burca (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 150; Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, (2008) 30 *Syd. LR* 375; R. Michaels, ‘Global Legal Pluralism’, (2009) 5 *Annual Review of Law and Social Science* 243.

²²⁴ Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kitzler (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805.

²²⁵ *ibid*, 806.

²²⁶ *ibid*.

²²⁷ Hans Kelsen, *Introduction to the Problems of Legal Theory* (1st edn, Oxford Clarendon Press 1992) 55.

²²⁸ John Griffiths, ‘What is Legal Pluralism’ (1986) 24 *Journal of Legal Pluralism* 4.

consistency.²²⁹ However, ‘law’ in the contemporary West very strongly evokes the singular system of law tied to a nation state and for this reason the ‘fact’ of pluralism in the West is more difficult to discern.²³⁰ Similarly, Muslim states are not inclined to be influenced by Western legal systems and accordingly often refuse to adopt laws originated or emanated from the West.²³¹ But it is interesting to note that, most of the Muslim states have adopted the laws, even after independence, which were imposed on them by their colonial power.²³²

At the emergence of nation-state, most of the countries have removed the experience and knowledge of the law from the people and their communities.²³³ However, the approaches of the state authorities and scholars have recently been changed based on the multitude of overlapping and indeterminate types of law, regulation and control.²³⁴ The global perspective brings to the forefront the decentered nature of global normative influences, whether these stem from ‘official’ sources or from unofficial sources such as shared legal cultures, ethnicity, religion, nationality or geography, and transitional interested groups.²³⁵ As a result, “pluralism is produced by a more expansive notion of ‘law’ and therefore generating a multiplicity of legalities and if all of these heterogeneous normative influences are defined as ‘law’, then of course the perception that pluralism is legal and legitimate, becomes unavoidable.²³⁶ However, Public international law developed through the application of ‘legal pluralism’ is likely to overcome its legitimacy deficits if and when it can be bypassed with the law-society dichotomy and replace it with a critical account of the synergies and resistances between normative orders which create law-as-process rather than as object.²³⁷

The operation of Islamic international law on the use of force and its relationship with Public international law is a contested question. Whereas Islamic international law on the use of force

²²⁹ Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Sydney Law Review* 375.

²³⁰ Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kertzer (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805, 807.

²³¹ Joko Smart, ‘The Place of Islamic Law within the Framework of the Sierra Leone Legal System’ (1980) 18 *African Law Studies* 87.

²³² Peter Mandaville, *Islam and Politics* (2nd edn, Routledge 2014) 369.

²³³ Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Sydney Law Review* 375, 379.

²³⁴ *ibid.*, 389.

²³⁵ Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kertzer (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805, 808.

²³⁶ Brian Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Sydney Law Review* 390.

²³⁷ Richard Wilson, ‘Reconciliation and Revenge in post-apartheid South Africa: Rethinking Legal Pluralism and Human Rights’ (2000) 41 *Current Anthropology* 75; see also Anne Griffiths, ‘Reconfiguring Law: An Ethnographic Perspective from Botswana’ (1998) 23 *Law and Social Inquiry* 587.

is legitimate to operate among the Muslim states, it is not so in non-Muslim states.²³⁸ However, both Muslim and non-Muslim states are subjects of Public international law but the latter does not represent the values of the former to the extent to overcome the existing legitimacy deficits.²³⁹

The main power of legal pluralism is that, it strengthens the rule of law and promotes higher degree of legitimacy.²⁴⁰ For example, the International Court of Justice has acknowledged the contribution of Islamic legal tradition in the development of modern international law.²⁴¹ In *the North Sea Continental Shelf case* the International Court of Justice sought to demonstrate that-

Islamic law had in fact provided contemporary international law with some substantial principles including equity, modalities of establishing statehood and territorial control through identities characterised by religion, and various techniques of legal interpretation.²⁴²

Use of force has legal, political, moral, personal, human or psychological dimensions.²⁴³ Searching for objectivity and overlooking its multifariousness produces self-restrictive arguments.²⁴⁴ Therefore, it is essential to approach every incident of use of force from inter-subjectivity perspective. Inter-subjectivity materialises by appreciating our similarities as people who strive for self-creation, empowerment and happiness rather than being paralysed by our differences which emerge from diverse contextualises.²⁴⁵

It is religion which brings about the necessity for a pluralistic international system based on territory and the principle of *cuius regio, eius religio*.²⁴⁶ The terrorism promulgated by a certain branch of Islamic fundamentalism has recently shown that the universal recognition of religious pluralism remains precarious even in the contemporary inter-State order.²⁴⁷ So, to

²³⁸ James T. Richardson, 'The Social Construction of Legal Pluralism' in Adam Possamai, James T. Richardson and Bryan S. Turner (eds), *Legal Pluralism and Shari'a Law* (Routledge 2014) 80.

²³⁹ William Twining, 'Normative Legal Pluralism: Global Perspective' (2010) 20 *Duke J. Comp. & Int'l L.* 473, 505.

²⁴⁰ John Griffiths, 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism* 1.

²⁴¹ C.B. Bombardi, 'Islamic Law in the Jurisprudence of the International Court of Justice: An Analysis' (2008) 8 *Chicago Journal of International Law* 85; see also E. J. Powell, 'Islamic Law States and the International Court of Justice' (2013) *Journal of Peace Research* 1.

²⁴² *North Sea Continental Shelf* (Federal Republic of Germany/Denmark) ICJ Rep. 1969 p. 3, 99 645 -6.

²⁴³ See section 1.5 of chapter 1 (above).

²⁴⁴ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 2.

²⁴⁵ *Ibid*, 3.

²⁴⁶ Daniel Philpott, 'Religious Freedom and the Undoing of the Westphalian State' (2004) 25 *Mich. J. Int'l L.* 981.

²⁴⁷ Andrea Paulus, 'The Legitimacy of International Law and the Role of the State' (2004) 25 *Mich. J. Int'l Law* 1047, 1050.

what extent international law on the use of force has recognised religious pluralism universally? The following section answers this question.

5.4.1.1 The Extent of Legal Pluralism in the complementation process

The role of legal pluralism in the complementation process must not exceed beyond what is necessary to overcome the existing legitimacy deficits of Public international law on the use of force. This is because, whether law is exclusively defined by the state or not, but there is no universally satisfactory position of law which can overcome the legitimacy deficits of both Islamic international law and Public international law. One kind of position gives monism as a fact, while the other gives pluralism as a fact: Confining ‘law’ to the state seems too narrow as an international legal framework.²⁴⁸ Therefore, what is necessary is to have the greatest normative impact on the different states and non-state actors irrespective of their differences in the national legal systems.²⁴⁹

In order to have the greatest normative impact, it necessary to apply the right metaphor.²⁵⁰ The metaphor one decides is important because of its normative impact as it interprets and judges the situation, and these judgments can in turn lead to a prescribed set of actions.²⁵¹ These actions then bring the necessary normative impact. Therefore, application of the ‘semi-autonomy’ metaphor can be useful in bringing the greatest normative impact.²⁵² This metaphor is useful because it facilitates analysis of both interdependence with other systems and the self-identity of a particular system: the idea has proved to be enormously useful in the study of normative pluralism in the modern context.²⁵³

²⁴⁸ Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kirtzer (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805, 809.

²⁴⁹ Eugen Ehrlich, ‘The Sociology of Law’ (1922) 36 *Harvard Law Review* 130, 144; see also William Twining, ‘Normative Legal Pluralism: Global Perspective’ (2010) 20 *Duke J. Comp. & Int’l L.* 473.

²⁵⁰ Kenneth Burke, *A Grammar of Motives* (University of California Press 1969) 503; see also Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 109.

²⁵¹ Jeffrey T. Kennedy, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (OUP 2006) 109.

²⁵² S.F. Moore, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7 *Law and Society Review* 719, 742.

²⁵³ *ibid*; see also Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kirtzer (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805, 814.

5.4.1.2 The Bipolar division of the world into ‘Dar-al-harb’ and ‘Dar-al-Islam’ and their effect in developing a pluralistic international law on the use of force

Although it is true that Dar-al-Islam and Dar-al-Harb is a categorisation coined by Muslim jurists,²⁵⁴ the tendency in studies to emphasise the primary role of law, especially in Sunni Islam, has until now narrowed down the field of research almost exclusively to juridical text.²⁵⁵ Thus, it is essentially within juridico-political studies, mainly in the sections concerning jihad that the two notions are dealt with (such as in Khadduri, Lambton, Crone, Hallaq),²⁵⁶ still without being themselves the object of a thorough analysis.²⁵⁷ In these circumstances, it is essential to unveil the implication of this division of the world as far as use of force is concerned following a thorough analysis of the impact of this division in modern world.

It is true that the bipolar division of the world into Dar-al-Islam and Dar-al-harb is no longer valid in modern world in the context that the former represents the ‘abode of Islam’ and the latter ‘abode of war’.²⁵⁸ This is because, modern division of the world has been made into nation-states. However, the relevance and true impact of the division between Dar-al-Islam and Dar-al-harb, in the modern world, can be unveiled from the purpose of such division. History suggests that, the main reason for this division was to determine the law applied to a particular part of the world.²⁵⁹ For example, by the term ‘Dar-al-Islam’, the region was identified to be under the rule of Islamic law and hence consisted of territories of different nations but under the Islamic rule. This facilitated the merchants to identify what rules of commerce applied to that part of the world, namely taxation, prohibition and restriction on imports and exports. This

²⁵⁴ See section 3.2 of chapter 3.

²⁵⁵ Giovanna Calasso, ‘Introduction: Concepts, Words, Historical Realities of a “Classical” Dichotomy’ in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 1.

²⁵⁶ Majid Khadduri, *War and Peace in Islam* (Baltimore: John Hopkins Press 1955); Majid Khadduri, *The Islamic Law of Nations: Shaybani’s Siyar* (Baltimore: John Hopkins Press 1966); Ann Lambton, *State and Government in Medieval Islam: An Introduction to the Study of Islamic Political Theory*, vol 36 (OUP 1981); Patricia Crone, *Medieval Islamic Political Thought* (Edinburgh University Press 2004); Wael B. Hallaq, *Shari’a: Theory, Practice, Transformations* (Cambridge University Press 2009).

²⁵⁷ Giovanna Calasso, ‘Introduction: Concepts, Words, Historical Realities of a “Classical” Dichotomy’ in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 1.

²⁵⁸ Bashher Nafi, ‘Fatwa and war: On the Allegiance of the American Muslim Soldiers in the Aftermath of September 11’ (2004) 1 *Islamic Law and Society* 78.

²⁵⁹ Giovanna Calasso, ‘Introduction: Concepts, Words, Historical Realities of a “Classical” Dichotomy’ in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 11.

division also developed the system of recognition of territories under the rule of Islamic law and as a result, a concept similar to modern day regional organisation.²⁶⁰

Sovereignty is protected in Public international law by categorising internal and international armed conflicts. Islamic law can complement here as it does not categorise armed conflicts for the purpose of saving sovereignty of a state but of a region, which is dar-al-Islam. This concept has taken sovereignty to a higher level, which is at the regional level. To expand the sphere of the public order under Islamic rule, according to Islamic international law, the Muslim Community (ummah) is none but single, seamless entity, to whom laws apply equally irrespective of racial, ethnic, cultural, and linguistic differences.²⁶¹

This division of the world would not only apply the different legal systems at different parts of the world but also close the gap between the legal systems at international level. Dar-al-harb and Dar-al-Islam have systematically divided the world where Islamic law would only apply to the latter but not to the former. The fact that, within the territory where Islamic law applied the people who submitted themselves to the legal system were not only Muslims but also the followers and adherents of other religions, highlights the religiously plural character of societies to which Islamic law was historically applied.²⁶² In this setting, the world is divided into regions where every region possesses some common features and singular political jurisdiction.²⁶³ Therefore, sovereignty of the member states of every region is exercised within a regional body which first decides ‘to what extent sovereignty of its member states would be interfered’. This is similar to the principle of Islamic international law which only permits Muslim countries to intervene into the aid of another Muslim country.²⁶⁴ If the regional organisation fails, then the sovereignty of such member states would be subject to interference from an international body, for instance the Security Council. This principle is supported in Islamic international law by the precedent when the Prophet accepted military and logistical

²⁶⁰ Roberta Denaro, ‘Naming the Enemy’s Land: Definitions of dar-al-harb in Ibnal-Mubrak’s Kitab al-Jihad’ in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 97.

²⁶¹ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 52.

²⁶² Giovanna Calasso, ‘Constructing and Deconstructing the dar-al-islam/dar-al-harb Opposition’ in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 35.

²⁶³ Mushtaq Muhammad Ahmad, ‘The Notion of dar-al-harb and dar-al-Islam in Islamic Jurisprudence with special reference to the Hanafi school’ (2008) 47 *Islamic Studies* 18.

²⁶⁴ See section 3.2.2.1 chapter 3.

aid from the Jewish communities in Medina when he had been persecuted and denied any assistance from his own community in Mecca.²⁶⁵

This setting, at the international level, is likely to reduce tensions between powerful states and other states which are the likely subjects of the former's geopolitical targets. This is because, the lack of proximity between the states would denote any interference as illegitimate. Therefore, the step by step process of intervention, based on proximity, as provided by Islamic international law can complement Public international law. This setting also represents higher degree of legitimacy for promoting justice at the regional level and peace at the international level. This combination of legitimacy and justice, at the regional and international level, is likely to reduce the costs of recourse to force and protect international peace. In this way, states are unlikely to use force against another state which is outside the region and if any state does so then it would be subject to sanctions from its own regional organisation. This model of regional justice and international peace is likely to overcome the legitimacy deficits of Public international law on the use of force.

Legal pluralism, in Islamic international law, is developed through Islamic conception of universality.²⁶⁶ In order to comprehend this conception it is necessary to consider briefly the foundation concept of Islamic Ummah.²⁶⁷ This concept refers to a committed group of people sharing the same Islamic ideals, which form a common bond that 'transcends national and tribal loyalties rooted in the accident of birth, and is a community of believers, bound together in a brotherhood more vital than that of blood.'²⁶⁸ Therefore, the term 'Islamic Ummah' is used to refer to the worldwide community of Muslim believers, who aspire to create a universal Islamic nation, community or distinguishable political entity based on Islamic ideals,²⁶⁹ to which all Muslims belong regardless of where they reside physically,²⁷⁰ and to which ultimate loyalty is owed.²⁷¹ It is evident therefore, that unlike the Westphalian system, the normal characteristics

²⁶⁵ Ibid.

²⁶⁶ Bryan S. Turner, 'Legal Pluralism, State Sovereignty, and Citizenship' in Adam Possamai, James T. Richardson and Bryan S. Turner (eds), *Legal Pluralism and Shari'a Law* (Routledge 2014) 7.

²⁶⁷ Katja Samuel, 'Universality, the UN and the Organisation on the Islamic Conference: Single, complementary or competing universal legal orders?' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 267.

²⁶⁸ John A. Williams (ed), *Themes of Islamic Civilisation* (Berkeley, CA: California University Press 1971) 8.

²⁶⁹ A. al-Ahsan, *Ummah or Nation? Identity Crisis in Contemporary Muslim Society* (Leicester: Islamic Foundation 1992) 7; see also S. S. Khan, *Reasserting International Islam: A Focus on the Organisation of the Islamic Conference and Other Islamic Institutions* (OUP 2001) 2.

²⁷⁰ A. A. Kurdi, *The Islamic State: A Study based on the Islamic Holy Constitution* (London: Mansell 1984) 54.

²⁷¹ Ibid, 55; see also N. Levtziou, *International Islamic Solidarity and its Limitations* (Hebrew University, Jerusalem: Magnes Press 1979) 6.

of statehood, such as geographical location or fixed territory, are not relevant.²⁷² Rather, under Islamic international law sovereignty resides with the God.²⁷³ Therefore, the current setting of OIC (Organisation of Islamic Cooperation) can be a starting point to implement this new community based conception of sovereignty.

The OIC is founded on the concept and aspirations of the Islamic Ummah.²⁷⁴ One of its key Charter objectives is the attainment of unity, fraternity and solidarity within its membership.²⁷⁵ There is not only a different Islamic conception of universality but also this has resulted in the existence of parallel and competing Islamic and UN universal legal orders.²⁷⁶ The OIC membership states represent almost 30 per cent of the UN General Assembly's voting capacity and as a result have a potential to influence the development of all General Assembly norms.²⁷⁷ Furthermore, in the Security Council the OIC member states also liaise with the non-aligned movements to represent the interest of the Muslim Ummah.²⁷⁸ The member states have accepted the legal status of UN Charter in the one hand, and their own constitutional law in the other.²⁷⁹ As a result, a parallel and competing legal order exists between UN Charter system and OIC system. Both of these systems run side by side when the provisions for use of force are compatible. On the contrary, when the provisions are incompatible then a normative conflict occurs between the two systems.²⁸⁰

In these circumstances, it is necessary to apply an adequate legal theory to complement the use of force provisions in Public international law and Islamic international law to the extent that

²⁷² M.T. al-Ghunaimi, *The Muslim Conception of International Law and the Western Approach* (The Hague: Martinus Nijhoff 1968) 62.

²⁷³ Katja Samuel, 'Universality, the UN and the Organisation on the Islamic Conference: Single, complementary or competing universal legal orders?' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 267.

²⁷⁴ G.R. Alibabai, 'OIC: An Overview of its Failures and Achievements' in G. Sarwar (ed), *OIC: Contemporary Issues of the Muslim World* (Rawalpindi: Friends 1997) 65.

²⁷⁵ OIC Charter, Preamble and Article 1(1), available at <https://www.oicoci.org/page/?p_id=53&p_ref=27&lan=en> accessed on 3 December 2017.

²⁷⁶ Katja Samuel, 'Universality, the UN and the Organisation on the Islamic Conference: Single, complementary or competing universal legal orders?' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 263.

²⁷⁷ Saad S. Khan, *Reasserting International Islam: A Focus on the Organisation of the Islamic Conference and Other Islamic Institutions* (OUP 2001) 2.

²⁷⁸ Saeid. Mirzaee-Yengejeh, 'International Law as a Cultural Perspective: Towards a Convergence of Civilisations: Contributions of Developing Countries to the Formation and Application of International Law Justice' in R. St. J. Macdonald and D.M. Jonston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff 2005) 194.

²⁷⁹ Katja Samuel, 'Universality, the UN and the Organisation on the Islamic Conference: Single, complementary or competing universal legal orders?' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 275.

²⁸⁰ OIC Chapter, aims and objective, OIC Charter, Preamble and Article 1(1), available at <https://www.oicoci.org/page/?p_id=53&p_ref=27&lan=en> accessed on 3 December 2017.

both systems are interdependent on each other and the self-identity of a particular system is acknowledged at the same time.²⁸¹ This can be best achieved, as shown above, by adopting the ‘semi-autonomous’ metaphor. The legal framework developed in this method is likely to overcome the legitimacy deficits and secure justice, and this is because this method contains the legal theory adequate and necessary for the legitimacy and compatibility of use of force in Islamic international law and Public international law. As Margaret Davies rightly observed:

Arguably, adequate legal theory will theorise not only the state law as such, but also the position of this form of law in a complexity of plural normative orders.²⁸²

The aim of international law on the use of force as adopted in the United Nations Charter ought to be a powerful means of preventing conflict. However, the Charter system does not seem to have achieved this aim because at the very beginning of the 21st Century there has already been considerable number of inter-state conflicts, namely Iraq war, invading Afghanistan, intervention in Libya and Georgia, conflict in Syria.²⁸³ This suggests that the Charter system has considerably failed to prevent inter-state conflict and as a result suffering from major legitimacy deficits. This also suggests that the features and functions of legitimacy is absent in the state practices and hence legitimacy deficits are prevalent in the norm, institution applying that norm, and in the perception of the subjects. For example, the features of creating a limit on the use of force is absent in Articles 2(4) and 51 of the UN Charter.²⁸⁴ Similarly, the Security Council failed to maintain peace and security in the contemporary world, and its decision-making process lacks consistency and coherence. Finally, the overall process has failed to secure voluntary pull of compliance by the subjects.

Although it is true that most of the states in the world are the members of United Nations, in fact all the member states do not adhere to the same fundamental principles of inter-state policies. A state maintains its international relations in accordance with its own principles and such principles could come into conflict with each other based on diverse cultural and religious values.²⁸⁵ As a result, a conflict of values prevails between states which eventually threatens the legitimacy of Public international law on the use of force. In these circumstances, sustainable peace and security at international level can only be achieved if the existing

²⁸¹ S.F. Moore, ‘Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study’ (1973) 7 *Law and Society Review* 719, 742.

²⁸² Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kertzer (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805, 816.

²⁸³ See section 2.3 of chapter 2.

²⁸⁴ See section 5.2.2 of this chapter (above).

²⁸⁵ See section 2.3.2.1 of chapter 2 on ‘cultural relativism’.

legitimacy deficits of Public international law can be overcome. This is only possible if recourse to force is regulated by a pluralistic legal framework which recognises the diverse cultural values,²⁸⁶ and such decision is taken through a process which is consistent and coherent.²⁸⁷

5.5 Overcoming the barrier of Public international law: achieving a higher degree of legitimacy on the use of force

The above discussion, in chapter 2, on the origins of current international law in the context of colonialism, suggests that Public international law, is developed on the conception of its own universality.²⁸⁸ This basis of development also questions the Western dominance on the development and application of Public international law on the use of force.²⁸⁹ Furthermore, the self-description of Public international law as universal, objective and neutral has also been untenable for its reluctance to include the cultural and religious values of other major legal systems. This position of Public international law has put itself under a barrier where it senses its own legitimacy from its purported universality. Therefore, it is expedient to overcome this barrier in order to achieving a higher degree of legitimacy and securing the competence of the legal framework in regulating use of force at the international level.

Public international law on the use of force as enshrined in the UN Charter is not instituted in general for all the people within the World. It has been witnessed how powerful states have a greater stake in the decision-making process at the Security Council, how self-interest gratifications have disregarded the legal requirements and how the coalitions of willing and able have used extra-territorial force without following the legitimate process.²⁹⁰ Moreover, the UN Charter system does not represent the values of those who are required to comply with the use of force decision or affected by it.²⁹¹ For example, there are 57 Muslim states which are members of the Organisation of Islamic Cooperation (OIC) as well as the UN and consisting of over 1.5 billion Muslims²⁹² but their cultural and religious values have not been incorporated into the UN legal framework of use of force. This is known as ‘Parochialism’ in international

²⁸⁶ See section 5.2 of this chapter (above).

²⁸⁷ See section 5.2.3 of this chapter (above) for further discussion on ‘consistency and coherence’.

²⁸⁸ See section 2.2 of chapter 2.

²⁸⁹ See section 2.2 of chapter 2.

²⁹⁰ See section 5.2.3 of this chapter (above).

²⁹¹ Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* (Seventh edition, OUP 2012) 502.

²⁹² <http://www.oic-oci.org/oicv3/page/?p_id=52&p_ref=26&lan=en> accessed on 20 June 2017.

law.²⁹³ The manifestation of Western imperialism on the international law in the use of force has created a massive barrier in this framework.²⁹⁴

If Public international law leaves a part of the world community's legal system alone from being part of its framework then it is very likely that the people who are affected by the decisions of the institutions established by international law would not accept those decisions as legitimate. This is a barrier on Public international law which is based on 'lack of justified authority'. According to Francisco Suarez (1548 – 1617), 'only that precept is law which is instituted in general for all the persons included within a given community.'²⁹⁵ The legitimacy deficit of international law on the use of force can be found in his view of the law and even today such deficit can be witnessed.

Besides, the question of how Security Council functions while making decisions to use force, enhancing public participation in the decision-making process forms an important part of the process. Participation by public overcomes the input legitimacy deficit of the Security Council because when public interests are at stake, only public decision making appears legitimate.²⁹⁶ Any decision to use force must be taken by participation of the members of the international community to overcome the legitimacy deficits of any decision being taken and such community includes citizens of a state, people in a state's territory, or adherents of a particular religion.²⁹⁷ The social phenomenon of non-coerced obedience can be witnessed in the notion of legitimacy as it operates as a dynamic social force through the rule which the society chooses to obey or to regard as obligatory.²⁹⁸

It is true that a state will not comply with any international law on the sole basis of 'legitimacy' if it is not in the interest of the state. However, if systematic values are protected and promoted in international law as well as it is not biased against any state or regional organisation then

²⁹³ John Tasioulas, 'The Legitimacy of International Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 105.

²⁹⁴ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2005) 84; see also Stephen C. Neff, 'A Short History of International Law' in Malcolm D. Evans (ed), *International Law* (2nd edn, OUP 2006) 45; Lukas Meyer and Pranay Sanklecha, 'Introduction' in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 136.

²⁹⁵ Francisco Suarez, *A Treatise on Laws and God the Lawgiver* (Bk. I, 2 Suarez, Classics of International Law 1944) 74.

²⁹⁶ Andreas Paulus, 'The Legitimacy of International Law and the Role of the State' (2004) 25 Mich. J. Int'l Law 1047, 1053.

²⁹⁷ Andreas Fischer-Lescano & Gunther Teubner, 'Regime-Collision: The Vain Search for Legal Unity Sovereigns Entitled to the Benefit of the International Rule of Law' (2011) 22 EJIL 315.

²⁹⁸ See section 5.2.1 of this chapter (above).

‘legitimacy’ can be a fundamental basis for compliance.²⁹⁹ Also, in this way a ‘chain of legitimacy’ could be maintained in order to overcome the barrier that is currently affecting the Public international law from achieving its true universality. If the ‘chain of legitimacy’ is broken then the entire system, authority and result are subject to critical question of ‘legitimacy-deficit’. Therefore, it is the responsibility of the international community, which includes both states and regional organisations, to maintain the nexus of the ‘chain of legitimacy’ of international law on the use of force.

The chain of legitimacy recognises the values of the people in the decision-making process.³⁰⁰ This chain is essential for international law on the use of force to function effectively. The nexus of the chain of legitimacy becomes stronger by dismissing the claim of the expansionists to adopt an expansive use of force in self-defence beyond pre-emption, strengthening the regional organisations to deal with breach of peace and threat to peace situations and reformation of the veto system in the Security Council, and incorporation of values of the people of all member states into the corpus of international law. Here the people include those who are likely to be affected by such decision. It is very important to consider what the beliefs of the people are and how those beliefs are weighted by power.

Conclusion

Legitimacy of Public international law on the use of force is rooted in the classical natural law tradition. This tradition often said to have treated substantive moral justifiability, which is a concept of legitimacy for philosophers, as an essential element of legal validity.³⁰¹ Thomas Aquinas, for instance, is often quoted as stating that “if in any point [human law] deflects from the law of nature, it is no longer a law but a perversion of law.”³⁰² Likewise, William Blackstone estimated that “no human laws are of any validity, if contrary to the law of nature.”³⁰³ This position held by natural lawyers suggests that moral justifiability constitutes

²⁹⁹ John Tasioulas, ‘The Legitimacy of International Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 102.

³⁰⁰ See section 5.4 of this chapter (above).

³⁰¹ Christopher Thomas, ‘The Uses and Abuses of Legitimacy in International Law’ (2014) 34 *Oxford Journal of Legal Studies* 729, 737.

³⁰² Thomas Aquinas, *Summa Theologica* (Treatise on the Theological Virtues) Quest 95, Art II.

³⁰³ William Blackstone, *Commentaries on the Laws of England*, vol 1 (Clarendon 1766) 41.

an inextricable aspect of legal validity which is likely to result in a higher degree of legitimacy of an action, rule, actor or system.³⁰⁴

On the other hand, legitimacy of Islamic international law on the use of force is rooted in the source, such as Shari'a and in the process, such as Ijtihād. In addition to Qur'an and Sunna, the exemplary role that the jurisconsults play in society is explained in terms of Prophetic legacy. Muhammad was the first jurisconsult of the Muslim community, and later jurisconsults have continued to play the very role he played.³⁰⁵ Therefore, the legitimacy lies in the source which articulates the process to decide the legitimacy of Islamic law to keep pace with the time and social changes.

Both Public international law and Islamic international law are based on values conflicting to each other. However, there are values in both systems which share a common platform, namely morality and justice. Whereas the legitimacy of Islamic international law is rooted in the Shari'a which is a body of moral principles and requires the Mujtahids to make decisions on moral grounds, the legitimacy of Public international law is rooted in morality as well. This common value, which is morality, will lead Public international law and Islamic international law together on the road to substantive justice.³⁰⁶ Morality and substantive justice are both principles of Islamic international law and International Human Rights law of which Public international law forms a part.³⁰⁷ However, such morality and justice must consist in a set of standards which, among other things, place restrictions on often self-interested conduct to pay proper tribute to the standing and interests of others.³⁰⁸

Both Public international law and Islamic international law are originated from legitimate sources, namely natural law and divine law respectively. These systems have also developed and refined through processes which have provided the platform to overcome legitimacy deficits in the course of time. However, the processes that have been followed are not always perfect to overcome the legitimacy deficits. For example, decision-making process at the Security Council and abuses of the interpretation of divine law by unqualified agents. These

³⁰⁴ John Austin, *The Province of Jurisprudence Determined* (First published 1832, Wilfrid E Rumble ed, CUP 1995) lecture V; see also Hans Kelsen, 'The Natural Law Doctrine before the Tribunal of Science' (1949) II West Pol Q 481, 485; HLA Hart, *The Concept of Law* (2nd edn, OUP 1994) 208; Joseph Raz, 'Kelsen's Theory of the Basic Norm' (1974) 19 Am J Juris 94, 100.

³⁰⁵ Wael B. Hallaq, *A History of Islamic Legal Theories* (Cambridge University Press 1997) 204.

³⁰⁶ John A. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press 2001) 128.

³⁰⁷ Mashood A. Baderin, *International Human Rights and Islamic Law* (OUP 2003) 6.

³⁰⁸ Samantha Besson and John Tasioulas, 'Introduction' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 13.

have been possible due to the lack of accountability of the international institution or the agent in respect to the decision it takes and interpretation it offers. Eventually, the necessary degree of legitimacy remains unobtained. What is required, as far as complementation between Public international law and Islamic international law is concerned, is a jurisprudence that draws on both cultures, to address the legitimacy deficits of Public international law on the use of force. The complemented framework will promote the principles of accountability and transparency, which are the basic principles of both liberal democratic states which profess to Public international law and Muslim majority states which profess to Islamic international law.

This chapter concludes that the necessary degree of legitimacy cannot be obtained by overcoming the existing legitimacy deficits of Public international law and Islamic international law separately. Instead, it is necessary to find out how these systems could complement each other by filling the gaps created by the existing legitimacy deficits. This chapter has answered the second question of the thesis, namely 'how the legitimacy deficits could be overcome?' This answer has guided this study to the final stage where the final question of the thesis would be addressed, which is 'whether use of force in Public international law and Islamic international law can be compatible in modern world?'

Chapter 6

Compatibility of Use of Force in Public International Law and Islamic International Law

The study in the previous chapter has shown that legitimacy is an attribute that needs to be earned rather than to be found. In the era of power disequilibrium powerful states and non-state actors may recourse to force arbitrarily but are unlikely to find the required degree of legitimacy unless they want to earn it. The best way to earn such legitimacy would be to recognise the diverse values of the subjects into the corpus of Public international law and maintain proximity among them in the decision-making process.³⁰⁹

In order to promote legitimacy of Public international law on the use of force scholars have provided different models of the operation of the charter system in the current world. These models justify use of force by states and regional organisations on different grounds, namely coercive restraints from less powerful states (the relists model),³¹⁰ reciprocal restraints exercised by states in order to cooperate with other states that do likewise (the regimes model),³¹¹ and communal obligation within the Security Council to produce a collective restraint on state action.³¹² These models, although make arguments for legitimate use of force, rely on a strict positivist view of international law in which actions are categorised dichotomously and there is no grey area.³¹³ From this viewpoint, use of armed force, even in

³⁰⁹ See section 5.2 of chapter 5; for *contra* see Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP 2004) 29.

³¹⁰ See section 2.3.1 of chapter 2.

³¹¹ Robert Axelrod, *The Evolution of Cooperation* (New York: Basic Books 1984) 174; see also Kenneth A. Oye, 'Explaining Cooperation under Anarchy: Hypotheses and Strategies' (1985) 38 *World Politics* 1, 12; see also Robert O. Keohane, 'Reciprocity in International Relations' (1986) 40 *International Organisation* 1, 13; Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organisation* 421, 427; Beth A. Simmons, 'The Legalisation of International Monetary Affairs' (2000) 54 *International Organisation* 573, 582; see also Andrew T. Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823, 1844; for *contra* see Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press 1979) 69.

³¹² Richard A. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order' in Richard A. Falk and Cyril E. Black (eds), *The Future of the International Legal Order* (Princeton University Press 1969) 33; A. C. Arend, 'Do Legal Rules Matter? International Law and International Politics' (1998) 38 *Virginia Journal of International Law* 107, 124. see also Jeffrey T. Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55 *International Organisation* 553, 557; see also Thomas Risse, 'Let's Argue!: Communicative Action in World Politics' (2000) 54 *International Organisation* 1, 8, 20; Ian Johnstone, 'Security Council Deliberations: The Power of the Better Argument' (2003b) 14 *European Journal of International Law* 437, 454; see also Jennifer Mitzen, 'Reading Hebermas in Anarchy: Multilateral Diplomacy and Global Public Spheres' (2005) 99 *American Political Science Review* 401, 411; for *contra* see Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 5.

³¹³ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 5.

self-defence, is subject to the control of the Security Council,³¹⁴ and the Charter is an effective restraint only to the extent that it pushes states away from war and promotes peace.³¹⁵ However, assessing the efficacy of the Charter in this manner misconstrues both its underlying purpose and its institutional form.³¹⁶ Article 1(1) of the Charter expresses the purpose, which is to maintain international peace and security,³¹⁷ and the institutional form that has been developed to serve this purpose is through a collective security system.³¹⁸

The Charter framework has been subject to huge criticisms and challenges for failure to regulate use of force in the current world affairs.³¹⁹ A gap has been created in the Charter framework in which use of force has been subject to little or no control of the Security Council. Moreover, the practices of the states and regional organisations often give rise to the question of legitimacy, as opposed to legality, of use of force. As an attempt to fill this gap, the Security Council has devised new mechanisms and even legitimate actions which were repugnant to the Charter. For example, when the Security Council has legitimated uses of force implicitly and with retrospective effect which were not previously authorised by it.³²⁰ In addition, the Security Council, as a quasi-jury, has tried to bridge the gap, when it appears, between legality and legitimacy, so that the legal order is not seen to suffer from deficiency that arises when that gap becomes too wide.³²¹

This approach encounters its most difficult test when the legitimacy of use of force is lacking.³²² For example, when the Security Council acted like a judicial body by adopting resolutions to authorise use of force in Afghanistan following the 9/11 terrorists attack and the recognition of extension of use of force in the form of pre-emption by the UN Secretariat.³²³ This approach allows for consideration of how states' interests affect their particular understandings of law and their actions, rather than implicitly assuming that states respond uniformly to particular

³¹⁴ Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press 1963, reprint 1981) 273.

³¹⁵ John J. Mearsheimer, 'The False Promise of International Relations' (1995) 19 *International Security* 5, 7; see also Michael J. Glennon, *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (New York: Palgrave 2001) 2; Jennifer Mitzen, 'Reading Hebermas in Anarchy: Multilateral Diplomacy and Global Public Spheres' (2005) 99 *American Political Science Review* 401, 412.

³¹⁶ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 6.

³¹⁷ Article 1(1) UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 December 2017.

³¹⁸ See section 2.1 of chapter 2.

³¹⁹ See section 2.3 of chapter 2.

³²⁰ See 'introduction' to Chapter 5.

³²¹ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 134.

³²² See section 5.2 of chapter 5.

³²³ See section 2.1.2.1 of chapters 2.

arguments and actions according to a collective decision regarding the legitimacy of such actions.³²⁴ This is also apparent in regards to the decision making process of the Security Council where decisions are being made cumulatively – not collectively – as is based on rational calculation.³²⁵ In these circumstances, it is a challenge for Public international law on the use of force to overcome the existing legitimacy deficits by promoting peace and justice. This challenge, however, rather consists in devising a legal order that allows for the expression of different legal systems, albeit each of them claims to present a comprehensive system.³²⁶ This chapter is set to explore how the challenges could be overcome and this would enable the research to answer the final research question, namely ‘can use of force in Public international law and Islamic international law be made compatible in modern world’. Answering this question would also lead the way to conclude the thesis by answering the main question, which is ‘the extent to which use of force in Public international law and Islamic international law can be compatible and legitimate’.

6.1 Legitimacy Revisited

In chapter 5, it has been concluded that overcoming the existing legitimacy deficits on the use of force is likely to promote peace and stability in the modern world. However, when it comes to peace and stability ‘legitimacy’ is not the only criterion to satisfy. The states and regional organisations are often unwilling to overcome the legitimacy-deficits of Public international law on the use of force in order to promote their short-term interests.³²⁷ The main factors which influence the decision of the states and regional organisations for not overcoming the legitimacy deficits are national security and geopolitical interests.³²⁸ In these circumstances, why would states and regional organisations commit for overcoming the legitimacy deficits? The primary reason for overcoming these legitimacy-deficits should be to maintain sustainable peace and stability and this is for the long-term interests of all, namely non-state actors, states and regional organisations.

While urging to promote peace and stability and hence the higher degree of legitimacy at state level and inter-state level, it has become apparent that conflicting claims of legitimacy have

³²⁴ Alan Hyde, ‘The Concept of Legitimation in the Sociology of Law’ (1983) 2 *Wisconsin Law Review* 379, 391.

³²⁵ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 152.

³²⁶ Thomas Pogge, *Realising Rawls* (Cornell University Press 1989) 227; see also John Rawls, *Political Liberalism* (Columbia University Press 1993) 133; Thomas Franck, *Fairness in International Law and Institutions* (Clarendon Press 1995) 14; Brad Roth, *Governmental Illegitimacy in International Law* (OUP 1999) 6.

³²⁷ See section 5.2 of chapter 5.

³²⁸ See section 2.3 of chapter 2.

been made by different legal systems. In other words, a use of force may not be considered legitimate on both sides simultaneously albeit both sides may have a certain degree of legitimacy on their sides. In similar fashion, whereas certain use of force is claimed to be legitimate in Public international law, the claim is quite the opposite in Islamic international law. These conflicting claims of legitimacy on the use of force have been made in respect of rebellion,³²⁹ extraterritorial use of force in self-defence,³³⁰ and humanitarian intervention by states and regional organisations.³³¹ For instance, on the one hand Islamic international law permits extraterritorial use of force to protect people from persecution, on the other hand Public international law requires authorisation from the Security Council in such circumstances. Moreover, when a non-Muslim state uses force in the territory of a Muslim state then the latter sees this as an attack on their religion although this is not always the case. The argument that such use of force is legal in international law does not have any effect on the citizens of Muslim States due to the apex position of Islamic law in their belief and international law's unjustified trespass into such belief. These conflicting claims are giving rise to complex legal issues surrounding legitimacy, peace and justice.

6.2 The effect of incompatibility

The effect of incompatibility between Public international law and Islamic international law is twofold namely, internal disturbance and external aggression. Any of these is sufficient to cause breach of peace and stability at the state level and inter-state level. Whereas incompatible use of force by non-state actors and state authorities within its own territory could give rise to internal disturbance,³³² such use of force beyond the territory of a state could give rise to external aggression. Therefore, incompatible use of force creates tension in the world and gives rise to conflicts, both internal and external.

Samuel Huntington has claimed that it is a 'clash of civilisations' which is responsible for these conflicts.³³³ This claim has occurred from the blatant decline of the Western legal system by the conservative scholars of Islam.³³⁴ This decline, however, was based on mere political

³²⁹ See section 4.3 of chapter 3.

³³⁰ See section 2.1.2 of chapter 2.

³³¹ See section 2.1.4.1 of chapter 2. .

³³² *Prosecutor v Tadić* (Jurisdiction) (Appeals) 105 ILR 453, at para 70.

³³³ Samuel Huntington, *The Clash of Civilization and the Remaking of World Order* (New York: Simon & Schuster 1996) 81.

³³⁴ *Ibid*; see also Samuel Huntington, 'The Lonely Superpower' (1999) 78 *Foreign Affairs* 35.

reaction against the West.³³⁵ The ‘clash of civilisation’ argument of Huntington was mainly based on the political response by the Western scholars of Mawdudi’s radical view rather than investigating the context in which the division between Dar-al-Islam and Dar-al-harb was made.³³⁶ This division was actually made to identify the territory in which Islamic law was applicable and sovereignty of such territory.³³⁷

This claim is very strong in the context of a divided world where civilisations are in a race to triumph over each other but not in a world where Public international law must play a vital role in regulating such race so that civilisations do not use illegitimate force for their advantage. However, such role of Public international law must recognise the similarities of the different legal systems and accommodate the differences as well. The idea, as proffered by radical Muslim scholars, that decline of Islamic civilisations is attributable to Muslim States’ adoption of Western legal, cultural and political institutions is myopic in that it fails to thoroughly diagnose the root cause of the problem.³³⁸ Undoubtedly, Western colonialism and imperial disrespect for the sovereignty and independence of Muslim states are important reasons for the non-conformist attitude of radical Muslims.³³⁹ However, the salient reason underpinning Muslim dissatisfaction lies in the encroachment of biased politics into Muslim leadership.³⁴⁰

According to Falk, whilst Muslims occasionally entertain misgivings about the fairness of ‘Western-emplaced’ structures and processes of international order, they nevertheless invoke the equality of nations discourse with a view to advancing ‘the quest for peace and justice in the relations among the peoples of the world’.³⁴¹ However, it has been seen, in chapter 5, that sovereign equality in the decision-making process of using inter-state force does not play a vital role in the Charter system.

In this circumstance, an alternative system can develop from the approach of multipolarity. This approach does not rule out the inequality of sovereign states at the international level and

³³⁵ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 39.

³³⁶ Giovanna Calasso, ‘Introduction: Concepts, Words, Historical Realities of a “Classical” Dichotomy’ in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 14; see also Katja Samuel, ‘Universality, the UN and the Organisation on the Islamic Conference: Single, complementary or competing universal legal orders?’ in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 270.

³³⁷ See section 5.4.1.2 of this chapter.

³³⁸ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 183.

³³⁹ *ibid.*

³⁴⁰ See section 3.3 of chapter 3.

³⁴¹ Richard Falk, ‘False Universalism and the Geopolitics of Exclusion: The Case of Islam’ in J Allain (ed), *Unlocking the Middle East: The Writings of Richard Falk* (Gloucestershire: Apris Books 2003) 50.

the concept of hegemony as such: it opposes the notion of global hegemony but is not inimical to regional hegemonies that give rise to regional sphere of influence.³⁴² Multipolarity thus implies the distribution of political, economic and military power as between power centres in ways precluding the domination of one power centre over others.³⁴³ One traditional way of achieving this has been the system of the balance of power in Europe from the sixteenth to the nineteenth centuries under which no state was to become as strong and powerful as to dominate others.³⁴⁴ This balance of power is sometimes seen as a law of nature.³⁴⁵ Therefore, the existence of a balance of power as a political institution is necessary for international law on the use of force to exist, operate and survive. According to Oppenheim:

Law of Nations can exist only if there is an equilibrium, a balance of power, between the members of the Family of Nations. If the powers cannot keep one another in check, no rules of law will have any force, since an over-powerful State will naturally try to act according to discretion and disobey the law.³⁴⁶

Therefore, incompatibility between Public international law and Islamic international law is likely to give rise to continuing clash of civilisation scenarios as highlighted by Samuel Huntington. However, this clash could be overcome by securing compatibility between these two systems with an aim to achieving a multipolar hegemonic system where power will be decentralised to regional organisations which can keep one another in check. This system would also allocate the core states' domination in what can become their spheres of influence. Whatever the conceptual and ethical concerns this option raises, it still remains the case that in political terms the agreements between core states to respect each other's spheres of influence is much more likely than general political, still less legal, agreements between power centres.³⁴⁷

Multipolarity can be difficult to achieve but it essentially accords with the nature of Public international law and keeps the clash between states on the basis of sovereign inequality to a minimum. Moreover, in the settings of the Security Council where veto power can be exercised by five permanent members only which do not share the same values, such as liberal versus

³⁴² Alexander Orakhelashvili, 'Hegemony, Multipolarity and the System of International Law' in *International Law in a Multipolar World* (Routledge 2012) 116.

³⁴³ *ibid.*

³⁴⁴ *ibid.*, 117.

³⁴⁵ Kenneth N. Waltz, 'Anarchic Orders and Balances of Power', in Robert. O. Keohane (ed), *Neorealism and its Critics* (New York: Columbia University Press 1986) 116.

³⁴⁶ Lassa Oppenheim, *International Law*, vol 1 (2nd ed, London: Longmans, Green & Co 1912) 73.

³⁴⁷ Alexander Orakhelashvili, 'International Law and Geopolitics: One Object, Conflicting Legitimacies?' (2008) 39 NYIL 155.

illiberal, important policy decisions can only be adopted on the basis of a multipolar approach.³⁴⁸ A unipolar world has never existed and is conceptually impossible as far as international law on the use of force is concerned.³⁴⁹ As Hurrell explains:

States need international law and institutions both to share the material and political costs of protecting their interests and to gain the authority and legitimacy that the possession of crude power can never secure on its own. All major powers face the imperative of trying to turn a capacity for crude coercion into legitimate authority ... Power is not self-justifying; it must be justified by reference to some source outside or beyond itself, and thus be transformed into 'authority'. For this reason, it is a mistake to view 'law' as something that is, or can be, wholly separated from some completely separate thing, e.g., 'political interest'.³⁵⁰

Unipolar or hegemonic power indisputably matters, but it is often spread in such a way that puts limits on either the power wielder's ability to project power, or the effect of the projected power, or causes the power wielder to pay a higher political price than it foresaw.³⁵¹ For example, the US-UK led intervention into Iraq in 2003 ended up with higher political price being paid by the power wielders.

6.2.1 Why compatibility of Public international law and Islamic international law is necessary?

In the absence of any settled and agreed threshold of an 'armed attack' which trigger right of self-defence both at Public international law and Islamic international law, various threshold have been offered to legitimate use of defensive force. Therefore, it is necessary to agree on a threshold to trigger defensive use of force in both Public international law and Islamic international law. The modern world has witnessed both extra-charter state practices by states and extra-Shari'a practices by state and non-state actors. Moreover, there are discrepancies on the grounds and circumstances in which legitimate force can be used to protect people from human rights violation and persecution. While the post-World War II era altered the trend of excluding the non-European world from the sovereign equality discourse,³⁵² aiming also to

³⁴⁸ Alexander Orakhelashvili, 'Hegemony, Multipolarity and the System of International Law' in *International Law in a Multipolar World* (Routledge 2012) 118.

³⁴⁹ *ibid.*

³⁵⁰ Andrew Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (OUP 2008) 39.

³⁵¹ Alexander Orakhelashvili, 'Hegemony, Multipolarity and the System of International Law' in *International Law in a Multipolar World* (Routledge 2012) 120.

³⁵² Gerry Simpson, *Great Powers and Outlaw States* (Cambridge University Press 2004) 25.

curb hegemonic and aggressive conduct, Public international law has not yet acquired a fully impartial character detached from power politics.³⁵³ Therefore, if Public international law is to be more effective, it must use force in a way which is not only legitimate but also compatible with legitimate provisions of use of force of other systems, namely Islamic international law.

Islam, as a religious belief, has become universal as there are so many Muslims that live in non-Muslim majority countries where Islamic law does not regulate the affairs of states. If the provisions of Islamic international law and Public international law cannot be compatible with each other, particularly in terms of use of force, then the adherents of these systems would continue to question the legitimacy of each other's legal system based on incompatibility. Moreover, compatibility between these two systems would also maintain harmony and peace between the adherents followed by the necessary provisions for justice. In order for the Muslims to practise their religion anywhere in the world and enforce the Islamic legal principles at the state level and inter-state level there is no alternative but to complement Public international law and there are potentials for such complementation. Likewise, for the rest of the world to secure peace, stability and the minimal requirement of justice it is essential to complement Islamic international law. However, in order for such complementation process to begin, use of force in Islamic international law has to obtain the highest degree of legitimacy and so the Public international law.

Since legitimate use of force can bolster peace and justice, legitimate provisions for using force in both Islamic international law and Public international law can further not only the objectives of the UN Charter, which are peace and stability, but also the element which is absent from the Charter system and necessary to bolster sustainable peace and stability, which is justice. For example, on the one hand legitimacy (in the descriptive sense)³⁵⁴ of use of force in Kosovo brought peace and ended injustice at the state and inter-state level, on the other hand legitimacy of use of force in Libya not only failed to promote sustainable peace but also brought injustice when the NATO force supplied arms to the rebels.³⁵⁵ As enduring peace requires justice and due to lack of effective provision to secure justice, the UN Charter framework has failed to promote sustainable international peace in the contemporary world where regulating use of force has become a contentious issue and challenge to the charter based system of international

³⁵³ Howard H. Lentner, 'Politics, Power and States in Globalisations' in Henri Goverde (ed), *Power in Contemporary Politics: Theories, Practices, Globalisations* (London: Sage Publications 2000) 198.

³⁵⁴ See section 5.1 of chapter 5.

³⁵⁵ Thomas Franck, 'Break It, Don't Fake It' (1999) 78 *Foreign Affairs* 116.

law.³⁵⁶ As a result, it is essential for Public international law and Islamic international law to complement each other by promoting peace and justice respectively as the former judge of the International Court of Justice C.G. Weeramantry highlighted that:

If a meaningful international dialogue is to be achieved, it is imperative that intercommunication between Islamic and other legal traditions be progressively strengthened, and efforts be made to raise awareness about Islam's overall involvement in the development of international law.³⁵⁷

From the above discussion, it is apparent that, in order to secure enduring peace, it is essential to secure global justice. That means peace is to be obtained through justice but not at the expense of it. Although both justice and peace often come into conflict with each other, it is the requirement of legitimacy to obtain both justice and peace at the same time. For example, justice and peace can be compatible by enforcing rights accrued by harm being caused.³⁵⁸ Therefore, it is necessary to obtain justice through juridical coercion to obtain peace.³⁵⁹ In other words, justice here means substantive justice, which is a standard of moral evaluation that it would be justifiable to coercively impose on those who partake in a shared activity.³⁶⁰

The reason for securing justice is that legal norms are not only clear and certain, but also they are perceived as being legitimate and fair in order to be regarded as just and consequently implemented.³⁶¹ In the existence of challenges and innovative interpretation of legitimate use of force by non-state actors, states, and regional organisations it is expedient for the international legal framework to secure higher degree of legitimacy and hence peace through justice. As Sir Gerald Fitzmaurice observed:

Justice is very seldom achieved by directly aiming at it: rather it is a by-product of the application of legal rules and principles, a consequence of the general order, certainty and stability introduced into human and international relationships through the regular

³⁵⁶ See section 2.3 of chapter 2.

³⁵⁷ C.G. Weeramantry, *Islamic Jurisprudence: An International Perspective* (New York: St. Martin's Press 1988) 166.

³⁵⁸ Silviya Lachner, 'Basic Rights and Global Justice: The Problem of International Coercion' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 161.

³⁵⁹ Terry Nardin, 'Justice and Coercion' in Alex J. Bellamy (ed), *International Society and Its Critics* (OUP 2005) 247.

³⁶⁰ Silviya Lachner, 'Basic Rights and Global Justice: The Problem of International Coercion' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 161.

³⁶¹ Onuma Yasuaki, 'A Transcivilisational Perspective on Global Legal Order in the Twenty-first Century: A Way to Overcome West-centric and Judiciary-centric Deficits in International Legal Thoughts' in R. St. J. Macdonald and D. M. Jonston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Leiden: Martinus Nijhoff 2005) 151.

and systematic application of known legal rules and principles, even if these rules and principles are not always perfect and do not always achieve ideal results in every case.³⁶²

Islamic international law is sourced in the Qur'an, Sunna and scholarly contributions to Shari'a. Even the scholars' views are subject to jurisprudential and spiritual richness rather than 'their own personal views'. Custom can change the Public international law but it can only fill the gap in the development of Islamic international law as long as this is consistent with the Shari'a. On the other hand, Public international law, through the Charter system, is promoting peace and stability without actively promoting justice. Seen in this way, Islamic international law is promoting justice³⁶³ and the Charter-based international law on the use of force is promoting peace. In these settings, these two systems can collectively promote both peace and justice by complementing each other. In addition, this would arguably not only bring into question the sweeping assumption that Public international law has its roots in Western Civilisation alone, but also promote the universality and legitimacy of international norms and standards with a possibility of ensuring further compliance therewith.³⁶⁴

6.2.2 The promotion of peace and justice: a dilemma in Public international law on the use of force

Whereas at San Francisco, proposals for renunciation of state-to-state violence and the substitution of collective security were widely welcomed in principle, at least some states understood that political considerations might prevent the Council from using its new powers effectively and impartially and hence raising the question of justice in the decisions of the Security Council regarding use of force.³⁶⁵ For example, the Netherland's representative warned of future political temptations to buy peace at the cost of justice:

That price might well seem unreasonable to many; such a settlement could not be expected to command respect and therefore to endure, and if another and better settlement were not found, the prestige of the Security Council and of the organisation

³⁶² G.G. Fitzmaurice, 'The United Nations and the Rule of Law' (1953) 38 Transactions of the Grotius Society 135, 147.

³⁶³ Joel Hayward, 'Warfare in the Qur'an' in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 33-34.

³⁶⁴ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 181.

³⁶⁵ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 14; see also Michael J. Glennon, 'The New Interventionism: The Search for a Just International Law' (1999) 78 Foreign Affairs 2.

generally, would suffer accordingly. In other words, it does not seem possible to leave everything to mere opportunism.³⁶⁶

In these circumstances, as stated above, the Netherlands's representative proposed to appoint an independent body to decide the decisions of the Security Council on the basis of justice because he acknowledged that it is unjust to allow the Security Council to sit in judgment of its own proposals and also impractical to be left to the General Assembly due to the arbitrary appreciation of individual member-states.³⁶⁷ Although the Netherlands stood no chance of succeeding with its proposal for a council of wise and independent elders to represent the cause of justice in the system's operation, the issue to which this solution was directed remains important and still essentially unresolved.³⁶⁸

After overcoming the legitimacy deficits of Public international law and Islamic international law, as discussed in chapter 5, there are still circumstances when even after achieving higher degree of legitimacy, the use of force provisions failed to deliver peace and justice. For example, legitimacy requires foreign intervention in situations when use of force by tyrants enjoins protection under the political shield of sovereignty and such intervention is also a requirement of justice. However, foreign interventions often result in breach of peace within the territory intervened and also can lead to threat of international order. In this circumstance, human rights violation is a breach of peace and justice requires use of force to end such breach of peace.³⁶⁹ However, justice often comes into conflict with peace and it is difficult to impose both.

Justice, as far as use of force is concerned, denotes the first virtue of any social contract. If there is no justice in any social contract regulating use of force among the contractors then the operation of such contract is likely to fail due to illegitimate use of force.³⁷⁰ Therefore, justice is secured through legitimate use of force under the terms of a social contract. Michael Walzer has rightly stated that 'the only remedy against tyrannical regimes is revolution through the domestic process, not foreign intervention, as otherwise the citizens' rights to rebellion and to

³⁶⁶ Suggestions Presented by the Netherlands Government Concerning the Proposals for the Maintenance of Peace and Security Agreed on at the Four Powers Conference of Dumbarton Oaks as Published on October 9, 1944, 3 U.N.C.I.O., Doc. 2, G/7(j), January 1945, 312.

³⁶⁷ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 15; see also Suggestions Presented by the Netherlands Government Concerning the Proposals for the Maintenance of Peace and Security Agreed on at the Four Powers Conference of Dumbarton Oaks as Published on October 9, 1944, 3 U.N.C.I.O. General, Doc. 2, G/7(p), May 1, 1945 at 313.

³⁶⁸ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 16.

³⁶⁹ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 21.

³⁷⁰ John Rawls, *A Theory of Justice* (Harvard University Press 1971) 3.

self-determination is curbed. However, in the absence of necessary armed power to exercise such right of rebellion and self-determination it is just for foreign powers to intervene in accordance with social contract theory. But such intervention is not legitimate if there is a lack of proximity between such foreign powers and the intervened states. As justice is to be secured through legitimacy, it is necessary that a proximity can be established between the intervening and intervened states in order to overcome the legitimacy deficits of Public international law and as such justice in accordance with social contract. As a result, Rawls's theory of justice lacks proximity whereas Walzer's theory of 'just war' does not.³⁷¹ Here, Walzer's 'just war theory' resembles the social contract theory of that of Grotius which conceptualised the requirement of necessary proximity between the states to secure justice. On the contrary, Rawl's aim in international law is peace which a comprehensive concept of justice would threaten.³⁷² In order to facilitate peace, at the expense of justice, 'state sovereignty' was invented as a shield against a comprehensive concept of justice.

States, which are themselves unjust, cannot intervene into another state due to lack of legitimacy and hence justice.³⁷³ In commensurate to the requirement of legitimacy and justice, it is also essential that the necessary degree of neutrality is maintained.³⁷⁴ This is because, the external source of legal arguments from distantly located states, which do not have any social economic and political proximity between them and the other states, are susceptible for being the subject of use of force.³⁷⁵ Moreover, unjust states follow the principle of individualism, which is opposed to the principle of altruism, and the latter includes a belief in shared values which are not arbitrary but the distillation of societal functions.³⁷⁶ In an altruistic environment, where the power of individuals is transformed and vested in the state, use of force is legitimate to secure justice is a primary requirement of social contract entered into by the states at the international level on behalf of the individuals or group of individuals which they represent.

³⁷¹ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 23.

³⁷² John Rawls, 'The Domain of the Political and overlapping Consensus' (1989) 64 *New York University Law Review* 233.

³⁷³ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 23; see also John Rawls, *Theory of Justice* (Harvard University Press 1971) 380; D. A.J. Richards, *A Theory of Reasons for Action* (Oxford, Clarendon Press 1971) 138.

³⁷⁴ Roberto M Unger, *Social theory: Its Situation and Its Task, A Critical introduction to Politics* (Cambridge University Press 1987) 81.

³⁷⁵ Oliver W. Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 10; see also T. Twining 'The Bad Man Revisited' (1973) 58 *Cornell Law Review* 275.

³⁷⁶ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 59.

The social contract theory was the device used to legitimate use of force by authority of secular entities and to provide a premise for evaluating social organisations and questioning their justice.³⁷⁷ Hence, the right of non-interference with internal sovereignty and recognition of the external sovereignty of a state is the right guaranteed by social contract under the condition that such rights must be transferred to the political community. However, such right can be forfeited by the community where there is a breach of that contract, for instance breach of peace, and justice requires to restore peace by legitimate use of force. Therefore, if there is a breach of peace on the territory of any member state of the UN then the Security Council may authorise legitimate use of force in that territory and restore the full operation of the contract. The legitimate use of force includes the priority right of the regional organisation to intervene in order to promote peace followed the exercise of such right by the Security Council if the former fails to restore the condition of the social contract, and after all other alternatives than actual use of force have been extinguished, for instance as a last resort. Both Public international law and Islamic international law (if the members of the society of the territory are the subjects of Islamic law) do not, expressly or impliedly, hold that such use of force lacks the required degree of legitimacy.

Both sovereignty (in the name of peace) and justice (in the name of humanity) cannot be an absolute priority. This is because injustice may occur in a sovereign state and similarly peace may be promoted in a territory where sovereignty has been sacrificed by foreign intervention, such as NATO's intervention in Kosovo. In this circumstance, it is advisable for sovereignty and justice to be reconciled, if possible.³⁷⁸ However, it is often impossible to reconcile these two conditions as both are not inclined to be encroached by the other. As a result, it is expedient to promote a new concept of sovereignty where justice could be accommodated. This can be achieved by obtaining higher degree of legitimacy which is compatible with substantive justice. This is because justice is linked inseparably with legitimacy, including in terms of law-making, not least as only the exercise of power and authority that is based on Islamic values is perceived as being just.³⁷⁹ Although, as with justice, no general agreement exists as to the exact nature and meaning of legitimacy, it is accepted by most that a strong link exists between the legitimacy of a norm and its ultimate acceptance and compliance, including those of

³⁷⁷ Ibid, 21.

³⁷⁸ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 17.

³⁷⁹ A. A'La Mawdudi, *The Islamic Movement: Dynamics of Values, Power and Change* (K. Murad tr, Leicester: Islamic Foundation 1984) 49.

international law.³⁸⁰ This concept of substantive justice is linked to Islamic value of legitimacy and justice.³⁸¹ Therefore, such Islamic conception of legitimacy and justice have potentially significant implications in terms of UN law-making, not least in the development of substantive norms which generally do not reflect Shari‘a values or principles, and which procedurally have been produced by a non-Islamic system.³⁸²

6.2.3 Sovereignty revisited: perception of sovereignty and its limit

The concept of sovereignty which was introduced by Jean Bodin to the political and legal lexicon appealed to national unity and allowed the state to consolidate its power.³⁸³ The antagonism between natural and positive law precepts to appropriate sovereignty has since then marked the legal architecture.³⁸⁴ Moreover, the influence of Positive laws as man-made and emanating from sovereign’s will were gradually becoming unquestionable.³⁸⁵ Eventually, in the process of consolidating state power sovereignty becomes a predominantly political notion which enable the states to interact with each other regarding their external affairs, which is external sovereignty, without sacrificing interference in the internal affairs of states, which is internal sovereignty.

State sovereignty is based on the notion that no sovereign state shall interfere in the internal affairs of other sovereign states.³⁸⁶ On this basis, state sovereignty can be of two types, namely internal sovereignty and external sovereignty. These two types are interrelated to each other as if these are the two sides of the same coin. Whereas internal sovereignty entitles a state to be free from intervention, external sovereignty denotes its recognition as a sovereign entity at the international level.³⁸⁷ As a result, the former is the right of the state to use force in dealing with

³⁸⁰ A.A. An-Na’im, ‘Why Should Muslims Abandon Jihad? Human Rights and the Future of International Law’ in Richard Falk, B. Rajagopal and J. Stevens (eds), *International Law and the Third World: Reshaping Justice* (London: Routledge-Cavendish 2009) 82; see also Onuma Yasuaki, *A Transcivilisational Perspective on International Law* (The Hague: Hague Academy of International Law 2010) 177; Thomas Franck, *The Power of Legitimacy among Nations* (OUP 1990) 24.

³⁸¹ Katja Samuel, ‘Universality, the UN and the Organisation on the Islamic Conference: Single, complementary or competing universal legal orders?’ in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 275.

³⁸² Clark B. Lombardi, ‘Islamic Law in the Jurisprudence of the International Court of Justice’ (2007) 8 Chicago JIL 85, 87.

³⁸³ F. H. Hinsley, *Sovereignty* (Cambridge University Press 1986) 27; see also L. Wildhaber, ‘Sovereignty and International Law’ in R. St. J. Macdonald and D.M. Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Martinus Nijhoff 1983) 425.

³⁸⁴ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 25.

³⁸⁵ Thomas Hobbes, *Leviathan*, R. Tuck (ed) (Cambridge University Press 1991) 121.

³⁸⁶ Bardo Fassbender, ‘Sovereignty and Constitutionalism in International Law’ in Neil Walker (ed), *Sovereignty in Transition* (Hart Publishing 2003) 115.

³⁸⁷ *Ibid.*

its internal affairs and the latter is the right to be recognised as a sovereign entity in the capacity of being a member of international system consists of other sovereign entities. However, the failure of its internal aspect would affect the sovereignty as a whole and this is of particular interest to use of force.³⁸⁸

The membership of a state at the international system provides the internal as well as external sovereignty. Such membership also gives rise to correlated responsibility of every member state to respect the entitlement of other members. For example, article 48 of the International Law Commission's Restatement of the Law of State Responsibility gives rise to every state to be responsible for internationally wrongful acts which are committed not only against any particular state but also a group of states or regional organisation, such as genocide.³⁸⁹ In addition, article 49 permits countermeasures against a state which is responsible for the wrongful act in order to induce that state to comply with its obligation.³⁹⁰ These provisions have, in effect, provided for suspension or extinction of internal sovereignty for any state which is responsible for certain internationally wrongful acts. However, there is no provision in the Draft Articles on State Responsibility or elsewhere providing the extent to which internal sovereignty can be interfered with on the basis of suspension or extinction. In the absence of such provision, it is necessary to articulate the extent to which interference with internal sovereignty is legitimately permissible.

Article 2(7) does indeed guarantee states' freedom of choice as a guard against dictatorial interference by the UN organisation.³⁹¹ However, since the Charter's primary objective is the prevention of war, freedom of choice is a welcome but far from exclusive ordering principle.³⁹² Therefore, international organisation like the UN is entitled to take collective measures and as such intervene in the internal sovereignty of a state in certain circumstances. This is because states are not anthropomorphic, enjoying an autonomous moral standing, but are composed of individual human beings.³⁹³ However, the question is to what extent such sovereignty can be interfered? State sovereignty has been recognised by Article 2(7) of the UN Charter. It provides that:

³⁸⁸ Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 65.

³⁸⁹ State Responsibility, 31 May 2001, International Law Commission, article 48.

³⁹⁰ *ibid*, article 50.

³⁹¹ Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 61.

³⁹² *ibid*.

³⁹³ Herch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYBIL 1, 27.

Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Despite the prohibition of intervention in the internal or domestic affairs of states, there have been circumstances where the UN forces intervened. For example, in Congo, Yemen, Iraq, former Yugoslavia, Somalia, Haiti, and Sierra Leone.³⁹⁴ From practical perspective, such interventions were claimed to be legitimate on the basis of invitation from the governments of such states.³⁹⁵ However, such claim of legitimate intervention by invitation has not been authorised by the Charter.³⁹⁶ Moreover, the only circumstance that would trigger forceful intervention into the sovereignty of a state is on the ground of ‘breach of international peace and security’ as provided by Article 39 of the Charter.³⁹⁷ However, if state legitimacy is viewed in contractual terminology as protecting the basic human rights to liberty and life of its citizens, any aberration from this course may invite intervention because sovereignty is overridden through de-legitimation.³⁹⁸ In other words, the ultimate justification of the existence of states is the protection and enforcement of the natural rights of the citizens’ otherwise it forfeits not only its domestic legitimacy, but its international legitimacy as well.³⁹⁹

The threshold for triggering use of force on the ground of ‘breach of international peace and security’ has been gradually lowered in the practice of the UN’s principal organs.⁴⁰⁰ In its decision in the *Tadic* appeal, ICTY, referring to evidence that “the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a ‘threat to peace’ and dealt with under Chapter VII” concluded “that the ‘threat to peace’ of Article 39 may

³⁹⁴ See S. Res. 232 (1966) of 16 December 1966 (Rhodesia); S. Res 418 of 4 November 1977 (South Africa); S/RES/940 (1994) of 31 July 1994; S/RES/1160 (1998) of 31 March 1998; S/RES/1199 (1998) of 23 September 1998; S/RES/1203 (1998) of 24 October 1998; S/RES/1244 (1999) of 10 June 1999.

³⁹⁵ See section 2.1.4.3 of chapter 2.

³⁹⁶ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 41.

³⁹⁷ Article 39 UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 December 2017.

³⁹⁸ Phillip Montague, ‘Two Concepts of Rights’ (1980) 9 *Philosophy and Public Affairs* 160; see also Michael Walzer, ‘The Theory of Aggression’ in S. Luper-Foy (ed), *Problems of International Justice* (Boulder, Westview Press 1988) 151.

³⁹⁹ Fernando R. Tesón, *Humanitarian Intervention: AN Inquiry into Law and Morality* (2nd end, Dobbs Ferry Transnational Publication 1997) 15.

⁴⁰⁰ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 41.

include, as one of its species, internal armed conflicts.”⁴⁰¹ On this basis, in 1999, the then UN Secretary-General Kofi Annan has invited the states to redefine the parameters of sovereignty from the perspectives of globalisation and international cooperation.⁴⁰² In addition, in some instances the United States and United Kingdom as well as regional organisation, such as NATO, have intervened in the domestic affairs of different states.⁴⁰³ This course of action has given rise to a necessity to revisit the concept of sovereignty in the current world.

‘Peace’ within a territory is often left within the sovereign territory of a state where a state government or ruler is responsible for the maintenance of peace. However, what if the government or ruler is not legitimate due to being a usurper or tyrant? It is not just for the people to be ruled by a tyrant or a ruler who came into power by illegitimate or illegal means, for instance by using force rather than democratic or constitutional means. There may be peace in that territory as the new government or ruler might have been able to extinguish all rivalry movements by use of force but what about the status of the government or ruler and the means they are using to maintain such peace within the territory? This question gives rise to an inquiry into whether such government or ruler and their use of force are legitimate. The answer to this inquiry reflects on the view of Hans Kelsen who has stated that “the overwhelming interest that those in power, as well as those craving for power, have in a theory is pleasing to their wishes, that is in a political ideology.”⁴⁰⁴ This political ideology can be successfully implemented under the shield of sovereignty and hence suffers from legitimacy deficit as well as injustice.⁴⁰⁵

Justice requires the restoration and establishment of a new government or ruler and it may result in breach of peace, at least in short-term. Although it is true that the instances of international armed conflict are decreasing, but it is also true that the instances of non-international armed conflict are rising.⁴⁰⁶ Moreover, the complexity of the internal armed conflict and its frequent occurrence have given rise to not only breach of peace, either in short or long term, but also long-term injustice. It is understandable if the UN Charter promotes negative peace at the expense of short-term injustice,⁴⁰⁷ but it is not legitimate to maintain such

⁴⁰¹ *Prosecutor v. Tadic*, IT-94-1-AR 72 (October 1995), para. 30.

⁴⁰² Report of the Secretary-General on the Work of the Organisation, G.A.O.R., 54th Sess., 4th Plen. Meeting, A/54/1, 20 September 1999.

⁴⁰³ Adam Roberts, ‘The Use of Force’ in David Malone (ed), *The UN Security Council: From the Cold War to the 21st Century* (Lynne Rienner Publishers 2004) 136.

⁴⁰⁴ Hans Kelsen, *General Theory of Law and State* (A. Wedberg tr, Harvard University Press 1949) xvii.

⁴⁰⁵ M. Koskenniemi, ‘The Future of Statehood’ (1991) 32 *Harvard ILJ* 397.

⁴⁰⁶ Antonio Tonca, *Foreign Armed Intervention in Internal Conflict* (Martinus Nijhoff 1993) 147.

⁴⁰⁷ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 40.

peace at the expense of long-term injustice. This is because long-term injustice can lead to long-term breach of peace, which is positive peace.⁴⁰⁸ For example, the interventions in Syria and Libya have caused not only reoccurrence of breach of peace situations but also long-term injustice within the respective territories. In these circumstances, it is necessary to determine ‘is peace more precious than justice’? Is peace, conscionable, or even possible, without justice? These questions lead the way to the most important as well as controversial condition of peace as designed in the Charter system, which is sovereignty. The concept of sovereignty emerged in order to stabilise and incarnate a political order, national or international, against the entanglements of personal predilections and individual moralities.⁴⁰⁹ The extrapolated international rules, in particular the rule on the non-use of force, reflect this purpose.⁴¹⁰ International law on the use of force is designed primarily to promote peace at international level by leaving the states to control ideological differences within the territory under their sovereign power so that these ideological differences do not transform into breach of peace at international level.⁴¹¹ That means, an international organisation, like the Security Council, which is responsible for a system of collective security can leave any state alone to sacrifice the lives of its subjects if doing so protects peace and security at the international level. In the words of Koskenniemi:

Statehood functions as precisely that decision-process which tackles the problems of multiplicity of ideas and interpretative controversy regarding their fulfilment. Its very formality intends to operate as a safeguard so that these different (theological) ideals are not transformed into a globally enforced tyranny.⁴¹²

The existence of statehood under the shield of sovereignty often cause injustice and this injustice begins at the state level and may escalate at inter-state level with a legitimate cause, for instance to obtain justice. For example, rebellion against any tyrant and despotic government or ruler may give rise to internal armed conflict and eventually result in international armed conflict by transformation of such rebellion into right of self-determination.

⁴⁰⁸ Michael. J. Glennon, ‘The New Interventionism: The Search for a Just International Law’ (1999) 78 *Foreign Affairs* 2.

⁴⁰⁹ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 31.

⁴¹⁰ *ibid.*

⁴¹¹ *The Corfu Channel Case*, ICJ Rep. (1949) 4, 35.

⁴¹² M. Koskenniemi, ‘Theory: Implications for the Practitioner’ in P. Allott, T. Carty, M. Koskenniemi, and C. Warbick (eds) *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law 1991) 42.

In these circumstances, use of force by rebels is likely to be legitimate against the tyrants as a requirement of justice. The peace, therefore, has been breached to pursue justice. In other words, justice may require breach of peace in the current setting of international law on the use of force. As a result, sovereignty (in the name of peace) and justice often come into conflict with each other as the then Secretary-General Kofi Annan rightly stated that:

Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas that does not tell us which principle should prevail when they are in conflict.⁴¹³

6.2.3.1 How sovereign is sovereignty?: A comparative analysis of the sovereign power distributions in a divided world

Although sovereign equality has been stated in the UN Charter as its underlying principle in regards to the status of states at international level, the states have not achieved such equality as far as their role in the use of force is concerned.⁴¹⁴ This is consistent with the notion, as in Islamic international law, that the sovereignty belongs to the God only.⁴¹⁵ In practice, it is not possible to obtain sovereign equality in the power relationship and decision making process in terms of use of force. As a result, the conceptual differences between sovereignty in Islamic international law and Public international law actually in the same position from practical perspective. In addition, the nation state principle has been embraced by the Islamic world, largely out of economic, political, historical, self-determination, post-colonial and security-related necessity.⁴¹⁶ Therefore, the principle of nation-state is not repugnant to the interests of the modern Islamic world.

However, in the absence of sovereign equality there has been an unequal distribution of power in the decision-making process of the Security Council as well as in the use of extraterritorial force by the states. This situation has given rise to the revival of different principles of legitimate use of force on the basis of religion, political opinion, philosophical and ideological position.⁴¹⁷ Despite the modern division of the world into nation states has been agreed and accepted by both the adherents of Islamic law and other secular legal systems, there has been

⁴¹³ We the peoples: the role of the United Nations in the twenty-first century, Report of the Secretary-General, A/54/2000, March 27, 2000, p. 35, para. 218.

⁴¹⁴ Gerry Simpson, *Great Powers and Outlaw States* (Cambridge University Press 2004) 25.

⁴¹⁵ Katja Samuel, 'Universality, the UN and the Organisation on the Islamic Conference: Single, complementary or competing universal legal orders?' in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 271.

⁴¹⁶ Majid Khadduri, 'The Impact of International Law upon the Islamic World Order' (1972) 66 ASIL 46, 49.

⁴¹⁷ See section 5.2 of chapter 5.

disagreements as to the extent of the sovereign powers. As a result, it is necessary to secure consensus on the extent of legitimate use of force by sovereign powers in a modern world. As previously concluded that sovereignty is no longer an absolute political shield that can be used by states within its territory, a new concept of sovereignty is necessary to accommodate legitimate use of force to secure peace and justice at the same time.

Restricting the use of armed force entails high sovereignty costs.⁴¹⁸ It places external authority over some of the most significant decision that states make, thus in effect operating as a trade-off Westphalian sovereignty⁴¹⁹ and invoking international legal sovereignty.⁴²⁰ International agreement, like the UN Charter, provided the platform for boarding in a train of international sovereignty. However, it has proven to be an incomplete contract that lacks centralised means of interpretation.⁴²¹ As a result, states have been acknowledging the binding character of the Charter prohibition of use of force on the one hand and successfully managing to recourse to auto interpretation of this prohibition on the other hand. In these circumstances, the Charter system dampens concerns of uncertainty and mitigates sovereignty costs.⁴²² However, this institutional form is operating in exchange of high price for legitimacy and justice. How high a price in justice could be exacted for the sake of preserving the primacy of peace? And how well was peace being preserved by permitting such injustice?

In the practice of UN political organs, the distinction between what is justified (exculpated) and what is excusable (mitigated) is so fine as to be of pure (yet also considerable) theoretical interest.⁴²³ Bosnia, Kosovo, Macedonia, Somalia, Haiti, North Korea, Taiwan, East Timor, Iran and Iraq loomed large as cases where coercive diplomacy could make a difference.⁴²⁴ However, the practice and preference of use of force over diplomatic efforts to resolve disputes have been unsuccessful.⁴²⁵ While the dictate of 1945 had been ‘peace over justice’ under all

⁴¹⁸ Kenneth W. Abbott and Duncan Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organisation* 421, 435.

⁴¹⁹ The exclusion of external actors from the authority structure of a given state as Max Webber stated that ‘Modern state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’.

⁴²⁰ Stephen D. Krasner, *Sovereignty: Organised Hypocrisy* (Princeton University Press 1999) 14.

⁴²¹ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 16.

⁴²² *Ibid.*, 17.

⁴²³ Thomas Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (Cambridge University Press 2002) 191.

⁴²⁴ Marry M. Blechman and Tamara Cofman Wittes, ‘Defining Moment: The Threat of Force in American Foreign Policy Since 1989’ in Paul C. Stern (ed), *International Conflict Resolution after the Cold War* (National Academy Press 2000) 90; see also Ian Brownlie, *Use of Force by States* (Clarendon Press 1963) 364.

⁴²⁵ Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 61; see also White and Cryer, ‘A Threat Too Far?’ (1999) *Cal. W. Int’l LJ* 243, at 253.

circumstances, the notion of 'justice over peace' had now clearly gained momentum and weakened claims that the eventual use of force was unlawful.⁴²⁶ However, in this wake of the necessity to secure justice it is essential that positive peace is secured and in addition, the realisation of justice.⁴²⁷ The process of such interlacing can begin by complementing the legitimate rules of use of force of Public international law and Islamic international law as the former promotes peace and the latter promotes justice. This is because, without justice there can be no solid foundation for enduring peace.⁴²⁸

Both justice and peace promote higher degree of legitimacy. Legitimacy is a value system in which human rights uphold the values of legitimacy (legitimacy in the descriptive sense)⁴²⁹ and sovereignty upholds the value of political legitimacy. However, political legitimacy has become the subject of huge criticism due to its reluctance to recognise the values of legitimacy in the diplomatic affairs of state.⁴³⁰ In the current world, where use of force has become the subject of various interpretation, coercive diplomacy has often triumphed over the requirement for legitimacy. As a result, political legitimacy has been sacrificed to protect the interests of the powerful states by recourse to coercive diplomacy.

However, blatant preparation for the use of force can hardly become lawful once coercive diplomacy has failed and the promise of force is implemented.⁴³¹ The Charter's primer on peace preservation and war preclusion, in this case, complements the concept of coercive diplomacy and hence the necessity of justice in securing such coercive diplomacy is of vital importance. This is a genuine reading of the Charter and for this reason, it is said that 'extreme peace is war' and extreme justice is injustice.⁴³²

⁴²⁶ Susan J. Atwood, 'From Just War to Just Intervention' (2003) 19 New Eng. J. Pub. Pol. 55.

⁴²⁷ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 40.

⁴²⁸ Report of the Director-General to the ILO Conference, 48th Session 1964, Part I, pp 71 – 72 cited in M. Moskowitz, *International Concern with Human Rights* (Leiden: Sijthoff International Publishing 1974) 157.

⁴²⁹ Thomas Franck, *Fairness in International Law and Institutions* (OUP 2002) 221.

⁴³⁰ Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law* (OUP 2004) 29; see also Jean-Marc Coicaud, 'Introduction' in Hilary Charlesworth and Jean-Marc Coicaud (eds), *Faultlines of International Legitimacy* (Cambridge University Press 2010) 2.

⁴³¹ Nikolas Stürchler, *The Threat of Force in International Law* (Cambridge University Press 2007) 61; see also White and Cryer, 'A Threat Too Far?' (1999) Cal. W. Int'l LJ 243, at 253.

⁴³² *Summum ius summa iniuria* - Legal maxim cited by Cicero in De Officiis I, 10, 33.

6.3 The compatible and incompatible provisions of use of force in Public international law and Islamic international law

Most Western scholars have often associated Islam with destruction and violence.⁴³³ As concluded in chapter 3, this association is not based on any logical interpretation of Islamic jurisprudence. Therefore, insights into the profound spiritual and jurisprudential richness of the Muslim traditions are required to overcome existing preconceptions and prejudices towards Islam and Muslim States. For instance, Islamic law on the use of force, by qualifying use of force through norms in the Qur'an and Sunna,⁴³⁴ neatly corresponds with the general prohibition of use of force in Public international law that are, among others, geared towards the mission to prevent nations from using aggression in furtherance of their political, economic and religious objectives.

Whereas the general prohibition of use of force corresponds to both Public international law and Islamic international law, there are provisions of use of force which are incompatible with each other. The incompatibility of these provisions is mainly based on the claims of legitimate use of force. Use of force without the authorisation from the Security Council or defensive use of force not later approved by the SC is a serious concern in this regard. It lacks legitimate authority and is inconsistent with international law. Whereas Islamic international law requires any state to use legitimate force in accordance with *Siyar*, Public international law failed to secure compliance with such legitimacy requirement particularly when states and regional organisations recourse to force without authorisation from the Security Council.⁴³⁵ The national law may require certain procedures to be followed before use of force decision being taken but such procedures are not subject to scrutiny at the international level. In Islamic international law, the *Siyar* provisions are scrutinising legitimate authority and just cause but 'what is scrutinising the same in Public international law'? In this circumstance, the *Siyar* provisions may work as a guideline for the Security Council to impose some requirements of

⁴³³ Bernard Lewis, *Islam in History: Ideas, Men and Events in the Middle East* (London: Alcov Press 1973); see also Ruven Firestone, *Jihad: The Origin of Holy War in Islam* (OUP 1999); Samuel Huntington, *The Clash of Civilization and the Remaking of World Order* (New York: Simon & Schuster 1996).

⁴³⁴ Muhammad ibn Jarir al-Tabari, *AL-Tabari's Book of Jihad: A Translation from the Original Arabic* (Yasir S. Ibrahim tr, The Edwin Mellen Press 2007) 36; See also Khaled Abou El Fadl, *Reasoning with God: Reclaiming Shari'ah in the Modern Age* (Rowman & Littlefield 2014) xxxv; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press 1982) 47.

⁴³⁵ Syed Sharifuddin Pirzada, 'Islam and International Law' in Altaf Gauher (ed), *The Challenges of Islam* (Islamic Council of Europe 1978) 197.

legitimate use of force and just cause requirements on the states before using force against another state.

6.3.1 The compatible provisions of use of force

Despite the strong claims of legitimacy deficits of Islamic international law and Public international law by the opponents of these legal systems, there are compatible provisions between these two systems. For example, both these systems legitimate use of force only as a last resort and respect the just war theory.⁴³⁶ Both Public international law and Islamic international law prohibit use of force to retaliate or take revenge and limit such use of force only to repel any further attack.⁴³⁷

In addition, both systems concurrently agree that defensive force can be used against state as well as non-state actors at the state level and inter-state level. Like Public international law, Islamic international law also prohibits aggressive and permits defensive use of force.⁴³⁸ Both these legal systems recognise the principles of non-intervention and have developed principles for systematic intervention on humanitarian reasons.⁴³⁹ However, despite these similarities these two systems often come into conflict with each other.

6.3.2 The incompatible provisions of use of force in Public international law and Islamic international law

The argument for defensive use of force has been made on numerous occasions by states and regional organisations to legitimate their use of force.⁴⁴⁰ However, the arguments for such legitimate use of force were made despite the Charter has narrowed it down to defensive force in the occurrence of an ‘armed attack’.⁴⁴¹ These extra-Charter uses of force were facilitated by the lack of specific criteria for triggering an ‘armed attack’ and as such strong claim for legitimate right of self-defence.⁴⁴² This lacking of specific criteria and strong claim for legitimate right of self-defence have also resulted in both expansion and restriction of the right of defensive use of force by innovative interpretation from scholars, politicians and non-state

⁴³⁶ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 166.

⁴³⁷ See section 2.1 of chapter 2 and section 3.2 of chapter 3.

⁴³⁸ Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden 1977) 55; see also Mahmoud Shaltut, ‘The Qur’an and Combat’ in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 18.

⁴³⁹ See section 2.1.4.1 of chapter 2 and 3.2.2.1 of chapter 3.

⁴⁴⁰ Oscar Schachter, *International Law in Theory and Practice* (Leiden: Martinus Nijhoff 1991) 152 -55.

⁴⁴¹ Article 51 UN Charter, available at <<http://www.un.org/en/documents/charter/>> accessed 13 December 2017.

⁴⁴² See section 2.2 of chapter 2.

actors.⁴⁴³ In these settings, Islamic international law, on the other hand, provides for defensive use of force without needing the occurrence of an ‘armed attack’ but to protect the people from persecution.⁴⁴⁴

6.3.3 The compatible versus incompatible: a comparative analysis

Imposing any system of law on any population to whom such law is alien is prone to be violated very often than to be followed.⁴⁴⁵ For example, prohibition of use of force except in self-defence, the principle of non-intervention and sovereignty are principles of Public international law which are primarily based on Western legal systems and to certain extent alien to Islamic legal systems. Therefore, the dominance of the Western legal systems in the formation of Public international law results in conflict with those other parts of the world where the legal systems are not similar. Hence, those other parts of the world do not hold the provisions of international law on the use of force as contextually legitimate even though most of these provisions being conceptually similar. The conceptual similarity loses its force in the acceptance of the alien legal systems or provisions as law due to the label that has been affixed with such law, namely Public international law and Islamic international law.

6.3.3.1 Use of force in self-defence

Both Public international law and Islamic international law allow use of force in self-defence but in different circumstances, namely Public international law allows defensive use of force in response to an ‘armed attack’ and Islamic international law allows proportionate use of force in self-defence even if the attack does not occur in the threshold of an ‘armed attack’. As there is no set threshold to trigger an armed attack, Islamic international law can complement to develop a general right of self-defence in response to any attack which does not reach the threshold of an ‘armed attack’. For example, proportionate use of force in self-defence.

Pre-emptive self-defence is readily available in Islamic international law when such force is necessary and there is no other alternative. Islamic international law invokes the ‘necessity’ requirement to use force but subject to obtaining higher degree of legitimacy. In other words, it feeds the ‘necessity’ requirement in accordance with law, such as by fulfilling the Islamic legal requirement of use of force, for instance jihad and harb. On the other hand, the state

⁴⁴³ Andrea Paulus, *Realism and International Law: Two Optics in Need of Each Other* (2002) 96 *American Society of International Law Proceedings* 269; see also Sean D Murphy, ‘The Doctrine of Pre-emptive Self-Defence’ (2005) 50 *Villanova Law Review* 699.

⁴⁴⁴ John Kelsay, *Arguing the Just War in Islam* (Harvard University Press 2009) 116.

⁴⁴⁵ Carlo Focarelli, *International Law as Social construct* (OUP 2012) 35.

practice under Islamic international law suggests that the necessity requirement often triumphs over the legal requirement. For example, Turkey's use of armed force in January 2018 in Syrian border territory which is under the control of Kurdish community which the former claims to be terrorists and on that basis, uses force in pre-emptive self-defence.⁴⁴⁶

6.3.3.2 Double Standards of Islamic international law in the decision-making process

In Islamic international law, 'Jihad' requires religious authorisation whereas 'harb' requires political authorisation and direction.⁴⁴⁷ These requirements ensure a double standard in the decision making process. Islamic international law can also maintain a double standard in the use of pre-emptive force in self-defence to promote higher degree of legitimacy. However, 'post-use of force' scrutiny by an independent body is necessary to ensure that such decision making has not been subject to abuse and post conflict justice is recognised by Islamic international law.⁴⁴⁸

6.3.3.3 State responsibility for use of force by non-state actors

Islamic international law does not hold a state responsible for extraterritorial force being used by non-state actors. Rather this system promotes use of force for law enforcement purposes, for instance as a requirement of justice, by specifically using force against the non-state actors which has used such extraterritorial force. For example, punishing Banu Qurayza tribe for treachery rather than the whole Jewish community.⁴⁴⁹ On the other hand, Public international law, although in limited circumstances, attributes responsibility to state for the extraterritorial use of force by non-state actors and therefore permits defensive use of force against the responsible state. Islamic law will only allow intervention to defend the state from aggression perpetrated by the non-state actors who are harboured in foreign countries. Although this is against the general prohibition of use of force, the necessary degree of legitimacy is achieved.

6.3.3.4 Intervention by invitation

Intervention by invitation is allowed in both Public international law and Islamic international law but the difference is that in the former system only legitimate government can consent or

⁴⁴⁶ BBC News Desk, 'Syria war: Turkey denounces US 'terror army' plan for border' (15 January 2018) <<http://www.bbc.co.uk/news/world-middle-east-42687958>> accessed 20 January 2018.

⁴⁴⁷ Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 20.

⁴⁴⁸ M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in the Time of War and Peace* (Cambridge University Press 214) 249.

⁴⁴⁹ John Glubb, *A Short History of the Arab Peoples* (Hodder and Stoughton: London 1969) 46.

invite whereas in the latter system both government and people can give consent or invite to intervene. Islamic international law can complement where such intervention is necessary to protect the people against tyranny especially when collective security system does not respond to such crisis. In this way, Islamic international law allows use of force to promote justice.⁴⁵⁰ For instance, in Islamic international law force (both defensive and offensive) can be used to root out oppression, persecution, and other forms of injustice.⁴⁵¹ Public international law, on the other hand, confines the lawful exercise of unilateral force to the single case of self-defence.⁴⁵² However, even such narrowed down lawful exercise of self-defence often lacks legitimacy and makes claim for its expansion.⁴⁵³

6.3.3.5 Protections of Nationals Abroad

In Public international law, the principle of responsibility to protect allows states to use force to protect their nationals abroad.⁴⁵⁴ On the other hand, Islamic international law requires states to use force not only to protect the nationals but also foreigners (*Musta'min*) and non-Muslims (*dhimmis*) indiscriminately.⁴⁵⁵ The recognition of the status of *Musta'min* and *Dhimmis* was a reminder of the Universalist mission of the Islamic faith, and Roman legal concepts of sovereignty had been erased since the early Islamic conquests, which did away with all traces of communal jurisdiction.⁴⁵⁶ Therefore, Islamic international law promotes justice by allowing use of force to protect everyone living within the jurisdiction.⁴⁵⁷ Hence, Justice is the supreme and quintessential Islamic value in relation to legal, political and social issues especially.⁴⁵⁸

⁴⁵⁰ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: The John Hopkins Press 1966) 10.

⁴⁵¹ Mouloud Kassim Nait-Belkacem, 'The Concept of Social Justice in Islam' in Altaf Gauhar (ed), *The Challenge of Islam* (London: Islamic Council of Europe 1978) 134.

⁴⁵² Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 177.

⁴⁵³ See sections 5.2 and 5.3 of chapter 5.

⁴⁵⁴ Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 165.

⁴⁵⁵ Francisco Apellaniz, 'An Unknown Minority between the dar-al-harb and dar-al-islam' in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 34.

⁴⁵⁶ Giovanna Calasso, 'Introduction: Concepts, Words, Historical Realities of a "Classical" Dichotomy' in Giovanna Calasso and Giuliano Lancioni (eds), *Dar al-Islam/Dar al-harb: Territories, People and Identities* (Brill 2017) 14.

⁴⁵⁷ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: The John Hopkins Press 1966) 10; see also Labeeb Ahmed Bsoul, *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 14.

⁴⁵⁸ G. Kramer, 'Justice in Modern Islamic Thought' in Abbas Amanat and Frank Griffel (eds), *Shari'a: Islamic Law in the Contemporary Context* (Stanford University Press 2007) 27; see also Ali Ahmed, 'The Role of Islamic Law in the Contemporary World Order' in Mashood A. Baderin (ed), *International Law and Islamic Law* (Farnham: Ashgate 2008) 56; see also Sheikh Wahbeh al-Zuhili, 'Islam and International Law' (2005) 87 IRRC 269, 271.

6.3.3.6 Judicial scrutiny of use of force

As the states and regional organisations are claiming legitimacy of defensive use of force beyond the charter framework, the nature and extent of such defensive force have become subject of dynamic interpretation and covering different circumstances. For example, use of force in the gap between Articles 2(4) and 51.⁴⁵⁹ Uses of force in this gap are claimed to be legitimate on the ground of necessity to enforce the law and thus resulted in claims of legitimacy of such use of force based on diverse grounds. In these challenging circumstances, it is necessary to agree on the legitimate extent of such use of force in different circumstances. Islamic international law can complement Public international law in this regard by adopting the Islamic principle of proportional use of defensive force, which is subject to judicial scrutiny.⁴⁶⁰ In this way, all the extra-Charter claims of legitimate use of force would be subject to accountability and scrutiny.

6.4 Crime of Aggression and its compatibility with Islamic international law on the use of force

Following the trial of military personnel, who were responsible for unlawful resort to major military force after the First and Second World Wars, ‘aggression’ was declared to constitute the supreme international crime.⁴⁶¹ Today, the prohibition on aggression is widely considered a *jus cogens* norm – a standard of international law that may not be changed by a contrary treaty provision or the development of a new rule of customary international law.⁴⁶²

6.4.1 The definition of aggression in the Charter system

The United Nations Charter has provided for the maintenance of international peace and security by prohibiting aggression. However, due to the challenges posed on the charter system in relation to use of force, in certain circumstances, ‘aggression’ has been claimed to be legitimate.⁴⁶³ For example, humanitarian intervention, fighting international terrorism and promoting national security. This claim of legitimate aggression has been inconsistent with the

⁴⁵⁹ See section 2.1.3 of chapter 2.

⁴⁶⁰ M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in the Time of War and Peace* (Cambridge University Press 2014) 249.

⁴⁶¹ ‘International Military Tribunal (Nuremberg), Judgment and Sentences, 1 October 1946’ (1947) 41 *American Journal of International Law* 172, 186.

⁴⁶² *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits) (*Nicaragua v. United States*) [1986] ICJ Rep.14, 100 -101; see also Mary O’Connell, ‘Jus Cogens, International Law’s Higher Ethical Norm’ in D. Ear Childress III (ed), *The Role of Ethics in International Law* (Cambridge University Press 2011) 78.

⁴⁶³ See section 2.3 of chapter 2.

definition of ‘aggression’ adopted by the General Assembly in 1974 which aimed to protect the sovereignty and territorial integrity of states. The General Assembly definition of aggression is based on Resolution 3314.⁴⁶⁴ Aggression is defined, in broad terms, as:

The use of armed force, against the sovereignty, territorial integrity, or political independence of a state, or in any other manner inconsistent with the UN Charter.⁴⁶⁵

Whereas the Resolution strongly prohibited any justification for aggression,⁴⁶⁶ such prohibition has not been absolute as it has allowed use of armed force which is without prejudice to the United Nations Charter including its provisions on the lawful use of force.⁴⁶⁷ This arrangement has permitted ‘aggression’ as a legitimate use of armed force to self-defence as provided in Article 51 of the Charter and Collective action taken by the Security Council according to Article 39 of the Charter. However, this definition has not explicitly limited aggression to the exceptions provided by the Charter.⁴⁶⁸ For example, the Resolution’s annex did not directly equate all uses of force that violated Article 2(4) of the UN Charter with ‘aggression’.⁴⁶⁹ As a result, this definition of aggression remains open-ended to include use of armed forces which is not permitted in the UN Charter.

6.4.2 The definition of aggression in the ICC

Despite the open-ended nature of the definition of aggression, the aspiration to prosecute and punish governmental leaders who initiate use of force in aggression continued since the prosecution of major political leaders at the Nuremberg and Tokyo war crimes tribunals.⁴⁷⁰ Throughout most of the 20th century, that aspiration remained unfulfilled, but 120 states adopted the Rome Statute establishing the International Criminal Court (ICC).⁴⁷¹ The ICC Statute was adopted in Rome on 17 July 1998 and entered into force on 1 July 2002.⁴⁷² Article 5(1) (d) of the Statute provides that the ICC has jurisdiction over, among other crimes, the crime of aggression.⁴⁷³ Because the state parties were not able to reach agreement as to what

⁴⁶⁴ GA Res. 3314 (XXIX), 14 December 1974.

⁴⁶⁵ Ibid, Article 1.

⁴⁶⁶ Ibid, Article 5(1).

⁴⁶⁷ Ibid, Article 6.

⁴⁶⁸ Julius Stone, ‘Hopes and Loopholes in the 1974 Definition of Aggression’ (1977) 71 *American Journal of International Law* 224.

⁴⁶⁹ Sean D. Murphy, ‘The Crime of Aggression at the International Criminal Court’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 538.

⁴⁷⁰ Ibid, 533.

⁴⁷¹ Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.

⁴⁷² Mary O’Connell and Mirakmal Niyazmatov, ‘What is Aggression? Comparing the Jus ad Bellum and the ICC Statute’ (2012) 10 *Journal of International Criminal Studies* 189.

⁴⁷³ Article 5(1) (d), Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.

constitutes the crime of aggression during the Rome Conference, it was decided that the ICC would not have authority to exercise jurisdiction over the crime until after amendments to the Statute defining the crime of aggression were adopted.⁴⁷⁴

Following the proposal of Special Working Group on the Crime of Aggression (SWGCA), a definition of aggression has been adopted at the Kampala Review Conference.⁴⁷⁵ The gist of the General Assembly definition was followed by the parties of the International Criminal Court (ICC) at Kampala in 2010, with a view to defining aggression.⁴⁷⁶ The Kampala amendment defines both ‘act of aggression’ and ‘crime of aggression’. Under Article 8*bis*(2), ‘act of aggression’ means:

The use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall in accordance with the United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

⁴⁷⁴ Article 5(2), Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3.

⁴⁷⁵ Mary O’Connell and Mirakmal Niyazmatov, ‘What is Aggression? Comparing the Jus ad Bellum and the ICC Statute’ (2012) 10 *Journal of International Criminal Studies* 189.

⁴⁷⁶ Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression, Res. RC/Res.6, Annex I, 11 June 2010.

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁴⁷⁷

Under Article 8bis (1) ‘crime of aggression’ means:

the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁴⁷⁸

These definitions of ‘act of aggression’ and ‘crime of aggression’ have raised some contentious issues regarding the nature and the circumstances of use of force when ‘act of aggression’ can be treated as a ‘crime of aggression’. Although the ICC’s definition of ‘act of aggression’ draws heavily on the General Assembly’s 1974 resolution, the latter never included all types of use of force in repugnant to Article 2(4) of the UN Charter as act of aggression.⁴⁷⁹ On the contrary, the ICC’s definition of ‘act of aggression’ included any violation of Article 2(4) of the UN Charter as act of aggression without any scrutiny from the Security Council.⁴⁸⁰ However, such scrutiny is recognised by the 1974 General Assembly resolution. As a result, ICC’s definition of ‘act of aggression’ includes every violation of Article 2(4) of the UN Charter.⁴⁸¹

Each use of force in violation of Article 2(4) of the UN Charter can be an act of aggression but the question is, whether such act can be prosecuted as ‘crime of aggression’. ICC’s ‘crime of aggression’ by its terms is a leadership crime; the defendant must hold a position by which he or she ‘effectively ... exercise[s] control over or ... direct[s] the political or military action of

⁴⁷⁷ International Criminal Court Assembly of States Parties, Review Conference, Resolution RC/Res 6, Annex I, Art 8bis, para 2 <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 18 December 2017.

⁴⁷⁸ International Criminal Court Assembly of States Parties, Review Conference, Resolution RC/Res 6, Annex I, Art 8bis, para 1 <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 18 December 2017.

⁴⁷⁹ Sean D. Murphy, ‘The Crime of Aggression at the International Criminal Court’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 538.

⁴⁸⁰ Sergey Sayapin, *Crime of Aggression in International Criminal Law: Historical Development, Comparative Analysis and Present State* (Springer 2014) 311.

⁴⁸¹ Yoram Dinstein, *War, Aggression and Self-Defence* (5th edn, Cambridge: Cambridge University Press 2011) 135.

a State'.⁴⁸² The language adopted excludes non-governmental actors, such as persons leading a terrorist group, such as al-Qaeda, leaders of an insurgency, or industrialists in a country even if they have substantial involvement in and influence upon governmental conduct.⁴⁸³ As a result, any state which is harbouring a terrorist group to initiate an act of aggression against another state cannot be prosecuted for crime of aggression according to ICC's definition. This position eventually conflicts with the law of state responsibility which makes every state responsible for use of force or act of aggression committed by non-state actors from its territory.⁴⁸⁴ In these circumstances, the ICC definition is incompatible with the law of state responsibility as far as prosecution for 'crime of aggression' is concerned.

In addition, the ICC's definition of 'crime of aggression' has provided for a new requirement, which is 'manifest violation of the UN Charter'.⁴⁸⁵ However, this requirement of 'manifest violation' is not found in the UN Charter or in the General Assembly's 1974 resolution.⁴⁸⁶ Determining the existence of a 'manifest violation of the Charter' requires findings with respect to each of the three elements identified in the definition of the crime: character, gravity, and scale.⁴⁸⁷ If the 'manifest violation' standard is interpreted in this way, there may be few prosecutions for crimes of aggression before the ICC since aggression of that scale very rarely happens.⁴⁸⁸ Similarly, the non-prosecution of cases under such a high standard might have the unfortunate effect of *sub silentio* condoning lesser uses of force.⁴⁸⁹ On the contrary, a low standard for what constitutes crime of aggression could end up deterring low levels of undesirable coercion, but it might also inhibit lawful uses of force that help to keep aggressors in check.⁴⁹⁰ In these circumstances, it is necessary to determine the dividing line between permissible force and impermissible aggression.

⁴⁸² Roger S. Clare, 'Amendments to the Rome Statute of the International Criminal Court Considered at the First Review Conference on the Court, Kampala, 31 May - 11 June 2010' (2010) 2 Goettingen J. Int'l Law 689.

⁴⁸³ Mauro Politi, 'The ICC and the Crime of Aggression' (2012) 10 Journal of International Criminal Justice 267, 285.

⁴⁸⁴ Article 8, International Law Commission, 'Responsibility of States for Internationally Wrongful Acts' (12 December 2001) <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 24 December 2017; see also James Crawford, *State Responsibility* (Cambridge University Press 2013) 152.

⁴⁸⁵ International Criminal Court Assembly of States Parties, Review Conference, Resolution RC/Res 6, Annex I, Art 8bis, para 1 <https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 18 December 2017.

⁴⁸⁶ Sean D. Murphy, 'The Crime of Aggression at the International Criminal Court' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 541.

⁴⁸⁷ RC/Res 6, Annex III, Understanding No 7.

⁴⁸⁸ Sean D. Murphy, 'The Crime of Aggression at the International Criminal Court' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2015) 553.

⁴⁸⁹ *ibid.*

⁴⁹⁰ *ibid.*, 556.

6.4.2.1 Permissible acts of aggression

The general prohibition of use of force is a peremptory norm of Public international law.⁴⁹¹ Therefore, any use of force which is not allowed within the exceptions provided by the UN Charter and customary international law is likely to lack the necessary degree of legitimacy.⁴⁹² However, all extra-Charter uses of force are not illegitimate due the nature and extent of such uses of force.⁴⁹³ For example, pre-emptive self-defence and humanitarian intervention. Uses of force in these contexts are claimed to be legitimate based on 'just war' theory.⁴⁹⁴ 'Just war' theory has provided the valuable support for legitimate pre-emptive use of force in self-defence.⁴⁹⁵ In addition, customary international law has provided the platform in adapting the Charter framework to legitimate such defensive force in pre-emption.⁴⁹⁶ As a result, the question of permissibility of use of force, in the context of crime of aggression, is narrowed down to humanitarian intervention.

Humanitarian intervention has been the state practice for centuries and represents customary international law.⁴⁹⁷ States have intervened to protect the 'natural rights' of other states' subjects, or to protect their own subjects from abuse in a foreign land.⁴⁹⁸ However, following the atrocities and tragedies occurred before and during World War II, the prohibition of use of force was adopted by the UN Charter in order to promote peace. But this prohibition to use force has not explicitly provided on the consequences of such use of force to prevent human rights abuses and humanitarian crises.⁴⁹⁹ As the international community gets further away from the memories of World War II and faces more modern tragedies, support for humanitarian intervention grows to secure justice.⁵⁰⁰ Moreover, humanitarian intervention could be a potential tool to prevent war crimes, genocide and crimes against humanity which the Rome

⁴⁹¹ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 205.

⁴⁹² See sections 2.4 and 2.5 of chapter 2.

⁴⁹³ See section 5.2 of chapter 5.

⁴⁹⁴ Erin Creegan, 'Justified Use of force and the Crime of Aggression' (2012) 10 *Journal of Int'l Crim. Justice* 59.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ See section 2.5 of chapter 2.

⁴⁹⁷ Erin Creegan, 'Justified Use of force and the Crime of Aggression' (2012) 10 *Journal of Int'l Crim. Justice* 59.

⁴⁹⁸ F. K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International 1999) 31.

⁴⁹⁹ C. Kerß and L. von Holtzendorff, 'The Kampala Compromise on the Crime of Aggression' (2010) *Journal of International Criminal Justice* 1179, 1205.

⁵⁰⁰ F. K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (Kluwer Law International 1999) 221.

Statute criminalises. State practices have also appeared to have favoured humanitarian intervention, at least in clearly non-pre-textual cases, such as in Bosnia and Rwanda.⁵⁰¹

Use of force by a terrorist group can be an ‘act of aggression’ but has not been categorised as a ‘crime of aggression’ under the ICC’s definition.⁵⁰² As a result, terrorist groups are not subject to prosecution for crime of aggression. This is a dilemma as ‘breach of international law on state responsibility’ has not been made subject to criminal responsibility in the ICC’s definition of ‘crime of aggression’. However, such use of force by a terrorist group can be reconciled with the law of state responsibility. This is because, the law of state responsibility holds the state responsible for aggressive use of force by a terrorist group from its territory.⁵⁰³ As use of force in self-defence is permissible under Article 51 of the UN Charter against an ‘armed attack’ by a terrorist group,⁵⁰⁴ use of force by terrorist groups can be effectively defended even where ICC’s definition of aggression excluded such use of force as a crime.

It is worth pointing out that ‘crime of aggression’ is a political crime in contrast to ‘genocide’, which is a crime against humanity, or war crime, which is inexcusable.⁵⁰⁵ The political nature of the crime makes the leadership of one state responsible for ‘crime of aggression’ when any harm is committed against the territorial independence and sovereignty of another state.⁵⁰⁶ On the other hand, the 1974 General Assembly definition of aggression focuses on state responsibility for aggression and not on individual criminal responsibility.⁵⁰⁷ Furthermore, the International Law Commission recognised state responsibility for aggression in Article 19 of the Articles on State Responsibility.⁵⁰⁸

⁵⁰¹ S. L. Burg and P. S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (M E Sharpe 1999) 40; see also M. Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (Cornell University Press 2002) 48.

⁵⁰² Mauro Politi, ‘The ICC and the Crime of Aggression’ (2012) 10 *Journal of International Criminal Justice* 267, 285.

⁵⁰³ Article 8, International Law Commission, ‘Responsibility of States for Internationally Wrongful Acts’ (12 December 2001) <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 24 December 2017; see also James Crawford, *State Responsibility* (Cambridge University Press 2013) 152.

⁵⁰⁴ See section 2.1.2.1.1 of chapter 2.

⁵⁰⁵ Erin Creegan, ‘Justified Use of force and the Crime of Aggression’ (2012) 10 *Journal of Int’l Crim. Justice* 59, 62.

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Article 5(2), GA Res. 3314 (XXIX), 14 December 1974.

⁵⁰⁸ Article 19, International Law Commission, ‘Responsibility of States for Internationally Wrongful Acts’ (12 December 2001) <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf> accessed 24 December 2017; see also James Crawford, *The International Law Commission’s Articles on State Responsibility, Introduction, Text and Commentaries* (Cambridge University Press 2001) 36.

The historical record and the weight of authority demonstrate that, within the *jus ad bellum* ‘aggression’ is any serious violation of the prohibition on the use of force.⁵⁰⁹ A violation of Article 2(4) of the UN Charter is a *prima facie* act of aggression.⁵¹⁰ Acts serious enough to trigger the Article 51 self-defence will constitute aggression.⁵¹¹ The *jus ad bellum*, established by the UN Charter and customary international law, does not recognise individual criminal responsibility for crime of aggression. However, the ICC definition does so recognise but by creating different definition than that found in the *jus ad bellum*. In these circumstances, the legitimacy of prosecutions for crime of aggression under the ICC definition is under scrutiny especially when such definition is not supported by either *jus ad bellum* or customary international law. Moreover, as aggression is a political crime the decision to use force is political and should be subject to political sanction, such as by the Security Council, rather than criminal ones.⁵¹²

6.4.3 The compatibility of crime of aggression with Islamic international law on the use of force

Islamic international law does not specifically impose criminal responsibility for use of force in aggression.⁵¹³ However, any aggressive use of force, irrespective of its character, scale and gravity, is prohibited in Islamic international law.⁵¹⁴ On the occurrence of aggressive use of force, Islamic international law provides for defensive use of force in response to such aggression and this is compatible with the Charter framework. In addition, humanitarian intervention is permitted in Islamic international law to save persecuted people from tyranny and oppression. However, such use of force is not permitted in the Charter framework but in customary international law. Therefore, Islamic international law is compatible with customary international law in this respect.

The legitimacy of use of force, in Islamic international law, is depended on the right authority and just cause.⁵¹⁵ As a result, legitimate extraterritorial recourse to force is the authority of a ruler or government but not any non-state actor or terrorist group, and this is

⁵⁰⁹ Mary O’Connell and Mirakmal Niyazmatov, ‘What is Aggression? Comparing the Jus ad Bellum and the ICC Statute’ (2012) 10 Journal of International Criminal Studies 189.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² Erin Creegan, ‘Justified Use of force and the Crime of Aggression’ (2012) 10 Journal of Int’l Crim. Justice 59.

⁵¹³ See section 3.2 of chapter 3.

⁵¹⁴ Mahmoud Shaltut, *Jihad in Mediaeval and Modern Islam* (Rudolph Peters tr, E.J. Brill, Leiden 1977) 55; see also Mahmoud Shaltut, ‘The Qur’an and Combat’ in Prince Ghazi bin Muhammad, Ibrahim Kalin and Mohammad Hashim Kamali (eds), *War and Peace in Islam: The Uses and Abuses of Jihad* (MABDA 2013) 18.

⁵¹⁵ See section 3.2.3.1 of Chapter 3.

because a ruler or government has the right authority to make decision on recourse to force.⁵¹⁶ In addition, the ‘just cause’ of use of force is determined by ‘jihad’ which is the basis of use of force in Islamic international law.⁵¹⁷ As extraterritorial use of force under the banner of ‘jihad’ is a collective duty under Islamic international law, the ruler or government must satisfy that such use of force is legitimate. In other words, the ruler or government must provide the basis for use of force before calling for jihad and such basis must be consistent with Shari‘a.⁵¹⁸

As jihad is a collective responsibility, Islamic international law does not recognise individual criminal responsibility for aggression even when the call for jihad has been illegitimate, for instance when the ruler called for jihad for material gain which is opposed to Shari‘a. For example, call for jihad by Saddam Hussain for continued support in the invasion of Kuwait in 1990.⁵¹⁹ As a result, Islamic international law does not recognise individual criminal responsibility for aggression. Therefore, if a leader of a Muslim state is prosecuted for crime of aggression then he can question the legitimacy of such prosecution on the basis that the use of force was in accordance with Islamic international law and hence legitimate. In these circumstances, Muslim majority states may not be inclined to accept the jurisdiction of the ICC for prosecution of crime of aggression or send a notice of reservation to reflect that ‘in case of any inconsistency between Shari‘a law and the ICC Statute then the former shall prevail’. This course of action is consistent with *jus cogens* as it does not provide for individual criminal responsibility for aggression.

However, aggression is specifically prohibited in Islamic international law and aggressive use of force triggers right of self-defence even when such aggressive use of force is not to the extent of an ‘armed attack’. This situation promotes justice as when a Muslim state uses defensive force against any aggressor state the former can claim legitimacy of using such force on the basis of Islamic international law. The same is true of a Muslim state using force to end humanitarian crises in another state. Although the ruler or government claims legitimacy of

⁵¹⁶ Mohammad Asad, *The Principle of State and Government in Islam* (Dar al-Andalus: Gibraltar 1985) 59; See also Shawki Allam, *The Ideological Battle: Egypt's Dar al- Iftaa Combats Radicalization* (The Grand Mufti of Egypt 2016) 21.

⁵¹⁷ See section 3.4 of chapter 3; see also Niaz A. Shah, ‘The Use of Force under Islamic Law’ (2013) 24 EJIL, 343, 358.

⁵¹⁸ Farooq A. Hasan, ‘The Sources of Islamic Law’ (1982) 76 American Society of International Law Proceedings 65; see also Shaheen S. Ali, ‘Resurrecting Siyar through Fatwas?’ in M. Cherif Bassiouni and Amna Guellali (eds.), *Jihad and its Challenges to International and Domestic Law* (The Hague Academic Press, The Hague, 2010) 116.

⁵¹⁹ Yvonne Yazbeck Haddad, ‘Operation Desert Shield/Desert Storm: The Islamist Perspective’ in Phyllis Bennis and Michel Moushabeck (eds), *Beyond the Storm: A Gulf Crisis Reader* (Oliver Branch Press: New York 1991) 251.

such use of force in Islamic international law, the assessment for using force is made by the ruler or government based on political considerations, namely national interest, safeguarding or restoring other people's fundamental rights or action the necessity of international order and stability decision, rather than legal. Where political considerations are the key elements for decision-making on use of force, the responsibility for such decision-making should be subject to political sanction by regional or international organisation rather than criminal. As a result, the ICC definition of aggression lacks legitimacy because both Public international law and Islamic international law do not provide for a criminal responsibility for aggression.

6.5 The role of treaties in the complementation process

Islamic international law on the use of force and its approach to treaty obligations may be drawn on to uphold the notion of peaceful and amicable relations between the members of UN which include not only Muslim states but also other countries which are not ruled by Islamic law.⁵²⁰ Muslim nations' propensity for territorial plurality and peaceable conduct has been borne out by their institution of regular treaty relations with non-Muslim States with which Islamic polities have in practice rejected to have been in an unmitigated state of hostilities on account of religious differences.⁵²¹ It is in this context that entering into bilateral and multilateral treaties can be one of the effective ways to accommodate conflicting legal systems in an international level to agree on conduct of use force.⁵²²

However, treaties themselves could be conflicting to each other. For example, a treaty between two countries made an agreement not to use force against each other is likely to be in contravention of a multilateral treaty which required its member states to take immediate collective action by using force against the country against which collective measures have been authorised by an international institution established by such treaty, for instance the Security Council. Likewise, a treaty between country A and country B for not to use force against each other, similar agreement between country B and C, and between country C and A are unlikely to come into conflict with each other as all the parties agreed to abstain from using force. On the contrary, if country A and country B agrees on not to use force against each other but country B and C agreed the same and also that they will collectively defend any external

⁵²⁰ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 173.

⁵²¹ Ibid, 182.

⁵²² Labeeb Ahmed Bsoul, *International Treaties (Mu'ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 111.

attack in their country. However, country A and country C are not in such contractual obligation. In this setting, if country A uses force against country C then country B cannot offer help to country C for being contractually obliged to not to use force against country A. In this scenario, B is represented as a Muslim country which is obliged by a bilateral treaty with another country, which is country A, that the former must not use force against the latter and vice versa.⁵²³ Country B is, however, can notify the other party, which is country A, about termination of the treaty and then recourse to force against it if the latter is responsible for violation of the treaty provisions.⁵²⁴ This is the position of Islamic international law which binds the parties to a treaty even if when use of force by any of the parties of the treaty is necessary to protect serious catastrophe.⁵²⁵

On the contrary, Public international law has developed hierarchy in the status of treaties. Any treaty or its provision can supersede others on the basis of its status. For example, a peremptory norm of international law on the use of force, such as Article 2(4) of the UN Charter, can supersede any conflicting provisions in a bilateral treaty. The status of peremptory norms of a treaty has been recognised by the 1969 and 1986 Vienna Conventions on the Law of Treaties (VCLT).⁵²⁶ For example, the Preamble to the 1969 VCLT refers to ‘the principles of international law embodied in the Charter’, and Article 30(1) makes the rules on successive treaties on the same matter ‘subject to Article 103 of the Charter’.⁵²⁷ Article 52 further stipulates that ‘a treaty is void if concluded by the threat or use of force in violation of the principles of international law embodied in the Charter’.⁵²⁸ 1986 VCLT includes analogous cross-references; most significantly, Article 30 establishes that ‘in the event of a conflict between obligations under the Charter ...and obligations under a treaty, the obligations under the Charter shall prevail’.⁵²⁹ As a result, Article 103 has been incorporated into general treaty

⁵²³ Ibid, 25.

⁵²⁴ Ibid, 108.

⁵²⁵ The role of treaties in Islamic international law is discussed in section 3.2.2.2 of chapter 3.

⁵²⁶ Richard Gardiner, *Treaty Interpretation* (OUP 2008) 6.

⁵²⁷ Hazel Fox, ‘Article 31(3) (a) and (b) of the Vienna Convention and the Kasikily/Sedudu Island Case’ in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties* (Leiden: Martinus Nijhoff 2010) 59.

⁵²⁸ Henry Steiner and Detlev Vagts, *Transnational Legal Problems* (The Foundation Press 1986) 331.

⁵²⁹ Carmen Draghici, ‘The Development of self-contained regimes as an obstacle to UN Global Governance’ in Matthew Happold (ed), *International Law in a Multipolar World* (Routledge 2012) 286.

law.⁵³⁰ This has put Public international law in a more advantageous position especially for the development of the treaty law on the different status and effect of the treaty provisions.⁵³¹

On the other hand, Islamic international law established the binding nature of the treaty but not developed its dynamic characteristics, particularly the peremptory nature of treaty provisions, except that any treaty provisions opposed to the Shari‘a is void. As a result, there is a gap in Islamic international law when the treaty provision is neither in accordance with nor opposed to Shari‘a. For example, where the terms of a treaty between Muslims and non-Muslim states are not specifically set out in the Shari ‘a. This gap can be filled by Public international law through its application of hierarchical characteristic of treaty validating conventions, such as Vienna Conventions, in the overall application of Islamic international law in relation to treaties. For example, Where the Shari‘a does not state any specified term for contractual relationship it is possible to enter into such contractual relationship without specifying the time limit and subject to the provision for termination by notice.⁵³² This arrangement is likely to promote the stability of the treaty law of Islam by maintaining a parallel system with the Public international law.

However, due to the nature of such conduct, which is using armed forces, the consequences of breach of any of the conducts prohibited by a treaty has to be enforceable by an international body. In the absence of any such body at the international level, can the victim state which has suffered from the breach recourse to force? If yes, then it would be in violation of the prohibition of use of inter-state force as provided in the UN Charter which is a peremptory norm of international law.⁵³³ Islamic international law permits use of force against the party which are responsible for breaking a peace treaty treacherously or by recourse to aggression.⁵³⁴ As a result in Islamic international law any state, against which a peace treaty is breached treacherously or by recourse to aggressive use of force, has an automatic right to use force against any state which is responsible for breaching such treaty.⁵³⁵ However, such use of force requires a hefty burden of proof from the Claimant, such as the requirement to prove that a

⁵³⁰ K. Wellens, ‘The Practice of the United Nations Security Council with Regard to Treaties and (Other) Agreements Governed by International Law’ in M. Kraven and M. Fitzmaurice (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (Wolf Legal Publishers 2005) 139.

⁵³¹ Catherine Brölmann, ‘Limits of the Treaty Paradigm’ in M. Craven and M. Fitzmaurice (eds), *Interrogating the Treaty* (Wolf Legal Publishers 2005) 29.

⁵³² Labeeb Ahmed Bsoul, *International Treaties (Mu‘ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 117.

⁵³³ Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 50.

⁵³⁴ Labeeb Ahmed Bsoul, *International Treaties (Mu‘ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 113.

⁵³⁵ *Ibid*, 127.

peace treaty has been broken by treachery or aggression is on the Claimant and the standard is beyond reasonable doubt and this position makes such use of force very difficult to exercise.⁵³⁶ Seen in this way, Islamic international law promotes ‘justice’⁵³⁷ but Public international law promotes ‘peace’.⁵³⁸ In this conflict between justice and peace, which is a grey hole of Public international law, both Islamic international law and Public international law can complement each other through their respective law of treaties.

The scope of Islamic international law is not contingent upon bilateral agreements between the nations but unilateral obligations of Muslims to the rest of the world.⁵³⁹ Therefore, it is not primarily a system based on consent but a system based on principles of Islamic religion and morality.⁵⁴⁰ As a result, Islamic international law can complement Public international law where it has been questioned that consent is the basis of legal obligation where such consent is not directly given by those who are to take the consequences. However, when a treaty or agreement had been concluded between and among Muslims and non-Muslims, the parties involved were to observe the relevant terms on a reciprocal basis, in congruence with the principle of *pacta sunt servanda*.⁵⁴¹ In this way, Islamic international law recognises treaty obligation based on state consent in the one hand, and renewal of such consent to overcome the legitimacy-deficits of the remote decision making process by international organisations in the other.

Conclusion

In chapter 5, legitimacy has been analysed as a descriptive theory of international law on the use of force. However, this theory has to take seriously the empirical realities that hinder its applicability in practice because, if it does not then it will provide principles which are not politically feasible and these principles will therefore fail to be action-guiding.⁵⁴² This argument of non-ideal theorists is similar to that of realists and expansionists of the use of force in self-defence.⁵⁴³ Ideal theorists, on the other hand, argue that allowing political feasibility

⁵³⁶ Ibid, 136.

⁵³⁷ Majid Khadduri, *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: The John Hopkins Press 1966) 10.

⁵³⁸ Joel H. Westra, *International Law and the Use of Armed Force* (Routledge 2007) 10.

⁵³⁹ Majid Khadduri, ‘Islam and the Modern Law of Nations’ (1956) 50 *American Journal of International Law* 358.

⁵⁴⁰ Onder Bakircioglu, *Islam and Warfare: Context and Compatibility with International Law* (Routledge 2014) 52.

⁵⁴¹ See section 3.2.2.2 of chapter 3.

⁵⁴² C. Farrelly, ‘Justice in Ideal Theory: A Refutation’ (2007) 55 *Political Studies* 844.

⁵⁴³ See section 2.3 of chapter 2.

this central role in justifying principles of justice will lead to non-ideal theorists endorsing injustice.⁵⁴⁴ For example, theorists operating with this political feasibility constraint in the 21st Century have endorsed extra-Charter use of force to a much extended extent under the banner of self-defence because of the political infeasibility at the time of abolishing it.⁵⁴⁵

The twin horns of this dilemma, which is the charges of ‘political irrelevance’ and ‘adaptive preference formation’ respectively, are highly relevant to the theoretical debate on the justice and legitimacy of international law.⁵⁴⁶ One solution to the dilemma could be to hold that a theory of justice should either only contain non-deal principles or ideal principles.⁵⁴⁷ However, such solution is likely to be subject to criticisms due to the fact that, both ideal and non-ideal principles are not exclusively sufficient to respond to such criticisms.⁵⁴⁸ Hence, the natural response to this is to try and develop a complementary understanding which contains both ideal and non-ideal principles.⁵⁴⁹ In this response, both principles can form into a common understanding of shared or preferred values without ignoring the practical realities of adopting such values.⁵⁵⁰

The prohibition of use of force in Public international law invokes the positivist aspect of sovereignty whereas the introduction of extra-consensual arguments such as justice as human rights invokes the aspects of natural law. However, each line of argument can substitute the other or they can mutually recombined. Hence, one may refer to justice of keeping promises or to the order which adherence to article 2(4) brings but also to the justice of adjusting the rule when circumstances change. Concerning the latter, separation of law from state action suffers from ‘the problem of normative source’, that is the inability to determine the content of the rule.⁵⁵¹ On the other hand, fusion of law with practice suffers from the problem of legitimacy. In these circumstances, a distinction may be made between two different traditions which adopted very different approaches to use of force, the ‘theological’ or ‘scholastic’ tradition

⁵⁴⁴ Lukas Meyer and Pranay Sanklecha, ‘Introduction’ in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 19.

⁵⁴⁵ Andrew Mason, ‘Just Constraints’ (2004) 34 *British Journal of Political Science* 251.

⁵⁴⁶ Lukas Meyer and Pranay Sanklecha, ‘Introduction’ in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 19.

⁵⁴⁷ *ibid.*

⁵⁴⁸ Gerald A. Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008) 250.

⁵⁴⁹ Lukas Meyer and Pranay Sanklecha, ‘Introduction’ in Lukas Meyer (ed), *Legitimacy, Justice and International Law* (Cambridge University Press 2009) 20.

⁵⁵⁰ See chapter 5 for ‘shared or preferred’ values.

⁵⁵¹ Nikolas T. Tsagourias, *Jurisprudence of International Law: The Humanitarian Dimension* (Manchester University Press 2000) 60.

which forbade, pre-emption, and the ‘humanist’ or ‘oratorical’ tradition which permitted it.⁵⁵² Both Public international law and Islamic international law recognise legitimate recourse to force in pre-emption in response to imminent threat of force. Hence, both these systems represent ‘humanist’ or ‘oratorical’ tradition, and accordingly can legitimately be compatible with each other.

Despite the fact that this concept of legitimacy is contained in different systems of law, namely Public international law and Islamic international law, which are conflicting to each other in terms of origins and applications, their essential characteristics comply with the pluralistic nature of such law. Consequently, the law derived from the different sources and legal systems that are not constrained within a single community but different communities of the world. They have legitimacy within their respective communities but higher degree of such legitimacy is achieved when outside their respective communities, which is at the inter-state level. The *modus vivendi* that existed between Muslim and non-Muslim powers in the earlier periods show that a balanced and equitable relationship can only come about once Islamic values are understood and accommodated in the international political order.⁵⁵³ According to one Modern Muslim scholar the relationship between Muslim and other nations is based on how the other nations perceive Islam.⁵⁵⁴

As Margaret Davies rightly observed:

Clearly the increasing prominence of international law and human rights play a significant role in creating a legally plural environment on the global scale – after all, the relationship between international and domestic law immediately creates (at least) a duality of law across the entire globe, while human right is a global normative discourse which enters into local normative patterns in many distinct ways.⁵⁵⁵

A judicial space for scrutinising use of force can also be created as soon as pluralistic legal framework is achieved through adequate legal theory between different states, both weak and strong. However, before that both Public international law and Islamic international law need

⁵⁵² Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (New York: Oxford University Press 1999) 16.

⁵⁵³ Labeeb Ahmed Bsoul, *International Treaties (Mu‘ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 2.

⁵⁵⁴ Al-Ghunaimi, ‘Qanun al-Salam fi al-Islam’, 104 cited in Labeeb Ahmed Bsoul, *International Treaties (Mu‘ahadat) in Islam: Theory and Practice in the Light of Islamic International Law (Siyar) according to Orthodox Schools* (University Press America 2008) 25.

⁵⁵⁵ Margaret Davies, ‘Legal Pluralism’ in Peter Cane and Herbert M. Kertzer (eds), *The Oxford Handbook on Empirical Legal Research* (OUP 2010) 805, 815.

to operate in plural fashion so that the necessary degree of legitimacy, such as descriptive legitimacy, can be secured. This is because, operating in plural fashion is an essential prerequisite to global justice and enduring peace.

This chapter finally concludes that, use of force in Public international law and Islamic international can complement each other when it comes to internal conflict, such as rebellion, and extraterritorial conflict, such as humanitarian intervention and pre-emptive use of force in self-defence. The process of complementation is necessary to overcome the legitimacy deficits of these two systems and secure a pluralistic international law. This process of complementation would not only remove the conceptual conflicts between these two systems but also any misunderstanding of the *jus ad bellum* provisions. The process of complementation can be completed and continued by adopting the conception of 'legal pluralism' together with application of the general provisions of the law of treaties of Public international law and Islamic international law.

Chapter 7

Conclusion of the Thesis

Overall in this thesis, the use of force in Public international law and Islamic international law has been dealt with by exploring the interface of facts, rules, ideas, challenges, assessing their significance and elucidating the interrelations between theory and practice. The focus of this research has been the legitimacy of the facts, rules, ideas, challenges and the potential of these two systems to be compatible where there are conflicting provisions on the use of force. Legitimacy has been approached from the perspectives of index and descriptive legitimacy in order to scrutinise the essential elements of the components of legitimacy to its higher degree and take a step closer to justice. In addition, this thesis has examined the potential of conjunctive theory, which is legal pluralism, to play a vital role in the complementation process between Public international law and Islamic international law.

After setting out the introductory matters in chapter 1, this thesis advanced its study to examine the legal status of international law on the use of force. In chapter 2, the legal status of use of force has been examined by scrutinising the UN Charter provisions for use of force, customary international law in relation to use of force and the challenges posed on the Charter framework. This examination has furthered the inquiry into the origins of current international system from the context of colonialism which revealed the predominantly Western origin of Public international law on the use of force. The Western origins of international law turned out to be the main legitimacy deficit for its self-description of itself as universal, objective, and neutral. This claim of purported universality and accordingly legitimacy of Public international law prompted for an analysis of the debate between cultural relativism and universality from the perspective of expansion of use of force beyond the proscriptions of the UN Charter. The study, in chapter 2, reached to the conclusion that, the challenges are threatening the effectiveness of the Charter system in the one hand and questioning the legitimacy of extra-Charter use of force on the other. This conclusion required engagement with further study to find out the extent of legitimacy deficits of use of force in Public international law from the perspectives of the current legal framework as well as the challenges posed.

While researching to discover the extent of legitimacy deficits of Public international law on the use of force, it has come to the attention of the researcher that it is necessary to examine

the legitimacy of Islamic international law as well. This is because Islamic international law is not free from challenges and legitimacy deficits. As a result, the study examined use of force provisions of Islamic international law, in chapter 3. This chapter studied the sources of use of force in Islamic international law, namely the Qur'an and Sunna. It also studied the meanings and significances of the controversial term, which triggers use of force in Islamic law, which is *jihad*. The study revealed that, although Islamic international law has a strong source-oriented legitimacy, this system has been subject to serious influx from non-divine sources, and as a result there has been controversial interpretation of the Shari'a from the perspective of use of force which eventually transformed the meaning of jihad to invoke hostility and an all-out war against non-Muslims. These findings furthered the study to discover the extent of the legitimacy deficits of Islamic international law on the use of force.

After establishing the position that both Public international law and Islamic international law suffer from legitimacy deficits, the study furthers to discover the extent of such legitimacy deficits. However, in the process of conducting the research the researcher has realised that, as Islamic international law is the development of jurists and exegetes it is necessary to examine its development and see how the source-oriented legitimacy has been faded through the course of time. This examination has taken the researcher to the classification of armed conflict in Islamic international law. It has been then discovered that, unlike Public international law Islamic international law does not categorise armed conflict. Instead, this system equally treats non-international and international armed conflicts. It has also been discovered that this system promotes substantive justice right from the domestic level up till to the international level, even if it is at the expense of peace. The focal point of this setting of Islamic law is not only to promote justice but also to provide effective control of use of force at the domestic level, and to prevent escalation of armed conflict to a large scale at the international level. As a result, Islamic law of rebellion has been the subject matter of study in chapter 4. This chapter discovers that, Islamic law of rebellion is much more advanced than Public international law as the former recognises the right of rebellion and the treatment of rebels whereas the latter does not effectively deal with rebellion.

At this stage, the research findings have been limited to the nature of legitimacy of use of force in Public international law and Islamic international law. But the first research question required to find out the extent of the legitimacy of such use of force. In order to find the extent of legitimacy and its deficits the study advances, in chapter 5, to test the legitimacy deficits of both these systems by application of the appropriate tests of legitimacy. Index legitimacy and

legitimacy in the descriptive sense have been applied to both the uses of force provisions examined in chapters 2, 3 and 4. Having examined the legitimacy of Public international law and Islamic international law, it has been concluded that use of force in both systems are subject to critical legitimacy deficits. As a result, the study advances to find out how the legitimacy deficits could be overcome, which is the second question of the thesis. The research findings on this point recommend that, the process legitimacy deficit of Public international law could be overcome by reforming the decision-making process at the Security Council and by regionalising the system. In terms of Islamic international law, the legitimacy deficits could be overcome by limiting the interpretation of use of force provisions by qualified people only, such as *Mujtahids*.

Overcoming the legitimacy deficits of Public international law and Islamic international law left the thesis in a position where the two conflicting systems are lying separately in incomplete state due to the prevalent legitimacy deficits. This is because despite figuring out the ways to overcome the legitimacy deficits of these two legal systems, the conflict between them remains. For example, despite carrying out the reform of the Security Council and limiting interpretation by qualified people only the effectiveness of these legal systems does not improve to deal with the challenges of modern world, namely threat of use of force by terrorists and other non-state armed actors operating in Muslim states who are claiming legitimacy of terrorism and asymmetrical use of force on the ground that Public international law is illegitimate due to its rejection to include Islamic international law which has the potential to promote justice and peace at the same time. This claim of legitimacy by terrorist groups prompted for further study on overcoming the legitimacy deficits of Public international law.

The study, in chapter 5, concluded that, legal pluralism is an integral part the development of a compatible legal framework particularly at the international level where compliance of law is based on descriptive legitimacy as perceived by the subjects. Legal pluralism has been found to be a valuable characteristic of international legal framework which is prone to remove the political barrier, and promote peace and justice. Whereas this chapter has focused on the benefits of legal pluralism in overcoming the legitimacy deficits of Public international law, it has been acknowledged that pluralism itself cannot overcome the main legitimacy deficit, which is its own sense of deriving its own legitimacy from its purported universality. In order to overcome this main legitimacy deficit of Public international law, this chapter concluded that the cultural relativist approach can potentially overcome the barrier by adopting diverse cultural and religious values, namely Islamic international law which is originated from Islamic

religious values. This is because, legal pluralism requires these different and competing values to be recognised in the development of Public international law on the use of force. In this way, legal pluralism could overcome its descriptive legitimacy by promoting the notions of multipolarity and inclusiveness.

Chapter 6, eventually, dealt with the third question of the thesis, which is whether use of force in Public international law and Islamic international law can be compatible. This chapter examines the compatibility of use of force between Public international law and Islamic international law. The examination concludes on the finding that compatibility between these two systems is possible because both these systems have potentials which can promote effective legal framework at the international level. For example, Public international law promotes peace and Islamic international law promotes substantive justice. However, in the modern world where there are diverse claims of legitimacy of use of force it is necessary to promote both peace and justice at the same time. Therefore, if these two legal systems could complement each other, both enduring peace and substantive justice could be promoted. However, peace and justice often conflicts with each other and hence it is necessary to apply the right process of complementation in order to make these legal systems compatibles.

In this process of complementation, it has been acknowledged that the status and effectiveness of the law on use of force have been subject to criticisms from the perspectives of both rule-oriented and practice-oriented arguments. In order to avoid the perpetuation of this dilemma, this thesis has adopted a complementary framework of international law on the use of force where other legal system, such as Islamic international law, is considered by appraising the different variables, policies, their interrelations and weight in certain context. Thus, this thesis tried to discover the conformity of Public international law and Islamic international law in the common parlance of use of force by detecting the areas of discord in the theoretical 'legitimacy' analysis and transforming the format of that theoretical analysis through application of a matrix which contains theoretical (legal pluralism), legal (treaties) and pragmatic (regionalisation) components.

The linkage between Public international law and Islamic international law is the universality of both these systems where both are referring to the sources and the former is referring to, particularly, the application. Use of force at the international level has been subject to challenges and suffering from legitimacy deficits from the perspectives of both Public international law and Islamic international law. The modern world had made a demand for

legitimacy of use of force and that demand must be met by promoting international legal framework in plural fashion. This is because, there is no place for hegemony and monopoly by the powerful states at the international level due to their lack of legitimate authority to manipulate international law on the use of force by political and military power.

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