Islamic Ambivalence to Political Violence: Islamic Law and International Terrorism*

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From a formal point of view, it can be said that Islamic law prohibits all violence except in official punishment for crime, strict private self-defence or against combatants in formally declared legitimate war as regulated by law. Islamic religious ethics emphasize orderly and peaceful social relations and condemn clandestine violence against defenceless victims. However, there are certain ambiguities in the notions of self-defence and legitimate war, especially as seen in light of certain "precedents" in Islamic history. Moreover, some Islamic sources appear to sanction direct action and self-help. These latter mentioned ambiguities and sources contribute to creating a degree of ambivalence in Muslim attitudes and practice in relation to political violence and terrorism as defined, and to some extent distinguished, in this essay.

It is obvious that none of the above is peculiar to Islam and the Muslims since almost all major historical, religious and cultural traditions reflect similar ambivalence. Nevertheless, the strong association between religion and political action in Islam makes it particularly important to address these questions in the present Muslim context. This association has been dramatically emphasized by recent demands for a greater role for Islam and Islamic law in public life throughout the Muslim world. In other words, historical Islamic religious values and legal norms seem to have a greater impact on the current attitudes and practices of Muslims than appears to be the case with other historical religious and cultural traditions. To the extent that this is true, it would be useful to work with Islamic sources and arguments in order to repudiate the basis of political legitimacy and psychological motivation for political violence and terrorism in the Muslim context.

The focus of this article on political violence and terrorism in the Muslim context should not be seen as assuming or implying that these phenomena have a peculiar association with Islamic values and norms. In view of the brief historical and comparative background offered in the first section of this article, it would be

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incorrect to assume that Islamic cultural and political norms have an exceptional propensity to political violence and terrorism. Moreover, when we allow for the large number of Muslims and the extensive geographical size of the Muslim world, most of which suffers from conditions of severe political instability and economic underdevelopment, the political violence and terrorism associated with Islamic groups and individuals do not appear to be disproportionate or excessive in comparison to that of non-Muslim groups and individuals.

This article is predicated on the premise that Muslim peoples are entitled to exercise their right to self-determination in terms of an Islamic identity and the modern application of Islamic law, *provided* that they do so in ways which are consistent with certain minimum domestic and international standards. In particular, this article upholds the right and obligation of modern Muslims to resolve their cultural ambivalence to political violence and terrorism within an Islamic framework and in favour of the rule of law in both the domestic and international contexts. Islamic self-determination in terms of archaic concepts and antiquated norms is, in my view, both undesirable and impracticable.

In order to address questions of the international dimension of political violence and terrorism from an Islamic perspective, this article begins by defining these phenomena for our present purposes and placing them in an historical context. The second section of the article will briefly explain the nature and sources of Islamic law as a necessary prelude to discussing political violence and terrorism in the Muslim context. Further explanation of the Islamic equivalent to international law in historical context will be offered in the third section, followed by a brief statement of the specific principles of Islamic law relevant to international political violence and terrorism. The final section of this article will address the general question of Islamic law reform, and propose a specific approach toward an Islamic contribution to the rule of law in international relations.

By emphasizing a formal legalistic approach, it is not in anyway suggested that this is the only or even necessarily the most useful method of discussing political violence and terrorism. It is obvious that these phenomena can and should be treated from political, sociological, psychological and other perspectives. However, I would suggest that an understanding of the legal point of view is useful, and perhaps necessary, for a meaningful discussion of these phenomena from any other point of view. Conversely, a legal approach would have to be sensitive to the political, sociological, psychological and other dimensions of the phenomena in question. It is common experience that people do not always comply with legal norms. Moreover, and to the extent that people do comply with legal norms, the impact of other factors has to be taken into consideration in assessing the practical consequences of such compliance. By the same token, an understanding of extra-legal factors is important for promoting greater compliance with legal norms and indicating possible directions for future policy and action.

I. Political Violence and International Terrorism

Although terrorism is a specific form or manifestation of political violence, it is advisable to use both terms for a number of reasons. As will be explained below, there are certain difficulties in defining the term "terrorism", especially as distinguished from other forms of political violence. In any case, it may be necessary to address other forms of political violence because what may be described as terrorism is often related, and is sometimes seen by the participants as direct retaliation, to other forms of political violence. Moreover, the term "terrorism" in common contemporary usage is generally conceived as applying a strongly negative label on the person(s) identified as "terrorists" and to their cause. Most people would agree, perhaps implicitly, with *Brian Jenkins* of the RAND Corporation that "[t]errorism is what the bad guys do".[1] These considerations would suggest that it may be useful for analytical purposes to use the broader term "political violence".

However, since the term "political violence" covers too wide a field, ranging from full scale international war to individual acts of politically motivated violence, it may also be helpful to use the term "terrorism" as indicating a specific form of political violence. It is certainly desirable that all forms of political violence should be effectively prohibited and combated in the same way that non-political violence is prohibited and combated. Unfortunately, although significant steps have been taken to outlaw war, especially under the Charter of the United Nations, it seems that much more needs to be done to effectively prohibit and combat that form of political violence.[2] Until a unified regime is developed to cover all forms of political violence, including war, it is necessary to distinguish between various forms of political violence. However, and in view of the difficulties, to be briefly explained later in this section, of providing a precise and comprehensive definition of terrorism as a specific form of political violence, we would be completely paralyzed if we are to wait for clear and conclusive distinctions between various forms of political violence.

In light of all the above considerations, I have decided to use both terms, namely political violence and terrorism. For the purposes of the present article, the term "political violence" refers to the broader phenomenon of using violence to settle or decide a political dispute or conflict, while the term "terrorism" refers to political violence by individual actors, whether they claim to be acting privately or under colour of official office.

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[1] *Quoted* in: *Terrell E. Arnold*, The Violence Formula: Why People Lend Sympathy and Support to Terrorism, Lexington and Toronto 1988, 1.

[2] *See* generally *Richard Falk / Friedrich Kratochwil / Saul H. Mendlovitz* (eds.), International Law: A Contemporary Perspective, Boulder/London 1985, chapters 5, 6; *Ingrid Detter De Lupis*, The Law of War, Cambridge 1987, chapter 2.

1. Terrorism in Historical and Comparative Perspectives

Although international terrorism has received extensive popular and scholarly attention in recent years,[3] the phenomenon itself is ancient, probably as old as human society and political conflict.[4] Moreover, many ancient and modern cultural and religious traditions have made their terrorist "contributions". For example, *David C. Rapoport* has explained and documented the international terrorist nature of three groups in major religious traditions: the early Jewish Zealots-Sicarii, the Isma'ili Shi'a Assassins of the eleventh to the thirteenth centuries and the Hindu Thugs who persisted for at least six centuries, possibly since the seventh century.[5]

Furthermore, although religion has sometimes played a central role in the motivation or orientation of terrorists, secular and nationalist causes have also produced terrorists, and continue to do so to the present day. The modern usage of the term "terrorism" itself is traceable to the tactics of the supporters of the revolutionary tribunal during the 1793/1794 Reign of Terror in France, and the methods of opponents of the czarist rulers of Russia.[6] Moreover, many of the contemporary terrorist groups have explicitly secular or nationalist orientations. Even groups associated with certain religions or religious sects, such as the Catholic Irish Republican Army, are clearly more nationalist than religious.

2. Defining Terrorism in the Modern Context

As a generic term, terrorism was defined several decades ago as "a mode of governing, or of opposing government, by intimidation".[7] *Terrell Arnold*, a former Deputy Director of the Office of Counterterrorism and Emergency Planning in the United States, suggested the following definition:

> Terrorism is the use or threatened use of violence for a political purpose to create a state of fear that will aid in extorting, coercing, intimidating, or causing individuals and groups to alter their behavior. Its methods are hostage taking, piracy or sabotage, assassination, threats, hoaxes, and indiscriminate bombings or shootings.[8]

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[3] Bibliographic volumes on the subject indicate that over 99 per cent of the works cited have been published after 1968. *See Augustus Norton / Martin Greenberg*, International Terrorism: An Annotated Bibliography and Research Guide, Boulder 1980; *Edward Mickolus*, The Literature of Terrorism: A Selectively Annotated Bibliography, West Port 1980.

[4] *See* generally *M. Cherif Bassiouni*, The Origins and Fundamental Causes of International Terrorism, in: *id.* (ed.), International Terrorism and Political Crimes, Springfield 1975, 5-10.

[5] *David C. Rapoport*, Fear and Trembling: Terrorism in Three Religious Traditions, in: American Political Science Review 78 (1984), 658-677.

[6] *See* the entry on terrorism in Webster's New Collegiate Dictionary, Springfield, MA 1951.

[7] *Ibid.*

[8] *Arnold* (note 1), 3.

Arnold then proceeded to state that terrorism is a subject which lends itself readily to definition by example. After a large number of recent examples of "what people as a rule think terrorists do", ranging from acts of the Italian Red Brigade, nationalist groups such as the Armenians and Palestinians, Islamic groups such as the Lebanese Hezballah (the Party of God), as well as State sponsored agents, he concluded that it is possible to build a cluster of examples around an unequivocal central concept of terrorism.[9]

Numerous other definitions of terrorism can be cited, but there is little consensus on what the "best" definition is.[10] However, based on a content analysis of 109 definitions of terrorism, *Alex Schmid* describes the frequency with which certain elements appear.[11] The element of violence/force appears in 83.5 per cent of the sample, followed by political intent at 65 per cent, emphasis on fear/terror at 51 per cent, *etc.* Some of the elements listed in this content analysis tend to overlap with others, or be another way of expressing the same idea. For example, ideas of threat and psychological effects and anticipated reactions, mentioned in 47 per cent and 41.5 per cent, respectively, appear to me to overlap with the preceding element of emphasis on fear/terror and the element of emphasis on intimidation, mentioned in 17 per cent of the sample. Nevertheless, and although such content analysis does not provide a definition per se, it "does point to the central element connected to terrorism upon which considerable agreement exists".[12] This agreement seems to focus on systematically planned politically motivated violence which does not distinguish between the intended target and innocent by-standers, or which is lacking in humanitarian constraints, in its use of terror to coerce/extort compliance with the demands of the actor(s).

Another possibly helpful tool is to distinguish terrorism from related concepts, especially ones which may be used to legitimize conduct that may otherwise be described as terrorist. Thus, *Arnold* seeks to distinguish between terrorism and insurgency as legitimate warfare in terms of targets of action, organization, objectives, location of operations and compliance or lack of compliance with the international rules of armed conflict, *etc.*[13] His purpose in doing so is to repudiate the common notion that if one cannot find some non-violent redress to accumulated grievances, the path of violence is always open.[14] He also wishes to repudiate the confusion between ends and means, often expressed in the phrase, "One man's terrorist is another man's freedom fighter".

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[9] *Op. cit.*, 3, 4.

[10] *Alex Schmid*, Political Terrorism, New Brunswick 1983, 73-75.

[11] *Op. cit.*, 76, 77.

[12] *Norman W. Provizer*, Defining Terrorism, in: *Martin Slann / Bernard Schechterman* (eds.), Multidimensional Terrorism, Boulder/London 1987, 5.

[13] *Arnold* (note 1), 8, 9.

[14] *Op. cit.*, 9.

3. The Moral Dimension

As correctly pointed out by *Grant Wardlaw*, "(a) major stumbling block to the serious study of terrorism is that, at base, terrorism is a moral problem".[15] Efforts at providing a universal definition of terrorism are unlikely to succeed because people wish to avoid having to apply this negative term to proponents of causes with which they sympathize. Thus, a distinction is often emphasized between ends and means, presumably in an attempt to maintain that if the ends were "just" or "deserving" the means may not be as objectionable as they would be if they are used to further an "unjust" or "undeserving" end.[16] "From this perspective", stated *Provizer*, "the debate over definition is less significant than the debate over the propriety of the action, that is its morality".[17]

To my mind, a clear moral judgment that "just"or "deserving" ends must always be pursued by equally "just" and "deserving" means is the only way out of the definitional difficulty. In other words, the same criteria for judging the justice of the end should apply to the justice of the means. Such judgment is in the best interest of all parties to any conflict because it enhances clarity of policy and efficacy of action. Its simple but irrefutable logic is reported to have been stated by a French peasant speaking in the 16th century of the religious wars in France: "Who will believe that your cause is just when your behaviors are so unjust?"[18]

4. A Legal Definition of Terrorism

The confusion over the definition of terrorism may be partly due to the fact that the parties are not always clear on the purpose of the definition. It is not conducive to clarity of thought on the subject to confuse political and sociological considerations regarding the nature of the conflict giving rise to the conduct in question, and/or the psychological processes of motivation of the perpetrators of the act. While all of these perspectives are necessary for understanding terrorism and dealing with it at various levels, a clear definition is imperative from the legal point of view.

For the purposes of the present article, the question should simply be one of applying the penal law of the State under whose jurisdiction the act is perpetrated. If the conduct constitutes a criminal offense under the penal law of the particular State, it should be prosecuted and punished as such regardless of the political or other motives of the culprit(s). If there are international or transnational aspects to

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[15] *Grant Wardlaw*, Political Terrorism, Cambridge 1982, 4.

[16] *Arnold* (note 1), 5.

[17] *Provizer* (note 12), 8.

[18] *Quoted* by *James Turner Johnson*, Can Modern War Be Just?, New Haven 1984, 61.

the conduct,[19] they should only be relevant to the question of jurisdiction, that is to say, determining which State has jurisdiction over the culprit. Once that question is settled through the application of the relevant rules of international and domestic law, the State awarded jurisdiction should proceed to enforce its own penal law.

In other words, I see no distinction between politically motivated criminal activity and other forms of criminal conduct. Murder, bodily harm, robbery, kidnapping or abduction, *etc.* are crimes under all legal systems, and should be treated as such regardless of the motive(s) of the culprit(s). In this respect, it is important to distinguish between motive in the general sense and intent in the legal sense. Intent in the legal sense relates to the actor's purpose or objective to produce the unlawful consequence, such as the desire to kill or harm the victim or take property through the use or threat of force or violence, while motive is the private reason or motivation which prompts the culprit to form that intent. If this distinction is not maintained, the administration of criminal justice will be thrown into total confusion, with executive and judicial organs of the State being preoccupied with searching for and evaluating a wide variety of complex private motives.

It is true, of course, that some legal systems allow for some consideration of motive(s) in the classification of certain crimes or determination of appropriate punishment. For example, the "mercy killing" of a terminally ill person may not be classified or punished as murder under some legal systems. However, such cases are radically different from politically motivated crimes in that the "well-being" or "best interest" of the victim of politically motivated violence is of no concern to the culprit.

The obvious problem with such clear-cut legalistic approach is whether the given State would have the political will to enforce its own penal law without regard to political or any other considerations. Besides the possibility of sympathy with the "cause" or political objectives of the culprit(s) leading to the above-noted confusion between ends and means, a State may be tempted to abdicate or compromise its duty to enforce its penal law in the interest of safety of its nationals or other interest perceived to be threatened by associates of the accused person(s). While such a temptation presents governments with a difficult decision, I believe that the best policy is that of strict enforcement of the penal law of the State.

It is not within the scope of the present article to elaborate on these aspects of the decision. However, I maintain that every effort must be made to assist governments in upholding the rule of law under difficult circumstances. One of the most fruitful avenues of such effort, I would suggest, is to repudiate any bases for sympathy for those who perpetrate criminal acts for political ends or motives. Such

[19] A distinction has been suggested between international terrorism, involving activity wherein the perpetrators are controlled by States, and transnational terrorism, where the perpetrators are essentially autonomous private actors. *See Schmid* (note 10), 258.

an effort would be most effective when it addresses the issues in terms of the cultural and religious traditions of the population, especially in the Muslim context where there is a direct and strong link between religion, on the one hand, and public policy and action, on the other.

The same sort of effort is necessary with reference to international/transnational aspects of terrorism. Combatting international/transnational terrorism is ultimately a question of national policy, a function of the political and sociological processes of each State as reflected in its relationships with other States. If it can be shown that there is no basis for sympathy for terrorists in the cultural and religious traditions of individual States, governmental resolve to combat this form of criminal activity will evolve and find expression in international co-operation in the field.

Terrorist acts are sometimes committed by officials of some governments under colour of their office. Is this fact relevant to the legal response to such conduct, and how? As a matter of principle, I see no distinction between crime committed by a private person and crime committed by an official of any government. If an official person commits a crime under colour of his/her office or official position, she/he should be prosecuted like any other offender. In other words, a claim that the accused was acting under official orders or in furtherance of official "duties" should not be accepted as a valid defence against a criminal charge or accusation. The fact that the apprehension and prosecution of "official" terrorists may require different practical and procedural arrangements should not be confused with the fundamental issue that there is no distinction in principle between a crime committed by an official of any government and one committed by a private person.

Needless to say, the realities of governmental action against domestic and international/transnational terrorism can hardly be seen as consistent with the above-stated legal approach. However, I believe that this sad fact does not bring into question or in any way diminish the basic validity and desirability of the suggested legal approach. If civilized human society is to be maintained, there is no alternative to strict compliance with the rule of law in both the domestic and international spheres. The crucial question would therefore be how to promote such compliance in the daily practice? Without in any way doubting the relevance and importance of other considerations and factors, I propose to address this question in the following pages from an Islamic point of view. In other words, I propose to examine Islamic sources with a view to promoting the rule of law in the domestic and international policy and action of Muslims.

II. Nature and Sources of Islamic Law

To begin with, we have to be clear on the meaning and scope of the term "Islamic law". The founding jurists of Islamic jurisprudence did not distinguish between the

religious, ethical, and legal aspects of their work. In fact, the term "law" itself, *qanun* in Arabic, was unknown to them. Rather, they preferred to speak of Shari'a, the path or way of life for the community of believers, the *umma*, or nation, of Islam. To Muslims, Shari'a is the "Whole duty of Mankind", moral and pastoral theology and ethics, high spiritual aspiration and detailed ritualistic and formal observance.[20] As such, Shari'a is the genereal source of ethical and religious norms as well as specifically legal principles and rules for Muslims. This is true for the vast majority of Muslims, commonly known as Sunni Muslims, as well as the Shi'a minority.

1. The Sources and Development of Shari'a

According to Muslim belief, the Prophet *Muhammad* received the literal and final word of God, the Qur'an, between 610 and 632 A. D. During the same period, the Prophet is believed to have explained and elaborated on the principles of divine revelation through verbal statements, his own actions and approval of the actions of his followers. These traditions of the Prophet came to be known as Sunna, which is recognized by Muslims as the second source of Shari'a.

Although Shari'a is believed by Muslims to be based on Qur'an and Sunna, in fact Shari'a represents the interpretation and elaboration of these two sources, and their supplementation through other sources to be explained below, by the founding Muslim jurists of the eighth and ninth centuries, A. D., the second and third centuries of Islam. As a religious text, the Qur'an was more concerned with establishing monotheism and setting the fundamental principles of individual and collective behaviour rather than laying down specific legal rules.[21] Thus, out of a total of 6219 verses of the Qur'an, only 500 (600 according to some scholars), had Shari'a content; and most of these relate to worship rituals, leaving only about 80 verses of legal subject-matter in the strict sense of the term.[22]

In contrast to the Qur'an which was collected and recorded soon after the Prophet's death,[23] Sunna was not collected and recorded until the late second and

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[20] *S. G. Vesey-Fitzgerald*, Nature and Sources of the Shari'a, in: *M. Khadduri / H. J. Liebesny* (eds.), Law in the Middle East, vol. 1: Origins and Development of Islamic Law, Washington, D.C. 1955, 85. For an analysis of the development of the concept of Shari'a *see Fazlur Rahman*, Islam, Chicago 1979, 101-109; *Ahmad Hasan*, The Early Development of Islamic Jurisprudence, Islamabad 1970.

[21] *Noel J. Coulson*, A History of Islamic Law, Edinburgh 1964, 11, 12, 17; *Fazlur Rahman* (note 20), 33-37; *Vesey-Fitzgerald* (note 20), 87.

[22] *Coulson* (note 21), 12; *Fazlur Rahman* (note 20), 69; *Vesey-Fitzgerald* (note 20), 87.

[23] *See* generally *John Burton*, The Collection of the Qur'an, Cambridge 1977, on the processes by which the present text of the Qur'an, *al-Mushaf*, came to be accepted as the authentic and full text of the final and literal word of God.

early third centuries of Islam.[24] In collecting and recording Sunna, specialized Muslim jurists developed elaborate techniques for verifying the authenticity of reported Sunna texts.[25] Nevertheless, in view of the fact that Sunna remained in the form of oral tradition for nearly two centuries of tremendous political turmoil and theological controversies, there have always been major doubts as to the authenticity and exact wording and circumstances of numerous texts of Sunna.[26] Moreover, when we scrutinize the techniques of authentication employed by the early Muslim jurists, and judge them by modern standards of evidence, more doubts can be raised as to the authenticity of some of the accepted texts of Sunna, and their significance as source Islamic norms.[27] By the same token, it may be safely assumed that some genuine Sunna texts were excluded as "unauthentic" or of doubtful authenticity.

Besides the scarcity of Shari'a principles in the Qur'an noted above, the total body of Sunna which was accepted as authentic by Muslim jurists and scholars can hardly provide a comprehensive and detailed source of social and legal norms. Consequently, the founding Muslim jurists have developed a number of "supplementary" sources and techniques of Shari'a. These secondary sources of Shari'a include *ijma*, the consensus of the Muslim community and *qiyas*, reasoning by analogy to an earlier established principle or precedent.[28] These and other secondary sources can also be seen as part of the broader concept of *ijtihad*, independent juristic reasoning to provide answers where the Qur'an and Sunna were silent. Sunna is cited as authority for the legitimacy of exercising *ijtihad* in such cases.[29]

Although *ijtihad* was actively employed during the formative stages of Shari'a, scope for its exercise was perceived as gradually diminishing as the founding jurists developed general principles and specific rules based on the Qur'an, Sunna and other sources and techniques between the eighth and ninth centuries. Moreover, due to their religious concern with the authority of Shari'a as the divinely sanctioned way of life for the believers, Muslim jurists insisted on extremely high qualifications for the person who may be authorized to exercise *ijtihad*. For these and possibly other reasons, a consensus evolved around the tenth century A. D., the third century of Islam, that the gates of *ijtihad* have been closed, that is to say, *ijtihad* was no longer allowed.[30] Since this consensus can be seen as a result of

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[24] *Fazlur Rahman* (note 20), 63-65; *Joseph Schacht*, Origins of Muhammadan Jurisprudence, Oxford 1959, 3-4.

[25] *Schacht* (note 24), 36-39.

[26] *Coulson* (note 21), 42; *Vesey-Fitzgerald* (note 20), 93.

[27] *Coulson* (note 21), 63; *Vesey-Fitzgerald* (note 20), 94.

[28] *Ahmad Hasan* (note 20), chapter VII; *Schacht* (note 24), 82-99.

[29] *Duncan B. MacDonald*, Development of Muslim Theology, Jurisprudence and Constitutional Theory, Lahore 1903, 86; *Vesey-Fitzgerald* (note 20), 93.

[30] *Coulson* (note 21), 80, 81; *Joseph Schacht*, An Introduction to Islamic Law, Oxford 1964, 69-75.

sociological and political circumstances rather than being based on the direct authority of the Qur'an or Sunna, modern Muslim writers have argued for the re-opening of the gates of *ijtihad*.[31] Indeed, some have argued that the gates of *ijtihad* may have never been closed.[32]

These last mentioned recent indications of creative intellectual and religious revival are clearly most welcome in the modern Muslim context. However, we have to emphasize that *ijtihad* and all juristic sources of Shari'a are subject to the two fundamental sources, namely the Qur'an and Sunna. While *ijtihad* may be used in interpreting the Qur'an and Sunna, Muslims in general believe neither *ijtihad* nor any source of Shari'a can be allowed to contradict any clear and definite text of Qur'an and/or Sunna. The implications of this principle will be discussed in the final section of this article in relation to the prospects of significant modern reform of Shari'a.

As indicated earlier, the founding jurists of Islamic jurisprudence interpreted the Qur'an and Sunna, and employed *ijtihad*, *ijma*, *qiyas* and other techniques to develop Shari'a as a comprehensive code for Muslims. Although elements of Shari'a had obviously existed from the beginning in the sense that clear and definite texts of the Qur'an and Sunna and specific instances of *ijtihad* and interpretation of texts of the Qur'an and Sunna were applied in the daily life of Muslims, the systematic development of Shari'a came about during the second and third centuries of Islam, the eighth and ninth centuries A. D.[33] In particular, the four major surviving schools of Islamic jurisprudence, *madhabib*, followed throughout the Sunni Muslim world, were established during the period.[34] As will be explained below, Shi'a jurisprudence developed around the same time.

2. *The Shi'a Perspective(s)*

The success of Shi'a clerics to seize power in Iran in early 1979 has brought Shi'a Islam to the attention of public opinion throughout the world. Moreover, in view of the subject of this article, it is important to consider briefly the ways in which Shi'a perspectives are similar or different from those of the Sunni majority.

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[31] *See* generally *C. C. Adams*, Islam and Modernism in Egypt, London 1953; *H. A. R. Gibb*, Modern Trends in Islam, Chicago 1947; *M. Kerr*, Islamic Reform: The Political and Legal Theories of Muhammad Abduh and Rashid Rida, Berkeley 1966.

[32] *Wael B. Hallaq*, Was the Gate of Ijtihad Closed?, in: International Journal of Middle East Studies 16 (1984), 3-41.

[33] *Coulson* (note 21), chapters 2 to 5, provides a most concise statement of the development of Shari'a.

[34] *Subhi Mahmassani*, Falsafat al-Tashri fi al-Islam (The Philosophy of Legislation in Islam), (*F. Ziadah*, translator), Leiden 1961, 32-35, lists the names of the founding jurists of the surviving as well as the extinct schools of Islamic jurisprudence, and the dates of their deaths.

Strictly speaking, it may be misleading to speak of the Sunni and Shi'a perspectives in contrasting terms because both groups of Muslims share much of same beliefs and religious dogma. In actual fact, there are some differences among Sunni as well as among Shi'a Muslims.[35] Indeed, some Shi'a Muslims, such as the Zaydis of southern Arabia, are closer to the Sunni majority than they are to some other Shi'a groups.[36] What unites all Shi'a, however, is the special status they ascribe to *Ali*, the Prophet's cousin and son-in-law, and the belief that the Imam, the legitimate ruler of the Islamic State, must be a descendent of *Ali* and *Fatima*, the Prophet's daughter.[37]

It may be helpful for our purposes here to note the following general points of agreement and disagreement between the main Shi'a sect, known as the Ithna 'Ashari or Twelvers, now in power in Iran, and Sunni Muslim. Like the Sunni majority, the Twelvers Shi'a accept the Qur'an as the literal and final word of God, although they disagree on the interpretation of the Qur'an.[38] They also accept the Prophet *Muhammad* as the final Prophet, and consequently accept Sunna as the second source of Shari'a, but do not accept a report of Sunna as authentic unless recognized by their own jurists.[39] Twelvers Shi'a do not accept the *ijtihad*, *ijma*, and *qiyas*, of Sunni Muslims, and prefer that of their own jurists.[40] Most importantly, the theological and legal thinking of Shi'a in general, and the Twelvers in particular, are dominated by the expectation of the return of the absent Imam, re-appearance of the hidden Imam in Isma'ili Shi'a belief, who has the ultimate authority to declare what Shari'a is, and to implement it in practice.[41] In the meantime, Shi'a Muslims try to live by the dictates of Shari'a as elaborated by their own jurists, and to co-exist with other Muslims, and with non-Muslims in the manner indicated by Shari'a.[42]

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[35] *Coulson* (note 21), 106.

[36] *Mahmassani* (note 34), 38; *A. A. A. Fyzee*, Shi'a Legal Theories, in: *Khadduri* (note 20), 113-131 (117).

[37] For detailed explanations of Shi'a sects *see Montgomery Watt*, Islamic Philosophy and Theology, Edinburgh 1962, 20-26, 50-56, 99-104. Reference may also be made to the numerous detailed works on the Shi'a, such as *Said Amir Arjomand*, The Shadow of God and the Hidden Imam: Religion, Political Order, and Societal Change in Shi'ite Iran from the Beginning to 1890, Chicago 1984; *Moojan Momen*, Introduction to Shi'i Islam: The History and Doctrines of Twelvers Shi'ism, Yale 1985.

[38] *Joseph Eliash*, The Ithna 'ashari Shi'i Juristic Theory of Political and Legal Authority, in: Studia Islamica 24 (1969), 2-30 (29).

[39] *Coulson* (note 21), 105.

[40] *Fyzee* (note 36), 123.

[41] *Op. cit.*, 114-121.

[42] *Op. cit.*, 121, 122.

3. The Nature and Modern Application of Shari'a

a) The Nature of Shari'a

As a result of their primary concern with regulating the relationship of the individual Muslim with his or her God, "the jurists had formulated standards of conduct which represented a system of private, and not of public law, and which they conceived it to be the duty of the established political power to ratify and enforce".[43] The conception of the role of the jurists and the duty of the political authorities in these terms was also reflected in the nature and degree of detail in the various fields of Shari'a. Not only did this lead to greater development of the religious and worship rituals and private and family law than the public law aspects of Shari'a, but it also led to the formulation of Shari'a principles in terms of moral duties sanctioned by religious consequences rather than legal rights and duties with specific temporal remedies.[44] All fields of human activity were categorized in terms of *halal* or *mubah*, permissible or allowed, and *haram*, impermissible or prohibited; with intermediate categories of *mandub*, recommended, and *makruh*, reprehensible.[45]

In this way, Shari'a addresses the conscience of the individual Muslim, whether in private or public and official capacity, rather than the institutions and corporate entities of the community and the State. The other major categorization of Shari'a in terms of *ibadat*, worship rituals and practices, and *mu'amalat*, social dealings, also conforms to the fundamental nature of Shari'a as religious obligations to be reflected in private and public action from an individual private perspective.

The same individual private perspective underlies the vast diversity of opinions over Shari'a's ruling on any given matter. Although Shari'a professes to be a single logical whole, there is immense diversity of opinion not only between the schools, but also among different jurists of the same school.[46] Because all the divergent, and sometimes conflicting, views are regarded as equally valid and legitimate, any Muslim has the choice of taking whatever view is acceptable to his or her individual conscience.[47]

In terms of content or subject-matter, and excluding the spiritual and ritual aspects, we find that Shari'a's hold was strongest in family law and inheritance, and weakest in penal law, taxation, constitutional law and the law of war, with the law of contracts and obligations in the middle.[48] This order of variation in detailed

[43] *Coulson* (note 21), 120.

[44] *Op. cit.*, 82, 83.

[45] *Op. cit.*, 83, 84. Individual jurists preferred different variations of these basic general categories, *see Ahmad Hasan* (note 20), 34-39; *Fazlur Rahman* (note 20), 83, 84.

[46] *Kemal Faruki*, Islamic Jurisprudence, Karachi 1975, 166-194; *Coulson* (note 21), 47-51.

[47] *Schacht* (note 30), 68.

[48] *Op. cit.*, 76.

regulation under the various aspects or fields of Shari'a is partly due to the greater degree of detailed regulation of the particular field in the Qur'an and Sunna leading to a stronger identification of the relevant rules of Shari'a with religious belief and practice. The other reason for this differential in specific regulation under Shari'a is the ancient dichotomy between the theory and practice of Shari'a.

b) Historical Application of Shari'a

It is certainly true that "Shari'a law had come into being as a doctrinal system independent of and essentially opposed to current [of the eighth century A. D.] legal practice".[49] Nevertheless, it is as dangerously easy to exaggerate the cleavage between the *umara* (amirs, military commanders and civil governors) and the *fuqaha*, jurists, as it is to ignore it.[50] While the jurists were obliged by the Qur'an itself to acknowledge the unity of the Islamic State, and consequently the necessity for an effective head of that State, however, distasteful the individual occupant of that office may have been to them, the rulers always had to make some outward deference to Shari'a because they owed their position to the religion of Islam. As a result of this state of affairs, there has been "an uneasy truce between *ulama* [*fuqaha*] ... and the political authorities [*umara*] ... As long as the sacred law [Shari'a] received formal recognition as a religious ideal, it did not insist on being fully applied in practice".[51]

The dichotomy between theory and practice, naturally enough, varied from time to time and from one field of Shari'a to another. The earliest stage of the Medina State (from 622 to 661 A. D.) is believed by the vast majority of Muslims to have reflected the strongest unity between the theory and practice of Shari'a;[52] but that was over an extremely limited territory and for a very short period of time. Although the strict observance of Shari'a is not believed to have been a high priority with the *Umayyad* dynasty (from 661 to 750 A. D.),[53] their executive officials were clearly guided by it, to the extent that it has been developed by their time.[54] In particular, increasing importance and prestige were attached to the office of the *qadi*, a judge who specialized in Shari'a. This was carried further under the early *Abbasid* dynasty (as of 750 A. D.), who based the legitimacy of their challenge to the *Umayyads* on a claim to have greater commitment to the implementation of Shari'a in a more comprehensive and strict fashion.[55] That commitment, however,

[49] *Coulson* (note 21), 120.

[50] *Vesey-Fitzgerald* (note 20), 91.

[51] *Schacht* (note 25), 84.

[52] *Fazlur Rahman* (note 20), 79; *Coulson* (note 21), 23-27.

[53] *Schacht* (note 30), 23; *Coulson* (note 21), 27.

[54] *Fazlur Rahman* (note 20), 79.

[55] *Ignaz Goldziher*, Introduction to Islamic Theology and Law (*Anras* and *Ruth Hamori*, translators), Princeton 1981, 45; *Schacht* (note 30), 49; *Fazlur Rahman* (note 20), 93.

> did not mean that the future course of the Islamic ship of state was to be steered by the Shari'a courts. The Abbasid rulers maintained a firm grip on the helm, and the Shari'a courts never attained that position of supreme judicial authority independent of political control, which would have provided the only sure foundation and real guarantee for the ideal of the *Civitas Dei*.[56]

Subsequent stages of Muslim history reflected continuous fluctuation between greater and lesser observance of Shari'a in practice.

c) Contemporary Application of Shari'a

As a result of increasing internal weakness and external western influence, the implementation of Shari'a in the public affairs of Muslims has reached a very low level since the late nineteenth century.[57] The main seats of Muslim power, in the Ottoman Empire, Persia and India, collapsed and were co-opted into accepting the European models of the nation-State and international order, and abandoning all pretence of conforming to Shari'a in public affairs.[58] European legal systems became the norm in domestic law enforcement and international relations, leaving only family law and inheritance for Muslims to be governed by Shari'a.

This displacement of Shari'a by modern western law seems to have been the outcome of a compromise. The ancient concepts and principles of Shari'a became increasingly difficult to maintain in domestic public affairs and in international relations with modern superior non-Muslim States. As correctly explained by *Noel Anderson*,

> to a Muslim, it has always been a far more heinous sin to deny or question the divine revelation that to fail to obey it. So it seemed [to Muslims] preferable to continue to pay lip-service to an inviolable Shari'a, as the only law of fundamental authority, and to excuse departure from much of it in practice by appealing to the doctrine of necessity (*darura*), rather than to make any attempt do adapt that law to the circumstances and needs of contemporary life.[59]

However, many Muslim countries are currently experiencing rising demands for a stronger Islamic identity and greater application of Shari'a.[60] It is natural for

[56] *Coulson* (note 21), 121.

[57] *James N. D. Anderson*, Law Reform in the Muslim World, London 1976, 1, 2.

[58] *Op. cit.*, 14-32; *H. Liebesny*, Law in the Near & Middle East, Albany, N.Y. 1975, 56; *Coulson* (note 21), 161.

[59] *Anderson* (note 57), 36.

[60] This phenomenon has been documented and discussed in numerous scholarly works; *see*, for example, *John Esposito* (ed.), Islam and Development: Religion and Sociopolitical Change, Syracuse, N.Y. 1980; *Mohammad Ayoob* (ed.), The Politics of Islamic Reassertion, New York 1981; *John O. Voll*, Islam: Continuity and Change in the Modern World, Essex 1982; *James Piscatori* (ed.), Islam in the Political Process, Cambridge 1983; *Daniel Pipes*, In the Path of God: Islam and Political Power, New York 1983; *John L. Esposito* (ed.), Voices of Resurgent Islam, Oxford 1983; *John L. Esposito* (ed.), Islam in Asia: Religion, Politics, and Society, Oxford 1987.

Muslim peoples to seek a sense of national identity following the achievement of political independence from colonial rule. Moreover, many individual Muslims may feel a strong sense of religious commitment to Shari'a, and be motivated by its dictates at the private psychological level regardless of the official policies of their governments. I would accept both the collective and individual aspects as legitimate exercise of the right to self-determination *provided* that such exercise does not violate the rights of others, whether at the domestic or international levels.

III. Islamic International Law in Historical Context

Although the founding Muslim jurists did not know and discuss international law in the modern sense of the term, some of them did elaborate on the relevant rules under the rubric of *siyar*, or conduct of State. The leading early Muslim jurist generally credited with founding *siyar* as a branch of Shari'a is *Muhammad ibn al-Hasan al-Shaybani*, the student of *Abu Hanifa* and one of the founders of the *Hanafi Madhhab*, school of Islamic jurisprudence.[61] Other jurists have treated some of the relevant issues in their general or specialized treatises on Shari'a.[62] However, the international law aspects of Shari'a should be understood in the historical context of the eighth and ninth centuries A. D. in which the founding Muslim jurists operated. When seen in this light, it will be realized that Shari'a's conception of international relations, and its version of Islamic international law, were a natural outcome of the interpretation of the fundamental sources of Islam in a certain historical context rather than the only valid interpretation of those source. Once this contextual framework of interpretation is appreciated, the door would be open for an alternative interpretation of the fundamental sources of Islam in the present historical context in order to develop a modern version of Islamic international law.

1. Impact of the Historical Context on the Principles of Shari'a

Islam was born in an extremely harsh and violent environment, and received a very hostile and aggressively violent reaction from the tribes of seventh century Arabia.[63] The first Muslims had to fight for their survival until Islam prevailed throughout Arabia by the time of the death of the Prophet. The pre-existing norms

[61] *Majid Khadduri*, The Islamic Law of Nations: Shaybani's Siyar, Baltimore 1966, Introduction.

[62] *See*, for example, *Omar A. Farrukh* (translator), Ibn Taimiyya on Public and Private Law in Islam or Public Policy in Islamic Jurisprudence, Beirut 1966.

[63] *Muhammad Husayn Haykal*, The Life of Muhammad (*Isma'il A. al Faruqi*, translator), Indianapolis 1976, 115-130; *Muhammad Hamidullah*, The Muslim Conduct of State, Lahore 1966, 48-61.

of inter-tribal relations were heavily, if not completely, dependent on the use or threat of violent force by the claimant of any "right", even the right to exist at all.[64]

The use or threat of force was also the norm among the various entities or polities of the region, including the two powerful empires to the north-east and north-west of Arabia, the Sasanian and Byzantine Empires.[65] Thus, when the first Muslim State was established in seventh century Arabia, force was the basic method of conducting what is known today as international relations.[66] It was therefore inevitable that Islam should endorse the use of force in Muslim relations with non-Muslims in that historical context. In doing so, however, Shari'a introduced new norms to control the reasons for going to war as well as its actual practice.[67] Some of these regulations of the use of force under Shari'a will be explained in the next section of this article.

Thus, it is important to emphasize the exclusive and limited nature of what may be described as ancient and pre-modern systems of international law. Customary rules and practices regulating relationships between various political entities prior to the rise of modern international law "were not truly 'international', in the modern sense, for each was exclusive and failed to recognize the principles of legal equality and reciprocity which are essential to any system if it is to become world-wide".[68] *Siyar*, Shari'a's equivalent to international law, was therefore consistent with the conception of the international law of the time.[69]

2. *Islamic International Law in the Present Context*

However, to argue that Shari'a was fully justified in endorsing the use of force in international relations, and that it did in fact restrict and regulate its use, is not to say that such use of force is still justified. Rather, since the use of force was justified by the historical context of violent inter-communal and international relations, it must cease to be so justified in the present context where peaceable co-existence has become a vital necessity for the very survival of humanity. Besides the independently growing enlightened trend towards peace and co-operation in human relations, modern means of atomic warfare have made hostile international relations unthinkable. Moreover, and until the threat or use of violent force has been

[64] *Haykal* (note 63), 15, 16; *Fred Donner*, The Early Islamic Conquests, Princeton 1981, 20 *et seq.*

[65] *Hamidullah* (note 63), 51.

[66] *Donner* (note 64), 37 *et seq.*

[67] *Khadduri* (note 20), 353 *et seq.*

[68] *Khadduri* (note 61), 3.

[69] *Op cit.*, 10 *et seq.*; *Majid Khadduri*, War and Peace in the Law of Islam, Baltimore 1955, 42-58.

totally eliminated in international relations, it is obviously true that the use of violence must be restricted and regulated to the maximum possible degree.

It must be emphasized, however, that for Muslims the historical context as such can neither be the source of Shari'a in the past, nor can it be its source in the future. According to Muslim belief, Islamic law in the past, present and future must be based on the Qur'an and Sunna. I fully accept this position, and only wish to suggest that the historical context is merely the framework for the interpretation and application of these basic sources of Islam. In other words, it is not suggested here that Islamic law should simply follow developments in human history regardless of the provisions of the Qur'an and Sunna. What is suggested is that the Qur'an and Sunna have been the source of Shari'a as the Islamic response to the concrete realities of the past, and must be the source of modern Shari'a as the Islamic response to the concrete realities of today.

In order to highlight the conflict and tension between Shari'a and modern international law and illustrate their implications to the subject of this article, it is necessary to state clearly and authoritatively the relevant principles and rules of Shari'a. Once the basis of current Muslim ambivalence towards internal political violence and terrorism are clearly identified, the need for international Islamic reform to promote the rule of law in international relations will be appreciated. That aspect will be discussed in the final section of this article.

IV. Shari'a and Political Violence

It is true that the focus of this article is international or transnational political violence and terrorism by individual persons. However, I submit that the ideological justification and psychological motivation for such individual violence in the Muslim context is closely linked to collective attitudes derived from the principles of Shari'a. As an essentially religious law, Shari'a addresses the individual Muslim as well as the State as the official organ of the community of Muslims. In this light, it would be useful to begin by a statement of the relevant aspects of Shari'a and then discuss their implications for the conduct of individual persons and groups.

1. Antagonism and Use of Force Against Non-Muslims

In addition to the explicit sources of Shari'a on the use of force against non-Muslims and renegade Muslims to be reviewed below, many verses of the Qur'an which were revealed after the Prophet's migration to Medina in 622 A. D. emphasized the internal cohesion of the Muslim community and sought to distinguish it from other communities in hostile and antagonistic terms. During the Medina stage, the Qur'an repeatedly instructed the Muslims to support each other and disassociate

themselves from non-Muslims and warned against taking non-Muslims as friends or allies. Thus, verses 3:28, 4:144, 8:72-73, 9:23 and 71 and 60:1, prohibited the Muslims from taking unbelievers as *awliya*, friends, helpers and supporters; and instructed them to look for friendly relations and mutual support among themselves. Similarly, verse 5:51 instructs the Muslims not to take Jews and Christians as *awliya*, as they are *awliya* for each other, and any Muslim who turns to Christians and Jews for friendship and support becomes one of them.

These verses and related Sunna provided the general context within which the sources dealing specifically with the use of force against non-Muslims were understood and applied by the early Muslims. As will be emphasized below in relation to the specific sources on the use of force against non-Muslims, all the above-cited verses were revealed during the Medina period and not the earlier Mecca period. As such, these sources should now be seen as having provided the necessary psychological support for the cohesion of a vulnerable community of Muslims trying to survive in a hostile and violent social and natural environment.

The commonly used Islamic term for the use of force in international relations is *jihad*. The literal meaning of the word *jihad* is effort and exertion which includes, but is not necessarily restricted to, exerting effort in war.[70] Thus, on the one hand, both the Qur'an and Sunna have used the term *jihad* in a wider sense of making the utmost effort, sometimes in ways that have nothing to do with the use of force.[71] In numerous verses of the Qur'an, such as 2:18, 5:54 and 8:72, the term *jihad* and its derivatives are used to refer to self exertion, whether in combat or peaceful efforts. Even as against the unbelievers, verse 25:52 instructs the Prophet and Muslims to use the Qur'an in *jihad* against the unbelievers. This obviously refers to using the force of arguments of the Qur'an, and not the force of arms, in *jihad*. Moreover, some verses of the Qur'an, such as 29:8, 31:15 and 47:31, use the term *jihad* and its derivatives in a sense which has nothing to do with the use of force. In one statement of Sunna, the Prophet described the use of force in battle as the minor *jihad* and self exertion in peaceful and personal compliance with the dictates of Islam as the major or superior *jihad*. In another Sunna, the Prophet is reported to have said that the best form of *jihad* is to speak the truth in the face of a tyrannical and oppressive ruler.[72] On the other hand, both the Qur'an and Sunna have used the term *qital*, fighting, and its derivatives to refer to the use of force in international relations. For example, this is clearly the sense of verses 2:190, 193 and 244; 4:76; and 9:12, 29 and 123 of the Qur'an.

[70] *Majid Khadduri*, Islam and the Modern Law of Nations, in: American Journal of International Law 50 (1956), 358-372 (359).

[71] In fact the term *ijtihad*, or independent juristic reasoning in developing principles and rules where the Qur'an and Sunna were silent, is derived from the same root as *jihad*, namely *jahad*, which means to make strenuous and sincere effort. Thus, exerting juristic effort in developing legal principles and rules is a form of *jihad*.

[72] *Al-Kaya al-Harasiy*, Ahkam al-Qur'an, Beirut 1983, vol. 1, 89.

In view of this linguistic ambiguity, and the fact that the term *jihad* has frequently been misused by Muslims and non-Muslims alike, it may be better to use the term "use of force" to refer to this aspect of Shari'a. This latter term is further recommended by the fact that it has become a term of art in international law, especially since its use by the Charter of the United Nations. As such, this term can be applied in cross-cultural analysis of the issues.

Much can be learned about Shari'a's view of the legitimate use of force in international relations through a review of the relevant sources of Shari'a in chronological order. This may be possible in relation to the Qur'an because of the relatively greater general agreement over the site, and hence at least the approximate date, of the revelation of each verse. It is much harder, if not impossible, to attempt a chronological survey of the Sunna because there is very little agreement on its chronological sequence. However, Sunna can be helpful in understanding the meaning of a given verse of the Qur'an, and will be used for this purpose in the following survey.

The first verses of the Qur'an which clearly sanction the use of force by Muslims against non-Muslims were revealed in Medina, after the Prophet and his companions migrated from Mecca in 622 A. D. According to *Ibn Kathir*'s leading interpretation and commentary on the Qur'an,[73] the first verses instructing Muslims to use force in "*jihad/qital*", against unbelievers were 2:190-93 and 22:39 which may be translated, respectively, as follows:

> Fight in the cause of God those who fight you, but do not transgress the limits (initiate attack or aggression), for God does not love the transgressors (aggressors). And slay them wherever you catch them, and turn them out from where they have turned you out, for tumult and oppression are worse than slaughter; but fight them not at the Sacred Mosque (of Mecca) unless they (first) fight you there; but if they fight you (there), slay them, (because) that is the reward of the unbelievers. But if they cease, God is Most Forgiving, Most Merciful. And fight them until (so that) there is no more tumult or oppression, and there prevails faith in God; but if they cease, let there be no hostility except to those who practice oppression.
>
> Permission (to fight back) is (hereby) given to those against whom war is made; and God is Most Powerful and Able to support them. (They are) those who have been wrongfully expelled from their homes (for no cause or reason) except that they say 'God is our Lord'; if God did not check one set of people by means of another, there would surely have been destruction of temples (of worship) and property ...

Verses 4:90, 8:39 and 61 of the Qur'an are identified by *Ibn Khathir* as having been revealed in Medina, without stating an exact date for their revelation. The first mentioned verse comes in the context of instructing Muslims to disassociate themselves from the hypocrites, and to confront and slay them wherever they find them. "But if they (the hypocrites) withdraw from you without fighting you", says

[73] *Mukhtasar Tafsir ibn Kathir*, summarized and edited by *Muhammad Ali al-Saboni*, Beirut 1400 Hijri (Islamic calender, corresponding to 1979).

verse 4:90, "and send you (guarantees) of peace, then God gives you no licence or permission (to fight them)". Verse 8:39 may be translated as saying "[a]nd fight (the unbelievers) until (so that) there is no tumult or oppression, and faith in God completely prevails everywhere; but if they cease (their oppression) God is most Capable (Knowledgeable) of what they do". Following verse 8:60, which instructs Muslims to prepare for war in order to deter the unbelievers, verse 8:61 states: "But if they (the unbelievers) incline towards peace, you shall also incline towards it (peace) and place your trust (confidence) in God, He is the one who Hears and Knows (everything)."

Then there is the whole of chapter 9 of the Qur'an which is identified by *Ibn Khathir* as having been revealed in the ninth year of *Hijra*, that is to say around 631 A. D., and is generally accepted to have been among the last of Qur'anic revelation. The verses of this chapter, such as verses number 5, 12, 13, 29, 36, 73 and 123, contain the clearest sanction for the use of force against non-Muslims, and are generally taken to have repealed or superceded all previous verses which prohibit or restrict the use of force. In particular, verse 5 of this chapter is said to have repealed, or abrogated for the purposes of Shari'a, over one hundred preceding verses of the Qur'an which instruct Muslims to use peaceful means and arguments to convince unbelievers to embrace Islam.[74] This verse appears in the context of instructing the Prophet to declare that he repudiates his previous pledges of non-aggression to unbelievers, subject to a four months period of grace, or until the end of the time set by a specific treaty of peace which the other side has not violated. Then comes verse 9:5 which may be translated as follows:

> But once the forbidden months (the period of grace) are over then fight and slay the unbeliefers (polytheists) wherever you find them, and seize them, beleaguer them, and lie in wait for them in every stratagem (of war); but if they repent, and establish regular prayers and pay *zaka*, (Islamic alms and religious tax) then open the way for them; for God is Most Forgiving, Most Merciful.

The other verse of this chapter which should be quoted in full is verse 29 because it applies to the use of force against *ahl al-kitab*, non-Muslim believers who have received heavenly revealed scriptures, mainly Jews and Christians. This verse may be translated as follows:

> Fight those People of the Book who do not believe in God or the Last Day, nor hold as forbidden what has been forbidden by God and His Apostle (the Prophet of Islam), nor acknowledge the Religion of Truth (Islam) until they pay *jizya* (poll tax) with willing submission, and feel themselves subdued.

Several conclusions can be drawn from this survey of the Qur'an on the use of force by Muslims against non-Muslims. The first clear conclusion is that this is an exclusively Medinese phenomenon, that is to say, it relates to the Medina period

[74] *Mustafa Zayd*, Al-Nasikh wa al-Mansukh (The Abrogator and the Abrogated in the Qur'an), vol. 1, Cairo 1963, 289-501; *id.*, vol. 2, 503-583; *Ahmad Hasan* (note 20), 67, 68.

after migration from Mecca. During the earlier period of Mecca, prior to migration to Medina in 622 A. D., there was no authorization in the Qur'an for the use of force against non-Muslims.[75]

The second clear conclusion from the above survey of the relevant verses of the Qur'an is that there was a progression in Qur'anic sanction for the use of force by Muslims against non-Muslims, from the use of force in self-defence to the use of force in propagating Islam. However, and as has already been indicated, since chapter 9 of the Qur'an was among the last revelations, it was taken by many Muslim jurists to have repealed, or abrogated for the purposes of Shari'a, all previously revealed inconsistent verses of the Qur'an. As will be explained in the final section of this article, it should be possible for modern Muslim jurists to reverse this process of abrogation in order to re-instate the principles of peaceful co-existence with non-Muslims.

The third conclusion to be drawn from the above survey of relevant verses of the Qur'an is that the use of force was not permitted except for these two mentioned reasons, namely, self-defence and propagation of Islam. In view of the claims of some modern Muslim writers that Shari'a permitted the use of force only in self-defence,[76] it is important to emphasize that both the Qur'an and Sunna did in fact, by the end of the Prophet's life, sanction the use of force in propagating Islam. It is simply not plausible to argue that the early Muslims conquered the whole of Syria, Iraq, north Africa and southern Spain to the west, and Persia and northern India to the east, in self-defence.[77] The truth of the matter is that Shari'a sanctioned and regulated the use of force by Muslims against non-Muslims not only in self-defence but also as a means of propagating Islam. Thus, and in accordance with this position, early Muslim jurists have developed the theory of Shari'a that Islam and unbelief cannot exist together in this world.[78] This principle is clearly illustrated by the last practice of the Prophet, and that of his Caliphs as well as the whole history of the early expansion of Islam.

Thus, we find numerous reports of the Prophet, and his Caliphs after him, instructing Muslim armies to offer the non-Muslim side the chance to embrace Islam, and that if they accepted the offer, then no force was allowed to be used

[75] *Noor Mohammad*, The Doctrine of Jihad: An Introduction, in: Journal of Law and Religion 3 (1985), 381-397 (385).

[76] *See*, for example, *Muhammad Abu Zahrah*, Nazariayt al-Harb fi al-Islam (The Theory of War in Islam), in: Revue Egyptienne du Droit International 14 (1958), 1-42 (6); *Mahmud Shaltut*, Al Islam wa al-'alaqat al-Dawliya (Islam and International Relations), Cairo 1951, 38. This claim was made earlier by *Ibn Taymiyya* in the fourteenth century; *see Ibn Taymiyya*, Qa'ida fi Qital al-Kuffar (A Principle in Fighting Unbelievers), Cairo 1949, 115-146.

[77] For an English translation of an early account of these conquests by a Muslim historian *see Philip K. Hitti* (translator), The Origins of the Islamic State, being a translation of kitab futuh Al-Buldan by al-Baladhuri, New York 1968.

[78] *Khadduri* (note 69), 59.

against them. If the non-Muslim side rejected the Muslim invitation to embrace Islam, and happened to be People of the Book, they were offered the second option of concluding a compact with the Muslims, commonly known *dhimma*, or pledge of honor, whereby they would agree to pay *jizya* and submit to Muslim sovereignty in exchange for being secure in their persons and property, and allowed to practice their religion and apply their personal laws, as explained earlier. The Muslim armies were instructed by the Prophet, and his Caliphs, that whenever the offer to embrace Islam was not accepted, and the alternative option to pay *jizya* was rejected by those qualified to receive such an offer, that is to say People of the Book, then the Muslims armies must fight them. For example, the following Sunna is reported in *Sahih Muslim*, one of the most authoritative compilations or records of Sunna:[79]

> Whenever the Prophet appointed a commander over an army or detachment, he enjoined upon him to fear God regarding himself and regarding the treatment of the Muslims who accompanied him. Then he used to say:
>
> 'Fight with the name of God and in the path of God. Combat those who disbelieve in God. Fight yet do not cheat, do not break trust, do not mutilate, do not kill minors.
>
> If you encounter an enemy from among the non-Muslims, then offer them three alternatives. Whichever of these they may accept, agree to it and withhold yourself from them:
>
> So call them to embrace Islam. If they accept, then agree to it and withhold yourself from them ...
>
> If, however, they refuse, then call them to pay the *jizya*. If they accept, then agree to it and withhold yourself from them. If they refuse, then seek help from God and combat them.'

It is remarkable that, although he quoted this and other similar Sunna, *Muhammad Hamidullah*, a leading contemporary Muslim writer on Islamic international law and relations, still attempted to avoid recognizing the true nature of Shari'a in this respect and called the use of force in propagating Islam the "idealistic" cause of war under Shari'a.[80] Another modern Muslim author attempted to avoid admitting that Shari'a required Muslims to use force against People of the Book, such as Christians and Jews, if they refused to pay *jizya*.[81] In contrast, it is my position that it would be better to recognize this and other aspects of Shari'a in their true nature and explain them in terms of historical context.

2. *Regulation of Use of Force and Peace Treaties*

Besides restricting the legitimate use of force by Muslims against non-Muslims to the two reasons of self-defence and propagation of Islam, Shari'a regulated the

[79] For a translation of this Sunna, and references to many other records of similar instructions by the Prophet, *see Hamidullah* (note 63), 305, 306; *Khadduri* (note 61), 75-77.

[80] *Hamidullah* (note 63), 167-169.

[81] *Noor Mohammad* (note 75), 389.

actual conduct of war in a number of ways.[82] First, the above-mentioned requirement of offering the other side the option of embracing Islam, and accepting *dhimma* when appropriate, constituted what is known in modern terminology as a formal declaration of war and fair warning as a necessary prerequisite to commencement of hostilities.[83] Furthermore, Shari'a regulated in detail the conduct of Muslim armies in combat. We have already seen, in his above-quoted Sunna, that the Prophet instructed Muslim armies not to cheat, break trust, mutilate or kill minors. In other reports he specified that the prohibition of killing non-combatants included women, children and monks.[84] *Abu Bakr* and *Umar*, the first and second Caliphs of the Prophet, who can safely be assumed to represent the accurate position of Shari'a, are often quoted as instructing Muslim armies not to embezzle, cheat, break trust, mutilate, kill a minor or an old man or a women, hew down a date-palms nor burn it, cut down a fruit-tree, slaughter a goat or cow or camel except for food. They are also quoted instructing Muslim armies not to interfere with people who have secluded themselves in convents.[85]

However, if Muslim armies were victorious, they were entitled to take enemy property as *ghana'im*, spoils of war, in accordance with prevailing practice.[86] This is clearly recognized by verses 48:19 to 20, 8:41 and 69, *etc.* of the Qur'an which regulate the distribution of such booty.

In light of all these sources, it is not surprising to find, as documented by *Khadduri* and other writers in the field, that those leading founding jurists of Shari'a who addressed inter-communal / international relations spoke of a permanent state of war between *dar al-Islam*, the abode of Islam or territory under Muslim rule, and *dar al-harb*, the abode of war or territory falling outside Muslim control.[87] According to those founding jurists of Shari'a, Muslims may have to conclude peace treaties, *sulh* or *ahd*, suspending hostilities with non-Muslim polities, if Muslim interests required that, but such treaties must be of a temporary nature, and only in order to permit Muslims to resolve their internal differences or prepare for the next round of fighting with the non-Muslims.[88]

As indicated by the rules on making peace treaties, and shown by many sources of Shari'a and historical experience, the theoretically permanent state of war between

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[82] *Khadduri* (note 69), 94-137; *id.* (note 61), 95-105.

[83] *Hamidullah* (note 63), 190-192.

[84] *Ibn Kathir* (note 73), vol. 1, 170.

[85] For translations of these instructions and references to their original sources *see Hamidullah* (note 63), 305-309.

[86] *Khadduri* (note 61), 106-129; *id.* (note 69), 118-132.

[87] *Id.* (note 20), chapter XV; *id.* (note 70), 358-360; *Ibrahim Shihata*, Islamic Law and the World Community, in: Harvard International Club 4 (1962), 101-114 (107); *Hans Kruse*, The Islamic Doctrine of International Treaties, in: Islamic Quarterly 1 (1954), 152-194.

[88] *Khadduri* (note 20), 354, 358.

Muslims and non-Muslims did not necessarily mean violence or fighting.[89] Nevertheless, it is important to remember that the theory of Shari'a is that Islam and unbelief cannot exist together in this world.[90] Thus, Shari'a requires that, whether through active fighting or other means, *dar al-harb*, the abode of war which is all territory outside the jurisdiction of Islam, must be brought within *dar al-Islam*, the abode of Islam where Shari'a prevails.[91]

Moreover, since upholding Islam is considered by Shari'a to be a legitimate cause for the use of force, such force can be used even against Muslims whose conduct is deemed to be subversive of the Muslim community or detrimental to the interests of Islam.[92] Thus, we find the standard treatises of Shari'a discussing both types of the use of force in the same context and language.[93] This approach is understandable in view of the religious nature of the State itself. Since apostates and rebels were regarded as the enemies of the Muslim community, they were to be treated on the same footing as external enemies.[94] Such reasoning is, of course, no longer valid or tenable under modern principles which would not sanction the use of force against such groups unless they used force themselves.[95] Furthermore, since Muslims are now organized in different separate nation-States, the use of force among Muslim-States, as in the case of the Iran-Iraq war, is now an international conflict which should be governed by the relevant rules of international law.

3. *Implications for Conduct of Individual Persons and Groups*

As indicated earlier, Shari'a addresses the individual Muslim person directly. It is the duty of the individual person to implement the dictates of Shari'a in his or her personal conduct as well as in collaboration with others or through official organs and institutions. Moreover, the individual Muslim is also influenced by the vast wealth of early Islamic history and precedents derived from the conduct of highly revered early personalities.

For example, the events of *al-fitna al-kubra*, or the Great Upheaval, which refers to the protracted and violent conflict over power following the murder of *Uthman*, the third Caliph, in 656 A. D., are very much alive in the imagination of the majority of Muslims, and continue to influence the course of events to the present

[89] *Khadduri* (note 69), 56, 57; *id.* (note 61), 15.

[90] *See* note 78 and accompanying text.

[91] *Op. cit.*, 64.

[92] *Hamidullah* (note 63), 171-188.

[93] *Khadduri* (note 61), 39-49.

[94] *Id.* (note 69), 76-80.

[95] This point was in fact appreciated by some early Muslim scholars such as *al-Mawardiy* who said that these classes come under international law only when they are of sufficient power or have acquired territory and rule over it. *See Hamidullah* (note 63), 170.

day.[96] It was during that period that *Ali*, the Prophet's cousin and son-in-law and designated fourth Caliph, was challenged by several groups of Muslims. As a result of those challenges, almost all of *Ali*'s short reign was occupied by civil war against his primary adversaries, the *Umayyads*, and renegades from his own ranks, the *Kharijites*. In 661, a group of *Kharijites* conspired to assassinate the three leading figures of the civil war, *Ali*, and the two leaders of the *Umayyads*, *Mu'awya ibn Abu Sufiyan* and *Amr ibn al-Ass*. However, since only the assassin assigned to murder *Ali* succeeded in his mission, *Mu'awya* was able to consolidate his position and established the *Umayyad* dynasty. *Al-Shi'a*, the partisans of *Ali*, became a persecuted minority following the assassination of *Ali* and subsequent death of his two sons from *Fatima*, the daughter of the Prophet.

Those events and subsequent developments of the second half of the seventh century continue to exercise extremely powerful psychological and political influence on many Muslims to the present day. For example, the Shi'a throughout the world commemorate annually the martyrdom of *Hussayn*, the son of *Ali*, on the anniversary of his death, called *ashura*, at the hands of the forces of *Yazid*, the second *Umayyad* Caliph.[97] On this date, thousands of Shi'a re-enact the tragedy and declare their commitment to uphold the right of the descendants of *Ali* and *Fatima* to rule as Imams of the whole of Islamic lands. Many non-Shi'a Muslims are also powerfully moved by the memory of that tragic event.

One of the central themes of the Qur'an and Sunna is the notion that Muslims have the obligation to uphold good and justice and combat evil and injustice.[98] Moreover, while the Qur'an does not explicitly specify the ways in which this obligation is to be discharged, some Sunna seem to suggest direct action. For example, in one very well known Sunna, the Prophet is reported to have said:

> Whoever among you perceives a *munkar*, an injustice/evil, he or she shall rectify it (the situation) by his or her own hands. If unable to do so, then he or she shall rectify the situation by speech. If unable to do so, then he or she shall disapprove of the injustice/evil in his or her own heart, and this (last mentioned option) is the lowest degree of belief (the last acceptable resort).

Neither the Qur'an, nor the above-quoted Sunna or any other Sunna explicitly sanction the use of private violent force in rectifying injustice and evil. It is true that these fundamental Islamic sources sanction direct action in rectifying injustice and evil, but such action need not, of course, be violent action. However, it can also be said that the commonly known Islamic sources are *not* explicit in condemning and prohibiting direct violent action. This is not surprising since the absence of the

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[96] For the events of that period *see Marshall G. S. Hodgson*, The Venture of Islam, vol. 1, Chicago 1974, 212-223.

[97] *Op. cit.*, 220; *see Moojan Momen* (note 37), 239, for a table of Shi'a religious commemorations.

[98] *See*, for example, verses 3:104, 3:110, 3:114, 4:114; 9:71, 9:112 and 22:41 of the Qur'an.

rule of law in the modern sense of the term during the times of the early Muslims may have necessitated the use of private violence.

Thus, on the one hand, Muslims are enjoined to rectify whatever *they perceive* to be injustice or evil, by direct private action, if possible. On the other hand, there has been a historical ambivalence in Islamic sources as to what sort of direct private action is permissible in rectifying injustice and evil. So long as a modern individual Muslim person is confronted with the duty to act in furtherance of his or her perception of what is good and just, and with a wealth of detailed historical events which seem to favour violent private direct action, it is likely that some Muslim individuals and groups will see private violent direct action as one of the options open to them. This is the basis of the creed of militant proponents of the literal application of historical Shari'a, commonly known as Islamic fundamentalists,[99] and the religious justification of their terrorist actions.[100] For any person motivated by this logic, international boundaries are of no significance whatsoever. If he or she believes that violent private direct action is necessary in another country or against the nationals of another Muslim or non-Muslim-State, he or she will act accordingly.

The only way to counter-act the force of this religious motivation and rationalization of domestic and international/transnational political violence and terrorism is to develop an alternative religious motivation and rationalization for non-violent action. This is the task addressed in the next section of this article.

V. Towards an Islamic Contribution to the Rule of Law in International Relations

Although the historical diversity of opinion among Muslim jurists reflected the possibilities of differences in interpretation of the texts of the Qur'an and Sunna, those possibilities have been exercised within a definite historical context. Now that the domestic and international circumstances within which the Muslims have to operate have changed drastically from what used to prevail at the time of the elaboration of the principles of Shari'a highlighted in the preceding section, I

[99] The term "fundamentalist" was first used with reference to a movement in American Protestantism in the early twentieth century. *See* generally *George Marsden*, Fundamentalism and American Culture, New York/Oxford 1982. However, in so far as this term implies a commitment to the "fundamentals", most Muslims would claim such a commitment. It may not, therefore, be appropriate to confine its use in the Muslim context to militant and literalist proponents of the modern application of Shari'a, as seems to be the common practice, especially in news media reports of the activities of these groups.

[100] For an example of this *see* the translation of the basic text of the group which assassinated President *Sadat* of Egypt in *Johannes J. G. Jansen*, The Neglected Duty, The Creed of Sadat Assassins and Islamic Resurgence in the Middle East, New York/London 1986, 160-230.

submit that these legitimate possibilities of interpretation should be exercised with the conscious knowledge of this drastic change in circumstances. The following considerations should be emphasized in this process of re-interpretation.

First of all, there is the obvious fact that concepts and ideas can only be derived from any text, whether believed to be of divine or human origin, through a process of interpretation. This principle should be easily appreciated by Muslims because even the Qur'an, which they believe to be the literal and final word of God, clearly describes itself in verses 12:2 and 43:3 as something conveyed through the vehicle of the Arabic language in order to be reflected upon and understood through the faculty of reason. In verse 29:49, the Qur'an describes itself as something which is understood and appreciated by the hearts and minds of those granted knowledge.

Consequently, Muslims should realize that they are always dealing with a *human interpretation* of their sacred sources rather than the sources *per se*. Moreover, and in accordance with the Islamic principle of individual responsibility,[101] each and every Muslim should know that he or she is personally responsible for the choice he/she makes in accepting or rejecting any given interpretation of the sacred sources. As frequently re-iterated by the Qur'an,[102] one cannot excuse himself or herself by accepting what has been handed down from previous generations of Muslims, or stated by contemporary Muslims. Each and every Muslim is responsible for what he or she may accept as the valid interpretation of the sacred sources. The crucial question would therefore be what are the criterion or guidelines for accepting or rejecting a given interpretation?

It is not possible to state and explain here the various approaches and issues related to this question. However, it is safe to assume that most Muslims would agree that the given interpretation must be consistent with the realities of the concrete situation within which a proposed principle is supposed to be applied. When *Imam al-Shafi'i*, the founder of the Shafi'i School, was asked why he varied some aspects of his teachings when he moved from Iraq to Egypt, he is reported to have said that the changes were necessitated by differences between the two environments and societies. This authoritative and commonly accepted proposition testifies to the relationship between the validity of the proposed interpretation of the sacred sources of Islam and the environment and circumstances within which the principle or rule is supposed to be applied.

None of the above considerations is new or conclusive because other considerations and counter arguments can easily be envisaged. When all is said and done, the ultimate question would be a moral one, namely what *ought* to be the principle in the particular case or situation. With particular reference to the issue of political

[101] Verses 6:164, 17:15, 35:18, 39:7, and 53:38 of the Qur'an.

[102] The Qur'an condemns this attitude in many verses such as 2:170, 5:104, 40:78, 31:21, 43:22. Although these verses apparently refer to previous peoples, and to polytheists who rejected Islam, they are equally applicable to similar attitudes of the Muslims themselves.

violence and terrorism, the question becomes should this sort of behaviour be acceptable or condoned by the norms of Islam?

To answer this question, one should consider the full implications and consequences of political violence and terrorism in light of the fundamental moral principle that one should treat others in the same way he or she would like to be treated by them. Thus, since one would not accept acts of political violence or terrorism being inflicted on his or her person or that of a person for whose safety and well-being one is concerned, then one should not inflict such acts on other persons. This proposition can be stated in terms of considering the consequences of the wholesale practice of political violence and terrorism. In other words, since the very basis of civilized human existence would be totally repudiated if every person, or even a large number of persons, should resort to direct private violence in rectifying injustice, and since one would not accept those consequences, one should not engage in that conduct.

Thus, in the final analysis, this is a plea for the rule of law in domestic and international relations. Whatever may be the problems that we have with the practice of lawlessness by other persons and official organs, the answer can never lie in repudiation of the principle of the rule of law itself. Whatever injustice may be inflicted on one person or group of persons, it would have to be rectified in an orderly and peaceful manner. This point was brilliantly made in the simple statement of the French peasant quoted earlier: "Who will believe that your cause is just when your behaviors are so unjust?"[103]

It is in no way suggested that Muslims should abandon their religious obligation to uphold good and justice and combat evil and injustice. On the contrary, Muslims must do their utmost in this regard, but only through peaceful and orderly means. As suggested earlier, ends and means are intricately connected; a good end can never be achieved through bad means. Muslim individuals and groups must therefore employ peaceful and orderly means in their struggles for peace and justice. Internal political action, to the extent of non-violent civil disobedience, and external political action through all diplomatic and other peaceful means of influencing public opinion and governmental action, are available and perfectly legitimate means of upholding good and justice and combating evil and injustice in accordance with the dictates of Islam.

It is with this perspective that I suggest that Muslim scholars and popular leaders should approach Islamic sources. While it is true that there has been ambivalence in the interpretation of the sources, and that there are precedents for political violence and terrorism in Islamic history, the clear choice of Muslims today should be to uphold the rule of law in domestic and international relations. All Islamic sources should be interpreted in this light by setting aside any source or precedent

[103] Note 18 and accompanying text.

which may be seen as supporting political violence and terrorism as having lost legitimacy and authority in the radically transformed present context, and by emphasizing and implementing sources and precedents which support the rule of law.

The Islamic theological arguments for this position have been explained in the work of the late Sudanese Muslim reformer, *Ustadh Mahmoud Mohamed Taha*.[104] Citing the impact of the historical context on the formulation of Shari'a, and the need for reformulation under contemporary circumstances, *Ustadh Mahmoud* argued for enacting those verses of the Qur'an and texts of Sunna which support peaceful relations and the rule of law. According to *Ustadh Mahmoud*, the practical application of the fundamental and permanent message of Islam of peace and co-operation had to be postponed in view of the concrete realities of the seventh century Middle East. Instead, the Prophet had to implement a transitional message of Islam which restricted and regulated but did not eliminate the use of force in inter-communal/international relations. However, in doing so, the Prophet also conveyed the fundamental message of peace and co-operation through the Qur'an and Sunna, but dit not elaborate on that message because to have done so would have confused the early Muslims who were supposed to implement the transitional message.

In terms of the subject-matter of the present article, *Ustadh Mahmoud* held that the verses of the Qur'an and Sunna which sanctioned the use of force in international/inter-communal relations, quoted and cited in section IV. 1. above, were merely transitional in application. In other words, he maintained that those sources will cease to be legally binding as part of Shari'a once the practical conditions and circumstances which justified their application in the seventh century have changed. He also emphasized the vital need for peace and the rule of law in domestic and international relations under contemporary circumstances, thereby concluding that the applicable Islamic message is one of peace and co-operation *and not* one of violence and confrontation.

Although it may not be possible to explain the technical aspects of *Ustadh Mahmoud*'s theory for Islamic reform in the present short article, it should be emphasized that the whole approach I have adopted in the preceding discussion is based on that theory. Moreover, it should be noted that although I find the ideas of *Ustadh Mahmoud* particularly appropriate for achieving the desired results of resolving the Islamic ambivalence to political violence and terrorism, any equally appropriate approach would be acceptable. The fundamental point here is that there is an urgent need for resolving this ambivalence in favour of the rule of law, and that the proposed reform methodology must enjoy Islamic legitimacy if it is to have the desired result of changing Muslim attitudes and policies.

[104] *Mahmoud Mohamed Taha*, The Second Message of Islam (translated with an introduction by *Abdullahi Ahmed An-Na'im*), Syracuse 1987.