

JUS AD BELLUM: A Study of Divergent Traditions

**Submitted in partial fulfillment of the requirements of the Bachelor
of Laws Degree, Strathmore University Law School**

by

Ramadhan Rahma Khamis

Registration Number

078809

Declaration

I, Rahma Ramadhan, do hereby declare that this research is my original work and that it has not been previously, in its entirety or in part, submitted to any other university for a degree or diploma. All other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

Date.....

Professor David Sperling

Acknowledgements

I would like to express my great gratitude to my family and friends for their encouragement and support. Many thanks to my supervisor Professor David Sperling for his continuous advice, support and encouragement throughout the various stages of this research project. Lastly, all due thanks go to Dr Abdulqadir Hashim for his time and wisdom.

TABLE OF CONTENTS

| | |
|--|----|
| CHAPTER ONE: INTRODUCTION..... | 3 |
| 1.1 Background to the Study..... | 3 |
| 1.2 Statement of the Problem..... | 6 |
| 1.3 Justification of the Study | 6 |
| 1.4 Statement of Objectives | 7 |
| 1.5 Research Questions | 7 |
| 1.6 Hypotheses | 7 |
| 1.7 Limitations of the Study..... | 8 |
| CHAPTER TWO: THEORETICAL FRAMEWORK AND METHODOLOGY | 9 |
| 2.1 Theoretical Framework..... | 9 |
| 2.2 Research Design & Methodology | 10 |
| CHAPTER THREE: REVIEW OF RELEVANT LEGAL RULES AND PRINCIPLES | 11 |
| CHAPTER FOUR: IRRECONCILABLE TRADITIONS?..... | 22 |
| 4.1 International and Islamic Traditions in theory and in practice | 22 |
| CHAPTER FIVE: REVIEW OF THE RESEARCH FINDINGS..... | 26 |
| 5.1 Reconcilability | 26 |
| CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS..... | 28 |
| BIBLIOGRAPHY | 29 |

CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Public international law¹, the law of the political system of nation-states and their relations with each other, prohibits the threat and use of force in settling international disputes. Being the foundation of modern international law, the Charter of the United Nations begins by declaring that the primary goal of the UN is to maintain peace and security.² The threat and use of force with regards to international relations is addressed by the UN Charter under Article 2(4) which provides that:

‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’³

Sanctions are invoked against States that resort to the use of force.⁴ Should a member state be attacked in violation of Article 2(4) above, Article 51 preserves the right of individual or collective self-defence if an armed attack occurs. The right of self defence was reiterated by the International Court of Justice in the Nicaragua Case where it was held that prohibition on the use of force is covered by treaty, the UN Charter and customary international law. The Court expressly stated that this prohibition is a *jus cogens* norm, that is, a fundamental principle of international law from which no derogation is ever permitted.⁵

Jus ad bellum (the right to engage in war) is a set of criteria to be satisfied or consulted prior to initiating or engaging in war in order to determine whether a particular war is permissible and justified. Exceptions to the general rule regarding prohibition of the threat and use of force are provided for under the UN Charter and customary international law. Customarily, international

¹ Public international law is the body of rules that is legally binding on States in their interactions with other States, individuals, organizations and other entities.

² Article 1, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

³ Article 2(4), Charter of the United Nations.

⁴ Article 39-51, Charter of the United Nations.

⁵ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America), ICJ Reports, 1986.

law on self-defence, under the Caroline case, established that ‘there must be a necessity of self-defence which was instant, overwhelming, leaving no choice of means and no moment of deliberation.’ The action of self-defence ought to be proportionate to the attack. Customary law, under the Caroline case, also permits use of force in instances of pre-emptive self defence. In such an instance, anticipatory self-defence in face of an imminent attack is permitted. This is the use of force when an attack is foreseeable and foreseen.⁶

Islamic tenets on the legality of warfare developed with the recital of the Islamic Holy book, the Qur’an, about 1300 years prior to the codification of public international law instruments⁷ concerning *jus ad bellum*. Sources of Islamic law are primarily the Word of God codified in the Qur’an and the accounts of the life of Prophet Muhammad found in *sunna*⁸ or *hadith*. Other sources include scholarly consensus referred to as *ijma*’ together with *ra’i* that is, an opinion based on the individual judgment of a knowledgeable person, understood broadly as the reasoning capability of diligent Muslims.⁹

Islamic *jus ad bellum* acknowledges the supremacy of *caliphal* authority. Initially, only the successors of the Prophet, known in the Arab-speaking world as the *Caliphs*, that is those who “followed” and exercised authority subsequent to the Prophet, had the legitimate authority to proclaim war.¹⁰ As the structure of the Islamic community evolved, this authority was passed on to the *Imam*.¹¹ The *Caliph*’s authority was similar to the concept of a ‘legitimate authority’ in public international law *jus ad bellum*.¹²

The Islamic ‘law of nations’ recognises that war implies violence and suffering. Thus, Muslim leaders, *Caliphs*, are instructed to accept an enemy’s offer of peace even at the risk of a possible deception.¹³

⁶ *The Caroline v. United States (1813)*, Moore digests of International law II 1906, 412.

⁷ Instruments such as The Declaration on Friendly Relations, UNGAR 2625, 1970 and the United Nations Charter.

⁸ Sunnah as explained by Shaykh Muhammad Ibn Ya’qub al-Kulyni in his book ‘Usul al Kafi’, it is a primary source of law taken from the sayings, actions and approvals of the Prophet Muhammad.

⁹ Al-Zuhili W, ‘Islam and international Law’ 87 *International Review of the Red Cross* Number 858, 2005, 276-277. Sunna is a method or ways of religious practices mostly originating from the Prophet who made recommendations or additions where appropriate.

¹⁰ Johnsons J, Murphy A, *The Blackwell Companion to Religion and Violence*, Blackwell Publishing Ltd, Malden, 2011, 7-66.

¹¹ An *Imam* is an Islamic leader who may lead worship services and sometimes serves as a community leader.

¹² *Caliph* is a steward/leader of an Islamic area/community called *Caliphate*.

¹³ J Johnsons, A Murphy, *The Blackwell Companion to Religion and Violence*.

In the Islamic tradition *jus ad bellum* is part of *jihad* and so it is essential to understand the meaning of *jihad*. The word *jihad* is derived from the Arabic consonantal root j-h-d which has the basic meaning of ‘exert/strive/struggle’.¹⁴ In Islamic tradition, there are two main kinds of *jihad*: major *jihad* and minor *jihad*. Major *jihad* is a personal process of self-purification, while minor *jihad* signifies the struggle or effort to defend the religion of Islam and of the *ummah* that is the general Muslim population. Minor *jihad* is a struggle which can be carried out by tongue, pen or sword.¹⁵

There are two theories of *jihad* on the use of force: defensive¹⁶ and offensive theories. The Qur’an has provided for use of force in self-defence ‘to those against whom fighting is launched because they have been wronged.’¹⁷ ¹⁸ The Qur’an permits Muslims who are attacked to use force. Wronging or attack is expounded by the Qur’an to mean ‘[they are] the ones who were expelled from their homes without any just reason...’ ¹⁹ Similar to principles of necessity and proportionality in public international law, the use of force is permitted in self-defence however aggression is expressly prohibited- ‘fight in the way of Allah against those who fight you, and do not transgress.’²⁰

The offensive theory of *jihad* is based on the concept of progression of rules on the use of force. Under the progression argument, it is stated that the Qur’an did not allow the use of force but favored patience in the early years of Islam. However, in the last year of the Medinan period (9 AH/ 631 AD) all the verses relating to self-defense were repealed by verses 9:5 and 9:29, making *jihad* a continuous obligation for Muslims of all ages.²¹ The offensive theory allowed the use of force against persons who break the faith and those guilty of treachery.

¹⁴ Ali A, ‘*The Holy Qur’an*’ English translation, King Fahad Holy Quran Printing Complex, Medina, 1987, 6:108.

¹⁵ Shah N, ‘Islamic Law and the Law of Armed Conflict: The Armed Conflict in *Pakistan*’, 24 *European Journal of International Law* (2011), at 66.

¹⁶ The defensive theory of *jihad* is similar to article 2 (4) and 42 of the United Nations Charter.

¹⁷ Qur’an, 22:39.

¹⁸ The translation of the Qur’an by Muhammad Taqi Usmani, *The Meaning of the Noble Quran*, 2006.

¹⁹ Qur’an, 2:190.

²⁰ Quran, 2:190.

²¹ Afsaruddin A, *War and violence*, The Quran an Encyclopeddia, Oneworld Publications, Oxford, 2008, 687.

1.2 Statement of the Problem

International law can be considered as a set of secular laws which provide a common agreed standard acceptable to states and peoples with different cultures and different legal and belief systems. Nevertheless, there are areas of law where countries, because of their religious or cultural values, differ with and may not want or agree to accept international law. This is the case with some interpretations of Islamic law which advocate the use of force to resolve conflict in circumstances where principles of international law might not condone force. Public international law and Islamic law differ regarding the use of force in the resolution of conflict. What are the consequences of such differences between international law and Islamic law and how are these differences playing themselves out among the members states of the United Nations and in the international arena?

1.3 Justification of the Study

Among the basic tenets of Islamic law is the principle that treaties must be respected. Thus, scholars argue that combatants in Muslim states that have ratified or assented to the Geneva Convention are bound by the Convention. However, some neo-classical Muslim scholars, who are now the minority, interpret Islam to be fundamentally at war with the non-Muslim world. They view Islamic law and international law as inherently irreconcilable.²²

The relation of Islamic law to international law is certainly complex. Although the claim of absolute validity encompassed in Islamic law also includes international relations, this claim is non-enforceable on the international level since it is beyond the power of Islamic states to unilaterally enforce the conformity of the international legal order with Islamic law. To understand how the two different legal systems related to each other, it is essential to analyse the consistencies and divergences between them, how far the one may be subsumed into the other and whether there is any possibility of finding any principles on which to build mutually acceptable common legal ground.

²² Moshtaghi R, 'The Relation between International Law, Islamic law and constitutional law of the Islamic republic of Iran- a multilayer system of conflict' *Max Planck Yearbook of United Nations Law, Max Planck Institute for Comparative Public Law and International Law*, Germany, Volume 13, 2009, 375-420.

1.4 Statement of Objectives

The aim of this research is:

1. To explore the differences between Islamic law and Public International Law regarding the use of force as a means of resolving conflict;
2. To assess the consequences of whatever differences are found to exist and particularly, the consequences related to international relations between Muslims and non-Muslim states; and
3. To assess whether the two legal systems- public international law and Islamic law are reconcilable with regard to *jus ad bellum*.

1.5 Research Questions

The following are the research questions to be answered:

1. In what ways does justification for the use of force to resolve conflict differ between International law and Islamic law?
2. How do the differences between Public International law and Islamic law play out with regards to state relations?
3. Are differences between Public International law and Islamic law regarding the use of force to resolve conflict irreconcilable?

1.6 Hypotheses

The hypotheses of this research are as follows:

1. The principles and rules governing the use of force to resolve conflict under Islamic law and public international Law are quite different;
2. These differences between the two systems lead to serious misunderstanding, conflict and even violence in international relations between Muslim and non-Muslim states;
3. The principles and practice of Public International Law and Islamic law regarding *jus ad bellum* are not reconcilable.

1.7 Limitations of the Study

Some resources, especially those written by Muslim scholars in Arabic were in accessible. Moreover, it was not easy to identify and find scholars and legal experts knowledgeable about this topic whom I could interview here in Kenya. Only one scholar could be traced in Kenya who was knowledgeable in the area of study, Dr Abdulqadir Hashim, a law lecturer at the University of Nairobi, Kenya.

1.8 Definitions of Terms

1. *Caliph* – Successor of Prophet Muhammad; a steward/leader of an Islamic area or community called *Caliphate*.
2. *ijma* – consensus of scholars and scholarly writing.
3. *Imam* - an Islamic leader who may lead worship services and sometimes serves as a community leader.
4. *Jihad* - a defensive war launched with the aim of establishing justice, equity and protecting basic human rights.
5. *ra'i* - an opinion based on the individual judgment of a knowledgeable person, understood broadly as the reasoning capability of diligent Muslims.
6. *Sunnah* - a primary source of law taken from the sayings, actions and approvals of the Prophet Muhammad recorded in *Sunna and hadith*.
7. *Ummah* – community; nation state.

1.9 Chapter Summary

This Chapter has introduced and given the background of the topic of research, explained the rationale for the study and stated its objectives, research questions and hypotheses. Finally the chapter described some of the limitations of the study and defined core terms used.

CHAPTER TWO

THEORETICAL FRAMEWORK AND METHODOLOGY

2.1 Theoretical Framework

The research is a study in comparative law that explores and compares public international law and Islamic law with specific focus on their respective legal tenets related to *jus ad bellum*, that is, the justification and legitimization of acting to initiate and/or engage in war. Each of these legal systems consists of unique and differing sets of rules that govern the use of force in conflict resolution.

Niaz Shah's comparative analysis of the theory of war in Islamic and International law emphasises the fact that peace is the rule and war the exception in both traditions and that no obligatory state of war exists between Islamic states and other states, whether Islamic or otherwise.²³ Furthermore, in Western civil and common law traditions there is no exact equivalent of the concept of 'holy war' that exists in Islamic legal discourse, nor does the concept of *jihad* as a collective religious duty resemble in any way the Christian concept of crusade. To describe *jihad* as "holy war" is in his opinion misleading. His study also perceives *jihad* to be a defensive war whose aim is to establish justice and equity and to protect basic human rights. Accordingly, the rules of Islamic humanitarian law are compatible with those established by international humanitarian law governing the conduct of war and the treatment of enemy persons and property.

Pakistani Muslim theologian Javed Ghamidi examines the problem of war systematically.²⁴ He first explains the Islamic Law of *jihad*. According to him, if a dispute between nations is solvable through negotiations, then there is no need of use of force.²⁵ However, if a nation goes astray and attacks the holy places of God, then *jihad* is to be undertaken. He supports this law by the following verse of the Qur'an: "And had it not been that Allah [God] checks one set of people

²³Zawati H, *Islam and the Law of Armed Conflict*, Cheltenham Publishers, Oxford, 2015, 249-287.

²⁴Ghamidi J, Saleem S, *Islam: A Comprehensive Introduction*, Al-Mawarid, Pakistan, 2012.

²⁵R Nico, 'Jihad and just war: A comparative analysis' (2010), Writing excellence award writers, paper 14. Accessed from http://soundideas.pugetsound.edu/writing_awards/14.

with another, the monasteries and churches, the synagogues and the mosques, in which his praise is abundantly celebrated would have been utterly destroyed.” (22:40)

Examining the theory of war in Islamic law, Sayyes Qutb concludes that peace is the rule, while war is the exception.²⁶ He points out the conditions to be met by Muslims prior to their engagement in war. He expressly states that in Islam peace is the rule and war is a necessity that should not be resorted to only to achieve the following objectives; to uphold the rule of God on earth, so that the complete submission of men would be exclusively to Him; to eliminate oppression, extortion and injustice by instituting the world to Allah; to achieve the human ideas that are considered by Allah as the aims of life and to secure people against terror, coercion and injury.²⁷

Similarly John Kelsay (1993) perceives that the Islamic tradition presents evidence of two meanings of the concept of peace: first, the desire to avoid conflict and, at a deeper level, the interest in the achievement of an ideal social order. In his view, in the Islamic tradition, one must strive for peace with justice. This is the special obligation of believers more than it is the natural obligation of all of humanity. He also says that the surest guarantee of peace is the predominance of al-Islam, that is, the submission to the will of God. One must therefore think in terms of an obligation to establish a social order in which the priority of Islam is recognized.²⁸

2.2 Research Design & Methodology

This study undertakes a comparative analysis of the legal tenets related to the use of force and justification for engaging in war in Islamic law and Public International law. Thus, the study relies primarily on the commentaries of legal scholars who are known to be experts in this field of study and other secondary sources that analyze the rules and the legislative framework in place for each of the two legal traditions involved.

²⁶Qutb S, *Islam and Universal Peace*, American Trust Publications, Indianapolis, 1977.

²⁷Qutb S, *Islam and Universal Peace*, American Trust Publications.

²⁸Kelsay J, *Islam and War*, John Knox Press, Westminster, 1993, 30.

CHAPTER THREE

REVIEW OF RELEVANT LEGAL RULES AND PRINCIPLES

3.1 Jus ad Bellum and the Rules of Engagement in Public International Law

Public international law or simply international law which was previously referred to as the “law of nations” consists of rules, principles and laws that govern the relations between states and international actors.²⁹

Being the branch of law that defines the legitimate reasons a state may engage in war, jus ad bellum mainly focuses on the criteria that legitimizes an attack or the criteria that renders a conflict just; that is under what circumstances is the use of military power legally justified.

From both a moral and historical point of view, there are strong presumptions against the use of violence as well as aggression.³⁰ Looking at the historical development of warfare, the earliest mention of rules and conditions that justified resort to war is in the 25th century BC the ancient Egyptians and Sumerians generated rules which defined the circumstances under which war might be initiated.³¹ Another early historical instance is when the ancient Hittites demanded a formal exchange of letters prior to initiating war.³² The great Italian philosopher St Thomas Aquinas, who lived in the 13th century, in the Summa Theologica discusses three conditions that must be fulfilled prior to engaging in war which are: just authority which was the prince, no private person had authority to command war; the second condition is just cause and self defense was stated as an example; the final condition is right intention.³³ Upon fulfillment of those conditions, the conflict was deemed to be just contrary to which the war was forbidden. A more structured procedure was that of the Roman Empire. The Romans went a step ahead and formalized laws and procedures that made the use of force an act of last resort. Envoys were

²⁹<http://the-beacon.info/topics/international-law-United-Nations/a-brief-overview-of-international-law/> Munro-Nelson J, ‘A Brief Overview of International Law’, (2009). Accessed on 25 November 2016.

³⁰ Johnson J, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton University, New Jersey, 1981, 81.

³¹ Johnson J, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton University, New Jersey, 1981, 81.

³² DiMeglio R et al, *Law of Armed Conflict Deskbook*, United States Army Judge Advocate General’s Legal Center and School, Virginia, 2013, 10.

³³ Aquinas T, *Summa Theologiae*, Benziger Brothers, New York, 1911, Part II Article 1.

dispatched by Rome to the state against whom they had grievances and they would then proceed to attempt to resolve the differences through diplomatic talks.³⁴

There are a variety of modern laws directed towards regulating the use of force in safeguarding relations between states. Both public international customary and treaty law contain legal bases for the use of force. The primary purpose of the United Nations is to maintain international peace and security.³⁵ The United Nations acknowledges and respects state sovereignty hence states ought to resolve disputes in a peaceful manner avoiding the threat or use of force against the territorial integrity or political independence of another state.³⁶ But the United Nations Charter does contain guidelines regarding the use of force can be permitted. The general rule is stated under Article 2 of the Charter, which declares that ‘All members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.’

The UN Charter provides for two exceptions to the general rule regarding prohibition of the threat or use of force under which States are permitted to resort to the use of force under Chapter VII of the Charter. Use of force is permitted when it is as a result of an enforcement action under the auspices of the UN Security Council. Article 51 of the Charter proceeds to state the other instance when engagement is allowed: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations.’ Sanctions are invoked against States that resort to the use of force.³⁷

3.2 Principles of Jus ad Bellum

International law and rules of customary international law, recognize the rules of jus ad bellum as principles, which are used to determine when the use of violence is justifiable. Customary international law being laws that are created and sustained by the constant and uniform practice

³⁴ Johnson J, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton University, New Jersey, 1981, 81.

³⁵ Article 1, Charter of the United Nations, 1 UNTS XVI, 24 October 1945.

³⁶ Article 2(3), Charter of the United Nations, 1 UNTS XVI, 24 October 1945.

³⁷ Article 39-51, Charter of the United Nations, 1 UNTS XVI, 24 October 1945.

of states in circumstances that give rise to a legitimate expectation of similar conduct in the future.³⁸

i) Just Authority

A state's decision to resort to war must be based upon the need to right a wrong for example in a situation of self-defense. The principle of "Just authority" states that only war waged under and by a legitimate authority is a just war. Such legitimate authority is derived from state sovereignty which is derived from popular consent. In cases of individuals or groups that do not have the consent to act for or on behalf of a legitimate authority then the use of violence by these particular individuals or groups is deemed to be illegal.³⁹

ii) Just Cause

It is commonly agreed that having a just case alone, which in this case refers to self-defense, is enough as it is seen as the most important condition of a just war.⁴⁰ Many scholars hold the view that self-defense against aggression is the only justifiable cause for war.^{41,42,43} The principle of "Just cause" theory stems from the right of states to their own of territorial integrity and sovereignty which are derived from the rights of individuals of that particular state through delegated power which ultimately rests on the consent of the same individuals.⁴⁴ As much as it is the responsibility of a state to protect the lives of its people it cannot be legally challenged with regards to their safety, life and liberty by another state.

A minority of scholars are of the view that the notion of "just cause" as applying only to self-defense by a state when attacked is far too narrow. To begin with, states can and should also be allowed to defend themselves from imminent danger of being attacked, what is, referred to as

³⁸ James G & Solomon A & Staunton M, 'Customary International Law', 1 International Judicial Monitor 5 (American Society of International Law and the International Judicial Academy), 2006. Accessed at http://www.judicialmonitor.org/archive_1206/generalprinciples.html.

³⁹<http://www.utm.edu/research/iep/j/justwar.htm> Accessed on 25 December 2016. Mosely A, Just War Theory, in the Internet Encyclopedia of Philosophy, 2009.

⁴⁰<http://www.utm.edu/research/iep/j/justwar.htm> Accessed on 25 December 2016. Mosely A, Just War Theory, in the Internet Encyclopedia of Philosophy, 2009.

⁴¹Green L, *The Contemporary Law of Armed Conflict*, Juris Publishing, Pittsburgh, 2008, 20.

⁴²Luban D, 'Just War and Human Rights', 9 Philosophy and Human Rights Affairs 2 Winter (1980), 160-181.

⁴³ The United Nations defined aggression in 1974 as 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State'. As stated in: Green L, *The Contemporary Law of Armed Conflict*, Juris Publishing, Pittsburgh, 2008.

⁴⁴Luban D, 'Just War and Human Rights', 9 Philosophy and Human Rights Affairs 2 Winter (1980), 160-181.

“anticipatory self-defense.⁴⁵ But, the actual danger ought to be evident and proximate. In such cases, anticipatory military acts are morally justified.⁴⁶

The classical case of self-defense arose from the Caroline case in 1837.⁴⁷ In this case, the British seized a vessel, Caroline, which has been used by the American rebels in armed raids on Canadian territory. Thereafter, the vessel was set on fire, by the British, and abandoned around the Niagara Falls resulting in the death of two US Nationals. The issue for determination here was whether the acts of the Brits were justifiable. Following diplomatic discussions between the two states it was, the then US Secretary of State Daniel Webster asserted that Britain would have to show ‘ a necessity of self-defense that is instant, overwhelming, leaving no choice of means and no moment of deliberation.’⁴⁸ These elements can and are collectively referred to as necessity such that the state exercising the right of self-defense ought to have acted in response to an armed attack thereby necessitating a response so as to defend itself from further attacks.

Still under self-defense, the acts of the state exercising their right of self-defense ought to exercise this right within the principle of proportionality. The Caroline case expressly states: ‘It will be for Great Britain to show, also, that the local authorities of Canada, even supposing the necessity of the moment...did nothing unreasonable or excessive; since the act justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.’⁴⁹ Following this, the right to self-defense is not absolute but must be exercised with restraint and it will not be justifiable for the responding state is not justified in launching military attacks that exceed the threat posed by the original attack.

The Caroline case which presents with it the Caroline test is of a customary law nature that has survived for over twenty centuries in addition to the UN Charter recognizing the right of self-defense. A former president of the International Court of Justice Sir Robert Jennings described the Caroline test as the *locus classicus* of the law of self-defense.⁵⁰

⁴⁵ Wan den Hole L, ‘Anticipatory Self-Defense Under International Law’, 19 American University International Law Review 1 (2003).

⁴⁶ Arend A, ‘International Law and the Preemptive Use of Military Force’, 26 The Washington Quarterly 2 (2003), 89-103.

⁴⁷ The Caroline and McLeod Cases, 32 American Journal of International Law 82 (1938), 82-84.

⁴⁸ Britain Parliamentary Papers, 30 Britain and Foreign State Papers (1843), 193.

⁴⁹ The Caroline and McLeod Cases, 32 American Journal of International Law 82, 82-84.

⁵⁰ The Caroline and McLeod Cases, 32 American Journal of International Law 82, 82-84.

The inherent right of self-defense, both individual and collective was reiterated in two resolutions of the United Nations, which were adopted in 2001.⁵¹⁵²

iii) Just or Right Intention

A war may only be fought for the sake of a just cause. In an instance where a state has both a just and unjust reason to engage in war then only the just cause may inspire the war. The concept of right intention, or just cause is all about the reason behind the decision to resort to the use of force –States must do so for the cause of justice and not for reasons such as self-interest. In an instance where reasons of national interest overwhelm the pretext of fighting aggression then a war cannot be considered to be just.⁵³

Even with a just cause, a war may surpass its boundaries of use of force. A just war is limited to the pursuit of the avowed just cause.⁵⁴ An example is when the coalition forces led by the United States were close to invading and occupying Baghdad during the 1991 Gulf War against Iraq. The main “declared” reason behind the United States military attacking Iraq was solely to liberate Kuwait from the occupation of Iraq. Upon achieving their objective, they then proceeded to negotiate a ceasefire despite strong political pressure inside the United States to occupy Iraq and remove Saddam Hussein from power. Had they done that they would have exceeded their authority according to the principle of “just intention”.⁵⁵ Usually, the use of violence and waging war with the intention of defending an oppressed group and securing its freedom is not popular as such a war is deemed to be too costly.⁵⁶

iv) Probability of Success

‘Human life and economic resources should not be wasted on war efforts that are certain to fail.’⁵⁷ Prior to engaging in a war one must weigh the costs, losses and benefits of waging that particular war, and the probability of success, taking into consideration Article 2 of the United Nations Charter. Nevertheless, in the event of a strong bullying force, regardless of the fact that

⁵¹UNSC S/RES/1368 (2001)Threats to international peace and security caused by terrorist acts.

⁵²UNSCS/RES/1373 (2001) Threats to international peace and security caused by terrorist acts.

⁵³<http://www.iep.utm.edu/justwar/#H2> Accessed at 1600 hrs on 28 December 2016.

⁵⁴http://oregonstate.edu/instruct/phl201/modules/just_war_theory/criteria_intro.html Accessed on 02 January 2017.

⁵⁵http://oregonstate.edu/instruct/phl201/modules/just_war_theory/criteria_intro.html Accessed on 02 January 2017.

⁵⁶<http://www.beyondintractability.org/essay/jus-ad-bellum> Michelle M, Jus ad Bellum: Beyond Intractability, Conflict Information Consortium, University of Colorado, 2003. Online article accessed on 28 December 2016.

⁵⁷<http://www.beyondintractability.org/essay/jus-ad-bellum> Michelle M, Jus ad Bellum: Beyond Intractability, Conflict Information Consortium, University of Colorado, 2003. Online article accessed on 28 December 2016.

there is a low probability of success, moral principles dictate that legitimate authority may oppose and stand up against such forces.⁵⁸

v) **Proportionality Principle**

Even after fulfilling the above principles, the use of violence is limited and must be proportional to the initial attack suffered by the retaliating state.⁵⁹ Pursuant to the concept of responsibility to protect, the force used by a retaliating state must be proportional to the magnitude of the attack and states are prohibited from using excessive force that is not necessary for attaining their just intention.⁶⁰

vi) **Last Resort**

With Article 2 of the United Nations Charter in mind, the principle of last resort simply states that all non-violent options, such as negotiations and diplomatic avenues, ought to be exhausted prior to a legitimate authority's deciding to wage war.⁶¹

3.3 Jus ad Bellum and the Rules of Engagement in Islamic Law

As we have seen above, the concept of jus ad bellum in international law provides restrictions and proper authority regarding the use of force limiting the authority to intra-state warfare as it was seen in Western traditions.⁶² We shall now proceed to expound on and discuss rules of engagement and use of force between nations according to Islamic law.

The central source of the Islamic religion is the Qur'an.⁶³ It is the primary source of law with regard to rules of engagement and legality of warfare. Islamic tenets on the legality of warfare were in existence over a thousand years prior to the codification of western international law

⁵⁸<http://www.utm.edu/research/iep/j/justwar.htm> Accessed on 25 December 2016.

Mosely A, *Just War Theory*, in the Internet Encyclopedia of Philosophy, 2009.

⁵⁹ Johnson J, *Just War Tradition and the Restraints of War: A Moral and Historical Inquiry*, Princeton University Press (1981), 41.

⁶⁰ Hubert D & Weiss T et al, *The Responsibility to Protect: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, 2001, 139.

⁶¹<https://www.ethicsandinternationalaffairs.org/2015/just-war-theory-last-last-resort/>. Aloyo E, *Just War Theory and the Last of Last Resort*, Cambridge University Press, Cambridge, 2015. <http://www.jstor.org/stable/2265110> Luban D, 'Just War and Human Rights: Philosophy and Public Affairs'. Accessed on 1 January 2017.

⁶²Al-Zuhili W, 'Islam and international Law' *87 International Review of the Red Cross* Number 858, 2005, 276 -277.

⁶³ S Hashmi & M Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, 1 The John Hopkins Press, Baltimore, 2001, 59.

instruments. Islamic jus ad bellum developed simultaneously with the development of the Qur'an – beginning around 600 CE.⁶⁴⁶⁵

The ideology behind the Islamic law of nations, which Eric Tristram refers to as *as-siyar*, in his article on Islamic jus ad bellum is brotherhood which he says is inherent in mankind and describes as the corresponding rights and protection that humans enjoy in mankind as God's creation and the peace and stability sought in God's creation.⁶⁶⁶⁷ In international law, a similar ideology of unity, protection of peoples' rights and universal peace is presented by the Charter of the United Nations Article 1 of the Charter states that: "The purposes of the United Nations are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principle of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of people, and to take other appropriate measures to strengthen universal peace;
3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a centre for harmonizing the actions of nations in the attainment of these common ends."

The main source of law in Islam the Qur'an, which comprises the words of God, together with accounts of incidences of the life of Prophet Muhammad as codified in *hadith*; together with

⁶⁴Al-Zuhili W, 'Islam and international Law' 87 *International Review of the Red Cross* Number 858, 2005, 276 -277.

⁶⁵Zouave E, 'Islamic jus ad bellum: the legitimacy of the use of force by states and armed groups' posted on 27 August 2014 at www.armedgroup-internationallaw.org.

⁶⁶Al-Zuhili W, 'Islam and international Law' 87 *International Review of the Red Cross* Number 858, 2005, 276 -277.

⁶⁷Zouave E, 'Islamic jus ad bellum: the legitimacy of the use of force by states and armed groups' posted on 27 August 2014 at www.armedgroup-internationallaw.org.

scholarly writings and consensus which is known as *ijma* and the reasoning of intelligent Muslims referred to as *qiyas*.⁶⁸

Traditional Islamic law did not foresee the creation of defined nation-states in the 20th century and thus the interpretation that later arose out of the primary sources did so in a power competition with western powers.⁶⁹The historian, Sohail Hashmi in his paper on the Islamic Ethic of Humanitarian Intervention presents three schools of interpretation regarding the relationship between the community, the *ummah*, and the nation state and He stated the following:

- a. The secularists who separate the *ummah* from any notion of political organization;
- b. The reformists who consider the nation-state an acceptable stepping stone to a higher unity and;
- c. The pan- Islamists who consider the very concept of a nation-state to be contradictory to the legal principles of the *ummah*.⁷⁰

As discussed exhaustively by Eric Zouave, there is no consensus regarding the acceptability of statehood in *as-siyar*, however Islamic tenants who recognize *pacta sunt servanda*, rule must be kept based on good faith, are in conformity with international standards of sovereignty, are against unjustified coercive infringement on the political order of a state.⁷¹⁷²⁷³ This therefore means that just like international law, treaties or agreements entered to by states or legitimate state representative regarding maintainance of peace are legally binding and must be upheld.

3.4 Motives for Engaging in Warfare in Islam

According to Muslim jurists, the primary motive for engaging in warfare is to respond to an attack and or any form of aggression. One ought not to be killed because of contravening Islam but to ward off aggression by an aggressor. The Qur'an expressly states three circumstances that justify engaging in warfare:

⁶⁸Baker W, *Islamic Theory of Statehood*, Judge Press Bangalore, Institute of World Culture Bangalore, 1981, 560 004.

⁶⁹<https://armedgroups-internationalallaw.org/2014/08/27/islamic-jus-ad-bellum-the-legitimacy-of-the-use-of-force-by-states-and-armed-groups/> Accessed on 28 December 2016.

⁷⁰S Hashmi& M Khadduri, *The Islamic Law of Nations: Shaybani's Siyar*, 1 The John Hopkins Press, Baltimore, 2001, nii.

⁷¹Al-Zuhili W, 'Islam and international Law', *87 International Review of the Red Cross* Number 858 (2005).

⁷² Muslims can enter into peace and conciliation pacts with non-Muslims. In Quran verses 8:61 states: 'But if they (the enemy) incline towards peace, do thou (also) incline towards peace...'.⁷²

⁷³Zouave E, 'Islamic jus ad bellum: the legitimacy of the use of force by states and armed groups' posted on 27 August 2014 at www.armedgroup-internationalallaw.org.

i) Defending the *Ummah*

Use of force is permitted in Islam if it is for the sole reason of protecting a part of the entire Muslim community against aggression. The holy Qur'an states: 'To those against whom war is made, permission is given (to fight) because they were wronged.'⁷⁴ It also goes ahead and expounds: 'And slay them wherever ye catch them and turn them out from where they have turned you out, for tumult and oppression are worse than slaughter...'⁷⁵

ii) Providing assistance to victims of injustices

Allah also states in the Qu'ran 'And why should ye not fight in the cause of God and those who, being weak are ill-treated (and oppressed)? Men, women and children, whose cry is: 'Oh Lord! Rescue us from this town, whose people are oppressors.'⁷⁶

The International Commission on Intervention and State Sovereignty proposes a similar situation in which military force can be used to intervene so as to ensure protection of human rights and rights of victims in during an armed conflict.⁷⁷ When a state is unable genuinely to protect the rights of its people, in need or the state itself is involved in violation of those rights, in this case the "world community", as referred to as by David Miller in his memo for the workshop on Global Governance which was held at Princeton University in February 2006, has a responsibility to ensure that those rights are protected and upheld.⁷⁸

iii) Self-defense

Islamic laws have permitted a state to resort to the use of force for defense purposes: 'Fight in the cause of God those who fight you, but do not transgress limits, for God loveth not transgressors.'⁷⁹ This verse is very important especially with regards to jus ad bellum but also it sums up the legitimacy of warfare in Islam. This verse also declares that the right to self-defense is not absolute thus bringing in the aspect of defending one's self (state) but within limits. It also

⁷⁴Ali A, *The Holy Qur'an* English translation, King Fahad Holy Quran Printing Complex, Medina, 1987, 22:39.

⁷⁵Qu'ran 2:191.

⁷⁶ Qu'ran 4:75.

⁷⁷ The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty conducted by International Development Research Centre, Ottawa, 2001. Accessed at https://www.princeton.edu/~pcglobal/conferences/normative/papers/Session6_Miller.pdf on 30 April 2017.

⁸⁰.The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty conducted by International Development Research Centre, Ottawa, 2001.

⁷⁹Qur'an 2:190.

shutters any slither of doubt that one had with regards to Islam being a religion of war.⁸⁰ The prescription for warfare of Muslims is against those who wage war against them, not those who do not.⁸¹

This is similar to the tenets of international law that recognize the right to self-defense as a just cause of waging war. As discussed earlier in this chapter, the Caroline case and Article 51 of the UN Charter both legitimize war waged because of self-defense.

Anticipatory self-defense had been discussed under international law. It is permitted as has been provided for by customary international law under the Caroline case. Islamic law also has authorities that govern the right to anticipatory self-defense. The primary source of Islamic law, the Qur'an, allows a party to make the necessary preparations for the use of force when an attack on Muslim territory is imminent.⁸² States and state actors governed by Islamic law can resort to the use of anticipatory force in instances when the opposing party is openly hostile towards and threatening them. This has been provided for in the Qur'an under Chapter 8:58 which states: "If thou fearest treachery from any group, throw back (their covenant) to them, (so as to be) on equal terms." Furthermore, Qur'an Chapter 8:60 says: "Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies."

Naiz Shah mentions the battle of *Badr* which took place in 624 CE as an example of anticipatory self-defense. The battle of *Badr* was talked about in *An-Anfal*, Chapter 8 of the Qur'an. Shah quoting from Sayyid Mawdudi states: "After 13 years of persecution, the Prophet Muhammad migrated from Mecca to Medina where he consolidated the Muslim community in a short time. He had concluded alliances and peace treaties with neighboring tribes and his influence was growing. This alarmed the powerful tribes of Mecca, particularly the Quraysh, because the Muslims could get control of the main trade route between Mecca and Syria which passed near Medina. The *Quraysh* apprehended that the growing power of Muslims in Medina might jeopardize their trade with Syria. They sent an expedition towards Medina to crush the Muslim

⁸⁰<http://answering-islam.org/BehindVeil/btv2.html> Accessed on 2 January 2017.

⁸¹ Ahmad A & Al-Halim A & Al-Harrani T, *6 Minhaj al-Sunnah al-Nabawiyyah*, Muassasat Qurtubah, Medina, 1406 H, 191.

⁸² Shah N, 'The use of force under Islamic law', *24 Journal of International Law* (2013), 343.

power. When the Prophet Muhammad received this news, he led a small force out of Medina to thwart an imminent attack on it.”^{83 84}

3.5 Chapter Summary

This chapter has looked at the rules of engagement in public international law and Islamic law of Nations. Public international law has seven principles that must be adhered to prior to engaging in war: just authority, just cause, right intention, probability of success, proportionality principle and last resort. Islamic law on the other hand has three motives for engaging in war: defending the *ummah*, providing help to victims of injustices and self-defense.

⁸³Shah N, ‘The use of force under Islamic law’, 24 *Journal of International Law* (2013), 343.

⁸⁴Mawdudi S, *Al-jihad fil-Islam*, 1996, 86.

CHAPTER FOUR

IRRECONCILABLE TRADITIONS?

4.1 International and Islamic Traditions in theory and in practice

In the previous chapter, we have seen that some features of international and Islamic law regarding the rules of engagement in war are similar. The most important difference is a peculiar feature of Islamic law that international jurisdictions do not possess. Muslim faithful are required to adhere to their laws for religious reasons, that is, because any violation of Islamic law is a violation of the believer's commitment to Allah, in addition to possibly being a violation of international and state laws.⁸⁵⁸⁶

The most salient rules of engagement between the international and the Islamic traditions have the same objective despite being worded differently. The first on being just authority: as we have seen, international law provides that only war waged under and by a legitimate authority will be deemed just. Here, depending on the legal system of the country, persons that have the power to initiate war are heads of states or the head of a state's military. Looking at the Islamic law equivalent, the legitimate authority to proclaim war is given to the *Imam*, which is equivalent to Islamic historical *Caliph's* authority in public international law. An *Imam* being an Islamic leader who may lead worship services and sometimes serves as a community leader. *Caliph* is a steward/leader of an Islamic area or community called *Caliphate*.⁸⁷⁸⁸

The second requirement in rules of international law rules engagement prior to war is a just cause. This has been explained extensively in the previous chapters. States are permitted to protect themselves from imminent danger, anticipatory self-defense, and also protect itself and its people from an attack, self-defense.⁸⁹⁹⁰⁹¹ Islamic law had also addressed the concept of a just cause in a similar fashion with self-defense, defending the *ummah*, within limits, as one of its

⁸⁵ Shah N, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Taylor & Francis Group, New York, 2011, 11.

⁸⁶ Interview with Dr Abdulqadir Hashim, 25 January 2017.

⁸⁷ Johnsons J, Murphy A, *The Blackwell Companion to Religion and Violence*, Blackwell Publishing Ltd, Malden, 2011, 7-66.

⁸⁸ Al-Zuhili W, 'Islam and international Law' *87 International Review of the Red Cross* Number 858, 2005, 276-277.

⁸⁹ Luban D, 'Just War and Human Rights', 9 *Philosophy and Human Rights Affairs* 2 Winter (1980), 160-181.

⁹⁰ Arend A, 'International Law and the Preemptive Use of Military Force', 26 *The Washington Quarterly* 2 (2003), 89-103.

⁹¹ The Caroline and McLeod Cases, 32 *American Journal of International Law* 82 (1938), 82-84.

accepted reasons for waging war.⁹²⁹³⁹⁴ Qur'an 4:75 presents another scenario where waging war would be permissible according to Islamic principles which are: providing assistance to victims of injustices, the oppressed.

The third rule according to international law, that is a "just intention" requires that war be waged only for the sake of a just cause, not out of self-interest.⁹⁵ In addition to these three rules, international law provides for additional rules that must be adhered to for a war to be a just. States must consider the possible damages that war will cause to human life and must only use force when the probability of success is high.⁹⁶ When states wage a just war by and under a legitimate authority with a just intention, it must do so within limits- upon retaliating states must use force that is proportional to the attack.⁹⁷ Islamic scholars like Abou El Fadl has advocated for a "balancing test" which can be equated to the proportionality rule in international law.⁹⁸ He states that "The act of resorting to force might be justified if the total good outweighs the total anticipated evil."⁹⁹ Harm caused by a just war should not be of a greater magnitude than the harm caused by the wrong that the just war was attempting to right.

4.2 Complementarity and "reservations" to International Treaties

Niaz Shah makes reference to a "complementary approach" in looking at the international and Islamic traditions. This involves "translating" or incorporating laws from one tradition into another where correspondence and agreement between the two traditions makes this possible. However, for such an initiative to be successful, a strategic implementation plan would needed both at the national and international level.¹⁰⁰

When looking at states that have Sharia law as their sole source of law for their jurisdiction, the rules of engagement in war of Islamic law and international law can be deemed to be

⁹² Qu'ran 2:191.

⁹³ Qur'an 2:190.

⁹⁴ Qur'an 22:39.

⁹⁵ <http://www.iep.utm.edu/justwar/#H2> Accessed at 1430 hrs on 28 February 2017.

⁹⁶ <http://www.utm.edu/research/iep/j/justwar.htm> Accessed on 29 December 2016. Mosely A, *Just War Theory*, in the Internet Encyclopedia of Philosophy, 2009.

⁹⁷ Johnson J, *Just War Tradition and the Restraints of War: A Moral and Historical Inquiry*, Princeton University Press (1981), 41.

⁹⁸ Fadl A, 'The Rules of Killing at War: An inquiry into Classical Sources', *The Muslim World*, 1999, 89.

⁹⁹ Dawoody A, 'Al Sarakhsi Contribution to the Islamic Law of Wa'r', *14 UCLA Journal of Islamic and Near Eastern Law*, 2005, 29-44.

¹⁰⁰ Shah N, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Taylor & Francis Group, New York, 2011, 10.

irreconcilable. This is the case, for instance, of Afghanistan which refuses to be bound by international legal rules and norms because it views international laws to be “man-made laws”. As such, according to the laws of Afghanistan, international treaties cannot compare to divine law and so cannot and should not override or bind its citizens.¹⁰¹

However, rules of international law are not imposed on states but are voluntarily accepted through an accession or ratification process. Once an Islamic state has become party to a treaty, that treaty becomes part of their national laws and thus binding out of their own volition.¹⁰² International law, however, provides the possibility for a nation-state, when ratifying international treaties, to make a “reservation” to a specific clause or provision of a treaty to which it is acceding.¹⁰³ This option of reservation in treaty law is ideal for Islamic states, for it allows a state, in this case an Islamic state, to choose the most favorable law(s) for its jurisdiction and/or to adopt an international law selectively.

This right is often exercised by member states of the United Nation. For example, the United Kingdom declared reservations to Article 25 of the United Nations Convention Relating to the Status of Refugees on health care. The UK specified that it would provide health care services to refugees domicile in the UK through the country’s National Health Services as provided for in the domestic laws of the countries of origin of the refugees.¹⁰⁴

For example, Pakistan, a member of the United Nations and a nation-state guided by Islamic principles, is considered the most Sharia compliant state in the world. Sharia law is the supreme law of the land and any law not in conformity with Islamic standards and principles is unconstitutional.¹⁰⁵ And yet Pakistan has ratified many international treaties.¹⁰⁶ In such circumstances Islamic law works as a filter to identify those international rules and legal norms that are consistent with Islamic traditions and to translate them into national law(s), exercising the internationally accepted practice of “reservation” if necessary.

¹⁰¹ Interview with Dr Abdulqadir Hashim, 25 January 2017.

¹⁰² Interview with Dr Abdulqadir Hashim, 25 January 2017.

¹⁰³ Shah N, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Taylor & Francis Group, New York, 2011, 4-10.

¹⁰⁴ Shah N, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Taylor & Francis Group, New York, 2011, 4-10.

¹⁰⁵ Shah N, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Taylor & Francis Group, New York, 2011, 8-9.

¹⁰⁶ Hamdani Y, ‘Pakistani Pluralisms and the Question of Shariat’, 9 *Criterion Quarterly* 2, 2014. Posted on <http://www.criterion-quarterly.com/pakistani-pluralism-and-the-question-of-shariat>.

4.4 The Principle of *Maslahah*

Among the fundamental objectives of the United Nations is to maintain international peace and security. Similarly, Islamic law provides for a concept known as *maslahah*, (public interest or benefit), which permits a juridical ruling that would not otherwise be envisaged following the traditional sources of Islamic law, out of concern for the public good while preventing evil. The source of the principle of *maslahah* is a hadith by the Prophet (pbuh), which states “*La dharar wa la dhirar.*” (English “Harm is neither inflicted nor tolerated in Islam”).¹⁰⁷ *Maslahah* consists of considerations aimed at securing a public interest benefit which is at the same time consistent with the aims and spirit of Sharia law. *Maslahah* can also be described as a legal tool that strives for what is best for the society, that is, the *ummah*.

Keeping in mind that Islam is a religion of peace, any steps taken to ensure that the essential values are protected fall under the concept of *maslahah*. The values that fall under public interest that ought to and can be protected by invoking this principle include: life; religion; lineage; intellect and property. Furthermore, *maslahah dharuriyyat*, essential public benefit, provides that the concept of *maslahah* be exercised in instances where the lives of people are in danger and neglect would lead to chaos or destruction.^{108 109}

4.1 Chapter Summary

In this chapter we have seen that just as the United Nation’s primary role is maintaining international peace and security, Islamic law has a similar doctrine of *maslahah* which allows considerations of equity and public interest to override or take precedence over what might be a strict interpretation of Sharia law based on *qiyas* to secure a public benefit. Islamic rules and rules of public international law strictly provide that a just war must be waged by a legitimate authority and both traditions are in agreement that it must be a head of state, head of the military or the equivalent an Imam in the Islamic tradition. Both traditions are also in agreement that self-defense is indeed a just cause.

¹⁰⁷ Leaman O, *The Qur’an: An Encyclopedia*, Taylor & Francis US, New York, 2006,299.

¹⁰⁸ Barnidge R, *The Liberal Way of War: Legal Perspectives*, Ashgate Publishing, Farnham, 2013, II.

¹⁰⁹ Barnidge R, *The Liberal Way of War: Legal Perspectives*, Ashgate Publishing, Farnham, 2013, II.

CHAPTER FIVE

REVIEW OF THE RESEARCH FINDINGS

5.1 Reconcilability

Each of the two legal jurisdictions studied –international and Islamic- possesses unique characteristics resulting from their historical development and context. This study had shown that despite some of the rules and principles of engagement in war of the two traditions being similar, Islamic nations cannot be governed solely by international law in spite of its intended and proclaimed universality. At the same time Islamic states and Islamic law do not exist in an international vacuum but rather as a member of a community of nations. Therefore, public international law is essential for Islamic states as a way of governing and regulating international relations between them and non-Islamic nations. Thus those nations that have adopted *Sharia* whether fully or in part, cannot be governed solely by Islamic law.

Hypothesis number one of the study, as outlined in Chapter One - 1.6, proposed that the rules and principles of engagement in war of public international law and Islamic law are quite different. The studies conducted in Chapter three, and our discussion text in Chapter four partially refutes this hypothesis, pointing out as it did that some of the rules and principles are similar.

Our second hypothesis stated that the differences in rules of engagement in the two traditions lead to conflict in international relations between Islamic and non-Islamic states. This hypothesis has been shown to be correct. Among the examples given is that of Afghanistan which refuses to be bound by international treaties.

The final hypothesis presented was that the principles and practice of public international law and Islamic law regarding *jus ad bellum* are not reconcilable. Discussion of this aspect of our study clearly shows that despite the differences in the rules of engagement in war of the two traditions, some aspects of the rules are reconcilable, thereby refuting the third hypothesis.

Indeed, the unique features of each of these traditions make them ultimately irreconcilable, however, the basic fundamental principles, with regards to rules of engagement in war, and the

primary objectives of both Sharia law and public international law, that is, the maintenance of peace and security and acting in the best interest of the public, are highly similar and therefore form the basis for a high degree of international understanding that transcends cultural and religious boundaries.

At this point we are pleased to recall and acknowledge once again the limitations of the study given the difficulty of accessing scholars knowledgeable about the topic and the fact that much scholarly writing about the topic is in Arabic and has not been translated into English. We have reached tentative conclusions and stand to be enlightened by scholars who are much more knowledgeable about the topic.

5.1 Chapter Summary

This chapter has looked at and assessed the validity of the hypotheses of the research study in relation to the research findings. The chapter also revisited the main limitation of the study which is lack of access to original scholarly writing in Arabic.

CHAPTER SIX

CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions and Recommendation

Islam is not only a religion but a way of life; it encompasses all aspects of life for a Muslim individual and an Islamic state. Given this circumstance, we can understand why some Islamic nations do not want to be bound by rules originating outside of Sharia law. Nevertheless, the existence in Islamic jurisprudence of concepts like *as-siyar* and *maslahah* allows individual Muslims and Islamic nations to find common ground with rules and principles that are not of Islamic origin. Muslim states can avoid conflict with the precepts of public international law by amending their legislation to include public international law regulations that are consistent with the validity of Islamic law.

International law and Islamic law both view relations between nation-states as being based on mutual acceptance and reciprocity. Moreover, Muslims are religiously required to fulfill treaty obligations with Islamic states and non-Islamic states. The option of reservation in treaty law can be used to mitigate differences of regulations in Islamic and public international law. Islamic nations have a way by which they can accede to and be bound by international agreements without violating Islamic law.

Laws are implemented to govern society and society is constantly changing, therefore social change leads to change in regulations. Taking into account the evolution of public international law, the rules and norms of public international law could be analyzed and re-interpreted by Islamic scholars and recorded in scholarly writing, thereby acknowledging the shift in acceptable social behavior and modern practice.

Sharia law and public international law are two clearly different legal systems. Despite these differences, a majority of Islamic states are members of the United Nations. Islamic states can utilize the reservation clause in international treaty law, the concept of *maslahah* and the authority of Islamic scholars as a source of law, to enhance international relations between Islamic and non-Islamic states and to accept the public international law rules of engagement in war as a way of maintaining and enhancing international peace and security.

BIBLIOGRAPHY

Advisory Opinions

Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ, 9 July 2004.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ, 8 July 1996.

Articles

Al-Zuhili W, 'Islam and international Law' 87 *International Review of the Red Cross* Number 858, 2005.

Arend A, 'International Law and the Preemptive Use of Military Force', 26 *the Washington Quarterly* 2 (2003).

Britain Parliamentary Papers, 30 *Britain and Foreign State Papers* (1843).

Dawoody A, '*Al Sarakhsi Contribution to the Islamic Law of Wa'r*', 14 *UCLA Journal of Islamic and Near Eastern Law*, 2005.

Fadl A, 'The Rules of Killing at War: An inquiry into Classical Sources', *The Muslim World*, 1999.

Ghamidi J, Saleem S, *Islam: A Comprehensive Introduction*, Al-Mawarid, Pakistan, 2012.

Hamdani Y, 'Pakistani Pluralisms and the Question of Shariat', 9 *Criterion Quarterly* 2, 2014. Posted on <http://www.criterion-quarterly.com/pakistani-pluralism-and-the-question-of-shariatpakistani-pluralism-and-the-question-of-shariat/>.

Harney J, 'How do Sunni and Shia Islam differ' *New York Times*, 4 Jan (2016). <http://www.nytimes.com/2016/01/04/world/middleeast/q-and-a-how-do-sunni-and-shia-islam->

[differ.html?_r=0](#).

James G & Solomon A & Staunton M, 'Customary International Law', 1 International Judicial Monitor 5 (American Society of International Law and the International Judicial Academy), 2006.

Luban D, 'Just War and Human Rights', 9 Philosophy and Human Rights Affairs 2 Winter (1980).

Morgenthau H, 'Positivism, functionalism and International law' 34 *American Journal of International law* (1940).

Moshtaghi R, 'The Relation between International Law, Islamic law and constitutional law of the Islamic republic of Iran- a multilayer system of conflict' Max Planck Yearbook of United Nations Law, *Max Planck Institute for Comparative Public Law and International Law*, Germany, Volume 13, 2009.

Nico R, 'Jihad and just war: A comparative analysis' (2010), Writing excellence award writers, paper 14. http://soundideas.pugetsound.edu/writing_awards/14.

R Nico, 'Jihad and just war: a comparative analysis' (2010), Writing Excellence Award Writers, Paper 14.

Shah N, 'Islamic Law and the Law of Armed Conflict: The Armed Conflict in *Pakistan*', 2011.

Shawamreh C, 'Islamic legal theory and the context of Islamic movements' *Notre Dame Journal of International & Comparative Law* (2012).

Zouave E, 'Islamic jus ad bellum: the legitimacy of the use of force by states and armed groups' posted on 27 August 2014 at www.armedgroup-internationalallaw.org.

Zuhili W, 'Islam and international Law' 87 *International Review of the Red Cross* Number 858, 2005.

Books

Ali A, '*The Holy Qur'an*' English translation, King Fahad Holy Quran Printing Complex, Medina, 1987.

Afsaruddin A, "*War and violence*" in *The Quran an Encyclopedia*, Oneworld Publications, Oxford, 2008.

Ali A, *The Holy Qur'an*' English translation, King Fahad Holy Quran Printing Complex, Medina, 1987.

Aloyo E, *Just War Theory and the Last of Last Resort*, Cambridge University Press, Cambridge, 2015.

Ahmed A, *Discovering Islam: making sense of Muslim history and society*, Psychology Press, Hove 2002.

Ahmad A & Al-Halim A & Al-Harrani T, *6 Minhaj al-Sunnah al-Nabawiyyah*, MuassasatQurtubah, Medina, 1406 H.

Baker W, *Islamic Theory of Statehood*, Judge Press Bangalore, Institute of World Culture Bangalore, 1981.

Barnidge R, *The Liberal Way of War: Legal Perspectives*, Ashgate Publishing, Farnham, 2013.

DiMeglio R et al, *Law of Armed Conflict Deskbook*, United States Army Judge Advocate General's Legal Center and School, Virginia, 2013.

Ghamidi J & Saleem S, *Islam: A Comprehensive Introduction*, Al-Mawarid, Pakistan, 2012.

Green L, *The Contemporary Law of Armed Conflict*, Juris Publishing, Pittsburgh, 2008.

Greig D, *International law*, 2ed, Butterworths, London, 1976.

Hall W, *International Law*, Clarendon Press, Oxford, 1924.

Hashmi S & Khadduri M, *The Islamic Law of Nations: Shaybani's Siyar*, 1 The John Hopkins Press, Baltimore, 2001.

John E, *What everyone needs to know about Islam*, Oxford University Press, New York, 2002.

Johnson J, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton University, New Jersey, 1981.

Johnsons J & Murphy A, *The Blackwell Companion to Religion and Violence*, Blackwell Publishing Ltd, Malden, 2011.

Kelsay J, *Islam and War*, John Knox Press, Westminster, 1993, 30.

Ibn-Kathir A, *al-Bidaya wal-Nihaya*, 2ed, Dar al-Adwa, Beirut, 1985.

Kelsay J, *Islam and War*, John Knox Press, Westminster, 1993.

Leaman O, *The Qur'an: An Encyclopedia*, Taylor & Francis US, New York, 2006.

Lewis B, *The Political Language of Islam*, University of Chicago Press, Chicago, 1988.

Miller D, *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, International Development Research Centre, Ottawa, 2001.

Shah N, *Islamic Law and the Law of Armed Conflict: The Conflict in Pakistan*, Routledge Taylor & Francis Group, New York, 2011.

Tunkin G, *Theory of International Law*, Harvard University Press Cambridge, Massachusetts, 1974.

Qutb S, *Islam and Universal Peace*, American Trust Publications, Indianapolis, 1977.

Usmani M, *The Meaning of the Noble Quran*, Maktaba Ma'ariful Quran, Karachi, 2006.

Zawati H, *Islam and the Law of Armed Conflict*, Cheltenham Publishers, Oxford, 2015.

Case Law

Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America), ICJ Reports, 1986.

The Caroline v. United States (1813), Moore Digests of International law II 1906, 412.

Declarations

UNGAR, *Declaration on Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, A/RES/2625 (XXV) 24 October 1970.

Interviews

Interview with Dr Abdulqadir Hashim, law lecturer at the Nairobi University, Nairobi, Kenya on 25 January 2017.

Online Resources

<http://answering-islam.org/BehindVeil/btv2.html>

<https://armedgroups-internationallaw.org/2014/08/27/islamic-jus-ad-bellum-the-legitimacy-of-the-use-of-force-by-states-and-armed-groups/>

<http://the-beacon.info/topics/international-law-united-nations/a-brief-overview-of-international-law/>

<http://www.criterion-quarterly.com/pakistani-pluralism-and-the-question-of-shariatpakistani-pluralism-and-the-question-of-shariat/>

http://oregonstate.edu/instruct/phl201/modules/just_war_theory/criteria_intro.html

<http://www.iep.utm.edu/justwar/#H2>

<http://www.jstor.org/stable/2265110>

https://www.princeton.edu/~pcglobal/conferences/normative/papers/Session6_Miller.pdf

<http://www.utm.edu/research/iep/j/justwar.htm>

Reports

Hubert D & Weiss T et al, The Responsibility to Protect: Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty, International Development Research Centre ,2001, 139.

The Responsibility to Protect Report: Report of the International Commission on Intervention and State Sovereignty conducted by International Development Research Centre, Ottawa, 2001.

Resolutions

UNSC S/RES/1368 (2001) Threats to international peace and security caused by terrorist acts.

UNSCS/RES/1373 (2001) Threats to international peace and security caused by terrorist acts.

Statutes

Charter of the United Nations, 1 UNTS XVI, 24 October 1945.