

# JIHAD AND THE MODERN WORLD

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## 1. INTRODUCTION

“Islam is a religion of peace.” This is certainly the mantra that has inundated us from almost every quarter since the horrifying events of September 11, 2001. From President George W. Bush to local, national and even international Muslim spokespersons, the peaceful nature of Islam has been reiterated time and again. Of course, this has not gone unchallenged. Skeptics, polemicists, even opportunists of various stripes, have repeatedly warned against accepting too uncritically what they hint at being a “new-found, politically correct depiction of a religion that includes, inter alia, a scripturally mandated institution of armed violence and a holy book that exhorts its adherents, at least on the face of it, to “slay ‘them’ wherever you find them. “ Today, close to a year after the tragedy, emotions and rhetoric on both sides have subsided a bit. But there is still a perduring suspicion among many Americans – including many Muslim Americans – when it comes to the question of Islam, violence and the relationship between Muslims and non-Muslims.

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Qur’an, 2: 191. All Translations of Qur’anic material in this essay will be my own.

To be sure, the uneasy relationship between the Muslim world and the modern Western powers has produced numerous polemical and apologetic false facts and half-truths that are grounded not only in misunderstandings of the other but of oneself as well. For example, the polemically invoked “Abode of Islam/Abode of War (Dar al-Islam/Dar al-Harb) dichotomy completely ignores the hallowed Monroe doctrine of the United States. Similarly, the Muslim critique of America’s crass secularism, purportedly reflected in its separation between Church and State, overlooks the perennial effort of Muslim “clergy” to keep the Muslim state out of the business of imposing its interpretation of the religious law on the community. One could easily add to this list of dialectical misunderstandings such things as the conflation of Arab with Muslim, various uses of the terms “fundamentalism” or the habit of speaking about “women” with no regard to time, place, marital or kinship status (i.e., whether a woman is a wife, a mother, a daughter, an aunt or a grandmother.) Indeed, so numerous are such infelicities that one would almost hope that Islam and the non-Muslim West could be re-introduced on more informed and objective terms.

In the present article, however, I shall limit myself to only one of the products of the modern encounter between the Muslim world and the West, namely the claim that Islam is a religion of peace. I propose to explore the credibility of this claim via a treatment of jihad, as the religiously sanctioned institution of armed violence in Islam. I shall focus on jihad not from the perspective of *jus in bello*, i.e., the rules and regulations governing the conduct of combatants in war, but rather from the perspective of *jus ad bellum*, the causes and justifications for going to war. My aim shall be to determine the normative role, function and status of jihad not in the abstract but, first, as an institution of Islamic laws, second, in the very particular context and circumstances are relevant to the enterprises of interpreting and applying the rules of Islam. As such, following a brief excursus on a few pertinent features of the Islamic legal tradition, I will preface my treatment of jihad in the modern world with a brief statement on the concept of change in Islamic law, as well as the impact of historical experience and circumstances on the substance and application of Islamic legal injunctions.

II. ISLAMIC LAW; STRUCTURE, STATUS AND THE PROBLEM OF FREE SPEECH

With the exception of its claim to divine origins, perhaps the most glaring contrast between Islamic law and modern, secular systems is that Islamic law constitutes what the late Orientalist Joseph Schacht referred to as an extreme case of “jurists’ law.<sup>2</sup> Islamic law was neither the creation nor the preserve of the early Muslim state. Rather, it developed to a large extent in conscious opposition to the latter. Private Muslims, during the first two centuries or so following the death of the Prophet Muhammad in 632 CE, succeeded in gaining the community’s recognition for their interpretive efforts as constituting the most authentic representations of divine intent. By the early decades of the 3<sup>rd</sup> Islamic century/9<sup>th</sup> century of the Common Era, a full-blown theory and methodology of legal interpretation had developed, with the Qur’an, the Sunna (or normative practice of the Prophet Muhammad) and the unanimous Consensus of the jurists (ijma) as the primary sources of Islamic law, and analogy (qiyas) as the primary method of extending the law to treat unprecedented cases. During this same period, the jurists began to organize themselves into interpretive communities or schools of law, called madhhabs, and by the end of the 4<sup>th</sup>/10<sup>th</sup> century, the madhhab had emerged as the exclusive repository of legal authority. From this point on, all interpretive activity, if it were to be sanctioned and recognized as authoritative or orthodox, would have to take place within the boundaries and under the auspice of a recognized school of law. By the end of the 5<sup>th</sup>/11<sup>th</sup> century, based on the principal of survival of the fittest, the number of Sunni schools would settle at four. These were the Hanafi, Maliki, Shafi I and Hanbali schools, all equally orthodox all equally authoritative. This is the number at which the Sunni schools of law have remained down to modern times. The main branch of Shi’ism, the Imami Twelvers (with whom I shall not have occasion to deal in this paper), had one main school, the Ja’fari school. These schools would continue their monopoly over authoritative legal interpretation unchallenged until the introduction of Western political, legal and educational institutions in the 19<sup>th</sup> and 20<sup>th</sup> centuries. As for the pre-modern Muslim state, to quote the late Shlomo Goitein, “with the exception of a few local statutes promulgated and

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See his Introduction to Islamic Law (Oxford: Clarendon Press, 1961), 5. One should note that many of the views in this work are now dated.

abrogated from time to time, the (pre-modern Muslim) state did not possess any law (of its own).” Islamic law, in other words, was the only legal system available to the premodern Muslim state, a system over whose substance and authority the state itself exercised little control.<sup>4</sup>

The introduction of Western political, legal and educational structures would bring about important and far-reaching changes, legally and otherwise. For our purposes, three of these call for mention. First, the theory underlying the nation-state granted the state a monopoly over the enactment and interpretation of law, a development that marginalized the traditional role of the religious jurists. Second, the concept of citizenship and equality before the law (and later the concern for predictability in the law) obliterated the legal pluralism and indeterminacy of the pre-modern period. The existence of four or more authoritative laws operating side by side gave way to a solitary “law of the land.” Finally, the importation of Western legal codes, particularly French, replaced whole areas of Islamic law, partly due to the colonial powers’ sense of a civilizing mission and partly due to gaps and inadequacies in the Muslim jurists’ deliberations. As a result, with the exception of family law, there is today scarcely an area of law in the Muslim world that is not influenced by or the genetic offspring of Western law and legal thinking.

On these developments, some have concluded that Islamic law is no longer relevant to the legal order of the modern Muslim world, with the possible limited exceptions, that is, of Iran, Sudan and Saudi Arabia. Most observers recognize, however, that while Islamic law may be irrelevant or marginal to the applied legal order in the hearts and minds of ever increasing numbers of Muslims, it retains its religious (and even cultural) authority in terms of the definition of rights and obligations. Thus, while a court may refuse to acknowledge, e.g., a marriage that does not satisfy all the requirements of

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State sponsored law; the state cannot obliterate citizens’ belief that they have a God-given right to engage in such a marriage. In short, Islamic law, embattled though it may be, continues to represent for the masses of Muslims inalienable, God-given rights and obligations. It was, in fact, the uneasy recognition of this reality that implicated jihad in the attacks of September 11.

Not only has modern history displaced the sources and substance of Islamic law, the religious clerics, heirs of the classical tradition, has also forfeited their monopoly over the interpretation of Islamic law. This is partly a result of the attempt by modern Muslim states to marginalize the traditional ‘ulama’ viewing the latter as impediments to progress. It is also related, however, to the proliferation of literacy and the unprecedented availability of books. Whereas pre-modern ‘ulama’ were insulated by their near-monopoly over the ability to read and write, the spread of public education and the rise of the printing press (and now the internet), have denied them exclusive access to the sources and tradition of Islamic law. Instead, new, modern, revivalist interpreters, male and female, have emerged. And these new “authorities’ have introduced their own

methodologies and approach the law with their own presuppositions, preferring interpretations that differ, at times vastly, from those upheld by the classical jurists or their heirs. Still, the classical tradition continues to enjoy the advantage of incumbency, i.e., of having emerged during a period that Muslims identify as their Golden Age. As such, even modern revivalists, often referred to as Fundamentalists, 6 \* grant the rules of classical Islamic law a prima facie presumption of correctness and authenticity. This is not always the case, however. And when the rules of the classical tradition are deemed to be incompatible with their priorities and perspectives, the Revivalists will jettison these in favor of interpretations that rely on a more direct reading of the Qur'an and Sunna.

One feature, however, of the classical tradition that even Revivalists have not sought to discard, at least not formally, is the aforementioned Unanimous Consensus (ijma) of the recognized Muslim community of interpreters, as the only authority capable of terminating disputes over interpretation. This is the source of what I refer to as Islam's "Problem of Free Speech."

Early in its theological development, Sunni Islam embraced a doctrine of prophetic infallibility (ismat al-anbiya). According to this doctrine, the Prophet was so divinely protected, as a result of which, in the period following his death, no individual, including the Caliph, could claim interpretive infallibility. Rather, this divine favor was deemed to have passed to the interpretive community as whole. In other words, only those interpretations upon which there was Unanimous Consensus were held to be binding on the entire community. Where there was disagreement, the various disputed views simply had to be left standing. For in the absence of the infallible Prophet (or any other individual) to declare this or that interpretation to be correct, there was no legitimate and certainly no objective, basis upon which to make the claim that one view was correct to the exclusion of the other views.

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A Mediterranean Society, 4 vols. (Berkeley: University of California Press, 1967-83), 1: 66.

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The state preserved, however, certain discretionary powers to supplement the law with edicts designed to fill gaps or accommodate the unanticipated, e.g. requiring licenses to Practice medicine. These edicts, however, were not the results of any "legal interpretation," and generally lasted no longer than the regime that issued them. The madhhab, on the other hand, transcended political regimes and reigned as the most permanent institution in Islam. On some of the discretionary powers of Muslim governments, see my *Islamic Law and the State: The Constitutional Jurisprudence of Shihab al-Din al-Qarafi* (Leiden: E.J. Brill, 1996), 133-41; see also Frank Vogel, *Islamic Law and Legal System* (Leiden: E.J. Brill, 2000), 169-308.

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That is, the fact that the attacks had obviously not fulfilled the formal obligation that jihad be initiated by the Caliph or Imam (the temporal leader of the world community of Muslims) did not stop anyone from assuming that the attackers were acting on some construction of their religious obligation as Muslims. One should also note, however, the distinction (see note 38, below) between jihad and terrorism.

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This appellation has acquired a certain currency, due to its popularity in discussions of certain Christian groups. One should note, however, that while literalism among Christian groups generally results in views considered by society at large to be socially conservative or even extreme, literalist interpretations proffered by Muslim Revivalists, especially women often result in liberal alternatives to traditionally held views. For example, literal readings of the Qur'anic verses on polygyny have been endorsed by some women wither to place unbearable restrictions on the institution or to ban it altogether.

\*Fundamentalism, Revivalism. Radicalism are capitalized is for the purpose of highlighting the specific Muslim manifestations of these trends as opposed to the general.

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The synergy between the classical doctrine of prophetic infallibility and the juridical principal of Unanimous Consensus produced in effect pre-modern Islam's "Free Speech" provision. As long as a jurist's view showed itself to be grounded in authentic and authoritative sources and based on recognized methods of interpretation,<sup>8</sup> no one could deny him the right to express it – regardless of substance – as long as it did not violate a pre-existing

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More recently, the significance of this doctrine has reemerged in disputes over the Salman Rushdie affair. For an informative and insightful treatment of both The Satanic Verses and the classical doctrine of 'ismah, see Shahab Ahmed, "Ibn Taymiyya and the Satanic verses," *Studia Islamica* vol. 87 no 2 (1998): 67-124, esp. 70-74, 86-90, 100 and passim.

8 These were defined under the discipline of usual al-fiqh (lit. the sources of knowledge and understanding of the law).

Unanimous Consensus. 9 Concomitantly, while there might be many views that could justifiably claim to represent an Islamic position, the only views that could claim to represent the Islamic position were those that were backed by Unanimous Consensus. 10 In the present context, the possibilities of this juridical pluralism raised a potential problem. For, since the attacks of September 11, friend and foe of Islam alike have taken to the practice of holding up one or another (“liberal” or “conservative”) view as representing the Islamic positions as part of an effort to prove that Islam is either the best thing since the invention of the wheel or an imminent threat and an offense to humanity. Having no interest in playing this game, I should like to proclaim outright that they view I shall express herein represents only an Islamic view. The value fact that those who declare Islam to be a religion of peace should be taken at their word and seen as representing an authentic interpretation of Islam, rather than being accused of seeking refuge in apologetic, politically correct falsifications under the pressure of post September 11 anti- Muslim mania.

### III. ISLAMIC LAW AND CHANGE

One of the most counterintuitive features of Islamic law is its receptivity to change and evolution. This idea runs counter to two widespread notions, one scholarly, and the other popular. On the scholarly level, the theory of the so-called “closing of the gate of ijtihad (independent interpretation), “ which enshrined taqlid (commonly (thought erroneously) construed as “blind following”) as the order of the day, is presumed to have led to rigor mortis in the law. On this understanding, there is presumed no such thing as change in Islamic law. As one scholar put it, in practical terms...any legal work composed between

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For a real sense of the seriousness with which this principle is taken, see I.K> Nyazee, *The Distinguished Jurist’s Primer* (a translation of Ibn Rushd’s, *Bidayat al-mujtahid wa nihayat al-muqtasid*) (United Kingdom: Garnet Publishing, 1995), where the different views of all four Sunni schools, plus the Zahirities and Shiites of classical times are catalogued.

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Modern Muslims, especially Revivalists, often attempt to get around the Rule of Consensus by raising their voices or resorting to ad hominid diatribes or emotionally charged invectives. Recognizing, however, that the modern state is the only likely candidate to replace Unanimous Consensus as the final arbiter, even the Revivalists tend to fall short of disavowing ijma as the only repository of infallibility.



And place in which these rulings were reached are n violation of Unanimous Consensus. In addition to supporting statements by several classical and modern jurists, he cites the declaration of the Fifth Session of the Islamic Law Academy (Majma' al-Fighi) of the Organization of the Islamic Conference; “ No jurist, neither as judge nor as an issuer of non-binding opinions (fatwa), may restrict himself to that which has been handed down in the manuals of the classical jurists, failing in the process to pay adequate attention to changes in custom.

In sum, contrary to the common misconception, neither tailed (recognizing the authority of precedent) nor the divine origins of Islamic law preclude the possibility of change. On the contrary, whether it is sought or not, change is simply inevitable. In the words of Qutah,

It is obvious that any leader (Imam) of any school of law, nay, any independent jurist (mujtahid), period, can only devise rulings for his particular time and place. It is impossible for him to extract rulings for all times and places. Rather, the most that he can do is lay down general precepts, universal rules and basic principles on the basis of which his followers and descendants can proceed (to extract rulings).

#### IV JIHAD

Having now dealt with the basic structure and nature of Islamic law, along with the principle of change, we may now proceed to our discussion of jihad. Following the procedural instructions outlined by Qutah, we shall begin with the period of revelation and move forward the classical period into contemporary times.

##### Jihad Among the Arabs at the Time of Revelation

In 1991, professor Fred Donner of the University of Chicago published an insightful article under the title “The Sources of Islamic Conceptions of War.” This was part of an edited volume entitled Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions. In this

17 al-‘Urf, 1-64.

18 al-‘Urf, 1-66

19 al- Urf, 1-60

20 Ed J Kelsay and J.T. Johnson (New York: Greenwood Press, 1991), 31-70.

Article, professor Donner began by questioning the propriety of relying solely on the Qur’an, the Sunna or the books of Islamic law for an understanding of the substance and the logic underlying the medieval Muslim concept of jihad. Rather, according to professor Donner, the Muslim valuation and articulation of jihad was just as much, if not more, a product of history as it was of religion. This insight yielded two extremely important implications. First, just as Islamic theology, philosophy and jurisprudence had been informed by perspectives brought by Hellenized and other converts from the world of Late Antiquity, so had jihad, in its classical formulation, been informed by such Roman-Byzantine concepts as “ charismatic victoriousness, “; according to which God would aid the expansionist endeavors of the empire against all enemies of the religion or the state.<sup>21</sup> Second, and more important, the whole Qur-anic rationale undergirding the verses on jihad could be seen as resting on a particularly intractable reality in 7<sup>th</sup> century Arabia. Speaking of this reality, professor Donner writes,

In this society, war (barb, used in the senses of both an activity and a condition) was in one sense a normal way of life; that is, a ‘state of war’ was assumed to exist between one’s tribe and all others, unless a particular treaty or agreement had been reached with another tribe establishing amicable relations.<sup>22</sup>

As an historian of Late Antiquity and early Islam, Professor Donner could substantiate this view on the basis of several historical resources. The Qur’an itself, however, confirms this reality and confers the additional advantage of providing a glimpse into the early Muslim perception of the world around them. It should be noted in this context that it matters little whether we accept the Qur’an as divine revelation or not. For whether it came from God or Muhammad or anywhere else, it certainly reflected the social, historical and political realities of 7<sup>th</sup> century Arabia.

Several verses of the Qur’an depict Arabia’s general “state of war.” For example, “Do they not see that we established a safe haven (in the Sacred Mosque) while people all around them were being snatched away?”<sup>23</sup> Similarly, “And remember

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21 Just War and Jihad<sup>34</sup>

22 Sources, 34. Emphasis added.

23 29:67.

When you were a small, marginalized group in the land living in fear that the people would snatch you away.... 24 the 106<sup>th</sup> chapter appears to be devoted entirely to the twin-themes of societal fear and security:

For the comforting of Quraysh [the tribe of the Prophet], the comfort of (being able to complete) the winter and summer caravans. Let them, then, worship the Lord of this House, Who their hunger with food and their fear with security.

It was, indeed, Arabia's endemic "state of war" that drove the pre-Islamic Arabs in desperation to institute the so-called Forbidden Months (al-Ashbur al-hurum), a pan-Arabian treaty of non-aggression, subsequently ratified by the Qur'an, that outlawed all acts of war initiated during the 11<sup>th</sup> 12<sup>th</sup>, 1<sup>st</sup> and 7<sup>th</sup> months of the lunar year. This particular sequence was pegged to the time of the annual pilgrimage to Mecca, which took place in the 12<sup>th</sup> lunar month. The Forbidden Months gave potential pilgrims ample time to travel from their homes to Mecca, spend the needed time carrying out the rites of the pilgrimage, and then make it back to their homes unmolested by any and all raiders or brigands. The 7<sup>th</sup> Forbidden Month provided the same for those who wished to travel to Mecca during the off-season for a "lesser pilgrimage".

Other verses in the Qur'an suggest that part of the reason many of the Prophet's contemporaries hesitated to follow him was their fear that they would lose the support of their tribes and allies and thus be rendered fair game for all attackers. For example, Qur'an 28: 57 reads. "They say, 'If we follow the guidance with you we shall be snatched from our land.'" Similarly, 3: 173 describes the nascent Muslim community as, "Those whom the people warned, 'Verily all the people have lined up against you, so fear them.'" These and numerous other verses clearly indicate that war, as an activity or a condition, was the assumed status among groups in the Prophet's 7<sup>th</sup> century Arabia. In a sense, one might say that Arabia only survived as an entity by virtue of a primitive version of the Cold War "balance of terror."

The fact that certain groups and individuals in Arabia feared losing the support of their tribes is actually much more germane to our discussion than appears at first blush. For the dynamic underlying this fear actually explains an

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24: 26.

Often overlooked aspect of the Qur'anic discourse and rhetoric on jihad. Far from depicting the early Muslims as a brave and warlike people, one of the most consistent Qur'anic criticisms of them is directed at their unwillingness to fight. It is in fact, this need to overcome this unwillingness that explains in large part the pungency and urgency of the Qur'anic injunctions to fight. “ *Fighting is prescribed for you, but you despise it; 25 Say [O Muhammad], If your fathers, your sons, your brothers, your wives, your close associates or moneys that you have earned or business whose stagnation you fear or homes with which you are pleased are more beloved to you than God and His Messenger and waging jihad in His path, then wait until God sends forth His command. And God does not guide a people who are corrupt; 26 “You shall not find a people who (truly) believe in God and the Last Day maintaining loving relations with those who strive to undermine God and His Messenger, be the latter their fathers, sons, brothers or close associates; 27 in a similar vein, this time showing a sense of indulgence, “ God does not forbid youth have friendly mutually respectful relations with those who have not attacked you because of your religion and have not turned you out of your homes. God simply forbids you to take as your patrons those who attack you because of your religion or turn you out of your homes or conspire with others to turn you out of your homes.” 28*

What these (and numerous other verses) depict is the early Muslims’ deep sense of divided loyalties between Islam, on the one hand, and “the old order,” at the center of which stood the tribe, tribal alliances and the presumed state of war, on the other. What the early Muslims had trouble accepting was not fighting in general (to which they were as used as anyone else in Arabia) but fighting that pit them against kith and kin. Ultimately, their wish was that they would be able to reconcile the old and the new order in such a way that enabled them to enjoy the benefits of both. From the Qur’an’s perspective, however, this could not be done without lending support, directly or indirectly, to the very forces whose existence and way of life included an active ideological and military opposition to Muhammad. Thus, the Qur’an sets out to break the early Muslims’ emotional, psychological and even material dependency on the “old order” by forcing them to affirm their commitment to Islam by way

25 2: 216  
 26 9: 24  
 27 58:22  
 28 60:8.

Of willingness to fight in accordance with the existing norm-for the life and integrity of the new religion.

In sum, by revealing those verses in which the believers are commanded to wage jihad, the Qur'an was not introducing the obligation to fight initially. On the contrary, the Qur'an was simply responding to a pre-existing state of affairs by effectively redirecting energies that were already being expended. Moreover, peace, i.e., the repelling of aggression, rather than conversion to Islam was the ultimate aim of his fighting. This is clearly indicated by several verses, scattered throughout the Qur'an, that clearly envision a terminus as other than conversion or annihilation: "If they incline towards peace, then you incline thereto, and place your trust in God, 29 and, Fight them until there is no oppression and religion is solely for God. And if they desist, then let there be no aggression except against the transgressors, 30 or even more elaborately, this time speaking of a group of "interlopers" who had made a career of playing both ends against the middle, now supporting Muhammad, now colluding against him,

They wish that you would reject faith as they have, so that you would all be equal. Do not accept them as patrons until they migrate to join you in the path of God. If they refuse to migrate, then seize them and slay them wherever you find them, and do not accept them as patrons nor as helpers. Except for those who arrive at the home of a tribe with whom you have a treaty, or who come to you in a state of contrition that will not permit them to fight you or to fight against their own... If they avoid you and do not fight you and declare themselves to be in a state of peace with you, then these people we do not give you permission to fight."

Based on this admittedly narrow sample, it seems clear that the *raison d'être* behind the Qur'anic injunction to fight was clearly connected with the very specific necessity of preserving the physical integrity of the Muslim community at a time and place when fighting, sometimes preemptively, sometimes defensively, was understood to be the only way to do so. To be sure, Qur'anic injunctions to fight often take on the appearance of a call to Holy War, i.e. war based solely on a difference of religion. But this is simply because the only

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29 8: 61

30 2: 193.

31 4:89-90.

people Muhammad and the early Muslims had to fear were non-Muslims. As de Tocqueville writes of 19<sup>th</sup> century France. “ The unbelievers of Europe attack the Christians as their political opponents rather than as their religious adversaries. 32 To the casual observer, however, such a conflict, though politically motivated, would simply show Christians on one side and unbelievers on the other, a Holy War to most eyes, if there ever was one. Yet, when the Prophet Muhammad died in Medina, at the height of his power, he died in debt to a Jew. Famous Companions of his, men like Hudhayfah b. al-Yamam, married Jewish women. The second Caliph, ‘Umar, under whose reign the Muslim empire expanded more than it did under any other reign, was killed by a Christian in Medina. Clearly, on these facts, if the unbelief of the unbelievers rather than their real or perceived hostility towards the Muslims had been the object of those verses in which the Muslims were commanded to “slay them wherever you find them”, certainly Muhammad and his Companions would have understood this and, at the time, there would have been nothing to prevent them from carrying this order out.

In sum, even before the Prophet Muhammad, Arabia was characterized by an overall “state of war”. The advent of the Prophet’s mission only altered this by altering the categories with which the various groups and individuals identified. From this point on, in the absence of a peace-treaty (which the Qur’an both sanctioned and sanctified) there would exist only the blurriest of distinctions between “non-Muslims” and “hostile forces”. This is the backdrop and *raison d’être* against which all the Qur’anic material on jihad must be read.

#### B. Jihad in the Classical Juristic Tradition

Turning to the post-Prophetic era, classical jurists unanimously divided jihad into two main modalities. The first we may refer to as “aggressive jihad”, which is pro-active, and according to the majority, constituted a communal requirement to be carried out at least once every year. The second modality was the “defensive jihad,” which was waged whenever Muslim lands were attacked. This jihad was actually a much more serious affair than its counterpart, in as much as many of the stipulations and restrictions governing aggressive jihad were dropped in the case of defensive jihad. For example, the Muslim ruler did not have to announce the obligation to join the defensive jihad nor conscript

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32 Democracy in America 2 vols. (New York: Vintage Books, 1990), 1: 314. Emphasis mine.

Soldiers for its prosecution. Similarly, all those groups who were normally exempt from participating in the aggressive jihad, e.g., women, mirrors, the elderly, young men who had not been granted permission by their parents, were required to participate in defensive jihad.

For our purposes of trying to determine the credibility of the claim that Islam is a religion of peace, we may ignore the defensive jihad, For no one would accuse Islam, or any other religion for that matter, of not being a peaceful religion simply because it insisted on defending itself. We shall thus restrict the remainder of our discussion to the aggressive jihad.

As I intimated above, the aforementioned “state of war” was not restricted to Arabia. It characterized the pre-modern world in general. In his book, *Violence and Civilization*, Jonathan Fletcher writes of Europe in the Middle Ages: “ individual lords had to engage in warfare to save themselves and their families. If they did no, then sooner or later they would be overtaken by another lord and have to submit to his rule or be killed.”<sup>33</sup> As late as the 19<sup>th</sup> century, Alexis de Tocqueville would reveal vestiges of this perspective in the United States. Relating the fear about how the country would be affected if Indians monopolized the Western frontier, he cite a contemporary view to the effect that, It is ...in our interest that the new states should be religious, in order that they may permit us to remain free. “<sup>34</sup> I other words, according to his understanding, only Christians would permit other Christians to remain free. In the case of the Muslim empire, an identical assumption would collude with the presumed “state of war” and produce a sense of mission that was reinforced by the overall medieval thirst for conquest. Jihad, for its part, like the Roman-Byzantine “ charismatic victoriousness, “ would lend itself well to these ambitions and these concerns.

Still, the Muslim conquests were neither for the sole purpose of conversion nor annihilating the infidel. In addition to the fact that non-Muslims paid higher taxes- and thus non-conversion operated to the financial advantage of the state-the rules of jihad stipulated that non-Muslims remained free to practice their religion upon payment of the so-called *jizya*, or income tax in exchange for which the Muslim state incurred the responsibility to protect them

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33 J Fletcher, *Violence and Civilization: An Introduction to the Work of Norbert Elias* (Cambridge: Polity Press 1997), 33 Emphasis not added.  
34 *Democracy*, 1:307.

From outside attack. 35 While the imperial quest for empire invariably informed the policies of every Muslim state, Muslim juristic writings continued to reflect the logic of the “state of war” and the assumption that only Muslims would permit Muslims to remain Muslims. They continued to see jihad not only as a means of guaranteeing the security and freedom of the Muslims but also as virtually the only means of doing so. For even peace-treaties were usually the result of one’s surrender to demands that had been imposed by a real or anticipated defeat by the sword.

To take one example, the juridical writings of the Spanish jurist, Ibn Rushd the Elder (d. 520/1122). A major legal authority and grandfather of the celebrated Averroes of Western fame, clearly reflect the influence of the perceived “state of war.” Because Ibn Rushd perceived it to be impossible for Muslims to live as Muslims outside of Muslim lands, he insisted that it was forbidden for Muslims to take up residence abroad. In fact, he even banned travel to non-Muslim countries for purposes of commerce, going so far as to urge the ruler to build check points and light-houses tops top Muslims from leaving the lands of Islam, Ibn Rushd insisted that they were religiously obligated to migrate to a Muslim polity. On this understanding, it comes as no surprise that Ibn Rushd endorsed the traditional doctrine on aggressive jihad as a communal obligation. During the course of his discussion, however, it becomes clear that his ultimate consideration was the security of the Muslims rather than either conquest or conversion. After exhausting the point that jihad is a communal obligation, Ibn Rushd comes to the following conclusion:

So whenever we are placed beyond the reach of the enemy and the outlying districts of the Muslim lands are secured and the gaps in their fortifications are filled, the obligation to wage jihad falls from all the rest of the Muslims...36

The purpose of jihad in other words, is to provide for the security and

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35 The jizya is an income tax levied on non-Muslim men who are exempted from military but gain the right of the protection of the Muslim State.

36 Al-Muqaddimat, 4 vols. (Beirut: Dar al-fikr, N.d. (on the margins of al-Mudaqannah al-kubra).



freedom of the Muslims in a world that kept them under constant threat. This may be difficult for many, especially Americans, to appreciate today. But we should remind ourselves that throughout the Middle Ages, while one could live as a Jew in Morocco, a Christian in Cairo, or even a Zoroastrian in Shiraz, one could not live as a Muslim in Paris, London or the Chesapeake Bay. Indeed, the “Abode of Islam/Abode of War” dichotomy, cited ad nauseam by certain Western scholars as proof of Islam’s inherent hostility towards the West, was far more a description of the Muslim peoples of the world in which they lived than it was a prescription of the Islamic religion per se.<sup>37</sup>

### C. Jihad in the Modern World

As we proceed to our discussion of the legal status of jihad in modern times, I should like to clarify the meaning of the claim that Islam is a religion of peace. “Religion of peace” connotes, rather, that Islam can countenance a state of permanent, peaceful coexistence with other nations and peoples who are not Muslims. In other words, contrary to the belief that Islam can only accept a world that is entirely populated by Muslims and, as such, Muslims, Islam can only accept a world that is entirely populated by Muslims and, as such, Muslims must, as a religious duty, wage perpetual jihad against non-Muslims, Islam can peacefully coexist with non-Muslims. This position, I shall argue, is no more than the result of an objective application of principles of Islamic jurisprudence which no jurist or activist, medieval or modern, has claimed to reject.

We have seen that a perennial “state of war” informed both the Qur’anic and the classical articulations of jihad. In effect, this “state of war” constituted what Muslim jurists refer to as the custom or prevailing circumstances underlying the law. The assumed relationship, in other words, among nations and peoples in both the Qur’anic and pre modern Islamdom was one of hostility. In such a context, jihad emerged as the only means of preserving the physical integrity

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<sup>37</sup> Indeed, the concept and function of the “Abode of Islam/Abode of War” dichotomy has been grossly exaggerated and often misrepresented. For example, the towering Shafi’i jurist, Abu al-Hasan al-Mawardi (d. 450/1058), includes among the definitions of the “Abode of Islam” (Dar al-Islam) any land in which a Muslim enjoys security and is able to isolate and protect himself, even if he is unable to promote the religion. See al-Hawi al-kabir 18 vols ed A.M. Mu’awwad and A.A. Abd al-Mawjud (Beirut: Dar al-Kutub al-Ilmiyah, 1414/1994), 14:104.

of the Muslim community. The 20<sup>th</sup> century has introduced, however, major changes to this situation. Beginning with the Covenant of the League of Nations after WWI and culminating in the signing of the United Nations Charter after WWII, the territorial integrity of every nation on earth has been rendered inviolable. In effect, this development dismantled the general “state of war” and established peace as the assumed and normal relationship between all nations. This was an unprecedented development in the history of the world, certainly as Muslims had known it. For, again, the assumed relationship between Muslims and the peoples surrounding them had always been one of hostility. This fundamental difference between the prevailing reality of premodern and modern times both justifies and requires a different interpretation and application of all scriptural and juridical injunctions that command Muslims to wage jihad against non-believers. Contrary to the situation dictated by a prevailing “state of war”, under a state of peace,” there is no obligation to wage aggressive jihad. Classical law manuals do not reflect this view (Ibn Rushd being the exception that proves the rule); nor should one expect them to. For not only as peace not the prevailing medieval order, it was part of the medieval “unimaginable.” By contrast, numerous modern jurists, from Rashid Rida to Abd al-Wahhab Khallaf to Wahbah al-Zuhayli, have confirmed Islam’s commitment to peaceful coexistence with non-Muslims.<sup>38</sup>

To be sure, this manner of argument will appeal to many liberal-minded observers, Muslim and non-Muslims alike. It is in fact a common practice among those who argue for change and reform in Islam to insist that this or that change wrought by modern developments requires a different interpretation and or application of Islamic law. It should be noted, however, that the shift from a “state of war” to a “state of peace” is much more easily achieved on paper than it is on the ground. And, according to the relevant principle of Islamic jurisprudence, the only changes in prevailing circumstances that can serve as a cause for changes in the law are those that are actually realized in the lives of the people. The fact that a community of lawyers or Muslim intellectuals, based on the state of discussion in their respective fields, conclude that the

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38 See, e.g. Muhammad Rashid Rida, *Tafsir al-manar* 12 vols (Beirut: Dar al-Kutub al-Ilmiyah, 1420/1999), 10: 257-91 (and compare his exegesis of 9: 29 with that of Sayyid Qutb (see below)); ‘Abd al-Wahhab Khallaf, *al-Siyasah al-shar’iyah* (Cairo: Matba at al-Taqaddum, 1397/1977), 64-84; Wahbah al-Zuhayli *al-Fiqh al-islami wa adillatuh* 9 vols. (Damascus: Dar al-Fikr, 1417/1996), 9: 925-41.

World has shifted from a “state of war” to a “state of peace” is not sufficient to establish this as a probative change in custom. This is clearly established by the aforementioned al-Qarafi in a passage dealing with the effect of custom on the status of expressions used as formulae for divorce:

It is not enough the jurist believes that a particular expression has become customary (as a formula for divorce). For his belief of what has become customary may stem from his training in the madhhab and his persistent study and disputation in the law. Rather, for an expression to become customary is for the common folk of a particular locale to understand one thing only whenever they hear it, nor from the mouth of a jurist but from one of their own and according to their use of this expression for this particular purpose. This is the “becoming customary” that is sufficient to transform the literal meaning of an expression to a legally binding meaning based on custom. 39

Two important implications emerge from this. First, the shift from the “state of war” to the “state of peace” cannot be simply asserted but must be confirmed on ground. As such, there may arise disagreements among Muslims regarding the obligation to wage jihad, not over whether or not an actual “state of peace” exists. Second, the major powers, especially the United States as the lone superpower, bear an enormous responsibility towards the world community, in as their policies and actions, more than those of others, have the capacity to confirm or undermine the newly established and admittedly fragile “state of peace”. To the extent that powerful nations flout Article I of the UN Charter, they actually contribute to the re-emergence of the medieval “state of war,” with all that implies in terms of relations among nations.

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39 Tamyiz 243 Divorce in traditional Islamic law was not a judicial proceeding but was initiated by the husband’s uttering a “pronouncement of divorce.” Since the expressions used in this pronouncement were not dictated by scripture, much ink was spilled over the question of which expressions constituted “pronouncements of divorce.” This is the point of al-Qarafis argument.

The	Counter	View
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The terrorist attacks of September 11 have put Muslim leaders and intellectuals, especially those in the West, on the defensive, a corollary to which has been a rush to extirpate all traces of violence from Islam. This is understandable, given the enormous pressure being applied by the media and government agencies in search of assurances from Muslims. But there is also a dangerous side to this approach. For it carries the potential to radicalize the Muslim masses by undermining the credibility of Muslim leaders and intellectuals, who come to be seen as being more interested in appeasing the government-media to be seen as being more interested in appeasing the government-media complex to explain away and provide alternatives to extremist and wrong –minded views end up losing the masses and thus consigning them to the very views that they are supposed to be displacing.

The views of the so-called Muslim Radicals cannot be simply ignored out of fear of bringing Islam under indictment. Nor can they be dismissed as the mindless rantings of a tiny, vociferous fringe or the politically motivated dribble of simpletons who just don’t understand the grand and glorious tradition of classical Islam. For, rightly or

wrongly, these views constitute the going opinion in many quarters. And, the authors of these views are often men of immense standing who wield enormous authority in the Muslim world and beyond. If the American government-media complex or American Muslim apologists can condemn or dismiss these views as extreme or unfounded, it should surely be no more difficult for the latter to dismiss their detractors as un- or insufficiently Islamic. Clearly, a more productive approach would be to search for ways of drawing Muslim Radicals into a logic that is both shared and esteemed by them and capable of serving as a basis for moving them beyond the blind and reckless radicalism that often characterizes their views.<sup>40</sup>

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<sup>40</sup> One should note that even if it should be concluded that jihad against America is communal obligation, this would not justify the terrorist attacks of September 11. For the law of jihad does not condone terrorism, which Islamic law basically defines as publicly directed violence against which the reasonable citizen, Muslim or non-Muslim, is unable to take safe-keeping measures. For a treatment of terrorism in Islamic law, see my “Domestic Terrorism in the Islamic Legal Tradition,” *The Muslim World* vol 91 no 1 (2001): 227-51. This article, incidentally, was the result of lectures delivered before September 11 at the University of Michigan Law School in November of 1999 and George town University Law School in February 2000.

Given the limitations of space, I shall be able to engage the view of only one such Radical, by many accounts, the most important of them.<sup>41</sup> This is the redoubtable Sayyid Qutb, chief ideologue of the Muslim Brotherhood, who was executed by the Egyptian government in 1966 and whose commentary, *In the Shade of the Qur'an* is perhaps the most widely read Qur'anic exegesis in the Muslim world. Indeed, for those who think that I might be conveniently avoiding Usamah b. Ladin, a child born in the Arab world twenty years from now will probably know little more of Usamah than his name. At some point in his life, however, if he is religious, that child will probably be exposed to, if not imbibe, the writings of Sayyid Qutb.

Whereas Usamah b. Ladin's effectiveness is linked almost exclusively to his ability to tap into the shared, negative experience of modern Muslims, Qutb grounds his views in a meticulously crafted methodology of Qur'anic interpretation, which he holds up as the best, if not the only, way to read the Qur'an. Perhaps more than any other Muslim thinker in modern times, his interpretive efforts have succeeded in sustaining the argument that the heirs of the classical tradition have bowed to the modern secular state's attempt to "domesticate" Islam, to borrow the term of Stephen L. Carter. According to Carter, in response to religion's higher calling, on the basis of which it may oppose the material interests of the state, "the state tries to move religion from a position in which it threatens the state to a position in which it supports the state."<sup>42</sup> This is largely the basis upon which Qutb has been able to appeal to the masses as an alternative to the classical tradition.

As a modern Revivalist, Qutb all but ignores the classical tradition of the madhhabs and relies almost exclusively on the Qur'an. Based on his reading of Qur'an 9:29, he insists that waging jihad against the People of the Book (Jews and Christians) is a permanent, communal obligation upon the Muslims.

Fight those who do not believe in God and the Last Day and do not forbid that which God and His Messenger have forbidden and do not

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41 For radical view from a more traditional perspective, see Abd al-Malik al-Barrak, *Rudud 'ala abatil wa shuhuhdt hawla al-jihad* ('Amman: al-Nur li al-'lam al-Islami, 1418/1997).

42. *God's Name in Vain; The Wrongs and Rights of Religion in Politics* (New York: Basic Books, 200), 30.

practice proper religion, among those who were given the Book until they pay the poll tax and they are subdued.

According to Qutb, the ninth chapter, in which this verse appears, was among the last to be revealed. As such, this verse constitutes the last and final stage of development in the Qur'anic doctrine on Muslim-non-Muslim relations. While Qutb was not a jurist trained in the classical tradition, contrary to the popular stereotype about Muslim Radicals, he was also not a literalist. Rather, he insists on a “dynamic” reading, of the Qur'an, reminiscent of the position of the classical jurists exemplified in the above-cited al-Qarafi and Qutah. According to this “dynamic” reading, the concrete circumstances on the ground are to inform both the interpretation and application of the text. In Qutb's own words,

The legal rules of Islam are, and always will be, subject to certain dynamism in accordance with the Islamic approach. And it is not possible to understand the texts of scripture in isolation from this reality. Indeed, there is a fundamental difference between reading the verses of scripture as if they existed in a vacuum and reading them in their dynamic context in accordance with the Islamic approach. 43

In this particular case, however, Qutb insists that as an historical fact Jews and Christians have always proved themselves to be hostile to Muslims. As proof, he adduces several verses from the Qur'an, which he takes to constitute scriptural evidence of the inherent beliefs and attitudes of Jews and Christians (rather than as a scriptural description of the attitude of particular Jews or particular Christians at particular places and times). In addition, he relates a series of historical events, from the Crusades to modern colonialism. From this it becomes clear that it is Qutb's belief that Jews and Christians (which one senses he uses as a catch-all for the West) are inherently hostile towards Muslims that informs his reading of 9:29. This belief, moreover, is so strong and overpowering that it preempts all other possibilities, including those established by the Qur'an itself. For example, at 5:82, the Qur'an states, “You will find those who are most closely drawn to the Believers in love to be those who say, “We are

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43 *Fi zilal al-qur'an* 6 vols (Cairo: Dar al-Shuruq, 1417/1996), 3: 1631.

Christians.” Similarly, speaking this time of both Jews and Christians, Qur’an 3:113-14 states, “They are not all the same. Among the People of the Book are those who stand at night reciting the words of God and prostrating They believe in God and the Last Day, they command what is good and forbid what is evil and they strive in the path of righteousness. Indeed, they are among the righteous.”

What all of this suggests is that Qutb’s understanding of the Qur’anic doctrine on Muslim-non-Muslim relations is as informed by his own reading into the text as it is by his attempt to extract meaning from the text. For the Qur’an clearly establishes a range of possible attitudes and behaviors on the part of Jews and Christians towards Muslims. Moreover, at least as many if not more exegetes, classical and modern, hold chapter five (which speaks of Christian love for Muslims) to be the last-revealed chapter as hold chapter nine to be so. As such, on purely formal grounds, one could just as rightly argue that chapter five reflects the final teaching on Muslim-non-Muslim relations. What brings Qutb to privilege 9:29 and to construe it in the manner he does seems to be his historical assessment, based in part on his own experience, of the attitude of Jews and Christians towards Muslims.

On this assessment, one would have to admit that whether we employ his “dynamic” method or the classical jurisprudence exemplified by al-Qarafi, Qutb is certainly correct in the conclusion he draws. But, it is equally true, on both approaches, that this conclusion could be overturned, assuming a different historical assessment. In other words, assuming that Jews and Christians are no longer active enemies of Muslims, or that there are political mechanisms in place that prevent them from acting on this hostility, even Qutb (or his followers), on his own methodology could be convinced to modify his interpretation of 9:29. In sum, assuming an overall “state of peace,” even Qutb might be forced to concede that there is no obligation to wage jihad against Jews and Christians.

Having said this much, there does appear to exist one potential stumbling block. This is Qutb’s insistence that the only realities to which Muslims are obligated to respond in adjusting their interpretations and applications of scripture are those that are the result of Muslim efforts.<sup>44</sup> In other words, developments such as the League of Nations or the United Nations, which were not the products of strictly Muslim efforts, are of no probative value in interpreting the Qur’an or deducing the rules of Islamic law. To be sure,

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44 For Qutb’s entire discussion on 9:29, see Zilal, 3; 1619-50.

there is a glaring (and redeeming) weakness in this position. For even the most casual acquaintance with the sources of Islam reveals that this principle cannot claim to derive from the Qur'an or the practice of the Prophet. Indeed, the Prophet can easily be shown to have endorsed all kinds of realities that were not the products of Muslim efforts, from the system of tribal alliances to "the Forbidden Months" to honoring pagan marriages contracted before Islam. In short, what matters in legal deliberations is, *ceteris paribus*, the concrete situation on the ground, not the agency via which that situation is brought into being. As such, the transformations effected by the U.N. Charter should be deemed no less probative than those effected by the pre-Islamic pagan Arabs.

## V. CONCLUSION

I have argued that Islam is a religion of peace. I have based this argument on the assertion that a prevailing "state of war," rather than difference of religion, was the *raison d'être* of jihad and that this "state of war" has given way in modern times to a global "state of peace" that rejects the unwarranted violation of the territorial sovereignty of all nations. Assuming the factual verity of this "state of peace," even Radicals like Sayyid Qutb could be convinced of the veracity of my argument affirming Islam's fundamental commitment to peace. Ironically, however, it is precisely here that a superpower like the United States is put in a position to contribute directly to the Muslim valuation of jihad in the modern world.

Lamentably, U.S. actions such as the 1999 bombing of Sudan and Afghanistan, its acquiescence in the face of Israeli incursions into South Lebanon and the Occupied Territories, its talk of an impending invasion of Iraq and its saber-rattling with Iran all undermine the credibility of any presumption of a new world "state of peace." Still, I would argue, those unfortunate challenges notwithstanding, the principle of territorial inviolability continues to enjoy general recognition throughout the world community. And it is this general recognition that sustains my commitment to the doctrine that Islam is a religion of peace.

In the end, however, whether Islam actually functions on the ground as a religion of peace will depend as much on the actions of non-Muslims as it does on the religious understanding of Muslims. Muslims will have to make a more courageous and assiduous commitment to the principle that recognizes changes in circumstances as a basis for changes in the law, what Sayyid Qutb himself referred to as the "dynamic" method of interpretation. Muslims will also have to avoid the fallacy of assuming that the realities of yesterday pass automatically into today or that the factual or historical assessments of the Muslims of the past constitute authoritative doctrines that are binding on the Muslims of the present.

As for non-Muslims, they will have to make a more conscious and sustained effort to conduct their military, economic and political affairs in a fashion that actually confirms the new world order of the United Nations Charter, by respecting the dignity and territorial integrity of Muslim and other nations, including variations on what the U.N. Charter refers to as "Trust Territories." They will have to refrain from acting in a manner that expresses or implies aggression and pushes the world back toward the dark ages of the "state of war." For under the latter condition, the aggressive jihad of the premodern world will find both practical justification and religious sanction. In these our times of weapons of mass destruction, spiraling conflicts and renewed aggression, let us hope that all of us, Muslims and non-Muslims alike, will recognize just how



quickly we may be moving toward the abyss and, in light of this, seize the opportunity to make our respective contributions to a better, safer world.

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45 Article 77 reads: “(1) The trusteeship system shall apply to such territories in the following categories as may be placed there under by means of trusteeship agreements: (a) territories now held under mandate; (2) territories which may be detached from enemy states as a result of the Second World War; and (3) territories voluntary placed under the system by states responsible for their administration.” For a commentary on these provisions see B. Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994), 948-62.