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Islamist Terrorism and the
Classical Islamic Law of War

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CONTENTS

I.	Introduction.....	1634
II.	Sources of Islamic Law	1635
III.	The Lesser Jihad and Shari'a Jus ad Bellum—Authorizing a Just War.....	1640
	A. Jihad and its Justification.....	1640
	B. The Call to Jihad.....	1646
IV.	Shari'a Jus in Bello—the Conduct of Hostilities	1648
	A. Killing of Noncombatants	1648
	B. Suicide Attacks.....	1649
	C. Treatment of Prisoners of War	1650
	D. Cessation of Hostilities.....	1651
V.	Islamist Terrorists	1653
VI.	Conclusion.....	1657

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I. INTRODUCTION

Islam is more than a religion; it is also an expansive legal system.¹ Islamic law, or Shari'a, governs every part of Muslim society including contracts, criminal law, transactional law, family law, and international law. In the words of the scholar Joseph Schacht, "Islamic law is the epitome of Islamic thought, the most typical manifestation of the Islamic way of life, the core and kernel of Islam itself."² Although there is no nation that currently uses the Shari'a as its State legal system, most Muslim nations require that their systems conform to the Shari'a.³ But Islamic law is important for another reason; it is at the heart of the Islamist⁴ terrorist movement. In fact, the main unifying principle among the various Islamist terrorist groups is their desire to return to a religiously ordered State based upon their interpretation of the Shari'a.

The association between Islam and terrorism has been at the forefront of our national debate for more than twenty years. Many misunderstandings exist about what Islam, and specifically Shari'a law, teaches about terrorist acts and the waging of war. Unfortunately, there is no perfectly defined delineation between Islamist terrorist ideology and mainstream Islamic ideology. The goal of this article is to provide the reader with a basic understanding of Shari'a law, describe Islam's teachings on key principles of the law of war, and show how the interpretation of Shari'a law relied upon by Islamist terrorists generally contradicts that of mainstream Islamic scholars.

The article begins with a review of the primary and secondary sources of Islamic law and the attendant controversies. It then defines jihad, explores the Islamic law on authorizing a just war, and highlights how terrorist groups selectively interpret the primary sources to justify their ideology. Next, it explains the divergent views on the law concerning treatment of noncombatants, suicide attacks, treatment of prisoners, and cessation of hostilities. The

1. Sobhi Mahmassani, *The Principles of International Law in the Light of Islamic Doctrine*, 117 RECUEIL DES COURS 205, 210 (1966).

2. JOSEPH SCHACT, INTRODUCTION TO ISLAMIC LAW 1 (1964).

3. See NINA SHEA, RADICAL ISLAM'S RULES 194–203 (Paul Marshall ed., 2005) for a discussion on how many Muslim countries still rely heavily on Shari'a. Additionally, many Muslim States still use substantive portions of Shari'a in their State legal systems, a common example being Islamic family law.

4. Islamism is an Islamic revivalist movement, often characterized by moral conservatism, literalism, and the attempt to implement Islamic values in all spheres of life.

final section further defines the background, principles, and goals of Islamist terrorist organizations, using al-Qaeda and associated Islamist terrorist groups as an example. It concludes by summarizing the divergent interpretations of Shari'a and makes modest suggestions on steps that can be taken to alleviate the influence of these terrorist groups.

II. SOURCES OF ISLAMIC LAW

Islamic law, or Shari'a, refers to the total sum of Islamic legal guidance. The two primary sources, in order of precedence, are the *Koran* and the Traditions of the Prophet, which are Muhammad's teachings, deeds, and approved practices.⁵ The two most important complementary sources of law are consensus of opinion and analogy.⁶ A familiarization with these sources and the associated controversies is necessary to understand the conflicting theologies of mainstream Islamic jurists and Islamist terrorists.

The most authoritative source of law in Islam is the *Koran*, which is viewed by Muslims as the very word of God as revealed to his Prophet, Muhammad.⁷ Muhammad was born in Mecca in AD 570.⁸ After a short career as a trader, he committed himself to intense worship and meditation.⁹ It was during this period that Muhammad began receiving divine revelations. The revelations occurred intermittently over the course of twenty-two years, starting in AD 610 and continuing until his death in AD 632.¹⁰ The *Koran* consists of 114 chapters, and contains 6,666 verses.¹¹ Of those verses, approximately seventy deal directly with the conduct of hostilities.¹² The Koranic revelations were normally committed to writing by Muhammad's followers, but were not originally organized in one comprehensive document.¹³

5. S. Sherif Hassan, Unpublished Materials for the Use of Students in the Seminar in Islamic Law and Middle Eastern Legal Institutions 117, Columbia University School of Law, (2010) (on file with author).

6. *See id.*

7. Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 10 JOURNAL OF CONFLICT AND SECURITY LAW 1, 3 (2005).

8. ABDULLAHI AHMED AN-NA'IM, TOWARD AN ISLAMIC REFORMATION 12 (1999).

9. *Id.*

10. *Id.*

11. Ali & Rehman, *supra*, note 7, at 3.

12. *Id.*

13. See Mohamed Abdel Dayem & Fatima Ayub, *In the Path of Allah: Evolving Interpretations of Jihad and its Modern Challenges*, 7 UCLA JOURNAL OF ISLAMIC & NEAR EASTERN LAW 67, 75 (2009); Hassan, *supra* note 5, at 128.

The process of consolidating the revelations began after Muhammad's death.¹⁴ The current version of the *Koran* was finally compiled, organized, and disseminated in AD 650.¹⁵ Rather than a chronological arrangement, the *Koran* is, for the most part, organized by the length of its chapters.¹⁶ The *Koran* and the Traditions were originally written in classical Arabic and have multiple translations that can lead to very different interpretations.¹⁷ Often, Islamist terrorists rely upon the less well accepted interpretations to support their radical agendas.¹⁸

It is important to understand the political context in which the *Koran* was revealed. The first revelations came during Muhammad's twelve and a half years in Mecca.¹⁹ He and his followers lived under the authority of the Meccan government and were subject to persecution.²⁰ Many of the revelations during that period are characterized by the need and desire for peaceful interaction with non-Muslims and the expansion of the faith through reasoned discourse.²¹ After the Harij, Muhammad's migration to Medina, the early Muslims' political fortunes began to change. Muhammad accumulated many followers and became the political ruler of Medina.²² Persecution of the Muslims by the Meccans continued, but the Muslims' ability to defend themselves had vastly improved. It is during this period when most of the verses relating to hostilities were revealed.²³ These verses governed how the Muslims should defend themselves and their faith. It is generally agreed that the Meccan revelations, along with the Traditions from that period, were primarily religious and moral axioms.²⁴ Comparatively, the verses revealed after the Harij (migration) are, to a great extent, political and legal in substance

14. Dayem & Ayub, *supra* note 13, at 74.

15. Hassan, *supra* note 5, at 128.

16. *Id.* at 129.

17. See YOUSSEF H. ABOUL-ENEIN & SHERIFA ZUHUR, ISLAMIC RULINGS ON WARFARE 9 (2004).

18. *See id.*

19. Hassan, *supra* note 5, at 127.

20. AN-NA'IM, *supra* note 8, at 12.

21. It was during this period that Koranic Verse 16:125 was revealed: "CALL THOU [all mankind] unto thy Sustainer's path with wisdom and goodly exhortation, and argue with them in the most kind manner: for, behold, thy Sustainer knows best as to who strays from His path, and best know He as to who are the right-guided." This verse shows the emphasis placed on promulgation of the faith through peaceful reason.

22. AN-NA'IM, *supra* note 8, at 12.

23. *Id.*

24. *Id.*

and address the specific political situations that presented themselves at the time.²⁵

As the Muslims' political and societal needs developed, the law required further refinement. Additional Koranic verses were revealed to Muhammad through the angel Gabriel to meet these requirements.²⁶ Some of the newer verses dealt with themes addressed in older verses, but in a way that reflected the changed circumstances.²⁷ This linear revelation addressing changing circumstances created what some commentators see as contradictions in the *Koran*. The prime example is the claim that the verses that advocate peaceful discourse with non-believers, revealed during the Meccan period, are contradicted by verses that are taken by some to advocate forced conversion, which were revealed during the later Medina period.²⁸ These and other seeming contradictions gave rise to the concept of abrogation,²⁹ a commonly accepted principle in Islamic jurisprudence and one which plays a central role in Islamist terrorist theology and justification for jihad.³⁰ Islamist terrorists rely partially on the abrogation of peaceful verses to justify their actions. As discussed below, most mainstream Islamic jurists instead rely upon historical context and advocate a holistic reading of the *Koran*.³¹

The second source of Islamic law is the Traditions of the Prophet.³² These are divided into three parts: sayings and statements of Muhammad; the deeds and actions of Muhammad; and Muhammad's silence or tacit approval regarding things that occurred with his knowledge.³³ While not the actual word of God, most Muslims believe in the infallibility of the Traditions because of Muhammad's role as the Prophet and supreme authority in

25. *Id.*

26. Hassan, *supra* note 5, at 126.

27. Dayem & Ayub, *supra* note 13, at 75.

28. *Id.* at 76.

29. *Id.* at 75.

30. For an additional discussion on abrogation, see THE ROYAL AAL AL-BAYT INSTITUTE FOR ISLAMIC THOUGHT, JIHAD AND THE ISLAMIC LAW OF WAR, 28–31 (2009) (“Abrogation (naskh) means that the legally binding status of a Qur’anic verse is superseded by the legally binding authority of a verse that is revealed later. For example, one verse of the Qur’an prohibits Muslims from praying while intoxicated, while a later verse abrogates this verse by promulgating an absolute prohibition on the consumption of alcohol.” *Id.* at 28–29.).

31. DR. MUHAMMAD HAMIDULLAH, THE MUSLIM CONDUCT OF STATE 18 (7th ed. 1987).

32. Hassan, *supra* note 5, at 134.

33. *Id.*

the interpretation of the *Koran*.³⁴ This belief is based upon the following Koranic verses:³⁵ “O you who have attained faith, pay heed unto God and his Apostle”;³⁶ “Hence, pay heed unto God, and pay heed unto the Apostle”;³⁷ “Whoever pays heed unto the Apostle pays heed unto God thereby”;³⁸ “Hence, accept [willingly] whatever the Apostle gives you [thereof], and refrain from [demanding] anything that he withholds from you.”³⁹

While there is little controversy among most Muslims over the authority of the Traditions, there has been controversy over some of the Traditions’ authenticity.⁴⁰ This controversy partially derives from the fact that the Traditions were not comprehensively compiled until more than one hundred years after Muhammad’s death.⁴¹ Manipulation and outright forgeries of Traditions were promulgated for political or personal ends for approximately two hundred years after that.⁴² Principles from other religions and axioms from the great philosophers were even ascribed to Muhammad.⁴³ A solution for this problem was devised by the great Islamic jurist Muhammad ibn Idris al-Shafi, who developed a system to validate the Traditions.⁴⁴ Although the system has many detractors in western scholarship,⁴⁵ it put an end to the manipulations and forgeries and established an empirical standard for accepting Traditions believed to be authentic.⁴⁶ There are six compilations of these Traditions that all Sunni⁴⁷ Muslims accept as authoritative.⁴⁸

The two next most important sources of Islamic law are consensus of opinion and analogy.⁴⁹ While the *Koran* and Traditions are based upon the

34. *Id.*

35. *Id.*

36. KORAN 8:20.

37. *Id.* 5:92.

38. *Id.* 4:80.

39. *Id.* 59:7.

40. See H.A.R. GIBB, MOHAMMEDANISM 39 (1962).

41. Hassan, *supra* note 5, at 135. It should also be noted that many Traditions were recorded during Muhammad’s life.

42. See GIBB, *supra* note 40, at 75.

43. *Id.*

44. FAZLUR RAHMAN, ISLAM 47 (1979).

45. See N.J. COULSON, A HISTORY OF ISLAMIC LAW 64 (1964).

46. *Id.* at 70.

47. More than seventy-five percent of all Muslims worldwide identify as Sunni. Central Intelligence Agency, *Field Listings—Religion*, THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/religions/> (last visited Nov. 30, 2021).

48. AN-NA’IM, *supra* note 8, at 23.

49. Mahmassani, *supra* note 1, at 230.

revealed word of God and guidance from his Prophet, these two sources of law consist of opinions of influential Muslim jurists based on their own human rationality.⁵⁰ Most Muslims accept the authority of consensus and analogy, but Islamist terrorists reject them and other complementary sources as being inauthentic expressions of the will of God.⁵¹

The foundation for consensus of opinion is partially based on the Tradition that Muhammad said, “My people shall never be unanimous in error.”⁵² The classical requirement for this source of law is universal acceptance by Muslim jurists.⁵³ The controversies here are apparent:⁵⁴ What is the definition of a Muslim jurist? Does universal mean unanimous? Is one school’s consensus binding on the others? Is one generation’s consensus binding on the next? Should the consensus be based upon popular agreement, or agreement among religious scholars? Pragmatic Islamic jurists forged ahead in the face of these problems and were able to convince their most influential contemporaries to agree on many legal principles through consensus. This led one Islamic scholar to remark that “the gap between theory and practice of [consensus of opinion] remains a striking feature of this doctrine.”⁵⁵ But despite the controversy and gap between theory and practice, consensus of opinion has greatly enhanced the breadth and depth of Islamic law.⁵⁶

The fourth source of Islamic law, analogy, was developed in response to the expansion of the Islamic State and the requirement for more specific guidance than what was found in the *Koran*, Traditions, and consensus of opinion.⁵⁷ Analogy is the process of extending a legal rule to a new case.⁵⁸ It requires that both cases have an identical common effective cause.⁵⁹ An example is the extension of the prohibition of wine to all intoxicating liquors, the common effective cause being the intoxicating property.⁶⁰ Many criticize the use of analogy for several reasons: the *Koran* is a sufficient source of law;

50. *Id.*

51. See Dayem & Ayub, *supra* note 13, at 19.

52. AN-NA’IM, *supra* note 8, at 23.

53. M.H. KAMALI, PRINCIPLES OF ISLAMIC JURISPRUDENCE 168 (1991).

54. See AN-NA’IM, *supra* note 8, at 23–24.

55. KAMALI, *supra* note 53, at 168.

56. See AN-NA’IM, *supra* note 8, at 24.

57. SOBHI MAHMASSANI, FALSAFAT AL-TASHRI FI AL-ISLAM, [THE PHILOSOPHY OF LAW IN ISLAM] 234 (Farhat J. Ziadeh trans., 1961).

58. Mahmassani, *supra* note 1, at 231.

59. *Id.*

60. *Id.*

analogy is just guess work by jurists; and, it may be argued, Muhammad and the Companions were against analogy.⁶¹ Despite these criticisms, a majority of Muslim jurists accept the authority of analogy as the fourth source of Islamic law.

III. THE LESSER JIHAD AND SHARI'A JUS AD BELLUM— AUTHORIZING A JUST WAR

A. *Jihad and its Justification*

It is well accepted among mainstream Islamic jurists that Islam is fundamentally a religion of peace.⁶² The literal translation of the word Islam is “submission or surrender,” in the context of submitting to the will of God.⁶³ “The word ‘peace’ and its derivatives are cited in more than one hundred verses of the *Koran*, while the word ‘war’ and its derivative verb are mentioned in only six verses.”⁶⁴ Notably, the most common greeting in the Muslim world is “assalamu alaikum,” which means “peace be upon you.”⁶⁵ A key Koranic passage that reinforces this peaceful vision of Islam is the following: “But if they incline to peace, incline thou to it as well, and place thy trust in God”⁶⁶

Although the preferred method for the expansion of Islam is through peaceful propagation,⁶⁷ Islamic law authorizes the use of force in certain circumstances, and makes it obligatory in others. When Muhammed and early Muslims were persecuted by the Meccan Arabs, the Koranic revelations authorized jihad (*jus ad bellum*) to defend the faith.⁶⁸ In later revelations, as discussed below, the *Koran* called for aggressive jihad. Some argue this justifies expansion of the faith by force.

The word jihad should not be exclusively read to mean war. Jihad’s literal translation is “effort and exertion.”⁶⁹ It is used in the *Koran* in the wider sense

61. MAHMASSANI, THE PHILOSOPHY OF LAW IN ISLAM, *supra* note 57, at 81.

62. See HAMIDULLAH, *supra* note 31, at 7; Mahmassani, *supra* note 1, at 242.

63. Hassan, *supra* note 5, at 121.

64. Mahmassani, *supra* note 1, at 242.

65. *Id.*

66. KORAN 8:61.

67. Mahmassani, *supra* note 1, at 279, 242.

68. *Id.* at 279. It is worth noting that the early jihads to defend the faith brought relative peace to the Arabian Peninsula, served as a unifying force among the Arabs, and brought an end to tribal feuds. *Id.* at 278.

69. AN-NA’IM, *supra* note 8, at 145.

of self-exertion, as well as effort and exertion in war.⁷⁰ The *Koran* and the Traditions set forth two classes of jihad, the greater and the lesser.⁷¹ The greater jihad refers to worship and the spiritual struggle with oneself that every Muslim must constantly engage in.⁷² The greater jihad was the original jihad and was described in the following three early Koranic verses when the use of force was still prohibited:⁷³

“And those of you who make jihad in Our (cause), We will certainly guide them to Our paths”⁷⁴

“Therefore, listen not to the unbelievers, but make jihad against them with the utmost strenuousness, with (the *Koran*).”⁷⁵

“And whoever makes jihad he does so for his own soul”⁷⁶

The greater jihad directed Muslims to persevere against oppression and to peacefully propagate Islam.⁷⁷ Conversely, the lesser jihad is the religious obligation or command to fight a just war on behalf of Islam.⁷⁸ The lesser jihad also encompasses more than physically going to war. It includes the giving of property and wealth, organizing and communicating, and all other acts in support.⁷⁹

The lesser jihad originated as a means to preserve the religion and protect early Muslims from attacks by non-believers.⁸⁰ The first verses of the *Koran* that sanctioned jihad against non-Muslims, thus providing *jus ad bellum*, were revealed shortly after the Harij (migration to Medina) in AD 622.⁸¹ The verses main focus is on self-defense and compassion. Two of the most important of these verses about defensive jihad may be translated as follows:

And fight in God’s cause against those who wage war against you, but do not commit aggression—for verily, God does not love aggressors. And

70. *Id.*

71. Dayem & Ayub, *supra* note 13, at 73.

72. *Id.*

73. LOUAY M. SAFI, PEACE AND THE LIMITS OF WAR—TRANSCENDING THE CLASSICAL CONCEPTION OF JIHAD 6 (2003).

74. KORAN 29:69.

75. *Id.* 25:52.

76. *Id.* 29:6.

77. SAFI, *supra* note 73.

78. Dayem & Ayub, *supra* note 13, at 73.

79. HAMIDULLAH, *supra* note 31, at 163. This is supported by Koranic verse 9:41: “Go forth to war, whether it be easy or difficult [for you], and strive hard in your God’s cause with your *possessions* and your lives”

80. Mahmassani, *supra* note 1, at 279.

81. AN-NA’IM, *supra* note 8, at 145.

slay them wherever you may come upon them, and drive them away from wherever they drove you away—for oppression is even worse than killing. And fight not against them near the Inviolable House of Worship unless they fight against you there first; but if they fight against you, slay them: such shall be the recompense of those who deny the truth. But if they desist—behold, God is much-forgiving, a dispenser of grace. Hence, fight against them until there is no more oppression and all worship is devoted to God alone; but if they desist, then all hostility shall cease, save against those who [willfully] do wrong.⁸²

Permission [to fight] is given to those against whom war is being wrongfully waged—and, verily, God has indeed the power to succor them—those who have been driven from their homelands against all right for no other reason than their saying, “Our Sustainer is God!” For, if God had not enabled people to defend themselves against one another, [all] monasteries and churches and synagogues and mosques—in [all of] which God’s name is abundantly extolled—would surely have been destroyed [ere now].⁸³

The use of force authorized by these revelations is notable in that they do not allow aggressive jihad, but are defensive in nature. However, they did signify a change in Islamic doctrine that began an evolution towards an increasingly aggressive Koranic authorization of jihad.⁸⁴ The first phase of this evolution, associated with Mohammed’s time in Mecca, was non-confrontational: the use of force was prohibited.⁸⁵ That was likely necessary due to the small number of followers and the lack of any political power.⁸⁶ The second phase of the evolution, the start of which can be attributed to the quotes in the preceding paragraph, was one in which defensive jihad was authorized.⁸⁷ The final stage of the evolution of jihad was what some claim authorizes the expansion of the faith through offensive war against non-believers, including both polytheists and Judeo-Christians.⁸⁸

It is this final stage, the promulgation of Islam through force, which is so controversial amongst Muslims and non-Muslims alike. Two key verses

82. KORAN 2:190–193.

83. KORAN 22:39–40.

84. Dayem & Ayub, *supra* note 13, at 76.

85. *Id.*

86. AN-NA’IM, *supra* note 8, at 12.

87. Dayem & Ayub, *supra* note 13, at 76.

88. *Id.*

from Chapter 9 of the *Koran*, believed to be amongst the last Koranic revelations and recorded sometime around AD 631, are at the heart of the controversy.⁸⁹ These verses are often referred to as the “Sword Verses.”⁹⁰ The first deals with the polytheists that were prevalent in the Arabian Peninsula at the time.

And so, when the sacred months are over,⁹¹ slay those who ascribe divinity to aught beside God where you may come upon them, and take them captive, and besiege them, and lie in wait for them at every conceivable place. Yet if they repent, and take to prayer, and render the purifying dues, let them go their way: for, behold, God is much-forgiving, a dispenser of grace.⁹²

Islamist terrorists hold that this is clear authorization for Muslims to wage war on the polytheists and other non-Muslims. Mainstream Islamic jurists maintain that the verse must be read in conjunction with preceding verses and others that restrict this aggression to warfare already in progress with those who have been aggressive or breached treaty obligations.⁹³

The second verse deals with the “people of the book,” Christians and Jews, whom Muslims hold in higher regard than the polytheists.⁹⁴ It may be translated as follows:

And fight against those who—despite having been vouchsafed revelation [aforetime]—do not [truly] believe either in God or the Last Day, and do not consider forbidden that which God and His Apostle have forbidden, and do not follow the religion of truth [which God has enjoined upon them], till they [agree to] pay the *jizya*⁹⁵ with a willing hand, after having been humbled [in war].⁹⁶

89. AN-NA’IM, *supra* note 8, at 146.

90. THE ROYAL AAL AL-BAYT INSTITUTE, *supra* note 30, at 31.

91. Here the *Koran* is confirming the pre-Islamic custom that was prevalent in Arabia that there were times when all tribal warfare had to cease.

92. KORAN 9:5.

93. THE MESSAGE OF THE QUR’AN, 255–56 (Muhammad Assad trans., 1980).

94. Muslims recognize the prophets of Judaism and Christianity and believe that all three religions worship the same God.

95. The *jizya* was a tax paid by male Christians and Jews in Muslim lands who, if Muslim, would have been eligible for combat. The tax was for support of the armed forces, which they did not partake in. Muslims, on the other hand, were required to pay the *zakat*, which was based on percentage of income and used for charity.

96. KORAN 9:29.

In this verse we see that Christians and Jews are permitted to retain their religion but must submit to the rule of the Muslim State and agree to pay the *jizya*. Importantly though, taking the verse out of context by over-emphasizing the “fight against” language, Islamist terrorists use this as authorization to target Christians and Jews for jihad based upon their status as non-Muslims. Mainstream jurists believe that the jihad authorized here may only be made in the face of unprovoked aggression.⁹⁷

The real controversy in these verses is in how the reader uses them. As mentioned above, Islamist terrorist theology relies heavily upon the concept of abrogation. They maintain that their interpretation of these and similar verses abrogate more than one hundred earlier verses expounding upon the principles of tolerance and peaceful propagation of the faith.⁹⁸ The legal concept, which is familiar to those from western legal systems, is that the most recent law is the one that controls.⁹⁹ This view of Islam, that the *Koran* enjoins Muslims to an offensive conflict with non-believers, does find support with some Islamic scholars.¹⁰⁰ These scholars point to historical precedent in the actions of the early Muslims, including the Companions,¹⁰¹ when they used this aggressive view of Islam to conquer Syria, Iraq, northern Africa, southern Spain, Persia, and northern India.¹⁰²

Other historical precedent for this view is found in the practice of dividing the world into dar al-Islam and dar al-harb. Based upon the “Sword Verses,” the actions of the Companions, and the concept of the universality of the Muslim State,¹⁰³ early Muslim jurists divided the world into these two principal parts.¹⁰⁴ Dar al-Islam is the Muslim controlled region.¹⁰⁵ Dar al-harb is everywhere else—the enemy territory with which Islam is at war.¹⁰⁶

97. THE MESSAGE OF THE QUR’AN, *supra* note 93, at 261.

98. AN-NA’IM, *supra* note 8, at 146.

99. *See id.* at 56, where the author discusses *nask* (abrogation).

100. *See* Ali & Rehman, *supra* note 7, at 5; AN-NA’IM, *supra* note 8, at 147.

101. The Companions of the Prophet were his close associates who had the opportunity to witness much of his life. Several of them succeeded Muhammad as leader after his death.

102. AN-NA’IM, *supra* note 8, at 148.

103. “From its inception, Islamic society was conceived as universal, because it was based on the universal bond of religion. Muhammad’s mission was directed to all humanity.” Mahmassani, *supra* note 1, at 232.

104. Mahmassani, *supra* note 1, at 251.

105. *Id.*

106. *Id.*

Dar al-harb is converted to dar al-Islam only when the practice of Islam is accepted and Shari'a law is enforced.¹⁰⁷ The aggressive view of Islam holds that "dar al-Islam is under permanent jihad obligation until the dar al-harb is reduced to nonexistence" through surrender or conquest.¹⁰⁸

Under classical Islamic law, surrender by the enemy normally meant that the non-Muslim State converted to Islam.¹⁰⁹ This comes from the Tradition of Muhammed saying "I am ordered to fight people until they say: there is no God but Allah; and if they say it, they render immune (from me) their lives (blood) and their property, save by way of right."¹¹⁰ The new converts were then afforded the protection that was due all other Muslims of the conquering State.¹¹¹ Where polytheistic enemies failed to submit to Islam and were conquered, they were subject to harassment, could have their property taken, or could even be subject to death.¹¹² However, Christians and Jews could be afforded protection and given the status of Dhimmi (non-Muslim living in a Muslim State).¹¹³ They were afforded the right to continue their religious worship, but had to pay the *jizyah*.¹¹⁴

The opposing way to view the "Sword Verses" is to understand them in their historical, political, and Koranic context. The early Muslim State¹¹⁵ was just that, a singular political entity. It would not have contemplated a future in which it would subdivide into the varied autonomous Muslim political States that exist today. These verses, as revealed through the Prophet and political ruler, simply authorized the early Muslim State to wage war on its neighbors in order to expand the State—a political policy. The historical reality was that the expansion of Islam brought a better political situation to many of the people who were conquered.¹¹⁶ The people of the region were

107. *Id.* at 251–52. See Ali & Rehman, *supra* note 7, at 9, for one theory that holds that any State that allows Muslims to worship freely may be considered dar al-Islam. Under this definition, most of the world would qualify as dar al-Islam.

108. Safi, *supra* note 73, at 7.

109. Mahmassani, *supra* note 1, at 295.

110. *Id.* at 296.

111. *Id.*

112. *Id.*

113. *Id.*

114. ABOUL-ENEIN & ZUHUR, *supra* note 17, at 36.

115. 610–700 AD.

116. Ali & Rehman, *supra* note 7, at 6.

often ruled by oppressive regimes that did not afford basic fundamental human rights that were available under Islam.¹¹⁷ At that time in history, Islam was the “broadest, freshest and cleanest political idea that had yet come into actual activity in the world.”¹¹⁸ The Muslims most likely viewed themselves as liberators.¹¹⁹

There is also evidence that the concept of abrogation as used by Islamic terrorists and advocated by many Islamic scholars did not even exist amongst the early Muslims.¹²⁰ Rather, it appears that the Companions of Muhammad viewed later revelations that contradicted earlier revelations as exceptions to the fundamental tenets of the faith.¹²¹ One such tenet being, “There shall be no coercion in matters of faith.”¹²² This reading of the *Koran*, that these few verses should not be read to abrogate the fundamental norms of the faith, is much more consistent with the *corpus juris* of the *Koran*.¹²³

B. *The Call to Jihad*

The *Koran* calls war a hateful duty,¹²⁴ and yet it clearly authorizes it in certain circumstances. As discussed above, there are two very distinct schools of thought on whether jihad should be waged to propagate the faith. Outside that disagreement, there is consensus upon when jihad is authorized and when it is a duty. Conservative jurists believe jihad should be waged only when absolutely necessary and subject to strict conditions.¹²⁵ These conservative jurists also believe jihad is *permissible* in the following circumstances: “(1) punitive war to prevent rebellion and sedition; (2) purely defensive war to repel aggression; (3) preventative war to avert any danger to the country as a whole or to religion and religious liberty and places of worship; and (4)

117. *Id.* at 6. Early Islam was groundbreaking in its protection of women and minorities, and for protecting individuals from government oppression.

118. *Id.* at 7.

119. *Id.* at 6.

120. AN-NA’IM, *supra* note 8, at 58.

121. *Id.*

122. KORAN 2:256.

123. See Mahmassani, *supra* note 1, at 241–49; ABOUL-ENEIN & ZUHUR, *supra* note 17, at 7–12.

124. “Warfare is ordained for you, though it is hateful unto you; but it may happen that ye hate a thing which is good for you, and it may happen that ye love a thing which is bad for you. Allah knoweth, ye know not.” KORAN 2:216.

125. Mahmassani, *supra* note 1, at 282.

sympathetic war to ward off oppression and injustice, especially to a friendly or allied nation, even if it be a non-Muslim.”¹²⁶

Mainstream Islamic jurists hold that the decision to declare the lesser jihad must be made by the State, the one notable exception being defense against foreign aggression.¹²⁷ Most constitutions in modern Islamic States follow this doctrine and reserve the call to war for the chief executive.¹²⁸ That is supported by Shari’a law, which vests that power in the Caliph¹²⁹ or Imam¹³⁰ alone, with allowance for limited delegation.¹³¹ Islamic terrorists justify their right to call for jihad by their perception that the rulers of modern Muslim States are Muslim in name alone and have been corrupted by the West.¹³² They dispute the rulers’ legitimacy, claim for themselves the authority of Imam, and call for *all* Muslims to take up arms against the West.¹³³

This call for *all* Muslims to participate in jihad, even if it were properly authorized, also runs contrary to Islamic law. The criteria for those eligible to fight are generally considered to be the following: (1) a Muslim; (2) having reached puberty, generally considered to be the age of fifteen; (3) having no mental defect; (4) being able to exercise free will in the decision to join in jihad; (5) a male, although there are historical examples to the contrary; (6) having obtained their parents’ permission; and (7) being debt free or possessing waivers from creditors.¹³⁴ Clearly these criteria are not followed by Islamist terrorists who recruit suicide bombers from amongst women, young children, and easily influenced individuals who have not obtained their parents’ permission.¹³⁵

126. *Id.* at 289–90.

127. HAMIDULLAH, *supra* note 31, at 163.

128. Mahmassani, *supra* note 1, at 289.

129. A caliph was the “political office used to govern urban areas of pre-Islamic Arabia and chosen by the consensus of tribal elders. The term pre-dates Islam and simply means ‘successor.’” ABOUL-EINEIN & ZUHUR, *supra* note 17, at 34.

130. *See id.* at 36 (“An Imam is, in one meaning of the word, merely a prayer-leader. For the Shi’a Muslims, Imam is appointed by God to lead the Muslims. . . . In the Muslim rulings on war, the term imam stands for the legitimate ruler, who was then called the caliph. For that reason, radical leaders have sometimes used the title of Imam.”).

131. Mahmassani, *supra* note 1, at 289.

132. *See* Dayem & Ayub, *supra* note 13, at 112; ABOUL-EINEN & ZUHUR, *supra* note 17, at 24.

133. Dayem & Ayub, *supra* note 13, at 112, 116–17.

134. ABOUL-EINEN & ZUHUR, *supra* note 17, at 12–13.

135. *Id.* at 13.

IV. SHARI'A JUS IN BELLO—THE CONDUCT OF HOSTILITIES

A. Killing of Noncombatants

It is of near universal consensus that the killing of noncombatants violates Islam.¹³⁶ In one often-quoted Tradition that is cited to support this tenet, Muhammad sees a woman who has been slain in battle and becomes angry over her death.¹³⁷ Additionally, Abu Bakr, the first Caliph after Muhammad's death, gave the Muslim army the following instructions prior to a campaign in Syria:¹³⁸

Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic service, leave them alone.¹³⁹

Muhammad and Abu Bakr's actions played a large part in the development of early Islamic humanitarian law on the protection of noncombatants.¹⁴⁰ There is general agreement that this group of protected people included "children, women, the very old, blind, crippled, disabled (mentally and physically disabled) and sick."¹⁴¹

Islamist terrorists defend their violation of these rules through two arguments. The first is that many of the women and children they kill are "potential combatants and enemies of Islam."¹⁴² Regarding Israel, they point to its policy of men and women serving in combat roles and the high frequency of Israelis remaining in military reserve even after their compulsory service obligation.¹⁴³ The second argument is that times have changed and the rules

136. HAMIDULLAH, *supra* note 31; Ali & Rehman, *supra* note 7, at 10; ABOUL-ENEIN & ZUHUR, *supra* note 17, at 21–22.

137. ABOUL-ENEIN & ZUHUR, *supra* note 17, at 21.

138. *Id.* at 22.

139. MALIK IBN ANAS, AL-MUWATTA, Book 21, Number 21.3.10.

140. *See* Ali & Rehman, *supra* note 7, at 10.

141. *Id.*; *see also* HAMIDULLAH, *supra* note 31, at 205 (monks and hermits are also authoritative examples of protected persons).

142. ABOUL-ENEIN & ZUHUR, *supra* note 17, at 23.

143. *Id.* *See also* Ali & Rehman, *supra* note 7, at 10 (quoting the Islamic scholar Iman al-Kasani who stated, "any person capable of fighting may be killed, whether he actually fights

have changed. They are severely outnumbered, under-resourced, and don't have the support of their State leaders. In order to effectively wage jihad, they have had to adjust tactics, which led Osama bin Laden to write, "due to the imbalance of power between our armed forces and the enemy forces, a suitable means of fighting must be adopted."¹⁴⁴ Neither of these arguments is supported by Islamic law or mainstream Islamic jurists.

B. *Suicide Attacks*

Muhammad insisted upon waging jihad in an honorable and courageous manner. Even the pre-Islamic Arabs' method of attack-and-retreat guerilla warfare¹⁴⁵ was disfavored by the Koranic verse, "God loves those who battle for His cause in ranks, as if they were a solid structure."¹⁴⁶ This structured type of warfare was seen by Muhammed as more courageous and efficient.¹⁴⁷ Any warfare that would have used a clandestine modus operandi to target civilians would have been seen by Muhammad, one can argue, as contradicting Islam's rules on the use of force.¹⁴⁸ The same may be said of any "unnecessarily cruel and torturous ways of killing."¹⁴⁹ On point is Verse 2:195 of the *Koran*, which prohibits actions akin to suicide attacks and addresses how faithful Muslims can support Jihad: "And spend in the cause of God, *do not throw yourselves into destruction* and do good for, verily, God loves those who do good." Importantly, Islam also prohibits burning enemy warriors alive¹⁵⁰ and suicide.¹⁵¹ It is clear that suicide bombing of innocent noncombatants violates the Shari'a.

or not, and any person unable to fight may not be killed, unless he actually participates in the fighting physically or mentally by way of tendering advice and provocation").

144. Osama bin Laden's fatwa was published in arabic, *Text of World Islamic Front's Statement Urging Jihad Against Jews and Crusaders*, AL-QUDS AL-ARABI, Feb. 23, 1998, at 1.

145. Mahmassani, *supra* note 1, at 293.

146. KORAN 61:4.

147. Mahmassani, *supra* note 1, at 293.

148. AN-NA'IM, *supra* note 8, at 156.

149. HAMIDULLAH, *supra* note 31, at 205.

150. Ali & Rehman, *supra* note 7, at 10.

151. "O you who believe, do not consume each others' properties illicitly—only mutually acceptable transactions are permitted. You shall not kill yourselves. GOD is Merciful towards you." KORAN 4:29.

C. Treatment of Prisoners of War

Shari'a law's treatment of prisoners of war is somewhat contradictory.¹⁵² In many respects the *Koran* and the Traditions establish rules for treating prisoners that, with important exceptions, favorably compare to modern international humanitarian law. On the other hand, Muhammad and the Companions were guilty of atrocities that provide support for how modern Islamist terrorists treat their captives. However, any analysis of Islam's treatment of prisoners should be considered in the historical context of practices that were prevalent in seventh century Arabia, as well as those of Athens, Rome, and other ancient cultural centers.¹⁵³ A comparison shows that Islamic law's treatment of prisoners was very progressive relative to those other cultures.¹⁵⁴

Most scholars hold that Islamic law forbade the execution of prisoners for acts done during belligerency unless the head of State personally authorized it.¹⁵⁵ Neither could belligerents be held liable for damages they inflicted upon the lives or property of early Muslims during belligerencies.¹⁵⁶ One Tradition holds that Muhammad ordered the following: "Take heed of the recommendation to treat the prisoners fairly."¹⁵⁷ In practice this meant that prisoners of war were to be well fed, protected from the elements, provided clothing where necessary, have their injuries attended to, be held in the same location as their close relatives if they were also captive, be safe from torture, and have respect paid to their rank and position.¹⁵⁸ Another Koranic verse extols upon Muslims to take care of captives as you would an orphan or the needy.¹⁵⁹

152. Ali & Rehman, *supra* note 7, at 10.

153. *See, e.g.*, ABOUL-ENEIN & ZUHUR, *supra* note 17, at 18 (pre-Islamic captives could expect to be killed); *see also* Mahmassani, *supra* note 1, at 305 (the author states that war was the main source of slavery in Athens and Rome).

154. The Greeks during this period had two systems: one for dealing with Greeks and one for non-Greeks. War with non-Greeks was unlimited warfare. Similarly, the Roman Empire had no limitations on belligerency. *See, e.g.*, Mahmassani, *supra* note 1, at 305.

155. *See, e.g.*, HAMIDULLAH, *supra* note 31, at 216 (stating that even the commander-in-chief could not authorize execution).

156. *Id.* at 214.

157. 1 TARIKH AL-TABARI, HISTORY OF THE PROPHETS AND KINGS 1337–38 (1901).

158. HAMIDULLAH, *supra* note 31, at 214–16; Dayem & Ayub, *supra* note 13, at 92.

159. "And (they) feed with food, despite its love, the needy wretch, the orphan and the captive." KORAN 76:8.

Conversely, there is evidence that the early Muslims did, in some instances, murder prisoners considered to be enemies of Islam.¹⁶⁰ One example was during the Battle of the Ditch where a Jewish tribe was decimated for turning against the Muslims during the battle.¹⁶¹ Some scholars also view the following Koranic verse as supportive of killing captives: "It is not for any Prophet to have captives until he hath made slaughter in the land."¹⁶² However, later verses tempered this verse,¹⁶³ and on balance, the early Muslims treated their prisoners of war much better than other cultures of the time.

D. Cessation of Hostilities

The normal state of Islam is peace, and so war was expected to come to an end.¹⁶⁴ There are four ways to end war under classical Shari'a law: the enemy's surrender; victory by force; treaty or armistice; and cessation of hostilities without any agreement on peace.¹⁶⁵

In early Islamic wars, the enemy's surrender without violence normally meant that the sovereign of the foreign State embraced Islam on behalf of his people and control of the land was ceded to the Muslim State.¹⁶⁶ The surrender was occasionally limited to acceptance of Islam, as it was not always necessary that the foreign lands be annexed.¹⁶⁷ Upon conversion to Islam, the foreigners received all the rights and obligations of all other Muslim citizens.¹⁶⁸ This is based on the following Tradition: "I am ordered to fight people until they say: there is no God but Allah; and if they say it, they render immune (from me) their lives (blood) and their property save by way of right."¹⁶⁹

160. ABOUL-ENEIN & ZUHUR, *supra* note 17, at 18.

161. *Id.*

162. KORAN 8:67.

163. "So when you meet those who disbelieve, it is smiting of the necks until you have routed them, then tighten the fetter (bond), and afterwards either benevolent release or ransom till the war lay down its burdens." KORAN 47:4.

164. *See* Mahmassani, *supra* note 1, at 242, 279.

165. *Id.* at 295.

166. HAMIDULLAH, *supra* note 31, at 263.

167. *Id.*

168. Mahmassani, *supra* note 1, at 295.

169. *See* JALALUDDIN AL-SUYUTI, AL-JAMI' AL-KABIR, No. 1630.

Victory by force was the most common result of the early Islamic conquests.¹⁷⁰ The course of the war was governed by the rules for the use of force discussed above. Polytheists who converted received the protections of Shari'a law; those that did not were subject to loss of their lives and property.¹⁷¹ Monotheists were allowed to continue the practice of their religion subject to payment of the *jizyah*.¹⁷²

Hostilities also ended as a result of an armistice or treaty of peace.¹⁷³ Most often the treaty or armistice called for an end to hostilities and the requirement that proper neighborly relations be followed.¹⁷⁴ If the foreign State ended as the weaker party, the Islamic State required payment of a tribute in exchange for a pledge of safeguard.¹⁷⁵ Under classical Shari'a law there could not be a treaty of perpetual alliance with non-Muslims.¹⁷⁶ This was based upon the following Koranic verses:¹⁷⁷

O YOU who have attained to faith! Do not take the Jews and the Christians for your allies: they are but allies of one another—and whoever of you who allies himself with them becomes, verily, one of them: behold, God does not guide such evildoers. . . . Behold, your only helper shall be God, and his Apostle, and those who have attained to faith—those that are constant in prayer, and render the purifying dues, and bow down [before God]: for all who ally themselves with God and His Apostle and those who have attained to faith—behold, it is they, the partisans of God, who shall be victorious! O you who have attained faith! Do not take for your friends such as mock at your faith and make jest of it—be they from among those who have been vouchsafed revelation before our time, or [from among] those who deny the truth [of revelation as such]—but remain conscious of God, if you are [truly] believers.¹⁷⁸

Based upon these verses, Muslim jurists held that the maximum length for a treaty with non-Muslims was ten years.¹⁷⁹

170. Mahmassani, *supra* note 1, at 296.

171. *Id.*

172. *Id.*

173. See HAMIDULLAH, *supra* note 31, at 264; Mahmassani, *supra* note 1, at 296.

174. HAMIDULLAH, *supra* note 31, at 264.

175. Mahmassani, *supra* note 1, at 297.

176. HAMIDULLAH, *supra* note 31, at 265.

177. *Id.* at 265–66.

178. KORAN 5:51, 5:55–57.

179. HAMIDULLAH, *supra* note 31, at 266.

Finally, under Islam, simple cessation of hostilities was possible, but theoretically unlikely.¹⁸⁰ This was because jihad was not to be waged unless there was a just and noble cause. Ending hostilities before that just and noble cause was fulfilled ran contrary to Islam.¹⁸¹ Unless it was a defensive war, it should not have been initiated unless success was a given, as the *Koran* mandates that offensive war should not be undertaken until the State is prepared to win.¹⁸² The following verse shows that submission was also unlikely:

O you who have attained faith! When you meet in battle those who are bent on denying the truth, advancing in great force, do not turn your backs on them: for whoever on that day turns his back on them—unless it be in a battle maneuver or in an endeavor to join another troop [of believers]—shall indeed have earned the burden of God’s condemnation, and his goal shall be hell: and how vile a journey’s end!¹⁸³

As can be seen in this verse, there was little room for retreat or surrender, although many Muslim jurists hold that the Muslim commander of the army could stop fighting when military necessity required it.¹⁸⁴

V. ISLAMIST TERRORISTS

Modern Islamism is based upon the teaching of Hassan al-Banna, the founder of the Muslim Brotherhood who advocated a return to the pan-Islamic State.¹⁸⁵ While there are several nuanced ideologies among Islamists, Islamist terrorists conform to five general principles: (1) a rejection of secularism and a dedication to the establishment of Islam as a State religion and legal system; (2) a return to the early roots of Islam, emphasizing the *Koran* and the example of Muhammad and his Companions; (3) expulsion of capi-

180. Mahmassani, *supra* note 1, at 297.

181. *Id.*

182. *See id.*; KORAN 8:60 (“You shall prepare for them all the power you can muster, and all the equipment you can mobilize, that you may frighten the enemies of GOD, your enemies, as well as others who are not known to you; GOD knows them. Whatever you spend in the cause of GOD will be repaid to you generously, without the least injustice.”).

183. KORAN 8:15–16.

184. Mahmassani, *supra* note 1, at 298.

185. Dayem & Ayub, *supra* note 13, at 102.

talistic western influences and a return to a Muslim social order; (4) the supremacy of religion over the State; and (5) jihad as the means to achieve its goals.¹⁸⁶

Al-Qaeda, which is Arabic for “the Base,” is the most well-known Islamist terrorist organization. It grew out of the Makta al Khidmat lil Mujahadin (MaK) at the end of the Soviet-Afghanistan war (1979–1989).¹⁸⁷ The MaK was co-founded by Osama bin Laden and his mentor, Dr. Abdullah Az-zam.¹⁸⁸ Al-Qaeda has a large number of affiliated organizations and operates as a network of Islamist extremists and Salafi jihadists.¹⁸⁹ The main uniting bond is their adherence to Islamism and a particular fundamentalist interpretation of Islam.¹⁹⁰ They work towards a return to a pure Islamic State, free of secularism, and strict adherence to their interpretation of the Shari’a.¹⁹¹ This view advocates “an Islamic Palestinian state, removal of secular Arabic leadership, removal of western influence from the Arabic/Muslim world, the destruction of the Israeli state, and most of all, the return of the Caliphate.”¹⁹²

Al-Qaeda wants to unite the world’s one billion Muslims under a single leader.¹⁹³ The instrument for that unification is al-Qaeda and its affiliated organizations, and the method is jihad.¹⁹⁴ Bin Laden argued that the jihad in Afghanistan against the Soviets showed the Muslim world that they could unite to stop a common powerful enemy.¹⁹⁵ Al-Qaeda and other Islamist terrorist’s current common enemies are twofold: the Muslim leaders who, in Al-Qaeda’s view, have abandoned the people and Shari’a law; and America,

186. *Id.* at 102–3.

187. Richard J. Hughbank, *Understanding the al-Qaeda Organization: What Every Law Enforcement and Security Professional Should Know about Terrorism*, JOURNAL OF COUNTERTERRORISM AND HOMELAND SECURITY INTERNATIONAL, Summer 2008, at 2.

188. *Id.*

189. The Salafi jihadists believe it is the duty of every true Muslim to use force to reestablish an Islamic caliphate.

190. *Id.*

191. Dayem & Ayub, *supra* note 13, at 102–3.

192. Hughbank, *supra* note 187, at 2.

193. JANE CORBIN, AL-QAEDA: IN SEARCH OF THE TERROR NETWORK THAT THREATENS THE WORLD 23 (2003).

194. *Id.*

195. *Id.*; *Osama Bin Laden Declares Jihad in 1997 CNN Interview*, YOUTUBE (May 2, 2011), www.youtube.com/watch?v=orawG7vt68o (March 1997 CNN interview of Osama bin Laden by Peter Arnett).

who has supported these Muslim leaders and whom they believe has wrought atrocities on Muslims.¹⁹⁶

One of the main issues al-Qaeda and other Islamist terrorist organizations have with Middle Eastern Muslim leaders is their invitation and tolerance of western forces on the Arabian Peninsula.¹⁹⁷ Their objection is partially based on the Tradition that on his deathbed Muhammad said, “May Allah fight the Jews and the Christians! They took the graves of their Prophets as places of prostration. Two (religions) shall not co-exist in the land of the Arabs.”¹⁹⁸ Al-Qaeda and many Muslims believe that non-Muslim forces should not be allowed near the Holy Mosques of Mecca and Medina, much less live on the Arabian Peninsula.¹⁹⁹ Another key point of contention that al-Qaeda has with Muslim leaders is their abandonment of Islamic law in favor of secular legal systems.²⁰⁰

A primary means for al-Qaeda’s jihad in support of its fundamentalist philosophy has historically been the use of suicide bombers.²⁰¹ It is able to recruit young uneducated people to carry out these travesties by convincing them that Islam requires it of them. They argue two propositions: that every Muslim must wage jihad against the infidels and that Allah rewards martyrdom through Jihad with eternity in paradise.²⁰²

Islamic fundamentalists espouse the belief that, in addition to the commonly accepted five pillars of Islam,²⁰³ the lesser jihad is a sixth pillar and mandatory for all Muslims to practice. This concept of a sixth pillar is held by few Muslims.²⁰⁴ Instead, most Muslims believe that jihad is a collective

196. CORBIN, *supra* note 193, at 2; Combatting Terrorism Center at West Point, *Declaration of War against the Americans Occupying the Land of the Two Holy Places*, <https://ctc.usma.edu/harmony-program/declaration-of-jihad-against-the-americans-occupying-the-land-of-the-two-holiest-sites-original-language-2/> (last visited Dec. 1, 2021) (Osama bin Laden’s fatwa of August 23, 1996).

197. CORBIN, *supra* note 193, at 2.

198. IMAM MALIK IBN ANAS, *AL-MUWATTA OF IMAM MALIK IBN ANAS: THE FIRST FOUNDATION OF ISLAMIC LAW*, No. 45.5.17 (Aisha Abdurrahman Bewely trans., Kegan Paul International 1989) (795).

199. CORBIN, *supra* note 193, at 23.

200. *Declaration of War against the Americans Occupying the Land of the Two Holy Places*, *supra* note 196.

201. Hughbanks, *supra* note 187, at 4.

202. Mahmassani, *supra* note 1, at 280.

203. Muslims believe that there are five pillars to Islam that must be practiced by all Muslims: the belief in one God; the (five times a day) daily prayer; *zakaat* (alms giving); fasting; and the Hajj (pilgrimage to Mecca).

204. Mahmassani, *supra* note 1, at 281.

duty and not incumbent on Muslims individually.²⁰⁵ Generally, as a collective duty, Muslims are not to partake in the lesser jihad unless their heads of State order them to do so.

To promulgate his view of jihad as an individual duty, Osama bin Laden released the following in a fatwa²⁰⁶ regarding action to be taken against U.S. and Coalition forces: “Terrorizing you [Americans], while you are carrying arms on our land, is a legitimate and morally demanded duty. It is a legitimate right well known to all humans and other creatures.”²⁰⁷ He followed with a second fatwa in 1998 that was cosigned by other Islamist terrorist group leaders. That fatwa included the following:

We issue the following fatwa to all Muslims: The ruling to kill the Americans and their allies—civilians and military—is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God, “and fight the pagans all together as they fight you all together,” and “fight them until there is no more tumult or oppression, and there prevail justice and faith in God.”²⁰⁸

Bin Laden’s lack of authority to call for jihad is discussed in Part III(B) above.

In his first fatwa, bin Laden also called for young Muslims to serve as martyrs. In relevant part he stated the following:

He (Allah’s Blessings and Salutations may be on him) also said: “the best of the martyrs are those who do NOT turn their faces away from the battle till they are killed. They are in the high level of (paradise). Their Lord laughs to them (in pleasure) and when your Lord laughs to a slave of His, He will not hold him to an account”—narrated by Ahmad with correct and trustworthy reference. And: “a martyr will not feel the pain of death except like how you feel when you are pinched.” Saheeh Al-Jame’ As-Sagheer. He also said: “a martyr’s privileges are guaranteed by Allah; forgiveness with the first gush of his blood, he will be shown his seat in paradise, he will be

205. *Id.*

206. A fatwa is a religious opinion on a point of Islamic law that is normally published by an Islamic scholar.

207. *Declaration of War against the Americans Occupying the Land of the Two Holy Places*, *supra* note 196.

208. *Id.*

decorated with the jewels of belief (Imaan), married off to the beautiful ones, protected from the test in the grave, assured security in the day of judgment, crowned with the crown of dignity, a ruby of which is better than this whole world (Duniah) and its' entire content, wedded to seventy two of the pure Houries (beautiful ones of Paradise) and his intercession on the behalf of seventy of his relatives will be accepted"—narrated by Ahmad and At-Tirmithi (with the correct and trustworthy reference). Those youths know that their rewards in fighting you, the USA, is double than their rewards in fighting someone else not from the people of the book. They have no intention except to enter paradise by killing you. An infidel, and enemy of God like you, cannot be in the same hell with his righteous executioner.²⁰⁹

The *Koran* and the Traditions support the practice of martyrdom on behalf of Islam, but only when jihad is authorized.²¹⁰ Islamist terrorists also violate Islamic law when they make martyrdom their intent, rather than a possible outcome of a just war. One key Tradition states, “a person whose intent is glory, booty, or females has no ties to God, and only God knows who strives for his sake.”²¹¹

In support of its jihad against the United States, al-Qaeda's atrocities include the 1996 bombing of the Khobar Towers in Saudi Arabia, the 1998 attacks on the U.S. embassies in Kenya and Tanzania, the bombing of the *USS Cole*, and the September 11th attacks on the United States. Many other atrocities have been averted, yet this Islamist terrorist view continues to spread and continues to threaten U.S. military members, U.S. allies, Muslim governments, and civilians around the world.

VI. CONCLUSION

As seen in the preceding sections, there is no “perfectly defined delineation” between Islamist terrorist ideology and mainstream ideology.²¹² There are

209. *Id.*

210. *See, e.g.*, KORAN 4:74 (“Let those fight in the way of Allah who sell the life of this world for the other. Whoso fighteth in the way of Allah, be he slain or be he victorious, on him We shall bestow a vast reward.”); KORAN 9:111 (“Allah hath purchased of the believers their persons and their goods; for theirs (in return) is the garden (of Paradise): they fight in His cause, and slay and are slain: a promise binding on Him in truth, through the Law, the Gospel, and the Qur’an: and who is more faithful to his covenant than Allah? then rejoice in the bargain which ye have concluded: that is the achievement supreme.”).

211. MUHAMMAD AL-BUKHARI, 6 SAHIH AL-BUKHARI No. 430 (846).

212. *See* ABOUL-ENEIN & ZUHUR, *supra* note 17, at 31 for a similar conclusion.

aspects of Islam that may be manipulated to support extremist views. Chief among them is what may be read as the *Koran's* authorization for aggressive jihad to expand the faith. That view contradicts the basic precepts of Islam, which are peace and the freedom of religion. The *Koran* must also be viewed in its historical context. It was revealed in the seventh century, a time when aggressive war was the norm and there was no substantial *jus in bello*. Islam was very progressive and instituted rules for warfare that were not replicated by the West for another six centuries. While there is no seventh century culture whose law of war can conform to modern day norms, Shari'a law likely came closest.

The complicating aspect for Shari'a law is that the *Koran*, revealed almost fourteen hundred years ago, is held to be the literal word of God, the supreme law, and so a concordance with modern law is required to facilitate its use for modern legal issues. Al-Qaeda and other Islamist terrorist organizations reject this and instead hold onto a literal view and a selective understanding of the *Koran* and Traditions to support their world view. The issue then becomes developing a way to combat the influence and effect that Islamist terrorists have on the world.

In the battle of the marketplace of ideas, the best weapon is a better idea. Islamist terrorist groups and their supporting *madrasas* (religious schools) teach young Muslims in ways that "manipulate, hide, and deemphasize aspects of Islamic history, law and Koranic verse."²¹³ The most effective weapon against these groups is evidence that Islamic laws and principles contradict their terrorist ideologies.²¹⁴ That can only be achieved by Muslim leaders and clerics, but can be supported by western democracies.

Policy makers must educate themselves on Islamic law, the competing political interests, and Islamist terrorists' ideology and motivation. The United States cannot win a war against an enemy we do not know or understand. We have to ally ourselves with Muslim leaders who want to help us in this struggle, whether for their own self-interest, because they believe it is the right thing to do, or both. This is not a struggle that can be won through the use of military force or by western democracies alone. It is a battle of ideas, beliefs, and information that requires a unified effort.

213. *Id.*

214. *Id.*