Islamic Law and the Law of Armed Conflict

The armed conflict in Pakistan

Niaz A. Shah

Routledge Research in the Law of Armed Conflicts

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Islamic Law and the Law of Armed Conflict: The Armed Conflict in Pakistan demonstrates how international law can be applied in Muslim states in a way that is compatible with Islamic law. Within this broader framework of compatible application, Niaz A. Shah argues that the Islamic law of *qital* (i.e. armed conflict) and the law of armed conflict are compatible with each other and that the former can complement the latter at national and regional levels. Shah identifies grey areas in the Islamic law of *qital* and argues for their expansion and clarification. Shah also calls for new rules to be developed to cover what he calls the blind spots in the Islamic law of *qital*. He shows how Islamic law and the law of armed conflict could contribute to each other in certain areas, such as the law of occupation, air and naval warfare and the use of modern weaponry. Such a contribution is prohibited neither by Islamic law nor by international law.

Shah applies the Islamic law of *qital* and the law of armed conflict to a live armed conflict in Pakistan and argues that all parties – the Taliban, the security forces of Pakistan and the American CIA – have violated one or more of the applicable laws. He maintains that whilst militancy is a genuine problem, fighting militants does not allow or condone violation of the law.

Islamic Law and the Law of Armed Conflict will be of interest to students and scholars of international law, Islamic law, international relations, security studies and south-east Asian studies.

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With love to Fatima

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1 Introduction

The purpose of our research for the past few years has been the application of Islamic law and international law in Muslim states. We have observed two phenomena: a scholarly debate on the relationship of Islamic law and international law and the reality of Islamic law in Muslim states and international law as they exist and operate today.

The scholarly debate is polarised: Islamic law is criticised for its incompatibility with international law, especially human rights law, and international law is criticised for its secular and Western origin. This criticism of both legal systems has led to the creation of exclusionary and triumphalistic theories. The followers of exclusionary theory can be put into two categories: Muslim religious scholars and secular scholars. Muslim religious scholars are opposed to the application of international law in Muslim states. They want the application of laws based or derived from divine wisdom contained in the two primary sources of Islamic law, i.e. the Koran and the Sunnah (the model behaviour of the Prophet Muhammad). For them, divine wisdom is the ultimate measure for everything, and any nonconforming rule must give in to Islamic law. The secular scholars, who are mainly Western, are against religious law and want to enact and apply laws based on and derived from human intellect through debate and agreement. They are opposed to any rule that is not derived from this source through this process. For them man is the measure of everything. Both categories of scholar want to exclude the application of the other. This religious and secular dichotomy has led to the creation of triumphalistic theory. The thrust of the triumphalistic theory is which legal principle, Islamic or international, should prevail in case of a conflict. The secularists want international law to prevail whereas Muslim religious scholars want Islamic law to prevail over international law. In some cases, both groups of scholars stick to their arguments without any clear logic and in a fashion which could be rightly described as arrogant. Hence we face two fundamentalist camps: Muslim fundamentalists and secular fundamentalists.

The legal reality in Muslim states today is that most Muslim states want the application of Islamic law in Muslim states. The constitutions of most Muslim states have given Islam the status of official religion and require

that laws shall be enacted according to Islamic standards and that those laws conflicting with Islamic standards must be harmonised with Islamic standards. Examples of such constitutions are discussed later in the chapter. Many Muslim states have laws in force which they inherited from the colonial era. These laws are, however, allowed to remain in force because they are considered compatible with Islamic standards. The reality of international law today is that it is secular and is of Western origin (see Chinkin and Charlesworth 2004).

We argue for the compatible application of Islamic law and international law in Muslim states. Compatible application is possible for three reasons. First, neither Islamic law nor international law is exclusionary and triumphalistic in nature. Second, the most fundamental principles of Islamic law (i.e. *nusus,* explained later in the chapter) and international law (*jus cogens,* explained later in the chapter) are compatible. Third, Islamic *fiqh* rules, which are explained later in the chapter, and some statutory Islamic laws of Muslim states are incompatible with international law, but conflict among different rules could be dealt with through conflict-resolution mechanisms available in both international law and in Islamic law. First, international law also allows reservations and interpretive declarations which Muslim states could rely on. Second, Islamic *fiqh* rules are not infallible and could be reinterpreted through *ijtihad* which is discussed later in the chapter. The statutory Islamic laws of Muslim states are open to amendment and reinterpretation. Third, both Islamic law and international law allow following 'the most favourable interpretation' principle. When Muslim states become parties to an international legal treaty, it is binding on them and is a law which Muslim states want to follow. Islamic law allows following a rule that goes in favour of the public under the concept of *maslahah*, the rough translation of which is 'public good or interest'. International law especially human rights law also allows following an interpretation which goes in favour of individuals. Therefore, international law can be applied in Muslim states in a fashion that is compatible with Islamic law.

Let us see whether international law or Islamic law are exclusionary and triumphalistic in nature. The application of international law is based on the free consent and good faith of state parties to various treaties. Any state can choose not to become a party to a specific treaty. Article 38 of the 1945 Statute of the International Court of Justice (ICJ) allows the contribution of Islamic law and Muslim states to international law in two ways. Article 38 recognises treaties, customs and laws of the 'civilised nations' as the primary sources of international law. Islamic law, in this sense, is a part of the primary sources of international law. Article 38 also recognises the judicial decisions of national superior courts and writings of the eminent publicists as secondary sources. The decisions of the superior courts of Muslim states and writings of the Muslim jurists, in this sense, are secondary sources of international law. International law does not seem to be exclusionary in nature. It is rather accommodative of Islamic law and other legal systems.

International law is also not triumphalistic in nature. Article 103 of the 1945 Charter of the United Nations provides a conflict mechanism for resolving a conflict between a Charter rule and any other agreement in which the Charter rule prevails (cf. *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council and Commission*, 2008). This mechanism, however, does not apply to a conflict between a Charter rule and a principle of municipal law. Customary international law binds all states except those who object to a particular custom, but no derogation is allowed from *jus cogens*, a class of customary international law. Article 53 of the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention) defines *jus cogens* as 'a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'. Article 53 also states that 'a treaty is void' if it conflicts with a *jus cogens* principle of international law. In this case too international law prevails but only in a conflict between a *jus cogens* and a principle of another treaty. The mechanism, again, does not apply to a conflict between a principle of international law and municipal law. Once a state has consented to abide by an international treaty, it cannot, later on, rely on its internal law for its failure to perform a treaty. International law is also not triumphalistic in nature.

Islamic law, especially in the scheme of the Koran (2:29), allows everything unless something is clearly prohibited or an obligation is imposed. Islamic law, generally speaking, is accommodative of rules from other legal systems that are not against the basic principles and objectives of Sharia. The Koran by its very nature is not exclusionary in nature. The Prophet Muhammad had also made covenants with non-Muslims. It means that the second source of Islamic law is also not exclusionary in nature. Muslim states can become parties to treaties with non-Muslim states. In general, Islamic law requires all legal principles to conform to the objectives of Sharia especially the *nusus*, but as we argue that there is no conflict between *jus cogens* and *nusus*, the question of triumphalism does not arise.

Our second argument is that *jus cogens* and *nusus* are compatible. *Jus cogens* are very limited in number. The commonly accepted *jus cogens* rules are: prohibition of genocide, torture, the use of force in self-defence only, self-determination and racial discrimination (United Nations High Commissioner for Refugees [UNHCR] 2006a). A *nass* (sing. *nusus*) is a clear and fixed rule of the Koran or the Sunnah which does not allow amendment or different interpretation than what is clearly stated (see Kamali 2003; Nyazee 2006). According to Lane's *Arabic–English Lexicon* (1968), the *nass* in terms of the Koran and *ahadith* (pl. *hadith*, i.e. saying of the Prophet Muhammad) is an expression that makes specific reference to a statute or ordinance in the actual words of the Koran and the Sunnah without having to resort to interpretation. *Nusus* like *jus cogens* are very limited in number. The detailed comparative study of *jus cogens* and *nusus* could be the subject of an independent study

but here it is sufficient to mention two examples in passing. International law prohibits genocide. Similarly, as we shall see in Chapter 2, Islamic law also prohibits genocide. Torture is prohibited both by international law and Islamic law.

Our third argument, as stated above, is that some *fiqh* rules and statutory Islamic laws of Muslim states might conflict with the principles of international law but such conflicts could be resolved through conflict-resolution mechanisms available in international law and Islamic law. First, international law also allows reservations and interpretive declarations on which Muslim states could rely, but reservation which is against the object and purpose of a treaty is not allowed. Several Western states have entered reservations or interpretive declarations to international treaties. For instance, the United Kingdom entered reservations to Article 25 of the 1951 United Convention Relating to the Status of Refugees specifying how it would provide health services to certain individuals under its National Health Service in accordance with its law (UNHCR 2006b). Second, Islamic *fiqh* rules are not infallible and could be reinterpreted through *ijtihad*. Islamic statutory laws can also be reinterpreted and amended. Third, both Islamic law and international law allows following the most favourable interpretation principle. When Muslim states become parties to international legal treaty, it is binding on them and is a law Muslim states wanted to follow. Islamic law allows following a rule that is in the interest of public under the concept of *maslahah*. International law especially human rights law also allows following an interpretation that is in favour of the public. We believe that the exclusionary and triumphalistic theories are untenable and that the most fundamental rules of international law and Islamic law are compatible. Conflicts among the principles of international law and *fiqh* rules and the statutory laws of some Muslim states are possible, but such conflicts could be resolved through different mechanisms provided in international law and Islamic law and the flexibility allowed by these.

A comparative study is required in order to find out which rules of Islamic law are compatible with international law and how international law can be applied in Muslim states in a compatible fashion. In the past, we have conducted comparative studies of Islamic law and international human rights law (Shah 2006) and the use of force in Islamic law and international law (Shah 2008). This study is a continuation of the same effort in the same spirit. It compares the Islamic law of *qital* with the law of armed conflict commonly known as international humanitarian law. The Islamic law on the use of force, i.e. *jihad* in self-defence (the *jus ad bellum*) is different to the Islamic law governing the conduct of an armed conflict, the law of *qital* (actual combat), i.e. the *jus in bello*. This study does not cover the *jus ad bellum* and is only focusing on the comparative study of the Islamic law of *qital* and the law of armed conflict. The correct term to describe that branch of Islamic law which governs the conduct of *qital* is the Islamic law of *qital* but in this study Islamic law and the Islamic law of *qital* are used interchangeably.

Islamic law and the law of armed conflict: a complementary approach

My thesis is that although the origins and histories of Islamic law and the law of armed conflict are different, both legal systems are compatible and can complement each other. Islamic law can complement the law of armed conflict at national and regional levels and contribute to its development at international level. The law of armed conflict can complement and contribute to the development of Islamic law at national and regional levels. We argue that most rules of Islamic law are compatible with the law of armed conflict. There are, however, areas which are less clear, for example, the rules on naval warfare. We call these the grey areas of Islamic law. There are aspects of current armed conflict which Islamic law do not cover at all, for example, air warfare and the use of different kinds of weapon, such as nuclear weapons. We call these the blind spots of Islamic law. We argue that the grey areas could be clarified and expanded and new rules could be developed to cover the blind spots through *ijtihad* (independent individual reasoning). *Ijtihad* can be institutional or individual. Institutional *ijtihad* means that state institutions such as parliaments and judiciary or regional organisations of Muslim states, such as the Organisation of Islamic Conference (OIC) and the League of Arab States could develop Islamic law. Individual *ijtihad* means that individual Muslim jurists could develop rules which could guide the states and organisations in legislating in these areas. Both kinds of *ijtihad* could be used to achieve the goal: clarifying and developing rules of Islamic law to humanise armed conflict. It is very encouraging that the primary sources of Islamic law do not prohibit expanding the existing rules or developing new rules in this area.

In addition, after establishing our central thesis, we apply Islamic law and the law of armed conflict to a live armed conflict in Pakistan. We test the commitment of the Pakistani Taliban – Tehrik-i-Taliban Pakistan (TTP) – to Islamic law as they invoke Islamic law to resist the writ of the Pakistani government. We also examine the TTP's conduct of conflict under the law of armed conflict. We also test the commitment of the Pakistani security forces to Islamic law as Islam is the state religion. We also examine the conduct of conflict by the security forces of Pakistan under the law of armed conflict as Pakistan is party to the four 1949 Geneva Conventions.

Doctrinal feasibility

The complementary approach is doctrinally feasible. The objectives of the Islamic law of *qital* (Hamidullah 1968) and the law of armed conflict (International Committee of the Red Cross [ICRC] 2004; Kalshoven and Zegveld 2001) are compatible: to minimise unnecessary human suffering in an armed conflict. The basic principles of Islamic law (Hamidullah 1968; Shah 2008) and the law of armed conflict (Ministry of Defence 2005) – military necessity,

humanity, distinction and proportionality – are compatible. Existing rules of Islamic law can be expanded and new rules can be developed to cover those areas which are not covered by existing rules. The primary sources of Islamic law do not prohibit the development of such rules. The law of armed conflict is also not opposed to the development of municipal laws to deal with different aspects of armed conflicts. In fact, the law of armed conflict emphasises its implementation at national level. The positions of Islamic law and the law of armed conflict are further discussed under the following two subsections.

The law of armed conflict

The law of armed conflict can be implemented at two levels: national and international. At the international level, it can be implemented by permanent courts, such as the International Criminal Court (ICC) and ad hoc tribunals, for example, the International Criminal Tribunal for Rwanda (8 November 1994) and the International Criminal Tribunal for Former Yugoslavia (25 May 1993). At the national level, it can be implemented by the national courts (Segal 2001). The primary responsibility, however, lies with the national courts (Kellenberger 2006: ix). The four 1949 Geneva Conventions (GC I–IV) (GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146) impose two-pronged duties on state parties. They are obliged to enact penal laws to repress grave breaches of the Geneva Conventions, to take measures to suppress other violations and to seek, try or extradite persons accused of grave breaches. The language used in the four Geneva Conventions is similar: 'The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches' and 'shall take measures necessary for the suppression of all acts contrary to the provisions' of the Geneva Conventions. The 1977 Additional Protocol I (AP I) (Art. 85[1]) to the Geneva Conventions requires state parties to repress its grave breaches: 'The provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, and shall apply to the repression of breaches and grave breaches of this Protocol.' Article 86(1) of AP I obliges to 'repress grave breaches, and take measures necessary to suppress all other breaches' of the Geneva Conventions and AP I which result from a failure to act when under a duty to do so.

Article 5 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) requires state parties 'to enact, in accordance with their respective constitutions, the necessary legislation to give effect' to the Genocide Convention and to provide effective penalties for persons guilty of genocide or 'conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide' (Art. 3). Article 6 of the Genocide Convention further provides that persons charged with genocide shall be tried by a competent national tribunal or by such an international penal tribunal as may have jurisdiction in relation

to states which have accepted its jurisdiction (Segal 2001: 35). The role of an international tribunal is not ruled out but implementation at national level is the primary focus of the Genocide Convention.

Article 5 of the 1998 Statute of the ICC has given jurisdiction to the ICC over the crime of genocide, war crimes, crimes against humanity and the crime of aggression once aggression is defined. However, the establishment of the court does not minimise the role of national courts as its jurisdiction is 'complementary to national criminal jurisdictions' (Art. 1; Cassese 2008). A case will be inadmissible if it is 'investigated or prosecuted by a State which has jurisdiction over it' (Art. 17). Thus, 'the main responsibility for the prosecution of the international crimes will remain with national jurisdictions' (Kellenberger 2006: xi; see Dörmann et al. 2006). Crimes against humanity are crimes under customary international law but are also defined by Article 7 of the ICC Statute. Given the customary law status of these crimes, there is no treaty obligation on states to punish violations but states may assert jurisdiction on the basis of permissive universal jurisdiction (Segal 2001: 36). State parties can also assert mandatory universal jurisdiction under the Geneva Conventions and AP I for their grave breaches. While the Geneva Conventions do not expressly lay down that universal jurisdiction shall be exercised, they are interpreted as providing for universal jurisdiction (Segal 2001: 42). The 1954 Hague Cultural Property Convention (Cultural Property Convention) and its 1999 Second Protocol also provides for universal jurisdiction for certain violations of their rules (Segal 2001: 62). Article 28 of the Cultural Property Convention requires state parties to 'undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach' of the Convention. The 1999 Second Protocol (Art. 15[2]) obliges State Parties to criminalise in domestic law serious violations and other violations (Art. 21) of the Protocol. Those accused of serious violations can be tried or extradited (Art. 17). The exercise of the universal jurisdiction normally takes the form of state making new laws assuming jurisdiction over specific offences regardless of place or nationality of the perpetrator or the victim (Segal 2001: 40). The rules of the above conventions indicate that grave breaches and all other breaches of the four 1949 Geneva Conventions (see Pictet 1952: 368), AP I, the Genocide Convention, the Cultural Property Convention and its Second Protocol shall be repressed at national level.

Constitutions of Muslim states

Most Muslim states have given Islam the status of official religion. The constitutions of these states oblige law-making bodies to make all new legislation according to Islamic standards. In some states the superior courts may invalidate existing laws which are found incompatible with Islamic standards. Constitutionally, any law that conflicts with Islamic standards cannot

be implemented. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Human Rights Convention) enjoys more or less the same status in the United Kingdom. Under the 1998 Human Rights Act (Art. 19), the minister in charge of a legislative Bill must give a statement whether the Bill is compatible with the European Human Rights Convention. The Act has given power to the superior courts to declare a primary law incompatible if it conflicts with the European Human rights Convention but the courts can invalidate a subordinate legislation (Art. 4). Let us look at the constitutions of Pakistan, Afghanistan and Iraq as examples. These countries are Muslim states and are parties to the four 1949 Geneva Conventions.

The 1973 Constitution of Pakistan (Art. 2) recognises Islam as 'the state religion'. Art. 227 states that all existing laws shall be brought in conformity with and no law shall be enacted which is against the Koran and Sunnah. To give effect to these provisions, the Constitution (Art. 230) establishes a Council of Islamic Ideology which makes recommendations to the parliament and provincial assemblies as to the ways and mean of enabling Muslims of Pakistan to live according to Islamic standards; which advises on the Islamic standing of a legal question referred to it by the parliament, provincial assemblies and the President of Pakistan or a provincial governor; and which recommends measures to bring the existing laws into conformity with Islamic standards and to compile guidance in appropriate form to the parliament and provincial assemblies which can be given legislative effect.

The constitution (Art. 203[c]) also establishes a Federal Shariat Court. The court has the power to examine whether any existing law is repugnant to the injunctions of Islam. If any law is found to be incompatible with Islamic injunctions, the offending part must be amended within a specified period or it shall be considered as invalid after the expiry of the specified date. Any citizen or federal or provincial governments can challenge the Islamic standing of any legislation. The court can also initiate review proceedings by its own motion (Art. 203[d]). Any law passed by parliament must conform to Islamic law or its Islamic credentials can be challenged in the Federal Shariat Court.

The 2004 Constitution of Afghanistan has also made it impossible to enact laws which might be incompatible with Islamic standards. According to the preamble of the Constitution (paragraph 1), the people of Afghanistan 'believ[e] firmly in Almighty God, relying on His divine will and adhering to the Holy religion of Islam' and 'appreciat[e] the sacrifices, historical struggles, jihad and just resistance of all the peoples of Afghanistan'. The sacred religion of Islam is the religion of Afghanistan (Art. 2). No law is allowed to contravene the tenets and provisions of the holy religion of Islam (Art. 3). The Supreme Court is empowered to review international treaties to test their compliance with the Constitution. In addition, the Supreme Court is obliged to interpret international treaties in accordance with the laws of Afghanistan (Art. 121). Any principle of the law of armed conflict which

does not conform to Islamic standards is amenable to be declared invalid and, therefore, will never be implemented. Article 130 requires the courts to apply the Constitution and other laws to cases under consideration. However, 'if there is no provision in the Constitution or other laws about a case, the courts shall, in pursuance of Hanafi jurisprudence, and, within the limits set by this Constitution, rule in a way that attains justice in the best manner'. This literally means that cases involving war crimes will be decided according to Hanafi *fiqh* (the juristic law of the Hanafi School) as currently there is no law dealing with grave breaches of the four 1949 Geneva Conventions and other war crimes. Whenever legislation for repressing war crimes is enacted, it must pass the constitutional test of compatibility with Islamic legal standards.

The 2005 Constitution of Iraq recognises Islam as 'the official religion of the State and is a foundation source of legislation'. 'No law may be enacted that contradicts the established provisions of Islam' (Art. 2). In several other Muslim states such as Egypt, Saudi Arabia and Iran, Islam enjoys the status of official religion. In a situation where the primary responsibility for the implementation of the law of armed conflict lies with national courts and Muslim states, constitutions require that all legislation must conform to Islamic standards, the complementary approach seems to be the most viable approach.

The trend of inserting Islamic provisions in the national constitutions and regional treaties is obvious and persistent. The Taliban regime in Afghanistan was harshly criticised, and rightly so, for its restrictive interpretation of Islamic law. Islam was given prominent place in the newly adopted constitutions of Afghanistan and Iraq despite the heavy involvement of the United States of America (USA) and European nations in the drafting process. After reading the 2004 Constitution of Afghanistan and 2005 Constitution of Iraq, one is compelled to accept that we cannot have a system where religion will not play an important role in the governance of a Muslim state. At a regional level, the revised 2008 Charter of the OIC states that the organisation is founded on the basis of the religion of Islam. Article 5 of the OIC Charter establishes an International Islamic Court of Justice. The 2004 Arab Charter on Human Rights adopted by the League of Arab States is based on Islamic principles. The Islamic nature of Muslim regional organisations and treaties suggests towards the viability of the complementary approach.

The complementary approach: a strategy

To realise the objectives of the law of armed conflict reliance can be placed on Islamic law or the law of armed conflict or both. The aim is not that one legal system should trump the other but rather to prevent and minimise unnecessary human sufferings in an armed conflict. For the complementary approach to succeed, a two-pronged strategy is required: one at national level and the other at international level. At national level, Muslim jurists need to engage in a debate to distil Islamic legal rules from the primary sources related to

qital which may be presented to parliaments for enacting statutory laws. Muslim jurists can also help parliaments to enact laws to cover the blind spots. They can play a significant role in reinterpreting the primary sources and existing rules of *fiqh* as some *fiqh* rules are incompatible with the law of armed conflict. State institutions such as the Council of Islamic Ideology of Pakistan can play an important role by making concrete suggestions to the parliament on the Islamic law of *qital*. The superior courts, especially the Federal Shariat Court, have handed down landmark judgments in Pakistan (see *Muhammad Islam Khakhi* v. *The State* 2010; *All Pakistan Legal Decisions* 2008 Federal Shariat Court 1), which are the best examples of judicial *ijtihad*. In Afghanistan, the Supreme Court may decide cases according to Hanafi *fiqh* but can also provide concrete suggestions to the parliament to enact laws dealing with war crimes in Afghanistan. Muslim states' regional organisations such as the OIC and the League of Arab States could play a crucial role in developing the Islamic law of *qital*. For instance, the OIC has adopted the 1999 Convention on Combating International Terrorism and the 2004 Covenant on the Rights of the Child in Islam. The League of Arab States has adopted the 2004 Human Rights Charter of the Arab States.

At international level, the active participation of Muslim states in the development of the law of armed conflict is the key to its successful implementation at national level. As stated above, Article 38 of the ICJ Statute recognises the contribution of Islamic law to international law. The active contribution of Muslim states led to the inclusion of the Islamic concept of *kafala*, i.e. fostering/childcare in Article 20(3) of the 1989 Convention on the Rights of the Child. The most relevant example for our discussion is the Red Crescent, one of the distinctive emblems of ICRC. It was adopted as an emblem of the ICRC because of the active participation of Muslim states delegations at the 1929 Diplomatic Conference (ICRC 2007). Areas where Islamic law could possibly contribute to the law of armed conflict are rules dealing with an armed conflict of non-international character and the law of occupation. The Islamic law of *qital* among Muslims is very humane (see Marghinani 2005: 511). It does not make a distinction between armed conflicts of international or non-international character: all the rules of international armed conflict are applicable, in addition to a humane set of rules, to an internal armed conflict. Similarly, the Islamic law of occupation is very elaborate (Shaybani 2004) and can inform the development of the law of armed conflict. The law of armed conflict can contribute to the grey areas, such as naval warfare and blind spots such as air warfare. The primary sources of Islamic law do not prohibit such contribution.

Significance of complementary approach

The complementary approach is of great significance. Most armed conflicts these days are taking place within Muslim states. These conflicts are mainly

between armed groups and the armed forces of a state but occasionally a conflict could be between two armed groups, for example, the conflict between Hamas and Fatah in Palestine. In some instances, Muslim armed groups are fighting a non-Muslim state, for example, in Kashmir and Chechnya. The dominant trend, however, is that Muslim armed groups are fighting with the armed forces of Muslim states. Conflicts of this kind are happening today in Afghanistan, Pakistan, Somalia, Yemen, Iraq, the Sudan and Turkey. In all these armed conflicts the law of armed conflict and Islamic law are violated on a regular basis.

The complementary approach has a unique potential to enhance compliance with the law of armed conflict and Islamic law in these conflicts. First, Muslim armed groups such as those in Afghanistan, Pakistan, Kashmir, Iraq, Palestine and Chechnya claim to be relying on Islamic law. They reject the law of armed conflict as a Western construct except that they will cite it when it is beneficial to them. The Taliban in Afghanistan has issued two codes of conduct for its fighters. The first one was issued in 2006 and was followed by another one in 2009. The 2009 code is elaborate and has repealed the 2006 code. If the parliaments in Muslim states enact laws according to the primary sources of Islamic law, armed groups such as the Taliban will have no excuse to breach or challenge their trials for war crimes under Islamic law. The Islamic nature of the law would strip them of their objection. The April 2009 Sharia Regulation – introduced after a deal between Sufi Muhammad, the founder of Tehrik-e-Nifaz-e-Shariat-e-Muhammadi (TNSM; Movement for the Enforcement of Islamic Sharia) in Swat and Malakand and the Government of Pakistan – is a good example. Sufi Muhammad, an ally of the TTP, said that if Fazlullah, the head of Taliban in Swat, is summoned by a court and he does not appear before it, it will be against Sharia (*Daily Times*, 19 March 2009). The Islamic law of *qital* enacted by the parliaments of Muslim states would encourage Muslim armed groups to comply with it.

Second, Islamic law has a unique personal feature, i.e. Muslims are required to follow the law because Allah is watching them all the time and any violation is a violation of the believer's covenant with Allah (Rahim 2006). Muslim armed groups may also fear the displeasure of Allah followed by divine punishment. In many cases, Muslim armed groups challenge the writ of states but the personal feature of Islamic law could be a good reason for complying with the Islamic law of *qital*. Almost all Muslim states' armed forces are Muslims and the personal feature of Islamic law also applies to them:

> [D]uring the war between Russia and Turkey [1876–1878], the Ottoman Empire declared that it would use the Red Crescent on a white background in place of the Red Cross. While respecting the Red Cross symbol, the Ottoman authorities believed that the Red Cross was, by its very nature, offensive to Muslim soldiers. The Red Crescent was temporarily accepted for the duration of this conflict.
>
> (ICRC 2007)

The Red Crescent was recognised as a distinctive emblem in 1929 at the insistence of Muslim states.

By taking into consideration the contribution of Islamic law into the development of international law, we will enter into a 'legal dialogue of civilisations'. The mechanism of Article 38 of the ICJ Statute and the mechanism of *ijtihad* under Islamic law make the legal dialogue of civilisations possible. The complementary approach allows the application of the law of armed conflict within Muslim states without depriving them of their right to be governed according to their own laws. In fact, Muslim states and Muslims can be the owners and beneficiary of international law in general and the law of armed conflict in particular.

Introduction to Islamic law

A lot has been written on Islamic law (see Doi 2008; Hallaq 2009, Hasan 1993; Kamali 2003, 2008; Nyazee 2006; Rahim 2006; Schacht 1983) and it would be superfluous to write a detailed introduction to Islamic law. Readers who are familiar with Islamic law should skip this introductory section. A short introduction, however, is needed for readers who are not familiar with Islamic law so that they can easily follow the discussion in this study. A short introduction has also certain benefits. First, it will demonstrate that Islamic legal system is a practical working system. Second, it will show that qualified Muslim jurists can make a meaningful contribution to the development of Islamic law. Third, it will show that everything mentioned in the Koran and Sunnah is neither legal nor obligatory in nature. In fact, the legal and obligatory rules are fewer in number than the non-obligatory ones. It will also clarify the legal status of *fiqh*, i.e. every *fiqh* rule is not obligatory in nature. They are also not infallible and eternal, and new rules can be derived from the primary sources by the jurists of our time. Finally, it will be learnt that the Islamic legal system is flexible in many respects and has evolved over centuries to meet the needs and demands of a given society (see generally Hallaq 2005; Hasan 1970).

Terminology

For the study of Islamic law, understanding the basic terminology is essential. Islamic law is very often called Sharia law. Sharia literally means 'a way to a watering place'. In the Koran (45:18) it is used in contrast to what is whimsical (*hawa*): 'Then we have put you on a certain way [*shari'atan*] of the matter (i.e. the religion); so follow it, and do not follow the desires [*hawa*] of those who do not know.' Yusuf Ali (1989) translates *shari'atan* as 'the right way of religion', a wider concept than the mere legal rules which were developed later (Kamali 2008: 2). Sharia is thus a code of life in this world and the hereafter as is laid down in the Koran and the Sunnah. It includes both law and the tenets of faith. In this sense, it has wider meaning than *fiqh*: Sharia is

the law itself whereas *fiqh* is the knowledge of that law (Nyazee 2006: 24). *Fiqh* literally means 'understanding' and 'discerning'. In Islamic legal terms, it means 'the knowledge of the rules of conduct that have been derived by the jurist from specific evidence found in the Qur'an and the Sunnah as well as other specific evidence in ijma and qiyas' (Nyazee 2006: 23). Sharia is the divine body of law whereas *fiqh* is the rational body of law derived from divine sources which is why *fiqh* is not considered as infallible.

Usul al-fiqh is another phrase which needs understanding from the very beginning. *Usul al-fiqh* has two components: *usul* and *fiqh*. The term *usul* implies a 'body of principles'. In Islamic law, it means a set of principles which the jurist uses to derive law from the specific evidences in the Koran, the Sunnah, *ijma* and *qiyas* (Nyazee 2006: 37). *Usul al-fiqh* explains how Islamic law should be derived from its sources, how is it classified and understood and applied. To deduce the rules of *fiqh* from the evidence provided in the sources is the express purpose of *usul al-fiqh*. *Fiqh* as such is the end product of *usul al-fiqh*. *Fiqh* is the law itself (the *corpus juris*) whereas *usul al-fiqh* is the methodology of this law (Kamali 2003: 2). Unless the texts of the Koran and Sunnah are understood correctly, no rule can be deduced from them, especially in cases where the text is not self-evident. Therefore, the rules by which one is to distinguish a speculative text (*zani*) from a definite one (*qati*), the manifest (*zahir*) from explicit (*nass*), the general (*amm*) from the specific (*khass*), the literal (*haqiqi*) from metaphorical, etc., need special attention in *usul al-fiqh* (Kamali 2003: 3). *Usul al-fiqh* is also concerned with regulating the exercise of *ijtihad*.

Ijtihad is a mechanism to derive rules from the primary sources through using techniques such as *ijma* and *qiyas*. The literal meaning of *ijtihad* is the expending of maximum effort in the performance of an act. Technically, it is the effort made by the *mujtahid* (jurist carrying out *ijtihad*) in seeking knowledge of the rules of Sharia through interpretation (Nyazee 2006: 263). The primary task of a *mujtahid* is to discover the rules of Sharia from the texts in three ways. First, to discover the law that is either stated explicitly or implied in the primary sources, i.e. to discover it through literal interpretation. Second, to extend the law to new cases that are similar to cases mentioned in the primary sources but cannot be covered through literal methods. Third, to extend the law to new cases that are not covered by the previous two methods. The *mujtahid* thus performs a legislative function and is regarded as the jurist of highest category (Nyazee 2006: 264). The effort expended by a non-*mujtahid* is of no consequence as he is not qualified to carry out *ijtihad*. One of the basic qualifications of a *mujtahid* is that he must be a Muslim (Kamali 2003: 476). The role of a *faqih* is different than that of a *mujtahid*. A *faqih* is not an independent jurist like a *mujtahid* but one who works within the principles settled by a *mujtahid*. The function of a *faqih* is to extend the law to new unsettled cases: the extension of the law by reasoning from principles. This methodology used by a *faqih* is called *takhrij*: discovering the law through the general principles and extending it to new cases with the help of reasoning

from principles. The superior courts, including lawyers, of Muslim states exercise *takhrij* through their judicial functions (Nyazee 2006: 337).

Ijtihad and *fatwa* (pl. *fatawa*) are often used interchangeably but they are not the same thing. *Ijtihad* has a greater juridical substance as it explains its own evidential bases. *Fatwa* literally means 'response' but technically it means an opinion or verdict given by a *mufti* (a scholar of lower standing than a *mujtahid*) as a response to a question. It is defined as 'a response given by a qualified person (i.e. a mufti) who expounds the ruling of Shari'ah on a particular issue that is put to him by a person or a group of persons' (Kamali 2008: 174). This response may be very brief or detailed one as a *mufti* is not required to give his evidential basis. *Fatwa* is usually sought by individuals seeking an advice on legal or public issue. If the question asked is more complex, the *mufti* tends to give a detailed response and often would probe into the source evidence in which case it may be equivalent to *ijtihad*. The *fatwa* does not bind the person to whom it is addressed. An individual can seek another *fatwa* from a different *mufti* if he is not satisfied with it (Kamali 2008: 162). Historically, *fatwa* was a private activity but the practice diminished gradually. Nowadays a state-appointed *mufti* in some Muslim states issues *fatwa* according to a specified procedure, for example, the Egyptian Grand Mufti issued a *fatwa* on 1 June 2009 declaring the use of nuclear weapons against Islam (*Al-Arabiya*, 1 June 2009). In Malaysia, a *fatwa* becomes a law if approved by the Islamic Religious Council and the Sultan (Kamali 2008: 175). A *fatwa* issued by someone who does not qualify as *mufti* has no value at all. For instance, the *fatawa* of Bin Laden and Al-Zawahiri have no value as neither of them is either a *mufti* or a *mujtahid*.

Siyasah shariyyah is another essential concept to understand for the discussion of Islamic law. *Siyasah shariyyah* means government in accordance with the goals and objectives of Sharia. Although some commentators have attempted to confine it to administrative measures only while others have singled out criminal procedures and punishments as the main areas of its application (Kamali 2008: 225) but in its widest sense it applies to all government policies, be they in areas where Sharia provides explicit guidelines or otherwise (Kamali 2008: 226). The measures that are taken in the name of *siyasah shariyyah* must be Sharia-compliant as the purpose is to facilitate rather than to circumvent the implementation of Sharia. Rules of procedure, policy decisions, legislative and administrative measures that are laid down and taken for the implementation of Sharia would thus fall within the ambit of *siyasah shariyyah* (Kamali 2008: 225). *Siyasah shariyyah* is generally seen as an instrument of flexibility and pragmatism because Sharia is designed to serve the purpose of justice and good governance. Ibn Qayyim (cited in Kamali 2008: 226) divides *siyasah* into two types: oppressive policy which the Sharia forbids and just policy which serves the cause of justice even if it may at times depart from the letter of an injunction in favour of its spirit. Since justice and good governance are the principal goals of just policy, measures that are taken in pursuit of it are bound to be in harmony with Sharia (see generally Mawardi 2005).

*Meaning of Islamic law (*hukm shari*)*

The formal structure of Islamic law is studied by Muslim jurists under the title *hukm shari*. In its literal sense, the word *hukm* (pl. *ahkam*) means a 'command'. In its technical sense, it means a 'rule'. A *hukm* may be a rule of any kind (Nyazee 2006: 46). *Hukm shari* is defined as 'a communication from Allah … related to the acts of the subjects through a demand or option or through a declaration' (Sadr al-Shariah cited in Nyazee 2006: 47). It shows that a rule of law is a communication from Allah. The rule is related to the acts of the subjects. The *hukm* is expressed through a demand: to do or not to do something. The *hukm* may grant an option or a choice (*takhyir*) to do something. Sometimes, a *hukm* is a simple declaration declaring or determining a relationship of an act or set of facts with the *hukm* (Kamali 2004). Islamic law is a *hukm shari* which occurs, as discussed below, in five varieties: obligatory (*fard*), recommended (*manduh*), prohibited (*haram*), disapproved (*makruh*) and permitted (*mubah*). A *hukm shari* operates through its three elements (*arkan*): the lawgiver (*hakim*), the act on which the *hukm* operates (*mahkum fih*) and the subject (legal person or *mahkum alayh*) for whose conduct the *hukm* is stipulated (Nyazee 2006: 45–6).

Classifications of Islamic law

Hukm shari can be divided into two categories. The first is called the rule-creating obligations (*hukm taklifi*). The second is called the declaratory rule (*hukm wadi*). *Hukm taklifi* creates an obligation for the commission or omission of an act or grant a choice between the commission and omission of an act. The purpose of *hukm wadi* is either to inform the subject that a certain thing is a cause of, condition for or obstacle to a *hukm* or it explains the relationship between two rules or provide a criterion for judging whether an act performed is valid or void (Nyazee 2006: 54–5). The act or event that is affected by *hukm taklifi* is within the ability of the subject, for example, not to steal, whereas *hukm wadi* may or may not be within the ability of the subject, for example, the setting of the sun is a legal cause for evening prayer but the subject cannot bring it about (Nyazee 2006: 55).

Hukm taklifi is divided into the following five categories by Muslim jurists. A *hukm* may be obligatory (*fard*) (something must be done) or prohibitory (*haram*) (something must not be done). The rules in these categories are binding in nature and punishable if not followed. A *hukm* may be recommendatory (*manduh*) (if something is done, it would be commendable). The demand expressed in a recommended rule is not binding in nature. A *hukm* may disapprove (*makruh*) or permit (*mubah*) something. A *makruh* rule imposes a duty of a non-binding nature. A permissible rule does not create a duty of a binding nature but the subject is given a choice to perform or not to perform an act (Nyazee 2006: 53; Rahim 2006: 57). The various categories of Islamic rules dispel the myth that every rule of Islamic law is obligatory and binding

in nature and that its violations are followed by divine wrath. The different kinds of rule show flexibility (see Qaradawi 1982).

Purposes or objectives of Islamic law

An Islamic legal system tries to achieve certain goals and values. They are known as the objectives of Sharia or the purposes of Islamic law (*maqasid al-sharia*) (Nyazee 2006: 11). These objectives are similar to modern values and interests which most legal systems try to preserve and implement. Al-Ghazali (cited in Nyazee 2006: 202) has divided the objectives of Sharia into two categories: (1) purposes of the hereafter, preservation of religion; and (2) purposes pertaining to this world. The latter is further divided into four types: the preservation of life, progeny (or family), intellect and wealth. In total, Islamic law has five purposes if the preservation of religion is included. These five purposes are put into three categories. The first is 'necessities' and are regarded as the primary purposes. The second is called 'needs' which are additional purposes required by primary purposes even though the primary purposes will not be lost without them. The third category seeks to establish 'ease and facilities' and is regarded as 'complementary values' (Nyazee 2006: 203).

Usually, *maslahah* (sing. *masalih*) is mentioned in conjunction with the purposes of Islamic law. The principle of *maslahah* was first used by Imam Malik, the founder of Maliki School of jurisprudence. *Maslahah* literally means 'benefit' or 'interest' (Kamali 2003: 351). Sometimes, *maslahah* is roughly translated as 'public welfare' or 'interest'. For Muslim jurists, it means 'the seeking of benefit and the repelling of harm' as directed by the lawgiver, i.e. Allah (Nyazee 2006: 196). Seeking benefit without preserving the ends of Sharia is not permitted. Therefore, any rules derived from the sources seeking benefit or repelling harm must not conflict with the broader principles and nature of Sharia (Kamali 2003: 351). The scope of *maslahah*, however, is limited to those areas and issues where the primary sources are silent. In Islamic legal system, rules can be made according to the primary sources, but when the sources are silent on an issue, a *mujtahid* can make rules to cover those issues while keeping in mind *maslahah* which may not go against the purposes of Sharia. The concept of *maslahah* is based on the Koran as Allah's purpose in revealing Sharia was to promote human welfare and prevent corruption on earth. The Koran (5:6) states that 'Allah does not like to impose a problem on you' and Allah 'has chosen you and did not impose any hardship on you in the religion' (22:78). The Koran describes the purpose of the mission of the Prophet Muhammad 'as mercy for […] the [entire] world'.

Sources of Islamic law

The four major agreed-upon sources of Islamic law are the Koran, the Sunnah, *ijma* (consensus of opinion) and *qiyas* (analogical deductions) (Nyazee 2006: 141). The hierarchy or grades of these sources are based on the Koran verse

(4:59): 'O you, who believe, obey Allah and obey the Messenger and those in authority among you. Then, if you quarrel about something, revert it back to Allah and the Messenger.' In verse 4:59, 'Obey Allah' refers to the first source whereas 'obey the Messenger' refers to the Sunnah of the Prophet Muhammad. 'Those in authority among you' authorises the consensus of the jurists, i.e. *ijma*. The last part of the verse validates *qiyas* (Kamali 2003: 38). The first two sources are variously described as revealed, divine or primary sources. The last two sources are described as non-revealed or rational sources (Nyazee 2006: 142). The four sources of Islamic law are briefly discussed below.

The Koran

The word Koran means 'reading' or 'recitation'. Muslims consider it 'the word of God'. The Koran (26:192) says 'verily this is a Revelation from the Lord of the Worlds' and 'this [K]oran is not such as can be produced by other than Allah' (10:37). It was revealed to Prophet Muhammad through the angel Gabriel. The words of the Koran (God) (18:27) are eternal which 'none can change'. It is the first source of Sharia and all other sources are explanatory to the Koran (Kamali 2003: 16). The Koran (6:38) provides broad principles for most of the issues: 'We have not missed anything in the Book [Koran]'. Verse 5:3 describes Islam as a complete religion: 'Today, I [Allah] have perfected your religion for you, and have completed my blessing upon you, and chosen Islam as Din (religion and a way of life) for you.'

The Koran consists of 114 chapters (*sura*) and 6,235 verses (*ayat*) of unequal length. The contents of the Koran are not classified subject-wise. The order of verses and chapters was finally determined by the Prophet Muhammad before his death (Kamali 2003: 17). The entire Koran was revealed gradually over a period of around twenty-three years. The Koran (25:32) explains the logic of its gradualism (*tanjim*) thus: 'Why has the Qur'an not been revealed to him all at once?' (It has been sent down) in this way (i.e. in parts) so that we make your heart firm, and we revealed it little by little.' The verses of the Koran are divided into Meccan and Medinan verses on the basis of time and place where they were revealed. The Meccan verses are mainly related to faith and devotional matters as the revelatory process of the Koran started at Mecca. It was the beginning of the founding of a new religion. The Medinan verses deal with the social, economic, political, legal structures and Islam's relations with the non-Muslim world. The focus in Medina was to found and organise a community of Muslims: an *ummah* (Kamali 2003: 22–3). The Prophet Muhammad fought his battles in this period; hence the law of *qital* is the product of Medinan period.

The Koran is not a legal or constitutional document. It calls itself guidance (*huda*), not a code of law. Out of all the verses of the Koran, only one-tenth relate to law. The rest are devoted to matters of belief and morality (Kamali 2003: 25). The Koran is addressed to the conscience of the individual, alluding to the benefit that may accrue from observing its commands and a

harm that is prevented by its prohibitions. This allows the *mujtahid* to derive rules to regulate different human conduct (Kamali 2003: 23). The most significant feature of the Koranic legislation is its division into definitive (*qati*) and speculative (*zani*). A ruling of the Koran may be given in a clear and specific language or in a language that is susceptible to multiple interpretations. A definitive text is one which is clear and specific: it has only one meaning and admits no other interpretations. For instance, the Koran (24:2) states clearly: 'The fornicating woman and the fornicating man, flog each one of them with one hundred stripes'. Another example is: 'those who accuse the chaste woman (of fornication), but they do not produce four witnesses; flog them with eighty stripes' (Koran 24:4). These are clear rules and cannot be changed either by a *mujtahid* or parliament of a Muslim state. The specific rules of the Koran are very few. A speculative verse (*zani*), by way of contrast, is open to interpretation and *ijtihad*. The best interpretation is the one that conforms to the Koran itself (see generally Usmani 2005). The Sunnah is another source that interprets the Koran. If an interpretation is found in an authentic *hadith*, that becomes binding (Kamali 2003: 28). For instance, the Koran (4:23) prohibits marriage with one's mothers and daughters: 'prohibited for you are your Mothers [and] your daughters'. The definitive part is the prohibition of marriage with mothers and daughters. However, the phrase 'your daughters' can be taken literally, which would be a female child born through proper marriage or fornication. The juridical sense indicates that it can mean only a legitimate daughter (Kamali 2003: 29). The specific rules of the Koran are an integral part of the dogma and anyone who denies its validity automatically renounces Islam. But denying a particular interpretation is allowed. A *mujtahid* is allowed to interpret speculative text differently and so is the ruler to choose an interpretation for the purposes of enforcing the law (see generally Hamidullah 2004).

The Sunnah

Literally, Sunnah means 'a clear path' or 'a beaten track'. It also means a normative practice or an established course of conduct. A Sunnah may be a good or bad example and can be set by an individual, a sect or community. The opposite of Sunnah is innovation (*bid'ah*) which is characterised by lack of precedent and continuity with the past (Kamali 2003: 58). The word *sunnah* is used in the Koran (17:77; 48:23) in the sense of an established practice or course of conduct. The Sunnah of Prophet Muhammad is not clearly mentioned in the Koran but the phrase *uswah hasanh* (excellent conduct) of Prophet Muhammad is mentioned in the Koran (33:21), which is interpreted as a reference to the Sunnah of the Prophet Muhammad. For Muslim jurists and scholars, the Sunnah refers to all that is narrated from the Prophet Muhammad, his acts and sayings and whatever he has tacitly approved (Kamali 2003: 58). In its juristic sense, Sunnah for the scholars of *usul al-fiqh* means a source of the Sharia and a legal proof next to the Koran. For the scholars of *fiqh*, it refers to

a *shari* value which falls under the general recommendatory category (*manduh*). As a source of Islamic law, the Sunnah may also create rules such as obligatory (*wajib*), prohibitory (*haram*), disapproved (*makruh*) and permitted (*mubah*).

The scholars of Islamic law unanimously believe that the Sunnah of the Prophet Muhammad is the second source of Islamic law and its ruling of *haram* (prohibited) and *halal* (allowed) stands on an equal footing with that of the Koran (Kamali 2003: 63). The acts and teachings of the Prophet Muhammad which were meant to establish a rule of Sharia are binding. The authority of the Sunnah as a source of law is based on the Koranic evidence:

> Whatever the Messenger gives you, take it, and whatever he forbids you from, abstain (from it).
>
> (59:7)

> O you who believe, obey Allah and obey the Messenger and those in authority among you.
>
> (4:59)

> Whoever obeys the Messenger obeys Allah.
>
> (4:80)

> Never shall they become believers, unless they make you the judge in the disputes that arise between them, then find no discomfort in their hearts against what you have decided, and surrender to it in total submission.
>
> (4:65)

> It is not open for a believing man or a believing woman, once Allah and His messenger have decided a thing, that they should have a choice about their matter; and whoever disobeys Allah and His messenger, he indeed gets off the track, falling into an open error.
>
> (33:36)

The Sunnah is divided into legal (*tashriyyah*) and non-legal (*ghar tashriyyah*). The non-legal Sunnah consists of the natural activities such as the manner in which the Prophet Muhammad slept and ate and his favourite colour. Activities of this nature are not of primary concern to the Prophetic mission and therefore do not constitute legal norms (Kamali 2003: 67). Sunnah relating to specialised knowledge such as medicine, commerce and agriculture do not constitute binding Sharia either. Acts and sayings of Prophet Muhammad related to particular circumstances such as strategy of war, misleading the enemy forces, timing of attack, etc., are considered to be situational and do not constitute binding Sunnah. However, there is no harm in using these instances in similar situations for guidance.

The legal Sunnah consists of the exemplary conduct of the Prophet Muhammad which incorporates the rules of Sharia. The legal Sunnah is divided

into three kinds: the Sunnah of Prophet Muhammad as a messenger, as a head of the state (*imam*) and as a judge. In his capacity as a messenger, the Prophet expounded rules, which, on the whole, complement the Koran but also established rules on which the Koran is silent. Whatever the Prophet has authorised pertaining to principles of religion constitutes general legislation whose validity is not limited by time and circumstances. All commands and prohibitions falling in this category are binding on all Muslims without prior authorisation by an Islamic scholar or government (Kamali 2003: 69). All the rulings which originate from the Prophet in his capacity as head of state such as the allocation of public funds, appointment of state officials, signing of treaties, etc., do not constitute general legislation. Sunnah of this type may not be practised by an individual without prior authorisation of competent governmental authority (Kamali 2003: 71). Qaradawi (cited in Kamali 2003: 72) has given the following example of the Prophet Muhammad acting as head of state. The Prophet Muhammad, after winning the battle of Khyber, distributed the land of Khyber among the conquerors as this was considered the best action on that occasion. But he did not order the same at the conquest of Mecca, leaving the properties of locals untouched to win their minds. Sunnah that originate from the Prophet Muhammad in his capacity as a judge in particular disputes consist of two parts: the part which relates to claim, evidence and factual proof and the judgement which is issued as a result. The first part is situational and does not constitute general law. The second part lays down general law but it does not bind individuals directly, and no one shall act upon it without prior authorisation of a competent judge (Kamali 2003: 73). Anyone who has a claim shall follow a proper procedure to prove the claim and obtain judicial decision.

Very often, the Sunnah and *hadith* are used interchangeably, but both are different from each other. *Hadith* literally means a 'narrative', 'communication' or 'news consisting of the factual account of an event' (Kamali 2003: 61). The word occurs frequently in the Koran in this sense but after the death of the Prophet Muhammad stories relating to his life and activities dominated all other narratives, hence the word *hadith* began to be used exclusively for the sayings of the Prophet Muhammad (Kamali 2003: 61). A *hadith* is a saying of the Prophet Muhammad whereas the Sunnah is the example of the law that is deduced from it. A *hadith* in this sense is the carrier of Sunnah.

The Sunnah of the Prophet Muhammad are divided into two categories according to the subject matter (*matn*) and the manner of its transmission (*isnad* [sing. *sanad*]). The first category of Sunnah is further subdivided into verbal (*qawli*), actual (*fi'li*) and what is tacitly approved (*taqriri*). The verbal Sunnah consists of the sayings of the Prophet Muhammad. The actual Sunnah consists of his deeds such as the way he performed prayer, fasting and rituals of *hajj* (pilgrimage to Mecca) (Kamali 2003: 65). The tacitly approved Sunnah consists of the acts and sayings of the Companions of Prophet Muhammad (*suhaba*) which came to the knowledge of the Prophet Muhammad and of which he approved expressly or by remaining silent (Kamali 2003: 66).

The second category of Sunnah, i.e. according to its chain of transmitters, is further subdivided into continuous (*muttasil*) and discontinued (*ghayr muttasil*) *ahadith*. A continuous *hadith* is one which has a complete chain of transmitters from the last narrator to all the way back to the Prophet Muhammad. A discontinued *hadith* is one whose chain of transmitters is broken and incomplete (Nyazee 2006). Regarding authority of the discontinued category of *ahadith*, the majority of the scholars agree that acting upon it is not obligatory (Kamali 2003: 109). A continuous *hadith* is divided into *mutawatir hadith* (continuously recurrent), i.e. a report by an indefinite number of people related in such a way to exclude a lie or doubt; and *ahad hadith* (solitary), i.e. a *hadith* reported by a single individual or odd individuals from the Prophet Muhammad (Kamali 2003: 98). According to the majority of scholars, the authority of a continuous *hadith* is equivalent to the Koran. Many scholars have held that a solitary *hadith* engenders speculative knowledge acting upon which is preferable only (Kamali 2003: 97). The Hanafi jurists have added another category of *hadith* to the above two categories, i.e. well-known (*mashhur*): a *hadith* which is reported by one, two or more companions of Prophet Muhammad but has later become well known and transmitted by indefinite number of people. The Hanafi jurists consider acting on well-known *hadith* obligatory, but their denial does not amount to disbelief (Kamali 2003: 95; Rahim 2006: 68).

The scholars of *ahadith* agree on the fabrication of *ahadith* on a large scale (Kamali 2003: 87) which is why they have established a stringent mechanism to distinguish between genuine and forged *ahadith*. It is one of the common mistakes made by non-expert writers to cite *ahadith* of dubious origin without checking their authenticity, which has led to confusion in the academic literature. It is also noteworthy that acting on every *hadith*, even if regarded as genuine, is not obligatory as the categories of *ahadith* indicate.

Ijma

Ijma has literal as well as technical meanings. Literally, it is used in two senses: to determine or plan something and to agree upon a matter (Kamali 2003: 229; Nyazee 2006: 182). In the legal sense, *ijma* is defined as 'the consensus of [*mujtahidin*] [pl. *mujtahid*] from the Ummah of Muhammad (peace be upon him), after his death, in a determined period upon a rule of law (*hukm shari*)' (Nyazee 2006: 183). This definition lays down several conditions for *ijma* to be valid. *Ijma* must be done by *mujtahidin*; it must be done by the *ummah*; it must be after the death of the Prophet Muhammad; and it must be done in a definite period on a rule of law (Kamali 2003: 230; Nyazee 2006: 183). Agreement on any matter means that *ijma* is possible in juridical, intellectual, customary and linguistic matters (Kamali 2003: 230). *Ijma* is divided into two types on the basis of the way it is made known: explicit (*sarih*) and tacit (*sukuti*). An explicit *ijma* is one in which all jurists explicitly indicate their agreement on a legal issue in a given time and society. This type of *ijma* has binding strength as source of law (Kamali 2003: 248). Tacit

ijma is one when a *mujtahid* issues a verdict on a legal issue but the rest of the *mujtahidin* remain silent on it: it is neither expressly acknowledged nor rejected. The majority of jurists maintain that tacit *ijma* is a legally binding source of law (see Koran 4:59; 4:115), but they differ with respects to its strength. Some argue it is a definitive source like explicit *ijma* whereas others say it is a probable source of law (Nyazee 2006: 190).

Whatever the difference of opinion on the strength of different types of *ijma* may be, it is a source of Islamic law playing a crucial role in the development of Sharia. *Ijma* ensures the correct interpretation of the Koran, the faithful understanding and transmission of the Sunnah and the legitimate use of *ijtihad*. The existing body of *fiqh* is the product of a long process of *ijtihad* and *ijma*. *Ijma* in the early stages was confined to the jurist companions of the Prophet Muhammad. Later, when different schools emerged, the forum of *ijma* shifted to the leading schools (see Hasan 1978). Today, Muslims live in nation-states; hence, the highest judicial body can be the forum of *ijma* leading to national *ijma*.

Qiyas

Literally, *qiyas* means 'measuring' or 'ascertaining' the length, weight or quality of something. *Qiyas* also means comparison in order to suggest similarity or equality between two things. Legally, *qiyas* is the extension of Sharia value from an original (*asl*) case to a new case because the latter has the same effective cause (*illah*) as the former (Kamali 2003: 264). The original case is regulated by a given text, and *qiyas* seek to extend the same ruling to a similar new case. The commonality of effective cause between the two justifies *qiyas*. Jurists resort to *qiyas* only if a solution to the new case is not found in the Koran and Sunnah or a definite *ijma* (Kamali 2003: 264). The law may be deduced from any of these three sources through *qiyas*. *Qiyas* is different from interpretation as it is concerned with the extension of the rationale of a given text to cases which may not fall within the terms of its language. It is in this sense that *qiyas* is considered to be discovering and extending the law. For example, the Koran (62:9) forbids the sale and purchase of goods after the last call for Friday prayer. By analogy, this prohibition is extended to all kinds of transaction since the effective cause – diversion from prayer – is common to all (Kamali 2003: 266). Hence, *qiyas* is the application to a new case (*far*), on which the law is silent, of the ruling (*hukm*) of an original case (*asl*) because of the effective cause (*illah*) which is common to both. The new case must not be covered by the Koran and Sunnah or *ijma*, the effective cause must be applicable to the new case as it is to the original case and the application of *qiyas* to the new case must not result in changing the law of the Koran and the Sunnah (see Hasan 1986).

Fiqh and statutory Islamic law

Today we have two bodies of Islamic law: *fiqh* or juristic law and the statutory laws of Muslim states. Juristic law is contained in the major works of Muslim

jurists of high standing such as Abu Hanifa, Shaybani, Shafi'i and Imam Malik, to mention just a few. The majority of Muslim states, following different jurisprudential schools, have enacted laws through their parliaments. These laws are interpreted and applied by the national courts as positive law of the state. The 1961 Family Law Ordinance and the 1979 Hudood Ordinance (revised in 2006) of Pakistan are examples of statutory Islamic laws. The Supreme Court of Pakistan is the final interpreter of these laws. We describe these laws collectively as statutory Islamic law. In sum, Islamic law today consists of the primary sources (Koran and Sunnah), the legal rules derived from these sources by jurists (*fiqh*) according to rules of *fiqh* (*usul al-fiqh*) and the statutory Islamic laws of Muslim states. The primary sources are like the constitution of a state to which all other laws must conform. *Fiqh* is the rough equivalent of legal literature where views are given weight based on the reputation of a scholar. They are relied on by courts in some cases but juristic views do not carry the weight of positive law.

In this regard, Islamic law is not different from other legal systems. Let us take the example of the United Kingdom. Any textbook of English jurisprudence (see Bix 2009; Penner 2008) shows theories of law and principles of jurisprudence. The English law has different sources (Turpin and Tomkins 2007). The theories and views of some writers are given more weight than others. The courts also refer to the works of eminent jurists. There is a body of common-law rules and statutory laws: a positive law interpreted by the superior courts.

Islamic law is also not different than international law in many respects. As Article 38 of the ICJ Statute indicates, international law has primary and secondary sources (see generally Brownlie 2008). In international circles, huge importance is attached to the writings of jurists such as Grotius. International law has different schools and theories such as natural law theory, positivism, liberal theory, New Haven School and Southern theories (see Chinkin and Charlesworth 2004) and a huge body of legal literature exists on the subject. International law exists in various forms such as positive, customary and soft law (Boyle 2006: 141). Some international legal rules, like Islamic legal rules, are interpreted differently by different states and scholars. The right to self-defence under Article 51 of the Charter of the United Nations is a classic example. The USA and Israel interpret the use of force differently than most other states.

Islamic *jus ad bellum* and *jus in bello*

Jihad is generally – and wrongly – called the Islamic law of war and peace. I have discussed *jihad* elsewhere (see Shah 2008) but here it is sufficient to say that *jihad* is one of the most misunderstood concepts. *Jihad* is a very broad concept having several dimensions. The word *jihad* is derived from *juhd* meaning 'to struggle' or 'exert oneself'. According to Islam, this struggle or *jihad* starts from oneself: fighting one's evil influences and making efforts to gain the blessing of Allah by serving humankind and leading life according

to the injunctions of the Koran and Sunnah. The Koran (22:78) describes it as the 'struggle for (seeking the pleasure of) Allah, a struggle that is owed to Him'. This struggle is called greater *jihad*. All other struggles are considered lesser *jihad*. A lesser *jihad* can be any struggle in the service of Islam by using the pen and knowledge or personal actions, i.e. setting the best example by observing the Islamic principles such as honesty and working for the welfare of human beings. A lesser *jihad* also includes defending Muslims when a Muslim land is attacked or Muslims are persecuted for their belief in Islam. Verses of the Koran which allow the use of force in self-defence are the Islamic *jus ad bellum*. Once *jihad* as a self-defence begins, it becomes *qital* (Koran 9:29). Islamic law provides rules about how to conduct *qital*. The rules governing the conduct of *qital* are the Islamic *jus in bello*. *Qital* can be between Muslims and non-Muslims or among Muslim armed groups or between a Muslim state and a group of rebels. The rules on *jihad* and *qital* could be collectively described as the Islamic law of war and peace.

Law versus actions

We have the benefit of living and working in the Muslim world and the West. We have observed a common mistake made by people and in some cases scholars in the Muslim world and in the West: failing to distinguish between law and actions. In the Muslim world, many people fail to distinguish between international law and the actions of Western states, i.e. the invasion of Iraq, the discriminatory treatment of Muslims and the military actions of Israel against neighbouring Muslim states. They think international law allows every action of Western states. This is a mistake. The legality of an action is tested when it is adjudicated by an independent and impartial judicial body. The ICJ has decided several cases against Western states, especially the USA (*Nicaragua* v. *USA* 1986; *Iran* v. *USA* 2003) and Israel (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004). In the Western world, many people fail to distinguish between Islamic law and the actions of Muslims. Suicide missions targeting civilians are a classic example. The attitude to equate the actions of Muslims with Islamic law is a mistake. Every action of a Muslim is not supported by Islamic law. The Islamic standing of an action, such as the killing of civilians through suicide missions, can be tested when the issue comes before a court in a Muslim state applying Islamic law. The courts in many Muslim states sent to prison members of different militant groups engaged in terrorist activities. We need to put to legal test every action of Muslims and Western states rather than recognising them as a reflection of Islamic law or international law. This can be done not only through scholarly writings but, most importantly, through competent judicial bodies. For instance, Muslim religious scholars in Pakistan have unanimously declared suicide bombing targeting civilian against Islam (*Dawn* 2009). One of the leading Islamic centres in the world, Darul Uloom Deoband, India, issued a *fatwa* (31 May 2008) stating

that terrorism is un-Islamic. For healthy legal dialogue, it is essential that we separate law from state and individual actions. In some cases even the action of states cannot be regarded as a true reflection of Islamic law as in many Muslim states, governments lose cases in superior courts.

Scope of the book

The book compares the Islamic law of *qital* and the law of armed conflict. In doing so the book focuses on questions such as what is Islamic law, what are its primary sources and what these sources say about an armed conflict between Muslims and non-Muslims and among Muslim armed groups. Therefore, the focus is on the primary sources, especially the battles of the Prophet Muhammad. The practices of the four caliphs – Abu Bakr, Omer, Uthman and Ali – are also examined as without these the discussion on an armed conflict among Muslims would be incomplete. The views of classical Muslim jurists on the Islamic law of *qital* are also given due consideration. A great deal has been written on the law of armed conflict, and any detailed discussion would sound superfluous. The focus rather is on broader identification and examination of areas which are compatible and incompatible and where both may contribute to each other. The conduct of hostilities by the TTP is tested against Islamic law, the law of armed conflict and Pakistani law to see whether they act within the rules. The conduct of hostilities by the Pakistani security forces is tested against the law of armed conflict, Islamic law and Pakistani law to see whether they act within these rules. We also look at the prospect of or otherwise of war crimes prosecution in Pakistan.

Structure of the book

The book consists of three parts and an introductory chapter. This introduction (Chapter 1) lays out the thesis of the book and a brief introduction to Islamic law. Part I consists of three chapters. Chapter 2 examines in detail the Islamic law of *qital*. Chapter 3 examines the Islamic law of *qital* among Muslims. Chapter 4 compares the Islamic law of *qital* discussed in Chapters 2 and 3 with the law of armed conflict identifying areas which are compatible, incompatible and where both may contribute to each other. Part II consists of two chapters. Chapter 5 discusses the armed conflict in Pakistan and identifies three sets of legal rules that apply to this conflict: the law of armed conflict, Pakistani law and Islamic law. It also examines the Afghan Taliban code of conduct for *mujahidin* issued on 9 May 2009 as the TTP as a close ally of the Afghan Taliban may rely on it. Chapter 6 examines the conduct of hostilities by the TTP and the security forces of Pakistan. The legality and conduct of drone attacks in the tribal areas of Pakistan by the USA is briefly discussed as without it any discussion on the armed conflict would be incomplete. Chapter 6 also looks into the prospect of war crimes prosecution in Pakistan. Part III consists of Chapter 7 which concludes the book.

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Part I

The Islamic law of *qital* and the law of armed conflict

2 The Islamic law of *qital*

The Prophet Muhammad was born in AD 570 in Mecca. At around the age of forty, in AD 611, he started receiving revelations regarding different spiritual and temporal issues of his time. The process of revelation came to an end with his death in AD 632. All the revelations were compiled during the reign of the Third Caliph, Uthman (AD 656) (Leaman 2008: 30) in the form of the Koran. After the first revelation in Mecca (AD 611), the Prophet Muhammad started the propagation of his new religion: Islam. The Prophet Muhammad's own tribe, the Quraysh, strongly opposed his mission and started the persecution of the small number of converts to Islam. Their persecution compelled Prophet Muhammad to advise these Muslims to migrate to Abyssinia (Ishaq 2007: 146; Tabari 2003: 101). In AD 622, the persecution of Muslims, including the Prophet Muhammad, became unbearable, so he, along with other Muslims, migrated to Medina – known as Yathrib at that time – after consultation with and receiving a guarantee of protection from the Muslims of Medina (Tabari 2003: 126). In Medina, the Prophet Muhammad concluded pacts of peaceful coexistence with local Muslims and Jewish tribes (Hamidullah 1994). The most important pact was the Charter of Islamic Alliance (Mubarakpuri 2002: 174). The first part contained the rights and duties of the Meccan refugees (*muhajirun*) and local Muslims who were called helpers (*ansar*). The second part contained the rights and duties of the Jewish tribes (see Ishaq 2007: 231). This was the beginning of founding a Muslim community, i.e. the first Muslim city-state.

In AD 622, Arab society was divided into tribes and engaged in tribal wars. Wars were common features of Arab political existence. There was no unified legal system. Individuals owed their allegiance to the tribal head and the interests of the tribe were supreme (Smith 1903). The tribe as a group was responsible for the survival of its members and interests (Leaman 2008: 43; Rahim 2006). By necessity, tribes were forced to enter into alliances with other tribes either by means of intertribal marriages or by political covenants (Watt 2006). Might was right and a small incident could spark a violent tribal conflict (Hitti 1961). 'In [Arab] society, war … was in one sense a normal way of life; that is, a "state of war" was assumed to exist between one's tribe and all others, unless a particular treaty or agreement had been reached

with another tribe establishing amicable relations' (Donner 1991). Islam emerged and had to survive in these circumstances and fighting, sometimes pre-emptively, sometimes defensively, was understood to be the only way to do so (Jackson 2002). As was the Arab tradition, the Prophet Muhammad concluded pacts with the neighbouring tribes of Medina. Outside the Arab peninsula, two empires – Byzantine and Sassanian – were vying for the control of those regions that were militarily or commercially important (Ali 1989: 1025–32; Leaman 2008: 43). Islam was spreading very rapidly in different Arab regions, which caused alarm among the Arab tribes and other powers in the region and beyond, who started to struggle to retain their spheres of influence. The emergence of Islam as a third power specifically worried the Byzantine and Sassanian empires (Ali 1989: 1025–32; Mawdudi 1994: 175–86). It was in these political conditions that the Prophet Muhammad fought different wars first locally and, after consolidating his position in Medina, with neighbouring tribes and rulers.

The Prophet Muhammad did not participate in each war himself. In many cases, he appointed a commander for a specific expedition/battle. This kind of expedition is called *suriya* (pl. *suraya*). *Suriya* is an Arabic word which literally means 'a detachment or a group of soldiers'. As the Prophet Muhammad did not participate in *suraya,* he would give specific instructions how to conduct a particular *suriya*. The number of *suraya* was about thirty-five (Tabari 2003: 115–17). A military expedition which the Prophet Muhammad led himself was called a *ghazwa* (pl. *ghazwat*). The total number of *ghazwat* was about twenty-seven (Bukhari 2008: 38, 47). Some Muslim scholars, however, do not distinguish between *suriya* and *ghazwa* (Bukhari 2008: 489) and therefore provide a different number of *ghazwat*. Some of these military expeditions ended without *qital* (actual combat) whereas in others *qital* took place. Military expeditions in which *qital* took place are not many, but the way in which these combats were conducted is very significant for the Islamic law of *qital*.

The Islamic rules of *qital* originated as a result of the real wars the Prophet Muhammad fought during his time in Medina in AD 622–32. Many issues arose during these wars. These issues were addressed by a specific revelation or a decision by the Prophet Muhammad. This is why there are two primary sources of the Islamic law of *qital*: the Koran and the war practices of the Prophet Muhammad. The Koranic revelations were issue-specific, piecemeal and pragmatic. Hence, the body of rules governing the conduct of war evolved gradually. The Koranic rules and the practices of the Prophet Muhammad are closely knitted and can be better understood when examined together. As discussed in Chapter 1, not every verse of the Koran or every rule of the Prophetic Sunnah is of a binding nature. The rules contained in the Koran and the Sunnah are studied in five categories: obligatory, prohibited, recommended, approved and disliked. Rules falling in the first two categories have binding effect and are on a par with the positive law of a Muslim state. Practices of the first four caliphs are not binding in nature but reflect their

first-hand understanding of the Koran and the Sunnah and are rightly held in high regard. These practices also reflect custom and good practices of their age. The views of jurists such as Abu Hanifa and Shaybani are not binding in nature but carry the weight of views of eminent jurists and are followed by a large number of Muslims.

The purpose of this chapter is to examine the primary sources of Islamic law with a view to seeing whether Islamic law has the concept of armed conflict and, if it has, are there any rules to govern it. Our main argument is that Islamic law has the concept of armed conflict and an internal armed conflict. It also provides a very humane set of rules to govern armed conflicts. These rules can be gleaned from the verses of Koran and the war practices of the Prophet Muhammad. These rules, however, do not cover every aspect of modern armed conflicts. Therefore, it is proposed that Muslim states should and can develop a code for governing the conduct of *qital*.

Some of the verses of the Koran (9:5) such as 'slay [the pagans] wherever you find them' are examined in detail to see why they have caused controversy among the Muslim jurists. How have they got into the hands of Muslim armed groups justifying armed struggle? The Koran contains numerous verses covering different aspects of *jihad*: when to start fighting, exhorting Muslims to fight, rewards for those who die during fighting ('martyrs') and punishment for those who refuse to fight when it is necessary to fight ('hypocrites'). All these aspects of *jihad* are not within the remit of this chapter as we have discussed them elsewhere (see Shah 2008: 13) and briefly in Chapter 1. Here it is sufficient to say that the physical or *jihad* by the sword is called *qital* and falls in the second category of *jihad* known as lesser *jihad*. It is the rules of *qital* or the *jus in bello* which are the focus of this chapter.

The chapter is divided into seven sections. The first section deals with the basic principles and the second section with the general principles of *qital*. The third section focuses on the less-developed areas of air and naval warfare, the fourth on the law of extradition, the fifth on armistice, the sixth on occupation and the final section on neutrality.

Basic principles

Once the conflict begins, it does not mean that Muslim fighters are free to use force without restrictions. The primary sources of Islamic law do impose limits on the means and methods used in *qital*. The Islamic law of *qital* has basic and general principles. Five basic principles can be gleaned from the study of its primary sources: military necessity, distinction, proportionality, humanity and accepting an offer of peace during an armed conflict.

Military necessity

The Koran allows only the extent and degree of force necessary to achieve military objectives. Once the military objectives are secured, Muslim forces

have to cease their attack. On several occasions, the Koran says to fight the attackers until they are defeated, restrain from mischief (*fitna*) or choose peace instead of war. The following verses of the Koran illustrate the point:

> Fight them until there is no Fitnah anymore, and obedience remains for Allah. But, if they desist, then aggression is not allowed except against the transgressors.
>
> (2:193)

> Kill them wherever you find them, and drive them out from where they drove you out, as Fitnah … is more severe than killing. However, do not fight them near Al-Masjid-ul-Haram (the Sacred Mosque in Makkah) unless they fight you there. However, if they fight you (there) you may kill them …
>
> (2:191)

> But if they desist, then indeed, Allah is Most-Forgiving, Very-Merciful.
>
> (2:192)

> The holy month for the holy month, and the sanctities are subject to retribution. So when anyone commits aggression against you, be aggressive against him in the like manner as he did against you …
>
> (2:194)

These verses impose different kinds of restriction on the use of force. In verse 2:193, the objective is to end *fitna*, but if the other party desists from *fitna*, aggression is not allowed. *Fitna* is used in many places in the Koran mainly in the sense of rebellion and mischief. In verse 2:191, the objective is to expel others from where the Muslims were expelled. Here, expelling Muslim from their homes is regarded as *fitna*. Both verses 2:192 and 2:193 say if 'they desist', military necessity ends and fighting is not allowed. Verse 2:191 imposes limitations of place – the sacred mosque – whereas verse 2:194 imposes limitations of time, i.e. excluding the sacred months. The practice of the Prophet Muhammad suggests that the degree and kind of force required is only to achieve military objectives. For instance, once he sent a military expedition after the tribe of Banu Qazagh camped outside Medina in order to attack Medina (Bukhari 2008: 579). They fled as they saw the Muslim army approaching. They were not chased, as the military objective was to prevent the impending attack on Medina. Another example is when on the occasion of Zeeqard (Bukhari 2008: 409) the enemy fled from the scene. The Muslim army knew that the enemy had run out of water. They wanted to pursue the enemy but the Prophet Muhammad did not allow it and told them to show mercy once the enemy is subdued. The last instance also indicates towards the principle of humanity (see Muslim 2008: 627).

Distinction

Distinction is one of the fundamental principles of the Islamic law of armed conflict. The Koran (2:190) says 'fight in the way of Allah against those who fight you, and do not transgress'. This terse verse contains three important rules. First, Muslims are given permission to fight. Second, fighting is permitted only with those who are fighting Muslims, i.e. combatants. Third, Muslims are warned not to transgress the limits set by Allah and the Prophet Muhammad. The practice of the Prophet Muhammad was to make a clear distinction between combatants and non-combatants. Many tribes used to build forts for their protection in times of war. They would use children as human shields by holding them out of the walls of the fort so the enemy could stop shooting them with arrows (Shaybani 1966: 103; Hamidullah 1968: 202). Muslim fighters asked the Prophet Muhammad about this, who advised them to aim at the combatants only (Mawardi 2005: 65). If it is absolutely necessary to hit a particular target and it is impossible to distinguish, or every effort is made to distinguish, military from non-military targets, any resulting collateral damage is acceptable (Marghinani 2005: 446–7). Collateral damage is allowed, but distinction remains one of the basic principles of the Islamic law of *qital*.

Proportionality

Proportionality is the third key rule of the Islamic law of *qital*. The principle is clearly laid down in the Koran, and several verses may be cited to support it:

> And if you were to harm (them) in retaliation, harm them to the measure you were harmed. And if you opt for patience, it is definitely much better for those who are patient.
>
> (16:126)

> The one who does something evil will not be punished but in its equal proportion.
>
> (40:40)

> The recompense of evil is evil like it. Then the one who forgives and opts for compromise has his reward undertaken by Allah. Surely, He does not like the unjust.
>
> (42:40)

All these verses show that proportionality is a key principle, but verse 16:126 is conflict-specific and very apt: '[H]arm them to the measure you were harmed.' It was revealed to prevent disproportional harm in armed conflicts, which makes it the key verse on proportionality. Hamzah, the paternal

uncle of the Prophet Muhammad, was killed in the battle of Uhud (3 AH). Abu Sufyan, who was leading the Quraysh army against the Muslims, was accompanied by his wife Hind bin Utbah. During the battle, Muhammad's uncle was killed and Hind split Hamzah's belly and chewed off his liver. The Prophet Muhammad swore that he would kill thirty, and some authors say seventy, people in revenge. When the Muslim fighters heard the Prophet Muhammad saying this, they became angry and swore to cut their enemies into pieces. On this occasion, verse 16:126 was revealed to prevent Muslims from committing such excesses (Bukhari 2008: 499; Kathir 2005: 218–19). On the day Mecca was conquered, Hind was given amnesty together with others (Tabari 2003: 345). Like many other verses, verse 16:126 can be interpreted in two ways: one is to lay down the principle of proportionality and the other is to prohibit mutilation. The occasion of its revelation makes it a classic example of both of the principles of proportionality and prohibiting mutilation.

Humanity

Humanity is at the very heart of the Islamic law of *qital*. The most relevant verse is 16:126 which prohibits more harm than is necessary, including mutilation. In some instances, the Muslim army set the enemy forts on fire while enemy fighters were hiding in those forts (Bukhari 2008: 576). But later on the Prophet Muhammad prohibited the practice, saying it is for Allah alone who can punish by fire (Marghinani 2005: 457). 'Fairness is prescribed by God in every matter, so if you kill, kill in a fair way' (Muslim cited in Hamidullah 1968: 204). Muslims are required to treat war captives humanely (Tabari 2003: 182). The wounded shall be nursed and cared for. When Mecca was conquered in 8 AH, the Prophet Muhammad declared a general amnesty to Meccans despite the fact that they persecuted and forced him to migrate from Mecca to Medina (Shafi 1974: 312). The concern for humanity runs through other Islamic principles as well. 'It does not [… behove] Muslims to slay women or children, or men aged, bed-ridden, or blind, because opposition and fighting are the only occasions which make slaughter allowable … and such persons are incapable of these' (Marghinani 2005: 448). This indicates that non-combatants must not be harmed. Women and the elderly, however, forfeit their protection if they give advice or help in planning war. Humanity in war should be shown to both parties, which is why it is not obligatory for Muslim women, children and the aged and infirm to take part in conflict (Marghinani 2005: 444). Preference is given to unmarried men over married men in drafting soldiers (Shaybani 1966: 85).

Respect is always to be paid to the dead. For instance, around forty fighters of the Quraysh who were killed during the battle of Badr (2 AH) were buried in a well (Bukhari 2008: 67). Some of those who could not be moved because of damage to their bodies were buried on the spot (Bukhari 2008: 68). After

the battle of Khandaq, the Prophet Muhammad handed over the dead bodies of the enemy and refused to take money for the dead bodies (Hamidullah 1968: 256). All these principles indicate concern for humanity. This concern is in line with the Koranic (2:213) concept that all humankind is one community and deserves dignity (see Koran 17:70; 95:4).

Accepting an offer of peace

In addition to the four basic principles, the Koran lays greater emphasis on accepting the offer of peace during conflict. The Koran (8:61) says, 'if they tilt towards peace, you too should tilt towards it.' The implication of this verse is that even if they offer peace only with a view to deceive, this offer of peace must be accepted, as all judgement of their intentions is based on outward evidence (Razi, cited in Asad 1997: 249). In other words, mere suspicion is not an excuse for rejecting an offer of peace (Asad 1997: 249):

> While we must always be ready for a good fight lest it be forced on us, even in the midst of the fight we must always be ready for peace if there is any inclination towards peace on the other side. There is no merit merely in fighting by itself.
>
> (Ali 1989: 429).

Yusuf Ali (1989: 76) contends that peace cannot be withheld when the enemy comes to terms. We agree with Ali on the point that Muslims cannot refuse the offer of peace because the Koran (2:192) says 'But if they cease, Allah is oft-forgiving, most Merciful' (see also 4:128). As the war is in the cause of Allah – defending Muslims and their land – and Allah is merciful and forgiving, so shall be the Muslim army. The verses on accepting peace are more relevant for the discussion on the use of force but they can also be relied for truce and armistice, for example, to collect the wounded and bury the dead.

General principles

The Islamic law of *qital* has a set of general principles. Some principles are more clearly laid out than others, for example, the rule of civilian immunity is clear and absolute whereas the rules for naval warfare are not very clear. There are other aspects of modern conflicts which are not covered at all, such as air warfare. This, however, is understandable as naval warfare was not in vogue then as it is today and the concept of air warfare did not exist at that time. The following discussion of the Koranic rules and practices of the Prophet Muhammad demonstrate that, although not very comprehensive, there is a body of rules for governing the conduct of *qital*. This body of rules, however, could be further developed and expanded to cover every aspect of modern armed conflict.

Genocide

Some verses of the Koran, particularly 9:5 and 9:29, are sometimes interpreted in a way that suggests that the Koran allows the genocide of non-Muslims. The orthodox view is that the Koran did not allow *jihad* and favoured patience (see Afsaruddin 2008: 687; Bukhari 2008: 17) in the early years of Islam, i.e. the Meccan period (AD 610–22). After Prophet Muhammad's migration to Medina, *jihad* was allowed in self-defence when he started to found a Muslim community, i.e. Medinan period (AD 622–32). In the last year of Medinan period, 9 AH, all the self-defence-related verses were repealed by verses 9:5 and 9:29, thus making *jihad* a continuous obligation for Muslims of all ages. We call this the progression argument on the use of force, i.e. the state of patience or no use of force in Mecca, the use of force in self-defence in Medina followed by the permission to use force against all non-Muslims at all times. Let us elaborate this argument. In Mecca, *jihad* was not allowed. The following verses are cited to support this argument:

> Blame, in fact, is upon those who wrong people and make mischief on earth unjustly. For such people there is a painful punishment.
>
> (42:42)

> And if one observes patience and forgives, it is, of course, one of the courageous conducts.
>
> (42:43)

> Who observe restraint patiently and place their trust in their Lord alone.
>
> (29:59)

> (O Muslims,) many among the people of the Book desire to turn you, after your accepting the faith, back into disbelievers – all out of envy on their part, even after the truth has become clear to them. So, forgive and *overlook till Allah brings out His command*.
>
> (2:109; emphasis added)

As was alluded to in verse 2:109, in Medina, 'Allah [brought] out his command' and *jihad* was allowed in self-defence. The following verses are cited to support this argument:

> Permission (to fight) is given to those against whom fighting is launched, because they have been wronged, and Allah is powerful to give them victory.
>
> (22:39)

> (They are) the ones who were expelled from their homes without any just reason, except that they say 'Our Lord is Allah'. … Allah will

> definitely help those who help Him (by defending the religion prescribed by Him)
>
> (22:40)

> Fight in the way of Allah against those who fight you, and do not transgress. Verily, Allah does not like the transgressors.
>
> (2:190)

The argument goes that this rule of *jihad* in self-defence remained in force for eight years. The Muslim community consolidated itself within this period. After eight years, Muslims were obliged to fight and kill the polytheists but they might be spared if they embraced Islam. Verse 9:5 is cited to support the argument: 'So, when the sacred months expire, kill the Mushriks [polytheists] wherever you find them, and catch them and besiege them and sit in ambush for them everywhere. Then, if they repent and establish Salah [prayer] and pay Zakah [poor due], leave their way.' The People of the Book (Jews, Christians and Sabians) were to be fought and killed but they could be spared if they agreed to pay *jizia* (protection tax) after being subdued. Verse 9:29 is cited to support this argument:

> Fight those People of the Book who do not believe in Allah, nor in the Last Day, and do not take as unlawful what Allah and His Messenger have declared as unlawful, and do not profess the Faith of Truth; (fight them) until they pay *Jizia* with their own hands while they are subdued.

The argument goes that verses 9:5 and 9:29 had repealed the verses (22:39; 2:190) permitting *jihad* in self-defence. *Jihad* against non-Muslims thus became an obligation for every Muslim in all times. The rules of *jihad* progressed from a state of patience to the use of force in self-defence followed by an obligatory *jihad* against the polytheists and People of the Book. If this interpretation, that verses 9:5 and 9:29 have repealed the verses related to *jihad* in self-defence, is accepted, it would simply mean that the Koran obliges Muslims to commit what would amount to genocide of non-Muslims in our time.

The study of verses 9:5 and 9:29 in their historic and Koranic contexts suggests that the progression argument on the use of force or *jihad* is untenable. We argue that these two verses do not repeal the verses allowing the use of force in self-defence. To establish our point, we need to examine these two verses in their Koranic and historic contexts. We would also need to find out whether the Koran had used the 'kill them [polytheists]' language in other contexts as well. We also need to examine the practices of Prophet Muhammad and his immediate successors to find out how they dealt with the two categories of people – polytheists and People of the Book – after verses 9:5 and 9:29 were revealed. Did they kill the people in question when they could or were they treated differently? This analysis will also partially clarify Islamic rules on the treatment of war captives.

Verses 9:5 and 9:29

Chapters 8 and 9 of the Koran were revealed at Medina, and their subject matter is similar. Chapter 8 was revealed shortly after the battle of Badr (2 AH) dealing with the lessons of the Badr: the question of war booty, the qualities necessary for good fighting, victory against the odds and clemency and consideration for one's own people and for others in the hour of victory (Ali 1989: 413). It aimed to address the large questions arising at the outset of the life of a new organised community. Chapter 9 logically follows up the argument of Chapter 8 so closely (Ali 1989: 413) that a *bismillah* (in the name of Allah) is not written at the beginning. Every chapter of the Koran begins with *bismillah* except Chapter 9 because the compilers were not sure if they were separate chapters (Kathir 2005: 478). Chapter 9 is the last revealed of the Koranic chapters (Kathir 2005: 478; Shafi 1974: 305–6).

Verses 1–29 of Chapter 9 were revealed before the battle of Tabuk in October AD 630 (Ali 1989: 435). The subject matter of the chapter is: 'what is to be done if the enemy breaks faith and is guilty of treachery' (Ali 1989: 435). It does not lay down new rules for the initiation of *jihad*. Chapter 9 discusses three kinds of person: the polytheists (or pagans), the People of the Book and the hypocrites (those who pretended to be Muslims but never wholeheartedly embraced Islam). There were four kinds of polytheist in Medina in AD 630. First, those with whom the Prophet Muhammad had concluded a peace treaty at Hudaybiyya in AD 628, i.e. the Quraysh. One of the conditions was that no party would attack another party or its allies. The treaty allowed other tribes to join any of the main parties to the treaty. Banu Bakr joined the Quraysh whereas Banu Khazagh joined the Muslims. Banu Bakr breached the terms of Hudaybiyya by attacking Banu Khazagh and so did Quraysh by aiding its ally. The treaty was violated, so the Prophet Muhammad attacked and conquered Mecca in AD 629. The second group of polytheists were those with whom the Prophet Muhammad had peace treaties for a fixed period and who never broke the terms of their treaties, for example, Bani Zamrah and Bani Madlej. The third group was those with whom the Prophet Muhammad had an open-ended peace treaty: their terms were not fixed. The fourth group was those with whom the Prophet Muhammad had no treaty at all (Elahi 2008: 553; Bukhari 2008: 179). The first three verses address the first and second groups who were given a four-month guarantee of safe passage (*aman*):

> Here is a disavowal (proclaimed) by Allah and His Messenger against the Mushriks (polytheists) with whom you have a treaty.
>
> (9:1)

> So, move in the land freely for four months, and be aware that you can never frustrate Allah, and that Allah is going to disgrace the disbelievers.
>
> (9:2)

> And here is an announcement, from Allah and His Messenger, to the people on the day of the greater Hajj, that Allah is free from (any

> commitment to) the Mushriks, and so is His Messenger. Now, if you repent, it is good for you. And if you turn away, then be aware that you can never frustrate Allah. And give those who disbelieve the good news of a painful punishment.
>
> (9:3)

Verse 9:4 was addressed to Banu Zamrah and Banu Madlej: 'Except those of the Mushriks [polytheists] with whom you have a treaty, and they were not deficient (in fulfilling the treaty) with you, and did not back up any one against you. So fulfil the treaty with them up to their term'. Verse 9:7 was addressed to Banu Hamzah and Banu Kinana who remained faithful to their treaties with Muslims and they were given time until the end of their treaties. Verse 9:7 states, 'How can the Mushriks [polytheists] have a treaty with Allah and His Messenger? Except those with whom you made a treaty near Al-Masjid-ul-Haram. Then, as long as they remain straight with you, you too remain straight with them.' Verse 9:5 was addressed to Quraysh (Shafi 1974: 309–12) who broke the terms of Hudaybiyya: 'So, when the sacred months expire, kill the Mushriks [polytheists] wherever you find them, and catch them and besiege them and sit in ambush for them everywhere. Then, if they repent and establish Salah [prayer] and pay Zakah, leave their way.' Verse 9:29 was addressed to the People of the Book, the Romans:

> Fight those People of the Book who do not believe in Allah, nor in the Last Day, and do not take as unlawful what Allah and His Messenger have declared as unlawful, and do not profess the Faith of Truth; (fight them) until they pay *Jizia* with their own hands while they are subdued.

The immediate context for the revelation of verse 9:29 was the rumours that the Byzantines (Romans) – who were People of the Book – were preparing to attack Arabia (Ali 1989: 435). After the revelation of verse 9:29, the Prophet Muhammad gathered an army of 30,000 and marched towards Syria, staying at Tabuk, a town bordering the Byzantine territory, in order to repel the imminent Byzantine attack. The Byzantine invasion did not come off, but the Prophet Muhammad made treaties with some Christian and Jewish tribes near the Gulf of Aqabah (Ali 1989: 435). Verses 30–129 were revealed after the Tabuk expedition dealing with the hypocrites who did not join the Tabuk expedition and other issues, such as who must participate in *qital* (Ali 1989: 435).

The careful contextual analysis of verses 9:1–29 indicates that they were revealed to address particular groups of people and their relationship with the Muslims of that time. The subject matter and intention of these verses is not to create new rules for the use of force by superseding the previous verses (see Shah 2008) but whether to dissolve or not to dissolve treaties with the tribes in question. The dissolution of treaties means getting out of the treaty relationship. It does not mean that new rules for the use of force are created or that the previous ones are repealed. Ashiq Elahi (2008: 576) argues that

verse 2:29 is not about spreading Islam – through obligatory *jihad* – and eliminating the People of the Book if they don't embrace Islam. It is about *jizia*, a symbol of political dominance and sovereignty. It is addressed to the Muslims of seventh-century Arab society. It is not addressed to the Muslims of the twenty-first century to present the Koran to the People of the Book in one hand and a sword in the other and if they do not embrace Islam or pay *jizia*, then kill them. Verse 9:5 is about fighting those polytheists – Quraysh – who broke their covenants with the Muslims. It is not addressed to Muslims of the twenty-first century to kill on sight polytheists without any reason.

The 'kill them' language in the Koran

In addition to contextual analysis, the linguistic analysis indicates that the Koran did not use the 'kill them' language for the first time in verses 9:5 and 9:29. The same language has been used in verses revealed before 9:5 and 9:29 (see Ali 1989):

> *Kill them wherever you find them*, and drive them out from where they drove you out, as Fitnah (to create disorder) is more severe than killing.
>
> (2:191)

> They wish that you should disbelieve, as they have disbelieved, and thus you become all alike. So, do not take friends from among them unless they migrate in the way of Allah. Then, if they turn away, *seize them, and kill them* wherever you find them, and do not take from among them a friend or helper.
>
> (4:89)

> You will find others who want to be secure from you, and secure from their own people. (But) whenever they are called back to the mischief, they are plunged into it. So, if they do not stay away from you, and do not offer peace to you, and do not restrain their hands, then *seize them, and kill them* wherever you find them, and, we have given you an open authority against them.
>
> (4:91; emphasis added)

Whenever the Koran obliges the killing of non-Muslims, it is contingent upon their doing or not doing something. For instance, verse 2:191 is about expelling non-Muslims from where they had expelled Muslims. In verse 4:89, the killing is contingent on 'if they turn away', whereas in verse 4:91 it is conditioned on 'if they do not stay away from you'. The 'kill them' language has been used on specific occasions for specific groups of people. So is the case of verses 9:5 and 9:29. They do not repeal or purport to repeal verses related to *jihad* in self-defence. The only normative value verses 9:5 and 9:29 has is that in similar contexts and conditions Muslims may follow the course suggested by these verses. The rule of killing for specific reasons is not confined to non-Muslims only. The Islamic law of *qital* allows the killing of Muslims

in certain cases, for example, in rebellion. The contextual and linguistic analysis suggests that the Koran does not permit the killing of polytheists and People of the Book without reason.

In general, the Koran prohibits the crime of genocide. Several verses of the Koran and practices of the Prophet Muhammad can be cited to support this point, but verse 5:32 is the most relevant: 'Whoever kills a person not in retaliation for a person killed, nor (as a punishment) for spreading disorder on the earth, is as if he has killed the whole of humankind, and whoever saves the life of a person is as if he has saved the life of the whole of humankind.' Verse 5:32 can be divided into parts: the 'killing of innocent persons' and the 'saving of life'. The first part of the verse can be relied on for preventing or punishing the crime of genocide whereas the second part can be relied on for humanitarian intervention. The use of word 'person' means that any person cannot be killed without reasons mentioned in verse 5:32. It also means that a person of any background can be saved from destruction and death. This principle can be used for humanitarian intervention to protect nations and races of any description. It is important to note that humanitarian intervention to protect Muslims from persecution is mentioned in the Koran (4:75) separately. Verse 5:32 just reinforces the point that the ultimate aim of the Koran is to prevent the killing of all innocent people.

The practices of the Prophet Muhammad and Caliph Abu Bakr

As stated above, verses 9:1–29 were revealed before the Tabuk expedition in 9 AH. In fact, the Tabuk expedition was started after permission was given by verse 9:29 to fight with the People of the Book (Ali 1989: 35; Shafi 1974: 358–62) and is therefore regarded as a preface to the battle of Tabuk (Shafi 1974: 385). When the Prophet Muhammad reached Tabuk, the Governor of Aylah, Rubah, made a peace treaty with the Prophet Muhammad who accepted *jizia* from the governor. The people of Jarba and Adhruh also agreed to pay *jizia* and the Prophet Muhammad wrote a documents for each of them (Tabari 2003: 58). After the death of the Prophet Muhammad (AD 632), most of the former polytheist tribes who had embraced Islam during his lifetime renounced Islam and attempted to secede from the Muslim polity. Some even tried to invade Medina (Tabari 2003: 476), the capital of the Islamic state. Abu Bakr, the First Caliph, sent forces to suppress the secessionist tribes and to restore the writ of Islamic government. He gave the following instructions to commander Muhajir before sending him as reinforcement to the expedition of Kindah: 'If this letter of mine reaches before you have achieved victory, then – if you conquer the enemy – kill the fighting men and take the offspring captive if you took them by force' (Tabari 2003: 185). If verse 9:5 meant killing all polytheists, Abu Bakr would have given different instructions: kill them all when you capture them. The practices of the Prophet Muhammad and Caliph Abu Bakr suggest that verses 9:5 and 9:29 do not allow the genocide of polytheists or People of the Book.

War crimes

Criminal law is a very developed branch of Islamic law. It applies of in times both war and peace. The Prophet Muhammad applied criminal law to offences committed during the *qital* and before the *qital*. Two captives caught in the battle of Badr (2 AH) – Nazer bin al-Haris and Aqba – were killed for their past crimes (Bukhari 2008: 69–72). Similarly, Ibn Khatal and Maqees bin Sababa were killed for their previous crimes after Mecca was conquered in 8 AH (Bukhari 2008: 504). After the battle of Khyber, Zainab Bint Haris, the wife of Salam, tried to kill the Prophet Muhammad and other fighters by sending a poisoned roasted goat. Bashir Bin Bara died after eating the poisoned meat. Zainab was handed over to the heirs of Bashir, who killed her in *qisas* (Bukhari 2008: 468). In the wake of the attack on Mecca (8 AH), a Muslim commander, Khalid bin Walid, killed several individuals in fighting as a result of misunderstanding. The Prophet Muhammad sent Ali – his cousin and son-in-law – to pay compensation for their blood. Even compensation for a dog was paid (Tabari 2003: 349). Islamic criminal law was applied in these instances and it is in this sense justified to say that Islamic law punishes war crimes. Terms such as crimes against humanity and genocide are not available in Islamic legal texts but certainly these offences are punishable under Islamic criminal law. For instance, killing an innocent person is a crime and so is killing 100 innocent persons. It does not matter whether they were killed during time of war or peace. It is simply a crime.

War captives

The Koran (47:4) permits the taking of war captives. Captives should be treated humanely and fed well during their captivity: 'And they give food, out of their love for [God], to the needy, and the orphan, and the captive' (Koran, 76:8; see also *Muhammad Khakhi v The State* 2010). Verse 47:4 deserves some discussion to clarify different rules contained therein:

> So, when you encounter those who disbelieve, then (aim at) smiting the necks, until when you have broken their strength thoroughly, then tie fast the bond, (by making them captives). Then choose (to release them) either (as) a favour (shown to them), or (after receiving) ransom, until the war throws down its load of arms.

This is a key verse on taking captives. It also offers options for their eventual release. It encourages Muslim fighters to be steadfast during the battle and to fight until the enemy is thoroughly routed. Enemy persons can be imprisoned and must not be released until the war is finally over. If there is a risk that captives might rejoin their force and attack Muslims again, they must not be released. Verse 47:4 shows two ways to deal with captives: they can be

released as a favour shown to them or after they pay ransom (see Darululoom Deoband 2009).

Verse 8:67 states that, 'It is not befitting a Prophet that he has captives with him unless he has subdued the enemy by shedding blood in the land. You intend to have the stuff of this world, while Allah intends the Hereafter (for you).' Abu Bakr Jasas (cited in Elahi 2008: 43) argues that verse 8:67 had repealed verse 47:4 and is interpreted by some to mean that every enemy fighter caught should be killed rather than kept captive. Therefore, the rule of releasing captives for ransom or as a favour is repealed. The new rule laid down in verse 8:67 is to kill all non-Muslim captives. This argument, however, is untenable. Chronologically speaking, verse 47:4 was revealed in 1 AH whereas verse 8:67 was revealed in 2 AH (Usmani 2006: 219) but the latter does not seem to have repealed the former. Verses 8:67–71 were revealed on the occasion when the Prophet Muhammad consulted his companions on how to deal with the seventy captives caught in the battle of Badr (Ali 1989: 432; Usmani 2006: 338). His companions offered different views. Abu Bakr, amongst many others, advised releasing them after paying a ransom, whereas Omer favoured killing them. The Prophet Muhammad acted on the advice of Abu Bakr and released the captives after they had paid a ransom (Elahi 2008: 543). Thereafter, verse 8:67 was revealed, admonishing Muslims that *jihad* is not for worldly gains (i.e. ransom) but for the cause of Allah. It does not prohibit taking ransom or repealing the existing rule on ransom. The following two verses support this interpretation: 'Had there not been a decree from Allah that came earlier, a great punishment would have overtaken you because of what you have taken' (8:68) and 'So, eat of the spoils you have got, lawful and pure' (8:69). Verse 8:68 refers to a previous decree of ransom mentioned in verse 47:4 whereas verse 8:69 confirms the lawfulness of ransom. This is why the decision of taking ransom for the battle of Badr captives was not overturned. The aim of verse 8:67 seems to prevent a situation where enemy persons are arrested and released for financial gains rather than genuine war reasons. We saw this happening in the current armed conflict in Pakistan where Pakistani officials arrested dozens of individuals and handed them over to the United States in return for huge bounties (see Musharraf, 2006).

The practice of the Prophet Muhammad also does not suggest that verse 8:67 has a repealing effect as he released war captives after verse 8:67 was revealed (Bukhari 2008: 78–9, 580) except on one occasion. Captives were killed after the siege of Banu Qarayza in 5 AH (Bukhari 2008: 298; Hamidullah 1968: 217). Banu Qarayza had an agreement with Muslims that they would not aid anyone against the Muslims. But in the battle of Khandaq (5 AH), Banu Qarayza sided with the Quraysh against Muslims. After the battle of Khandaq, the Muslim army laid siege to Banu Qarayza for about twenty-five days. Finally, Banu Qarayza asked the Prophet Muhammad to end the siege and decide their fate as he wished. The Prophet Muhammad appointed Sad bin Muadh as an arbitrator to decide the matter. He decided to kill all

the males and to take their wealth as war booty. Hundreds of men were killed as a result (Bukhari 2008: 298). Shibli Nomani (cited in Bukhari 2008: 298) argues that Banu Qarayza was a Jewish tribe and that Muadh's decision was according to Jewish law, i.e. Deuteronomy 20:10–14 (see also Hamidullah 1968: 217). Nomani's argument is convincing because the Koran (5:48) allows the application of Jewish law to Jews. To sum up, there are three ways to deal with captives. They may be released as a favour or on ransom or released in exchange for Muslim captives. It should be clarified that some war captives were killed as a *qisas* (in retaliation) for their past crimes, and their treatment must not be confused with captives who were not accused of crimes.

Sunni jurists differ on the issue of killing captives but that suggests their personal preference of the courses open to deal with captives. Imam Abu Hanifa says the Muslim leader is allowed to kill or keep the captives as *dhimmi* (non-Muslim citizens under the protection of Muslim state in return for paying *jizia*), but they cannot be released for ransom. Imam Shafi says that captives may be exchanged for Muslim captives but Abu Hanifa is against it. According to Imam Shaybani, captives may be released for ransom if the Muslims need financial help. He also argues that captives may be released as a favour without ransom or in exchange for Muslim captives (cited in Elahi 2008: 543). Shaybani's view shows that verse 8:67 had not repealed verse 47:4. Ibn Rushd (2006: 456) reports that a 'group of jurists maintained that it is not permitted to execute the prisoners'. Whatever the view of each jurist on the issue is, juristic views do not create binding rules. These juristic views should not be confused with the obligatory rules of the Koran. The obligatory rule of the Koran (47:4) is to arrest and keep the captives 'until the war throws down its load of arms'. Then either release them as a favour or on ransom. A war captive has the right to draw up wills regarding his property at home which will be communicated to the concerned person. Among prisoners, a mother should not be separated from her child. The dignity of the prisoner should also be respected according to his or her position. 'Pay respect to the dignitary of a nation who is brought low' said the Prophet Muhammad (see Hamidullah 1968: 215).

Sex with female captives

The Koran permitted the Prophet Muhammad to have sexual intercourse with female war captives after they were divided as war booty and assumed the role of bondswomen. The Koran (33:50) states: 'O Prophet, we have made lawful for you all your wives whom you have given their dowers and those (bondswomen) whom you own, out of the captives'. This verse was specified for the Prophet Muhammad (Usmani 2006: 781) and has no application after his death. It is worth noting that we could not find an instance where the Prophet Muhammad had sexual intercourse with a war captive before marrying her.

The rule for Muslim fighters is that they were not allowed to have sexual intercourse with war captives. But this war-related rule must not be confused with the general rule whereunder Muslims were allowed to have sexual intercourse with their slave women. The Koran urges Muslims to 'guard their private parts' (23:5) but not from 'their wives or from those [bondswomen who are] owned by their hands, as they are not to be blamed' (23:6). 'But the one who seeks [sexual gratification] beyond that, then such people are the transgressors' (70:31; see 23:7). Chapters 23 and 70 of the Koran belong to Meccan period (Ali 1989: 843, 1524), and the bondswomen mentioned in verses 23:5–6 and 70:31 refer to normal slaves rather than war captives as the Prophet Muhammad started wars after his migration to Medina. Therefore, the rule does not apply to war captives. In a later verse revealed in 3 AH, the Koran (4:25) has given Muslims permission to marry believing slave girls. Some of the female war captives were divided as war booty and became bondswomen of the owner. This change of status from war captives to bondswomen is important because both are governed by different set of rules. Verse 4:25 permits marrying slave girls not having sexual intercourse with war captives. Shaybani (1966: 126) argues that a warrior is not allowed to have sexual intercourse with a captured girl. 'Adultery and fornication even with captive women' is not permitted and is punishable by *hadd* (fixed penalties for certain crimes where the judge has no discretion) punishment (Mawardi 2005: 81).

There, however, is one instance where the Muslim fighters had sexual intercourse with women they captured. In 5 AH in the battle of Mer Yaseegh, the tribe of Banu Al-Mustalq was defeated and their men and women were captured. Some Muslim fighters wanted to have sexual intercourse with the women they captured but they did not want to impregnate them. They wanted to do *azal* (not ejaculating inside a woman) but the Prophet Muhammad said that a soul that is destined to be born cannot be stopped by *azal* (Bukhari 2008: 328–31). This was interpreted as an implied permission to have sexual intercourse with female captives. Two points need to be noted regarding this incident. First, the Prophet Muhammad himself did not engage in sexual intercourse with captives. It is an isolated event and does not create any binding rule as the Prophet Muhammad did not give an express permission to have sexual intercourse with captives. Second, verses 24:1–4 were revealed after this incident prohibiting sex outside marriage.

Civilian immunity

The Koran clearly states to target those who are engaged in active combat. Everything else is immune from attack: civilians, civilian property, environment, etc. The Islamic law of *qital* is based on the premise that everything is immune from attack unless it is explicitly permitted to be attacked. Verse 2:190 has multiple meanings: 'Fight in the way of Allah against those who fight you, and do not transgress. Verily, Allah does not like transgressors'.

'Those who fight you' may also include those who make contribution to war such as planning the war but it certainly does not include non-combatants and anything that does not contribute to war. No specific punishment is mentioned for transgression except Allah's dislike but the Prophet Muhammad applied specific laws to specific transgressions. For instance, if a non-combatant were killed by mistake or intentionally, compensation or punishment was awarded accordingly. As stated above, Walid killed some individuals in fighting as a result of misunderstanding so the Prophet Muhammad sent Ali to pay compensation for their blood. Even compensation for a dog was paid (Tabari 2003: 349). Verse 2:190 is the key verse governing the conduct of war and it is in this sense that it lays down the foundation of the Islamic law of *qital*.

Civilian property: spoils of war

Civilian property is immune from attack, but during the siege of the fortress of Banu Nadir (4 AH), the Prophet Muhammad cut and burnt palm trees. Banu Nadir accused the Prophet Muhammad of vandalism (Bukhari 2008: 185), but verse 59:5 was revealed stating that 'whatever palm-tress you have cut down, or have left them standing on their roots, it was with Allah's permission'. It was interpreted that permission is given to cut trees when necessary. The aim of cutting the trees on this particular occasion was to stop the supply of dates to those under siege as the strategy of war required (Mawardi 2005: 82; Usmani 2006: 1033).

Muslim fighters usually took moveable property of the enemy and divided it as war booty. The first time war booty came into the hands of Muslims was in the *suriya* of Abdullah bin Jahsh in 2 AH. The Prophet Muhammad sent Jahsh, with twelve others, to spy on the war activity of Quraysh. On the way near Nihla, Jahsh met and attacked the caravan of Quraysh. Their leader was killed, and the rest fled, leaving behind their belongings. Jahsh took it as war booty and divided it into five shares. Four were distributed among his fighters and the fifth was left for the treasury. This was the decision of Jahsh but after this incident verse 2:218 was revealed stating that 'as for those who believed and those who migrated and carried out *jihad* in the way of Allah, they hope for Allah's mercy: and Allah is forgiving', i.e. permission for distributing war booty was given. Thereafter, the Prophet Muhammad approved the formula of Jahsh (Bukhari 2008: 44–5). After the battle of Badr (2 AH), differences arose between the younger and older fighters over the division of the spoils of war as the former claimed they were the ones who defeated the enemy and the spoils should be divided among them alone. Verse 8:1 was revealed to settle the dispute: 'They ask you about the spoils. Say, "The spoils are for Allah and the Messenger." So, fear Allah, and set your relations right, and obey Allah and His Messenger, if you are believers.' Thereafter, the spoils were divided among all of them according to the formula of Jahsh (Bukhari 2008: 69).

Fay is another kind of property which the Muslim took with them. *Fay* is property which came into the hands of Muslim fighters without fighting the enemy. The classic example is when the enemy fled from the battlefield leaving their property behind. The Prophet Muhammad did not divide *fay* among the fighters. It was given to the treasury instead and was used for different purposes such as to help the poor, orphans, wayfarers, etc. (see Koran, 59:6–10).

The practice of the Prophet Muhammad is inconsistent on the issue: on many occasions, men were killed during the war but their women and children were taken away and distributed as war booty (Bukhari 2008: 67, 328). However, on other occasions, no property or women and children were taken as war booty. For instance, after the victory of Mecca (8 AH), no war booty was taken. A general amnesty was announced instead. Another example is that after the battle of Khyber (7 AH), no property was taken as war booty (Bukhari 2008: 414).

The key question is whether these practices of the Prophet Muhammad on the issue constitute a binding rule. The practice of the Prophet Muhammad is inconsistent on the issue and does not seem to constitute a binding rule. He acted differently on different occasions as the circumstances warranted and it is open for a Muslim ruler to act differently in different circumstances. Ibn Rushd (2006: 456) says that in those days harm was allowed to be inflicted on life, property and personal liberty, i.e. through enslavement and ownership. What the Prophet Muhammad and early caliphs did was according to the Arab socio-economic set-up of that time. Every male member of each tribe was regarded as a soldier (Usmani 2006: 321) as there was no standing army. Similarly, every tribal property was a military asset as there was no distinction between military and civilian property (Hamidullah 1968: 247). The Arab tribes used to employ all their resources in a time of war. Taking away the property of a particular tribe was to weaken its military power. In today's set-up, there is a clear distinction between civilian and military property, hence the essence of Islamic law would not allow to attack or take civilian property. Regarding women and children, most of the Arab tribes lived a nomadic life. When a tribe was defeated by killing or imprisoning its men, women and children were left unprotected. So they were taken away too. Shaybani (1966: 98) says that the ruler should hire the means to carry them. There is no instance where the Prophet Muhammad took women and children leaving men and property behind. It was always the case; women and children were taken when they were left without protection as a result of war. Most of the women and children were released later as a favour or on ransom.

Protection of environment

Weapons systems were very basic at the time of the wars of the Prophet Muhammad and the danger of damage to the environment was not as great

as we dread in the twenty-first century. There are verses of the Koran and practices of the Prophet Muhammad indicating towards the protection of the environment. Cutting of trees was not allowed except when necessitated by the strategy of war: 'Whatever palm-trees you have cut down, or have left them standing on their roots, it was with Allah's permission' (Koran, 59:5). In another verse, the Koran (2:205) states: 'Once he turns back, he moves about in the land trying to spread disorder in it, and to destroy the tillage and the stock; and Allah does not like disorder.' Verse 2:205 was revealed in the background of a hypocrite named Akhan who used to conspire against Muslims. One day he passed by the farm of a Muslim, put it on fire and killed the cattle. Verse 2:205 addresses this specific incident but 'the words are of general application to cover everyone who commits' such acts (Usmani 2006: 64). Crops and grass can be used as fodder by a Muslim army to feed its animals on a military expedition but no damage is allowed. The Prophet Muhammad used to block water to the enemy but never poisoned it despite the fact that poisoning was used as tactic in those days (Bukhari 2008: 468). During the battle of Khyber (7 AH), the Muslim army besieged a fort of the enemy for three days. The enemy was forced out of the fort only when the Muslims blocked the supply of water from the nearby spring (Bukhari 2008: 413). The Koran and the Prophet Muhammad have shown concern for the protection of the environment. A body of rules can be developed to protect the environment from the potential damage of modern-day armed conflicts.

Individual responsibility

Islamic criminal law is based on the concept of individual responsibility and punishment during war and peace. Anyone who commits an unlawful act has to bear its consequences (Oudah 1999: II, 96). The principle of individual responsibility is based on the following verses of the Koran: 'No bearer will bear the burden of any other person' (35:18), 'if someone acts righteously, he does so for the benefit of his own soul, and if someone commits evil, he does so against it' (41:46) and 'whoever does evil shall be requited for it' (4:123). Islamic law also does not allow obeying unlawful orders. There is no punishment for disobeying an unlawful order. Only lawful orders of the commander and the Caliph should be followed.

Mutilation

Mutilation is not permitted by the Koran. As stated above, the most relevant verse (16:126) on the point is: 'and if you were to harm [them] in retaliation, harm them to the measure you were harmed. And if you opt for patience, it is definitely much better for those who are patient.' Verse 16:126 was revealed to prevent mutilation of enemy persons. Mutilation and even the cruel treatment of beasts is not allowed (Mawardi 2005: 66; Shaybani 1966: 99).

Spies

Espionage is an important aspect of war. The Prophet Muhammad used to send men before embarking on a military expedition to gather information against the enemy. Espionage took the form of a reconnaissance band or individual sent in disguise to enemy tribes or towns (Bukhari 2008: 52). Other warring tribes also relied on espionage. The spies arrested by Muslims were treated differently on different occasions. On one occasion, spies were beaten to extract information from them about the position of their own forces (Bukhari 2008: 59; Muslim 2008: 670). But they were not killed. On another occasion (4 AH), Umro met two spies of Quraysh while on his way from Mecca to Medina. He tried to arrest them but one resisted arrest and was killed on the spot. The other acquiesced to arrest and was taken to Medina. The Prophet Muhammad approved his arrest (Tabari 2003: 235). It is not clear whether he was killed. On another occasion, the Prophet Muhammad pardoned Hatib Ibn Abi Baltaah who wrote a letter to Quraysh that the Muslims in Medina were preparing to attack Mecca. He was pardoned because it transpired that he was worried about his property in Mecca if the city came under attack. He meant no ill-will (Hamidullah 1968: 234). It is also not clear from the practice of the Prophet Muhammad whether spies were tried or not. Hanafi jurists such as Abu Yusuf and Shaybani (cited in Hamidullah 1968–235) said that non-Muslim spies should be given capital punishment. No distinction is made, as far as punishment is concerned, between male and female spies. Sarakhsiy (cited in Hamidullah 1968: 235) argues that a minor should not be given capital punishment. Similarly, no distinction is made in Islamic law between spies of war or peace.

Perfidy and ruse of war

Islam law does not allow perfidy (Shaybani 1966: 77). In fact, perfidious breach of agreements is one of the reasons for resuming hostilities. The Prophet Muhammad, on several occasions, resumed hostilities after the other party acted perfidiously. The example of Banu Nadir is a perfect example of perfidy followed by an armed attack by Muslims. The Koran forbids treachery and all perfidious acts (8:58) and rewards those who are good in deeds (5:13). The Koran prohibits perfidious actions; on the one hand, and obliges Muslims to fulfil their obligations (5:1), on the other (see Muslim 2008: 629).

Ruses of war, contrariwise, are allowed and encouraged (Muslim 2008: 630). The Koran (8: 16) says, 'Whoever turns his back to them on such a day – unless it is for a tactic in the battle, or to join a company – turns with wrath from Allah, and his abode is … [Hell], and it is an evil place to return'. Verse 8:16 provides punishment for showing cowardice but permits ruses of war. The Prophet Muhammad used to say that war is the name of deceiving the enemy (Bukhari 2008: 277; Muslim 2008: 630). In the battle of Khandaq, fierce fighting continued for around thirty days but neither side was winning the war. Naeem bin Masghud asked the Prophet Muhammad to create a split

among the enemy forces by misleading them. After taking permission of the Prophet Muhammad, Naeem went to the Banu Qarayza telling them if the Quraysh lost the war, they would retreat to Mecca but that they would have to face the Muslims in their neighbourhood. Therefore, to make sure that the Quraysh will protect them in case of defeat, they needed to ask Quraysh to hand them over some of their men as a guarantee. Then Naeem went to Quraysh telling them that Banu Qarayza was repenting the fact that they had joined them against the Muslims. He also told them that Banu Qarayza had sent an envoy to Muslims in order to make peace with them and had promised Muslims to hand over some men of the Quraysh as a token of their sincerity towards Muslims. When the Quraysh told Banu Qarayza that the war had been prolonged and that they needed to make a decisive attack on Muslims, Banu Qarayza asked Quraysh that some of their men should be given as a guarantee that the Quraysh would assist Banu Qarayza in the event of defeat by Muslims. When the Quraysh heard Banu Qarayza's demand, they felt that Naeem was telling the truth. There was a heavy storm and the leader of Quraysh, Abu Sufyan, announced that Banu Qarayza had abandoned Quraysh and the storm had killed their animals so they needed to retreat to Mecca (Bukhari 2008: 276). This is how they lost the battle of Khandaq. On another occasion, the Prophet Muhammad also played a trick on Quraysh. He was leading a caravan of Muslims towards Mecca for a minor pilgrimage but the Quraysh did not like Muslims coming to Mecca. Therefore, the Quraysh stationed their men on the way but the Prophet Muhammad left the normal route, went through a narrow mountain pass and camped near Hudaybiyya where the famous treaty was signed (Tabari 2003: 284).

Child soldiers

Islamic law does not allow recruiting and sending child soldiers to the battlefield. The minimum age required to participate in *qital* is fifteen years. This is a consensus view of the Muslim jurists based on the practice of the Prophet Muhammad (Bukhari 2008: 15, 281). Before starting the military expedition of the battle of Badr (2 AH), the Prophet Muhammad examined his army and sent the young ones back to Medina (Bukhari 2008: 51). A fourteen-year-old boy, Ibn Omer, asked the permission of the Prophet Muhammad to participate in the battle of Uhud (3 AH) but he was not allowed to participate. After a year he was given permission to participate in the battle of Khandaq (4 AH) as he was fifteen at that time (Bukhari 2008: 280–1). This practice was followed in later wars as well.

*Safe conduct (*aman*)*

Providing safe conduct is one of the cardinal principles of the Islamic law of *qital*. *Aman* or quarter is defined as 'the practice of refraining from opposing them (i.e. the belligerents) through killing or capturing, for the sake of God' (Sarakhsiy cited in Hamidullah 1968: 208). It is founded on the Koranic

verse (9:6): 'And if any one of the Mushriks [polytheists] seeks your protection, give him protection until he listens to the word of Allah, then let him reach his place of safety. That is because they are a people who do not know.' Verse 9:6 was revealed when the Prophet Muhammad dissolved treaties with different tribes after these tribes violated terms of their treaties with Muslims (Usmani 2006: 348). Verse 9:6 provides an exception in favour of those who seek protection. 'Let him reach his place of safety' means his own place where he can be safe (Qutb 2003: VIII, 69). Quarter might be granted individually or *en masse*. It could be conditional or unconditional (Hamidullah 1968: 208). At the time of the conquest of Mecca, the Prophet Muhammad said that those who entered the courtyard of Kaba or the house of their chief – Abu Sufyan – were safe. Those who closed the doors of their houses and did not fight were also given *aman* (Bukhari 2008: 495). *Aman* is available not only to active and potential combatants but also to those who are incapable of fighting such as the infirm, women, infants, etc. (Sarakhsiy cited in Hamidullah 1968: 209). Apart from the ruler, a Muslim man and woman can also provide safe conduct which is binding on all Muslims and the ruler (Shaybani 2004; see Malik 1982: 198). Shaybani (1966: 192) reports a saying of the Prophet Muhammad that 'the one lowest in status can bind others if he gives a pledge [of security]'. But Muslims living outside Islamic rule cannot give *aman*. A person who is given *aman* is called *mustamin*. A *mustamin* is different than a *dhimmi*. *Aman* is temporary in nature. A *mustamin* losses his immunity if he acts as a spy (Hamidullah 1968: 202; Shaybani 1966: 173).

Hostages

In the time of the Prophet Muhammad, hostages used to be exchanged by parties as a pledge of good faith in carrying out the conditions of the treaty, but killing them was forbidden. This was the case even if the Muslim hostages were treacherously killed by the enemy or there was a clear agreement that hostages may be beheaded in retaliation for the guilt which is not theirs personally (Sarakhsiy cited in Hamidullah 1968: 205, 272). Several verses of the Koran (6:165; 17:15; 35:18) are cited to support this argument: no one shall be punished for the wrong-doings of others. During the reign of Amir Muawiyyah, the Byzantines broke their agreement while he was holding some of the Byzantines hostages but the Muslims desisted from killing them saying, 'fulfilling of a promise after treachery is better than responding with treachery' (Mawardi 2005: 78). An enemy emissary cannot be turned into a hostage carrying the message of his ruler. The emissary would be entitled to *aman* until he delivers his message and returns to his country (Hamidullah 1968: 145; Shaybani 1966: 170).

Humanitarian aid

Humanitarian aid is an essential part of the Islamic law of *qital*. 'Medical service is purely humanitarian. Doctors and nurses are never harmed'

(Hamidullah 1968: 279; see Shaybani 2004). In the battles of Uhud and Khandaq arrangements were made for hospitals, nurses and transportation of the wounded. The armies of Caliph Omer were provided with medical men. Hamidullah argues that Muslim relief work rendered for non-Muslims can be justified on the Koranic verse (5:2) 'help each other in righteousness and piety'. Muslims can render humanitarian service to anyone and vice versa (see Shaybani 1966: 258).

Air and naval warfare

There were no aeroplanes at the time of the Prophet Muhammad and his immediate successors. Hence, no rules related to air warfare are available from their times. It was also the case at the time of classical jurists; hence, no views of classical jurists are available on the issue. Abbas ibn Firnas (d. 275 AH) had perfected a man-propelled aeroplane but met his death on the descent after a successful flight (Hamidullah 1968: 229). Rules for air warfare were not developed in the early days of Islam but certainly the basic and general body of rules would apply to air warfare (see Hamidullah 1968: 229).

Sea voyage was common in pre- and post-Islamic Arabia. The Koran (see for example, 18:79; 30:41) has many references to sea travel and its hardships. A group of Muslims migrated from Mecca to Abyssinia by using boats (Hisham 2000) before migrating to Medina. The Prophet Muhammad also transported materials by sea for the Tabuk expedition in 8 AH. Boats were used in the campaign of Iraq, during the reign of Caliph Abu Bakr. In the time of Caliph Uthman, naval expeditions took on great proportions and his armies crossed the sea to penetrate Spain. The words 'admiral', 'arsenal', etc. have been assimilated into some European languages from Arabic (Hamidullah 1968: 231). Muslim jurists consider boats as a fort on land; hence, no special laws were developed for naval sieges and blockades (Hamidullah 1968: 231). No separate set of rules were developed for naval warfare but there is no reason why the basic and general rules of land warfare should not apply to naval warfare as well.

Extradition

Islamic law recognises the concept of extradition. The best example is the clause in the treaty of Hudaybiyya (6 AH) between the Prophet Muhammad and the Quraysh of Mecca: 'Whoever from among the Quraishites went to Muhammad without permission of his superior (*mawla*), Muhammad shall extradite him to them' (Hamidullah 1968: 142).

Armistice

Truce and armistice are recognised in the Islamic of *qital*. Truces may be of four kinds: limited or unlimited by time and limited or unlimited by place.

Truces limited by time and place are fixed and generally occur during war on a battlefield in order to carry on parleys, bury the dead, etc. (Hamidullah 1968: 263). The recent example is a unilateral truce declared by the Pakistani Taliban in Waziristan, Pakistan, as a token of respect for the holy month of Ramadan (the month of obligatory fasting for Muslims). They, however, also said that if they were attacked during Ramadan, they would respond in self-defence. The most important example of a truce for a fixed time is the treaty of Hudaybiyya (6 AH) between the Prophet Muhammad and Quraysh. It was fixed for ten years and at the end of this period, each one was free from treaty obligations. A truce unlimited in time and place usually takes place at the end of a war, when one party is defeated or both are exhausted (see Usmani's commentary on verses 9:4 [2006: 346]). A truce limited by time and place may be concluded by the commander in charge but others may be concluded by the Caliph or his authorised officials (Hamidullah 1968: 264).

Respecting agreements

The Koran urges Muslims to 'fulfil contracts' (5:1). The 'contracts' include all human contracts entered into between human beings (Usmani 2006: 193). It also includes clear and implied obligations (Ali 1989: 243). Fulfilling contracts is one of the qualities of a Muslim and '[success is attained] by those who honestly look after their trusts and covenants' (Koran, 23:8). There are, however, certain exceptional circumstances in which treaties can be denounced. For instance, if in war Muslims fear treachery from the enemy, they are allowed to denounce the treaty but they must declare it openly (Elahi 2008: 534). The Koran states, 'And if you apprehend a breach from a people, then, throw (the treaty) towards them in straight-forward terms. Surely, Allah does not like those who breach the trust' (8:58). This means that the termination of the treaty should be declared openly so that the enemy may not remain under the impression that the treaty is intact (Usmani 2006: 336). The Prophet Muhammad announced to the polytheists that their covenants with Muslims are terminated after they had continuously failed to respect their treaties (Koran, 9:1–5). One of the key elements of the truce and other treaties was that it must be in writing. Several texts of the treaties concluded by the Prophet Muhammad have come down to us.

Resumption of hostilities

Hostilities may be resumed with those who have violated their treaties with Muslims. The violators are given stern punishment: 'Those with whom you have entered into a treaty, then they break their treaty each time … so, if you find them in war, deal with them in a way that those behind them have to disperse fearfully, so that they take a lesson' (Koran, 8:56–7). These verses were revealed addressing the breach of treaty by Banu Qarayza during the battle of Khandaq. Banu Qarayza had a treaty with the Muslims that they

would neither attack Muslims nor aid someone against them. But Banu Qarayza sided with the Quraysh in the battle of Khandaq. Some of the tribes were banished as a punishment for their breach of treaties by the Prophet Muhammad, for example, Banu Qaniqa and Banu Nadir. Banu Qaniqa and the Prophet Muhammad had an agreement that they would neither attack nor aid someone else against each other but in the battle of Badr Banu Qaniqa aided the Quraysh against the Muslims. They broke their treaty with the Prophet Muhammad who afterwards besieged them for several days but finally they came out of their fort and asked the Prophet Muhammad not to kill them. He agreed to their request but ordered them to leave Medina (Bukhari 2008: 180). Banu Nadir killed two men of Banu Amer, an ally of Muslims. When the Prophet Muhammad learnt about it, he went to ask for *diyat* (blood money) of those killed but Banu Nadir instead of paying *diyat* attempted to kill Prophet Muhammad by throwing a big stone from the roof of a house. He returned to Medina and prepared to attack Banu Nadir. The Muslim army besieged Banu Nadir for fifteen days but they asked for safe conduct which Prophet Muhammad granted. They were given ten days to leave Medina and take whatever belonging they could except weapons. Some of them went to Khyber whereas others settled in Syria (Bukhari 2008: 180–1). Verses 8:56–7 and the practices of the Prophet Muhammad are consistent and have a normative value setting up a rule that upon breach of treaties hostilities can be resumed.

Occupation

One of the ways to bring war to an end is to defeat the enemy and occupy their land. By occupation, sovereignty of the territory is transferred to the conqueror. The occupation, whether permanent, temporary or strategic, gives the occupant the right of taxation and administration of the territory (Hamidullah 1968: 498). The practice of the Prophet Muhammad on the treatment of conquered land was different in the Arab peninsula and outside it. The lands of Banu Nadir and Banu Qarayza were distributed after these tribes were defeated and banished from Medina. They settled in Khyber but when they were defeated again in the battle of Khyber, their lands were left untouched but they had to give half of its produce to the Muslims (Bukhari 2008: 413–14). They were also allowed to practise their religion and to administer their own region as they wished. When Mecca was conquered, general amnesty was given to all those who did not want to fight and their lands were left untouched. It seems that the Prophet Muhammad preferred to leave the administration of lands in the hands of their owners unless there was a specific reason not to do so such as in the case of Banu Nadir and Banu Qarayza when they were expelled from Medina but not from Khyber. When the army of the Second Caliph Omer conquered the fertile lands of Iraq and Syria, they wanted to distribute the local lands as war booty but Caliph Omer decided against it. These lands were left to be cultivated by the local people

but they had to pay *jizia* (see Hamidullah 1968: 244–6; Marghinani 2005: 484). *Jizia* needs to be differentiated from *usher* (tithe) and *kharaj* (land tribute). *Usher* is for Muslim subjects. Land tribute is imposed on conquered lands. The land belongs to the inhabitants with the rights to till and sell it (Marghinani 2005: 484–8). *Jizia* is a capitation tax on the persons of conquered territories in return for protection afforded by the Muslim state. It is imposed on solvent men capable of fighting only. Everyone else is exempted: women, children, infirm, blind, monks, insolvents and paupers. *Jizia* can be negotiated or imposed by the Muslim ruler. *Jizia* serves as an aid to the troops (Marghinani 2005: 489–97).

Neutrality

Modern Arabs use the word *hiyadah* for neutrality whereas the pre-Islamic and early Arabs used the term *itizal*. The latter now applies to a school of Muslim thought called Mutazilites, as they remained neutral in the conflict between the Sunnis and Kharijites (Hamidullah 1968: 286). Neutrality as concept was known to pre-Islamic Arabs and is used – directly and implicitly – in the Koran in the discussion of warring parties. The Koran deals mainly with neutrality in warning Muslims that a particular group would not remain neutral in the fight against Muslims (59:11–12), do not befriend those who are not neutral against Muslims (60:8–9) and respect those tribes who have been neutral against you because of their agreements with the Muslims (9:4). The most relevant verse of the Koran where the word *itizal* has been used is the following (4:90):

> Except those who join a group between whom and you there is a treaty, or who come to you with their hearts feeling discomfort in fighting either against you or against their own people. If Allah had so willed, He would have given them power over you, then they would have fought you – so, if they stay away from you, and do not fight you and offer you peace, then Allah has not given you any authority against them.

The principle of neutrality becomes very clear when we read verse 4:90 in its context. The two preceding verses (4:88–9) deal with a group of people who came to the Prophet Muhammad and said that they had embraced Islam but after some time they left for Mecca on a pretend business trip. In fact, they never were converted to Islam but were hypocrites who came only to deceive Muslims (Usmani 2006: 169). Verse 4:89 ordered to kill the hypocrites. Verse 4:90 exempts those who have a peace treaty with the Muslims or those who joined them in the treaty. Similarly, those who came to the Muslims and said they would not fight anyone and wanted to remain in peace were also to be spared (Usmani 2006: 169). On several occasions, the Prophet Muhammad did not disturb those tribes who remained neutral in the conflict between Muslims and non-Muslims. For instance, Banu Qarayza and Ghatafan remained

neutral in the fight between Banu Nadir and the Muslims and were thus not harmed by the Muslims (see Hamidullah 1968: 293).

Conclusion

This chapter establishes that Islamic law recognises the concept of *qital* (armed conflict) and provides a detailed set of rules to govern the conduct of *qital*. The five basic principles of the Islamic law of *qital* are military necessity, distinction, proportionality, humanity and to accept an offer of peace during the conflict. There is a long list of general principles but it is by no means complete. There are areas where the rules need expansion such as naval warfare. There are areas that are not covered at all such as air warfare. The most significant conclusion that can be drawn from this discussion is that humanitarian concern is at the heart of the Islamic law of *qital*. The Islamic rules of *qital* consist of a binding and non-binding nature. The non-binding nature of many rules allows flexibility to develop rules for covering all aspects of modern armed conflict. Rules can also be developed on how to use modern weapons.

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3 The Islamic law of *qital* among Muslims

The Muslim world has suffered a great deal of violence in the recent past and is still in the grip of violent armed conflicts. External and internal actors have perpetrated violence in which thousands have lost their limbs, lives and property. These armed conflicts are among Muslims and non-Muslim forces in Muslim lands and Muslim armed groups and the security forces of Muslim states. To use the language of the law of armed conflict, these armed conflicts are of international and non-international character. The following are some past and current examples of armed conflicts in the Muslim world.

The former Soviet Union invaded Afghanistan in December 1979. The conflict ended in February 1989 by which time around 1 million Afghans had died. After the Soviet withdrawal, Afghanistan plunged into civil war and conflicts among regional warlords raged until the Taliban established itself as the ruler of Afghanistan in 1996. The US-led coalition routed the Taliban between October and December 2001. Since then the conflict has continued with varying degrees of intensity in different parts of Afghanistan. Over the decades, the Afghan conflict has changed from international to non-international and vice versa. In each phase of the conflict, hundreds of thousands of people lost their lives. The conflict between the Pakistani security forces and Tehrik-i-Taliban (TTP) in the North-West Frontier Province (now renamed as Khyber Pakhtunkhwa in April 2010) and tribal areas is a current example of an armed conflict among Muslims. The 1971 armed conflict between the Pakistani forces and the Mukhti Bani's fighters of East Pakistan (Bangladesh), the conflicts in Somalia and the Sudan and the ongoing power struggle between Hamas and Fatah groups in the Palestinian territory are other examples of armed conflicts among Muslims. All the armed groups involved in these conflicts except Mukhti Bani fighters rely on or claim that they follow the Islamic law of *qital*. In all these armed conflicts, an enormous amount of suffering has been inflicted on persons who had nothing to do with these conflicts, i.e. the innocent suffered and continue to suffer. All these conflicts bring to the forefront the concept of an internal armed conflict (i.e. armed conflict among Muslims) in Islamic law and the rules governing it.

The purpose of this chapter is to see whether Islamic law has a concept of an internal armed conflict and, if it has, are there any rules governing it.

Whether Islamic law allows the right to rebellion (for the right to rebellion see Fadl 2001) is not within the remit of this chapter. Our main argument is that Islamic law has the concept of an internal armed conflict and a very humane set of rules to govern it. This set of rules is not an elaborate code, but the Koranic verse 49:9 and the good practices of the First and Fourth Caliphs provide a solid basis for developing an elaborate code to govern armed conflict among Muslims. Given its humane nature and the fact that the Islamic law of internal armed conflict applies in conflict among Muslim states as well, it becomes more significant to develop such a code.

Islamic law recognises internal armed conflict. In Islamic tradition, internal armed conflict has religious and territorial underpinnings. Islam believes in the Muslim *ummah* (a single community of Muslims) which can be ruled by a Muslim Caliph. It is for this reason that for centuries no elaborate body of rules was developed to govern the relations among Muslim states. (After the emergence of Muslim nation-states and regional organisations such as the Organisation of Islamic Conference and the League of Arab States, this situation has been changed. Now Muslim states have plenty of bilateral and multi-lateral treaties among Muslim states.) Except *dhimmis* and aliens, the subjects of the Caliph are supposed to be Muslims. Therefore, presumably only a group of Muslims can challenge the Caliph's authority. An armed conflict between a non-Muslim group and the security forces of a Muslim state cannot be ruled out but in essence internal armed conflict has been seen as being among Muslims: a Muslim armed group fighting the Caliph or another armed group. The territorial aspect of the Islamic concept of armed conflict is that the Muslim armed group must be within the territory under the control of a Caliph. But a conflict is still regarded as internal if a Muslim armed group is temporarily in a territory not under the direct control of a Caliph. It is religion rather than territory that ultimately determines the nature of armed conflict in Islamic law: either it is between Muslims and non-Muslims or among Muslims.

Internal armed conflict in the Koran and Sunnah

Verse 49:9 is the only verse of the Koran dealing with the issue of conflict among Muslims:

> If two groups of the believers fight each other, seek reconciliation between them. And if one of them commits aggression against the other, fight the one that commits aggression until it comes back to Allah's command. So if it comes back, seek reconciliation between them with fairness, and maintain justice. Surely Allah loves those who maintain justice.

The circumstances in which verse 49:9 was revealed do not indicate that it addresses an internal armed conflict. There are different versions, but it seems

that the verse addresses situations such as a street brawl or a dispute between families (Elahi 2008: 178; Kathir 2005: 67). It was the immediate successors of the Prophet Muhammad and later jurists who interpreted it broadly, i.e. they applied its rules to internal armed conflicts. Verse 49:9 in fact provides the foundation of the law of internal armed conflict but is by no means an elaborate code on the matter. The significance of verse 49:9 is discussed later in the chapter.

The practice of the Prophet Muhammad also does not shed much light on different aspects of the matter as there was no organised rebellion during his leadership. Some provisions, however, were made for potential rebellion in some of the agreements which the Prophet Muhammad concluded with the Muslims of Medina. In the Charter of Islamic Alliance between the Meccan and Medinan Muslims, it was laid down that 'whoever is rebellious or whoever seeks to spread enmity and sedition, the hand of every God-fearing Muslim shall be against him, even he be his son' (Mubarakpuri 2002: 174). It was also laid down that anyone who violates the Charter of Islamic Alliance is a criminal and that no one should help or provide refuge to such a person. The Prophet Muhammad also said that 'abusing a Muslim is an act of disobedience and fighting him is disbelief' (Mubarakpuri 2002: 177). It is also reported that the Prophet Muhammad said that rebels must be beheaded.

Definition of internal armed conflict or rebellion

An internal armed conflict or rebellion is defined as where a large body, having the power of open resistance, withdraw themselves from the obedience of the Caliph because they believe that the Caliph conducts himself improperly, i.e. he is a tyrant or does not follow Islamic teaching faithfully (Haskafi 1978: II, 610; Marghinani 2005: 511). They refuse to fulfil duties imposed by the government such as the payment of taxes. They control a territory and collect taxes from the people under their control. They may or may not have their own *imam* (leader) (Mawardi 2005: 89). The aim of resistance is the deposition of the head of the state, i.e. the Caliph (Oudah 1999: I, 115). People in revolt are called *baghat* (sing. *baghi*). The word *baghi* means 'rebel', but in the language of law it is particularly applied to injustices, namely, withdrawing from the obedience of a rightful Caliph (Marghinani 2005: 511). Therefore, the rebels are called the 'people of rebellion' and the Caliph and his supporters the 'people of justice' (Oudah 1999: I, 115) as indicated in verse 49:9. Some jurists call rebels insurgents (Marghinani 2005: 511) but generally both words are used interchangeably.

The following elements must be present in an armed conflict to trigger the application of the Islamic rules of an internal armed conflict. The rebels must be large in number as opposed to a band of criminals. They must possess the power of resisting the writ of the Caliph openly. They must, in their view, have a sufficient cause to wage a war, perceive the Caliph as a tyrant or unjust or un-Islamic and aim to depose him. Their arguments for resisting the

Caliph must be based on Sharia. For instance, during the caliphate of Abu Bakr, the people who refused to pay *zakat* (poor due) pleaded that they would pay it to the man whose prayer could soothe their hearts. In support of their argument they cited the Koranic verse (9:103): 'Take Sadaqah (obligatory alms) out of their wealth through which you may cleanse and purify them, and pray for them. Indeed, your prayer is a source of peace for them.' If the rebels do not have a sufficient cause based on Sharia and resort to violence, it is called *haraba* (brigandage) (Oudah 1999: I, 115; Rushd 2006: II, 478). The rebels must be in control of a territory. If they are not large in number and do not control a territory and engage in the use of force, it is regarded as an issue of law and order and is treated as such in terms of punishment.

A conflict between two or more armed groups within the territory under the writ of a Caliph may also constitute an internal armed conflict (see Shaybani 1966: 246). Such a conflict must be among two rebel groups, one displacing the other from the area or city under its control. The current conflict between Hamas and Fatah in Palestine falls in this category. If the rebellion grows to the proportion of force equal to that of mother government and hostilities continue, it is called a civil war. It is irrelevant whether the rebels have deposed the head of the state or two claimants have sprung up and the sympathies of the people are divided (Hamidullah 1968: 178). The wars between Caliph Ali and Amir Muawiyyah are good examples of this (see Tabari 2003: 589).

Highway robbery or brigandage

Islamic law makes a clear distinction between rebellion, highway robbery and brigandage. If a group of corrupt people join together to use arms, cut off highways, steal property, kill people and prevent the free passage of persons, they are called highway robbers and brigands (Marghinani 2005: 436; Mawardi 2005: 93; Shaybani 2004: 79). About this kind of offender, the Koran (5:33) says:

> Those who fight against Allah and His Messenger and run about trying to spread disorder on the earth, their punishment is no other than that they shall be killed, or be crucified, or their hands and legs be cut off from different sides, or they be kept away from the land [they live in]. That is a humiliation for them in this world, and for them there is a great punishment in the Hereafter; except those who repent before you overpower them. Then, be sure that Allah is Most-Forgiving, Very-Merciful.

Verse 5:33 has been interpreted by jurists who had come up with different punishments depending on the gravity of the crime committed (Marghinani 2005: 436–7; Mawardi 2005: 93–7). The most obvious punishments are killing or crucifying them and cutting their legs or banishing them from their areas (see Rushd 2006: 547–52).

Rules governing internal armed conflict

The application of the Islamic law of *qital* depends on the religion of the fighters, i.e. whether they are Muslim or non-Muslim. If the conflict is with non-Muslims, it is considered an international conflict and the rules of international armed conflict apply. If the conflict is among Muslims, in addition to the rules of international armed conflict, the rules of internal armed conflict apply.

Reconciliation

The first rule for dealing with insurgents is to recall them to the authority of the Caliph because the Koran (49:10; see also 49:9) states that, 'All believers are but brothers; therefore seek reconciliation between your two brothers.' Caliph Ali dealt with the people of Heera in this fashion. If all efforts fail to achieve reconciliation, necessary force might be used to bring the rebels under the writ of the government. A precondition for the use of force is that the rebels must be at the preparatory stage of war, i.e. collecting arms and gathering forces to launch an attack at any time. In other words, the rebels' attack must be imminent (Marghinani 2005: 512). The use of force against rebels thus depends upon the military preparations of rebels: if the rebels' attack is not imminent, other forcible measure might be used (Marghinani 2005: 512). For instance, if the Caliph deems that the rebels are buying arms and preparing for war, he must arrest and imprison them until they repent. Imam Shafi (cited in Marghinani 2005: 512), however, says that force must not be used until the rebels commit an act of hostility because it is not lawful to kill Muslims. The starting point of conflict is the imminence of armed attack or a hostile act by the rebels.

Subjugation of rebels

The purpose of using force against the rebels is not to exterminate but to subjugate them. The Caliph should fight only those who are fighting his forces. Those who lay down their arms or withdraw from fighting shall be spared. The captives shall not be killed. Abu Hanifa, however, argues that they should be killed if it is expedient, i.e. required by military necessity (Oudah 1999: I, 118). This situation can arise if it is suspected that the captives might rejoin the rebels after their release and there is no time and place for keeping them imprisoned.

Wounded rebels

Those wounded in the battlefield shall be slain, if the rebels have a body of forces which the wounded rejoin if they are not killed and fight again. If the rebels do not have such body of forces to rejoin, slaying the wounded is forbidden. The key element seems to be avoiding the possibility of strengthening the

enemy forces by joining them and fighting again. Those who flee the battlefield shall also not be pursued because their rebellion has been quelled (Marghinani 2005: 512; Shaybani 2004: 75). Imam Shafi differs with the above Hanafi view saying that Muslim rebels can be repelled. Once they have been repelled, there is no reason to kill Muslims. Like non-Muslim belligerents, rebels shall be given safe conduct (*aman*) (Hamidullah 1968: 181). Save in self-defence, weapons that are unnecessarily destructive should not be used against the rebels (Mawardi 2005: 91).

Families and properties of rebels

The property of rebels cannot be plundered and divided among the Muslims as war booty and their families cannot be reduced to captivity or slavery for two reasons. First, Caliph Ali said and did so in the battle of Camel. Second, the Caliph is responsible for the protection of person and property of Muslims; hence, both are inviolable (Marghinani 2005: 512). The horses and arms of rebels may be taken and used against them especially if the Caliph needs them. Caliph Ali divided the arms of rebels at Basra on account of military necessity. This rule is in consonance with the general rule that a Caliph may use the arms of any subject in a time of necessity; hence, the rule is not different for fighting the rebels. Any property taken from rebels during the conflict shall be kept in custody and given back when the rebels repent (Marghinani 2005: 513) or are defeated. Most of these rules are succinctly put by Caliph Ali (Shaybani 2004: 75) thus: 'Do not pursue the retreater, do not execute the prisoner, do not kill the wounded, no veil should be opened [i.e. no woman should be molested or made captive], and no property should be taken.'

Women and slaves among rebels

If a belligerent woman from the rebels is caught fighting, she shall be detained until no rebel remains in the battlefield, i.e. the conflict is ended but she shall not be executed (Haskafi 1978: II, 613). It is permitted to fight those women who are taking active part in hostilities, and they may be killed in combat. If a slave is found fighting in the army of rebels, he could be killed. But a slave who is not taking part in fighting but only serves his master should be detained until no rebels remain in the battlefield. He should not be executed (Shaybani 2004: 76).

Plunder and pillage

Plunder and pillage is specifically forbidden in internal armed conflict. During the battle of Nahrawan, Caliph Ali threw back whatever his army had taken from the opposite party. Whoever recognised his property took it. The last thing to be recognised was a cooking pot, which was taken by its owner (Shaybani 2004: 76).

Punishment for rebellion

Islamic law permits the government to kill, repulse and subjugate the rebels and to seize their property to the extent it is deemed necessary. But once the rebels are overpowered and disarmed the security of their lives and properties shall be ensured. The rebels, however, can be punished for crimes not necessitated by the conflict such as drinking liquor, stealing, adultery or fornication (Oudah 1999: I, 121). The death penalty for rebellion is not clear from the reading of verse 49:9 but is based on the following two sayings of the Prophet Muhammad (cited in Oudah 1999: III, 59): 'Whoever makes a commitment of allegiance to his Imam is under the obligation to obey him as far as possible. If anyone tries to wrest the leadership of his Imam, behead him' and 'if my Ummah is untied and then someone rises against it, behead him, whoever he may be.'

Recognition of belligerency

Islamic law gives the right of full belligerency to the rebels. The territory under the control of rebels is considered as a de facto state (Hamidullah 1968: 182). The judgments of their courts are not reversible. If someone is tried in a rebel court, he cannot be retried by the state for the same offence (Shaybani 2004: 80). Any loss of life and property caused during the conflict is not punishable even if the culprits are identified. Similarly, revenue and taxes collected by the rebels absolve the individuals concerned and the Caliph cannot recollect revenue and taxes upon reconquest. If a merchant pays customs to the rebels, he will have to pay custom again upon entering the Muslim state as if it were a different state (Mawardi 2005: 92). Whoever joins the rebels and fights along with them will not be treated as apostate, his property will not be distributed among his heirs and his marriage shall not be treated to have come to an end (Shaybani 2004: 81).

Non-Muslim rebels

Hamidullah (1968: 186) argues that rebellion by non-Muslim subjects would be considered rebellion in a case where their territory is surrounded on all sides by the Muslim state. If it is not, their rebellion would be treated as a conflict with non-Muslims, i.e. a conflict of international character. Non-Muslim rebels joining hands with Muslim rebels are entitled to the same treatment as Muslim rebels.

The practices of Caliphs Abu Bakr and Ali

The question of armed conflict among Muslims or rebellion surfaced immediately after the death of the Prophet Muhammad, but the most organised rebellions were fought by the Caliphs Abu Bakr and Ali. The Third Caliph,

Uthman, was killed by the rebels but it was the Fourth Caliph who took the rebels on (Tabari 2003: III, 381). This is why instances of the practices of the First and Fourth Caliphs are invariably referred to by Muslim jurists in support of their arguments. Some of the practices but most importantly instructions of these two Caliphs to their commanders and forces are worth noting. Their practices and instructions do not have the force of the Sunnah of the Prophet Muhammad but definitely indicate the nature of and provide guidance on the rules governing the conduct of internal armed conflict. Some of the *fiqh* rules are solely based on the practices of these Caliphs because of their first-hand knowledge of the Koran and the Sunnah.

After the death of the Prophet Muhammad, several Muslim tribes stopped paying *zakat* and other taxes. Some even renounced the Islamic faith. This was considered as rebellion and as secession from the Muslim state by the First Caliph, Abu Bakr. He sent different military expeditions to bring them back into the fold of Islam. These military expeditions are known as the wars of apostasy (*ridda*). Abu Bakr gave the following instructions to commander Usamah before biding him farewell at the expedition of Qudah and Abil (Tabari 1993: X, 16):

> Oh army, stop and I will order you [to do] ten [things]; learn them from me by heart. You shall not engage in treachery; you shall not act unfaithfully; you shall not engage in deception; you shall not indulge in mutilation; you shall kill neither a young child nor an old man nor a woman; you shall not fell palm trees or burn them; you shall not cut down [any] fruit-bearing tree; you shall not slaughter a sheep or a cow or a camel except for food. You will pass people who occupy themselves in monks' cells; leave them alone, and leave alone what they busy themselves with. You will come to a people who will bring you vessels in which are varieties of food; if you eat anything from [those dishes], mention the name of God over them. You will meet a people who have shaven the middle of their head and have left around it [a ring of hair] like turbans; tap them lightly with the sword.

On every occasion when Caliph Ali confronted an enemy, he gave the following instructions to his men before and during the combat (Tabari 1996: XVII, 30):

> Do not fight them unless they attack you first. You, praise be to God, have a good case and holding back from fighting them until they attack will strengthen it. If you fight them and defeat them, do not kill the fugitives, do not finish off the wounded, do not uncover their nakedness, and do not mutilate the slain. If you reach their abodes, do not tear aside a curtain, enter a dwelling without permission, or cease any of their property apart from what you find in the army camp. Do not do harm against any woman, even if they utter abuse against your honour and vilify your leaders and righteous men …

On the occasion of fighting in Basra, Caliph Ali called out aloud in order to restrain his men (Tabari 1997: XVI, 102): 'Don't pursue those who flee! Don't finish off the wounded! Don't go into any houses!'

Humane law

The instructions of Caliph Ali demonstrate one dominant theme: humanity and kindness towards the rebels. The ultimate objective of an internal conflict is to bring the rebels back under the writ of the Muslim state. The aim is not to kill them. Therefore, they are treated humanely during and after the conflict. Another reason for the humane treatment is the nature of an internal conflict in Islamic tradition: it is between Muslims who are considered to be one brotherhood and *ummah*. Most of the conflicts in the Muslim states are among Muslims armed groups or between the state armed forces and the armed groups. This is why it is very important to emphasise the application of these rules in current conflicts especially the armed groups who claim that they comply with Islamic law, on the one hand, and do not recognise the law of armed conflict, on the other. These rules should also be relied on when fighting breaks out between two Muslim states, for example, in the Iran–Iraq war of 1980s and Iraq's invasion of Kuwait in August 1990.

Verse 49:9: a mini-convention

Several key principles can be derived from verse 49:9. First, the Koran did not rule out the fact that Muslim will fight with each other. Second, it lays down that the fundamental rule is to seek reconciliation between warring parties. It does not allow aggression by one group against the other. Verse 49:9 permits fighting against aggression until the aggressors come to 'Allah's command', i.e. join the people of justice. Third, any reconciliation must be based on fairness and justice must be maintained. In Islamic tradition, the concepts of fairness and maintenance of justice are very broad and a comprehensive code of rules can be developed to cover every aspect of an internal armed conflict. Regarding justice, the Koran (4:135) states: 'Stand out firmly for justice, … , even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor … if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do.' The following are just a few instances where the Koranic concept of justice could be applied together with verse 49:9. To be fair and maintain justice in a Muslim state, any war crimes committed by the rebels as well as the state security forces can be prosecuted so that war criminals do not go unpunished. Any such prosecution must be fair. Let us take an example from the armed conflict in Pakistan between the TTP and the security forces of Pakistan. The TTP deliberately targets civilians as a part of their strategy. They can be prosecuted for their crimes but in a fair way. Their trial must meet the standards of a fair trial. Fairness and justice also would require prosecuting the excesses against the TTP by the

security forces of Pakistan. Verse 49:9 can act as a mini-convention of an armed conflict among Muslims.

Conclusion

Islamic law recognises the concept of an internal armed conflict. There is no detailed code on how to conduct an internal armed conflict, but the Koran provides some foundational rules. The practices of the First and Fourth Caliphs also provide guidance on the subject. Classical juristic law shed further light on the conduct of an internal armed conflict. The absence of a detailed code on the matter leaves open the window for developing rules to cover different aspects of an internal armed conflict. The most significant point that needs to be kept in mind when developing new rules for governing an internal armed conflict is the humane nature and spirit of the relevant verses of the Koran. The unique feature of the Islamic law of internal armed conflict is that it applies even if the conflict is between two or more Muslim states with distinct territorial boundaries. This signifies that all conflicts among Muslim states would be governed by a very humane code, and it is hoped – despite the fact that all conflicts are brutal – that human suffering will be reduced.

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4 The Islamic law of *qital* and the law of armed conflict

The purpose of this chapter is to compare the Islamic law of *qital*, discussed in Chapters 2 and 3, with the law of armed conflict in order to find out to what extent they are compatible. Our aim is not to engage in a detailed comparison but to compare the basic and some general principles to see whether the fundamental rules of both legal systems are compatible. We also aim to find out whether the general tenor and broader purposes of both legal systems are compatible. A lot has been written on the law of armed conflict (Fleck 2008; Green 2000; Haye 2008; Henckaerts and Doswald-Beck 2005; Kalshoven and Zegveld 2001; Kolb and Hyde 2008; Moir 2008; Rogers 2004) and any detailed discussion here would be superfluous. Similarly, the rules of the Islamic law of *qital* have been discussed in Chapters 2 and 3 and do not need repetition. Therefore, what follows is a broad comparison of the Islamic law of *qital* and the law of armed conflict.

This chapter is divided into four sections. The first section compares the nature and purposes of the law of armed conflict with the nature and purposes of the Islamic law of *qital*. The second compares the basic principles of the law of armed conflict with the basic principles of the Islamic law of *qital*. The third section is the main section and it is divided into three subsections:

1. The first compares the general principles of the law of armed conflict with the general principles of the Islamic law of *qital*.
2. The second compares those principles of the Islamic law of *qital* which we call the grey areas with the law of armed conflict.
3. The third discusses those aspects of armed conflicts which the Islamic law of *qital* do not cover, i.e. the blind spots.

The fourth section concludes the chapter.

Nature and purpose

The origin of the law of armed conflict can be traced back to ancient civilisations, but the modern history of the law of armed conflict began with the Lieber Code of 1863, followed by several international declarations and conventions

(Ministry of Defence [UK] 2005: 6–7). In 1859, Henry Dunant was travelling across the war-ravaged plains of Lombardy and was horrified to see thousands of wounded soldiers left without care facing certain death. The idea of the Red Cross, which subsequently became the International Committee of the Red Cross (ICRC) was born from this dreadful sight in Dunant's mind (see Bory 1982; Dunant 1986). The ICRC played a pioneering role in the development of the law of armed conflict. The Islamic law of *qital* was also born as a response to deal with issues emerging from the battles of Prophet Muhammad with his enemies. None of the rules was born in a vacuum but were pragmatic responses to actual battles and issues directly related to these battles. Both legal systems were born in response to actual armed conflicts. There is a similarity of circumstances that gave birth to the law of armed conflict and the Islamic law of *qital*.

The main purpose of the law of armed conflict is to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of people, who are not, or are no longer, taking part in the conflict (Ministry of Defence [UK] 2005: 3). In simple words, the purpose of the law of armed conflict is to humanise armed conflicts. The main purpose of the Islamic law of *qital* is to minimise human suffering in an armed conflict. Therefore, the basic tenor and purposes of the law of armed conflict and the Islamic law of *qital* are compatible.

Basic principles

The law of armed conflict has a list of general principles but it has four basic principles: military necessity, distinction, proportionality and humanity. The Islamic law of *qital* has a list of general principles and four similar basic principles: military necessity, distinction, proportionality, humanity and an additional fifth principle of accepting an offer of peace during armed conflict.

Military necessity

Military necessity permits a party to an armed conflict to use that degree and kind of force that is required to achieve the legitimate purpose of the conflict, i.e. complete or partial submission of the enemy as soon as possible with the minimum loss of life and resources. This use of force must not be otherwise prohibited by the law of armed conflict and should be controlled (Ministry of Defence [UK] 2005: 21–2). Military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage (Additional Protocol I [AP I] 1977, Art. 52[2]). The modern law of armed conflict takes into account military necessity and it cannot be used to justify violations of law (Ministry of Defence [UK] 2005: 23).

Military necessity is also one of the basic principles of the Islamic law of *qital*. The Koran (2:190; 22:39) allows the use of force in order to achieve military objectives. Once military objectives are achieved, further attacks are not allowed. The Koran (2:193; see also 2:192) states 'fight them until there is no Fitnah [mischief] anymore, and obedience remains for Allah. But, if they desist, then aggression is not allowed except against the transgressors.' The military objectives in this verse seem to be the removal of mischief. Once that objective is achieved, further attacks are not allowed. The phrase 'if they desist' can be interpreted to cover all those combatants who are put out of action by being wounded or captured or unable to fight for whatever reason because they are no longer fighting. In essence, they desist from fighting. The principle of military necessity in the law of armed conflict and the Islamic law of *qital* is compatible.

Distinction

The second basic principle of the law of armed conflict is distinction. Military objects are legitimate targets but a distinction must be made between military and civilian objects and combatant and non-combatants. 'In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives' (AP I, Art. 48). The principle of distinction is also inherent in customary international law. Distinction between military and civilian objects and combatants and non-combatants is also one of the basic principles of the Islamic law of *qital*. The Koran (2:190) does not allow indiscriminate killing as it states that 'fight in the way of Allah against those who fight you' and warns: 'do not transgress' these limits. This terse verse contains three important rules. First, it gives permission to fight. Second, fighting is permitted only with those who are fighting Muslims, i.e. combatants. Third, it warns not to transgress the limits set by Allah and the Prophet Muhammad, i.e. the two primary sources of Islamic law. The principle of distinction in the law of armed conflict and the Islamic law of *qital* is compatible.

Proportionality

The third basic principle of the law of armed conflict is proportionality. Proportionality requires that the losses resulting from a military action should not be excessive in relation to the expected military advantage. Despite its importance, proportionality is not the subject of an independent article but AP I refers to it in two different places. In the first instance, it is mentioned in relation to indiscriminate attack: 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the

concrete and direct military advantage anticipated' (AP I, Art. 51[5][b]; see also the 1907 Hague Regulations IV (HR IV), Art. 23[e]). In the second instance, it has been mentioned in identical language in relation to precautions in attacks (AP I, Art. 57[2][a][iii] and [b]). Proportionality is one of the basic principles of the Islamic law of *qital*. The Koran (16:126) does not allow disproportionate harm: 'and if you were to harm (them) in retaliation, harm them to the measure you were harmed. And if you opt for patience, it is definitely much better for those who are patient.' Several Koranic verses (see 40:40; 42:40) deal with proportionality but verse 16:126 is the most relevant as it is conflict specific: '[H]arm them to the measure you were harmed.' It was revealed in the battle of Uhud (3 AH) to prevent Muslims from committing excesses in harming the enemy. The principle of proportionality in the law of armed conflict and the Islamic law of *qital* is compatible.

Humanity

The fourth basic principle of the law of armed conflict is humanity. Humanity forbids the infliction of suffering, injury or destruction not necessary for achieving legitimate military objectives. For instance, it is not necessary to attack a combatant being put out of action by being wounded or captured as no military purpose can be achieved by attacking him or her. Humanity is at the heart of the law of armed conflict and therefore can be found in several treaties (see Geneva Convention I [GC I] 1949 Art. 63[4]; Geneva Convention II [GC II] 1949 Art. 62[4]; Geneva Convention III [GC III] 1949 Art. 142 [4]; Geneva Convention IV [GC IV] 1949 Art. 158[4]; AP I, Art. 1[2]). Humanitarian concern is at the core of the Islamic law of *qital* and is one of its basic principles. The principle of humanity can be found in many verses of the Koran especially 2:190, 40:40, 42:40 and 16:126, which are discussed in Chapter 2. The principle of humanity in the law of armed conflict and the Islamic law of *qital* is compatible.

Accepting an offer of peace

The law of armed conflict does not deal with the subject of peace and peaceful relations among states. It is dealt with by Article 2(4) of the 1945 Charter of the United Nations. In Islamic law, as in the Charter of the United Nations, peace is the standard norm and the use of force is an exception to this rule (see Shah 2008). The law of armed conflict does, however, allow armistice, but an armistice is not a peace treaty. The Islamic law of *qital* allows armistice. The law of armed conflict does not oblige belligerents to accept an offer of peace during an armed conflict whereas accepting an offer of peace during an armed conflict is one of the basic principles of the Islamic law of *qital*. The Koran (8:61) lays greater emphasis on accepting an offer of peace during conflict: '[I]f they tilt towards peace, you too should tilt towards it.' This is why we regard it as the fifth basic principle. Muslims cannot refuse an offer of peace because

the Koran (2:192) says 'if they cease, Allah is oft-forgiving, [and] most Merciful' (see also 4:128). As Allah is merciful and forgiving, so shall be the Muslim army. The law of armed conflict does not have an equivalent principle requiring accepting an offer of peace during an armed conflict. The four basic principles of the law of armed conflict and the Islamic law of *qital* are compatible. The Islamic law of *qital*, however, has an additional principle of accepting an offer of peace during an armed conflict.

General principles

The law of armed conflict has a list of general principles. Similarly, the Islamic law of *qital* has a list of general principles. The general rules of both legal systems are discussed under three subheadings: existing rules, naval warfare less clear rules and air warfare non-existing rules.

Existing rules

Civilian immunity

Civilians and civilian objects are protected under the law of armed conflict. Parties to an armed conflict must always distinguish between civilians and combatants and civilian objects and military objects (AP I, Art. 48). The civilian population also enjoys 'general protection against dangers arising from military operations' (AP I, Art. 51[1]) but collateral damage is accepted (AP I, Art. 51[5][b]). The principle of civilian immunity is customary and applies to conflicts of international and non-international character. In addition, the 1977 Additional Protocol II (Art. 13[1][3]) specifies that 'civilians shall enjoy general protection against the dangers arising from military operations … unless and for such time as they take a direct part in hostilities'. Collateral damage is not prohibited per se but the principle of proportionality must not be breached. The Islamic law of *qital* is based on the premise that everything is immune from attack unless it is explicitly permitted to be attacked. The Islamic law of *qital* clearly states to fight only those who fight you, i.e. combatants. It does not allow wanton killing and destruction of property (Koran, 2:190). The principle of civilian immunity in the law of armed conflict and the Islamic law of *qital* is compatible.

Genocide

Genocide during both war and peace is a serious crime under the law of armed conflict and the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Article 1 of the Genocide Convention defines genocide as:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.

This definition has both mental and material elements, i.e. certain acts committed with certain intent. This definition has been incorporated in the 1993 Statute of International Criminal Tribunal for former Yugoslavia, the 1994 Statute of International Criminal Tribunal for Rwanda and the 1998 Rome Statute of the International Criminal Court (ICC Statute) and is considered as one of the most serious war crimes. The Islamic law of *qital* prohibits genocide in times of war and peace. The Koran (5:32) states: 'Whoever kills a person not in retaliation for a person killed, nor (as a punishment) for spreading disorder on the earth, is as if he has killed the whole of humankind, and whoever saves the life of a person is as if he has saved the life of the whole of humankind.' Verse 5:32 has two parts: 'prohibiting the killing' of and 'saving the lives of innocent persons'. The rule of prohibiting the killing of innocent persons can be relied on for preventing or punishing the crime of genocide whereas the rule of saving innocent lives can be relied on for humanitarian intervention. These rules are applicable to everyone as the word used is 'person', not a Muslim or a believer. The principle of prohibiting genocide in the law of armed conflict and the Islamic law of *qital* is compatible.

Crimes against humanity

The term 'crimes against humanity' originated from the term 'the laws of humanity' mentioned in the preamble of the 1907 Hague Convention IV (see Bassiouni 2007: 135) but was first defined in the 1945 Charter of the International Military Tribunal at Nuremberg. Article 6(c) defines crimes against humanity as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This definition clearly overlaps with the definition of genocide given in the Genocide Convention. Since 1945, crimes against humanity have been incorporated in several legal texts such as the 1993 Statute of International

Criminal Tribunal for former Yugoslavia, 1994 Statute of International Criminal Tribunal for Rwanda and the ICC Statute. In the Islamic law of *qital*, 'crime against humanity' is not defined but is certainly an offence under Islamic criminal law. Killing one innocent person is an offence; therefore, killing more than one person is also an offence. Crimes against humanity can also be covered under the Islamic law prohibiting genocide. There is, however, need for a clear definition and punishment for both genocide and crimes against humanity under the Islamic law of *qital*. Despite the lack of clear definition in the Islamic law of *qital*, the essence and spirit of dealing with crimes against humanity in the Islamic law of *qital* and the law of armed conflict are compatible.

Prisoners of war

Article 4 of the GC III spells out the categories of person entitled to prisoner-of-war status. The detaining power is responsible for their treatment (Art. 9) and maintenance free of charge (Art. 15). 'Prisoners of war must at all times be humanely treated' (Art. 13) and they 'are entitled in all circumstances to respect for their persons and their honour' (Art. 14). A prisoner of war shall be subject to the laws of the detaining power which shall take judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws (Art. 82) including for acts committed prior to capture (Art. 85). Prisoners of war may not be sentenced to different penalties than specified for the forces of detaining power for the same offences (Art. 87). 'Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities' (Art. 118). GC III is very elaborate and covers a wide range of other issues related to prisoners of war, such as medication, labour, exterior communications and drawing up wills. GC III does not prohibit the death penalty (Art. 100).

The Islamic law of *qital* allows the taking of war captives (Koran 47:4) but it does not define the categories of person entitled to prisoner-of-war treatment. Captives should be treated humanely and fed well during their captivity: 'And they give food, out of their love for [God], to the needy, and the orphan, and the captive' (Koran, 76:8). Enemy persons can be imprisoned and must not be released until the war is finally over. If there is a risk that captives might rejoin their force and attack again, they must not be released. The Koran (47:4) specifies two ways of releasing captives: they may be released as a favour shown to them or after they pay a ransom. The obligatory rule of the Koran (47:4) is to arrest and keep the captives 'until the war throws down its load of arms'. Then either release them as a favour or after they pay a ransom. The amount of ransom is not specified. It can be a nominal sum. It is important to note that only the head of state or his delegate can ask for ransom, not non-state actors. A war captive has the right to draw up wills regarding his property at home which will be communicated to the concerned person. Among prisoners, a mother should not be separated from her child.

The dignity of the prisoner should also be respected according to his or her position. 'Pay respect to the dignitary of a nation who is brought low' said the Prophet Muhammad (see Hamidullah 1968: 215). The Islamic law of *qital* allows trial of crimes committed before capture (cf. GC III, Arts 82, 85). The practice of the Prophet Muhammad indicates that war captives were given punishment for their past crimes, for example, some captives of the battle of Badr were punished. There is some difference in details but the general principles of the law of armed conflict and the Islamic law of *qital* on the treatment of war captives is compatible.

War crimes

International law recognises that certain violations of the laws and customs of war, most of which were codified in the Hague Conventions of 1899 and 1907 – are war crimes (Ratner 2007: 420). The 1945 Charter of the International Military Tribunal at Nuremberg defined war crimes as 'violations of the laws or customs of war'. The 1949 four Geneva Conventions contain lists of war crimes called 'grave breaches' and 'other violations.' Grave breaches include wilful killing, torture or inhuman treatment (including medical experiments), wilfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or civilian to serve in the forces of the hostile power, wilfully depriving a prisoner of war or protected civilian of the rights of a fair and regular trial, unlawful deportation or transfer of a protected civilian, unlawful confinement of a protected civilian, taking of hostages, making civilians and non-defended localities the object or inevitable victims of attack, the perfidious use of the Red Cross or Red Crescent emblem, transfer of an occupying power of parts of its population to occupied territory, unjustifiable delays in repatriation of prisoners of war, apartheid, attacks on historic monuments and depriving protected persons of a fair trial (see GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147; see also AP I Art. 110). Other violations of the Geneva Conventions and Additional Protocols are not grave breaches but are still regarded as war crimes. The ICC Statute has added some violations of the laws and customs of war to the list of war crimes. State parties are obliged to penalise grave breaches. The grave-breaches provisions apply only in armed conflict of an international character. There is a separate and rather limited set of rules that applies to a conflict of non-international character. This set of rules includes Common Article 3 of the four 1949 Geneva Conventions, AP II, prohibiting torture, hostage-taking, murder and ill-treatment. The ICC Statute also criminalises acts such as violence to life and person, outrages upon personal dignity, hostage-taking and summary execution.

Criminal law is a very developed branch of Islamic law. It applies in times of both war and peace. The practice of the Prophet Muhammad shows that he applied criminal law to various offences committed during armed conflicts.

Terms such as crimes against humanity and genocide are not available in Islamic legal texts but certainly these offences are punishable under Islamic criminal law. For instance, killing an innocent person is a crime and so is the act of killing 100 innocent people. It does not matter whether they were killed during time of war or peace. It is simply a crime. It is not relevant whether war crimes are committed in international or non-international conflicts. The law of armed conflict categorises war crimes into grave breaches and other violations whereas Islamic criminal law does not. The law of armed conflict ties war crimes such as grave breaches to an international armed conflict and has no application in conflicts of non-international character. In contrast, Islamic criminal law recognises war crimes in both kinds of conflict. The Islamic law of *qital* has a wider field of application than the law of armed conflict. Despite these differences, in essence the law of armed conflict and the Islamic law of *qital* are compatible.

Rape as a war crime

The treatment of rape as a war crime evolved over the years but today international law recognises rape as a crime against humanity. GC IV (Art. 27) and AP I (Art. 76[1]) state that 'women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault' (see also AP II, Art. 4[2][e]). Article 5(g) of the Statute of the International Criminal Tribunal for former Yugoslavia and Article 3(g) of the Statute of the International Criminal Tribunal for Rwanda describe rape as a crime against humanity and a war crime. Article 7 of ICC Statute recognises 'rape' and 'sexual enslavement' as a crime against humanity. Article 8(e)(vi) criminalises rape and sexual slavery committed in conflict of non-international character. Islamic law does not allow sexual intercourse – consensual and non-consensual – outside marriage. This rule is applicable in times of peace and war. The Koran (24:2) prescribes 100 stripes for unlawful sexual intercourse but the statutory laws of some Muslim states punish it with stoning to death. Rape is a serious offence punishable with death under Islamic criminal law. Hence, rape committed during armed conflict is treated as a serious crime by Islamic criminal law. The law of armed conflict and Islamic criminal law treat rape as a war crime and are compatible.

Protection of the environment

AP I (Art. 35[3]) prohibits 'employ[ing] methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'. The Additional Protocol I (Art. 55) requires that:

> care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended

> or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. Attacks against the natural environment by way of reprisals are prohibited.

Islamic law shows concern for the protection of environment. The practice of the Prophet Muhammad indicates that environmental protection was taken into consideration in planning and during armed attack. The principle in Islamic law is not as clear as it might be, but its spirit and concern for environmental protection is compatible with the law of armed conflict. There is, however, a need for developing clear Islamic rules for the protection of environment during armed conflict.

Individual criminal responsibility

Individual responsibility for crimes against humanity, war crimes and crimes against peace was recognised in Article 6 of the Charter of the International Military Tribunal at Nuremberg. Other international legal texts recognise that individuals are responsible for the war crimes that they commit themselves or which they order or assist others to commit. Article 7 of the Statute of the International Criminal Tribunal for the Former Yugoslavia states that 'a person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime … shall be individually responsible for the crime' (see also Statute of the International Criminal Tribunal for Rwanda 1994, Art. 6). Article 25 of the ICC Statute states that a person shall be individually responsible if he commits the crime himself or orders, solicits or induces the commission of a crime; aids, abets or otherwise assists in its commission or its attempted commission; or contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose.

Islamic criminal law is based on the concept of individual responsibility and punishment. The rule applies both in times of war and peace. Anyone who commits an unlawful act has to bear its consequences (Oudah 1999: II, 96). The principle of individual responsibility is based on the following verses of the Koran (35:18): 'No bearer will bear the burden of any other person'; 'if someone acts righteously, he does so for the benefit of his own soul, and if someone commits evil, he does so against it' (41:46) and 'whoever does evil shall be requited for it' (4:123). Islamic law does not allow obeying unlawful orders. In fact, Islamic law requires disobedience of an unlawful order. The principle of individual responsibility in the law of armed conflict and Islamic law is compatible.

Mutilation

The law of armed conflict prohibits mutilation in conflict of international and non-international character (see Common Art. 3[1]; GC I, Art. 12[2]; GC II,

Art. 12[2]; GC III, Art. 13; GC IV, Art. 32; AP I, Arts 11[2][a]; 75[2][a]). Islamic law also prohibits mutilation. The Koran (16:126) states, 'and if you were to harm (them) in retaliation, harm them to the measure you were harmed. And if you opt for patience, it is definitely much better for those who are patient.' Verse 16:126 was revealed to prevent mutilation of enemy persons by the Muslims. Abu Bakr, the First Caliph, issued orders forbidding it (Sarakhsiy cited in Hamidullah 1968: 205). Mutilation and even the cruel treatment of beasts are not allowed (Mawardi 2005: 66; Shaybani 2004). The rule prohibiting mutilation in the law of armed conflict and the Islamic law of *qital* is compatible.

Spies

Article 29 of HR IV states that 'a person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.' A spy is not entitled to the status of the prisoner of war (AP I, Art. 46) and is at the mercy of his captors but shall not be punished without a trial (HR IV, Art. 30). The trial must meet the standard of a fair trial (AP I, Art. 45[3]) especially standards of Article 75 of AP I.

Espionage is an important aspect of war. The Prophet Muhammad used to send men before embarking on a military expedition to gather information against the enemy. Espionage took the form of a reconnaissance band or individual sent in disguise to enemy tribes or towns (Bukhari 2008: 52). Other warring tribes also relied on espionage. The Prophet Muhammad reacted differently to the treatment of spies on different occasions. On one occasion, spies were beaten to extract information from them about the position of their own forces (Bukhari 2008: 59; Muslim 2008: 670). On another occasion (4 AH), Umro met two spies of Quraysh while on his way from Mecca to Medina. He tried to arrest them but one resisted arrest and was killed on the spot. The other acquiesced to arrest and was taken to Medina. The Prophet Muhammad approved the actions of Umro (Tabari 2003: 235). On another occasion, the Prophet Muhammad pardoned Hatib Ibn Abi Baltaah who wrote a letter to Quraysh that the Muslims in Medina are preparing to attack Mecca. He was pardoned after it transpired that he was worried about his property in Mecca if the city came under Muslim attack. He meant no ill-will (Hamidullah 1968: 234). It is also not clear from the practice of the Prophet Muhammad whether spies were tried or not. Hanafi jurists such as Abu Yusuf and Shaybani (cited in Hamidullah 1968: 235) said that non-Muslim spies should be given capital punishment. No distinction is made, as far as punishment is concerned, between a male and a female spy. Sarakhsiy (cited in Hamidullah 1968: 235) argues that a minor should not be given capital punishment. Similarly, no distinction is made in Islamic law between spies of war or peace. We cannot derive a clear rule on the treatment of spies from the practices of

the Prophet Muhammad as each case was dealt with on its own merits. There is, however, no instance where spies were killed after arrest. There is also no rule available in the primary sources of Islamic law permitting the outright execution of spies. The Islamic legal rule on the treatment of spies is not as clear as it might be, but it is compatible with the law of armed conflict to the extent that both do not allow the outright execution of spies. The Islamic legal rule, however, could be expanded and clarified as primary sources do not prohibit the fair treatment of spies. Just treatment and fair trial of spies is in accord with the general principles of Islamic law and concept of justice:

> O you who believe, be upholders of justice … even though against [the interest of] your selves or the parents, and the kinsmen. One may be rich or poor, Allah is better caretaker of both. So do not follow desires … If you twist or avoid [the evidence], then, Allah is all-aware of what you do. (Koran, 4:135).

Perfidy and ruse of war

The law of armed conflict prohibits perfidy but allows ruse of war. Article 37 (1) of AP I states that 'acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy'. For instance, the feigning of intent to negotiate under a flag of truce or of surrender is perfidy. In contrast to perfidy ruse is defined as:

> acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. (AP I, Art. 37[2])

Some examples of these are the use of camouflage, decoys, mock operations and misinformation. Some perfidious acts such as misusing the distinctive emblem of the Red Cross or the Red Crescent fall within the category of grave breaches of the law of armed conflict (AP I, Art. 85[3][f]).

The Islam law of *qital* does not allow perfidy (Shaybani 2004). In fact, perfidious breach of agreements is one of the reasons for resuming hostilities. The Prophet Muhammad, on several occasions, resumed hostilities after the other party acted perfidiously. The example of Banu Nadir is a perfect example of perfidy followed by an armed attack by Muslims. The Koran forbids treachery and all perfidious acts (8:71) and rewards those who are good in deeds (5:13). The Koran (5:1) prohibits perfidious actions, on the one hand, and obliges Muslims to fulfil their obligations, on the other (see Muslim 2008:

629). The Islamic law of *qital* and the law of armed conflict are compatible on the prohibition of perfidious behaviour in an armed conflict.

Ruses of war, contrariwise, are allowed and encouraged (Muslim 2008: 630) under the Islamic law of *qital*. The Koran (8:16) says, 'Whoever turns his back to them on such a day – unless it is for a tactic in the battle, or to join a company – turns with wrath from Allah, and his abode is … [Hell].' Verse 8:16 provides punishment for showing cowardice but permits ruses of war. The Prophet Muhammad used to say that war is the name of deceiving the enemy (Bukhari 2008: 277; Muslim 2008: 630). The example of the battle of Khandaq described in Chapter 2 is a good example of the ruse of war. The Islamic law of *qital* and the law of armed conflict have compatible rules related to perfidy and ruses of war.

Child soldiers

Article 77(2) of AP I requires parties to the conflict to take 'all feasible measures' to prevent children below the age of fifteen taking a direct part in hostilities. State parties are also required to refrain from recruiting them into their armed forces. Article 8 of the ICC Statute lists the conscription or enlistment of children under the age of fifteen into a state's armed forces or using them to participate actively in hostilities as a war crime.

The Islamic law of *qital* does not allow recruiting and sending child soldiers to the battlefield. The minimum age required to participate in *qital* is the age of fifteen. This is a consensus view of the Muslim jurists based on the practice of the Prophet Muhammad (Bukhari 2008: 15, 281). Before starting the military expedition, the Prophet Muhammad used to examine his army and sent the young ones back to Medina. This is what he did before the battle of Badr (Bukhari 2008: 51). A fourteen-year-old boy, Ibn Omer, asked the permission of the Prophet Muhammad to participate in the battle of Uhud (3 AH). He was not allowed to participate. After a year he was given permission to participate in the battle of Khandaq (4 AH) as he was fifteen by then (Bukhari 2008: 280–1). The rule was followed in later wars by successive Caliphs. The Islamic law of *qital* is categorical on the prohibition of child soldiers whereas the law of armed conflict requires only taking feasible measures. However, the general tenor and purpose of the law of armed conflict and the Islamic law of *qital* are compatible.

Quarter

In the law of armed conflict quarter, means 'refusing to spare the life of anybody, even of persons manifestly unable to defend themselves or who clearly express their intention to surrender' (Verri 1992: 93). Article 23(d) of HR IV prohibits the denial of quarter. Article 40 of AP I not only prohibits to 'order that there shall be no survivors' but also prohibits to 'threaten an adversary therewith' and 'or to conduct hostilities on this basis'. Article 4(4) of AP II extends the rule

to an armed conflict of non-international character. The Islamic law of *qital* has an equivalent and established concept called *aman*: providing safe conduct to everyone especially an enemy person (see Koran 9:6) but it is not the same as quarter in the law of armed conflict. *Aman* is, however, a broader concept and could be used to achieve the purposes of quarter. For instance, *hors de combat* could be spared under the principle of *aman*. An exact rule, however, could be found in the example of the Prophet Muhammad at the time of attacking Mecca when he declared that those who took refuge in the courtyard of Kaba or the house of Abu Sufyan would be safe. Safe quarter was offered to those who chose not to fight the Muslim army. The Islamic principle of *aman* is applicable in conflict with Muslims and non-Muslims. The tenor and purpose of quarter in the law of armed conflict and *aman* in the Islamic law of *qital* are compatible.

Hostage-taking

Common Article 3 of the four 1949 Geneva Conventions prohibits the taking of hostages (see also GC IV, Art. 34; AP I, Art. 75[2][c]). Article 47 of the GC IV and Article 85(2) of AP I both treat the taking of hostages as a grave breach of both the convention and the protocol respectively. The Islamic law of *qital* prohibits the taking of hostages, especially of messengers and emissaries. The prohibition is absolute even if the opposite party has taken hostages or has killed Muslim hostages. The principle of prohibiting hostage-taking under the law of armed conflict and the Islamic law of *qital* is compatible.

Internal armed conflict

The law of armed conflict provides two sets of rules for two different kinds of conflict: conflicts of international and non-international characters. The set of rules dealing with armed conflict of international character is very elaborate, whereas the set of rules applicable to an armed conflict of non-international character is limited. Common Article 3 of the four 1949 Geneva Conventions and AP II specifically deal with armed conflict of non-international character. AP II has not been widely ratified and is applicable to state parties only. As most of the rules applicable to armed conflict of international character have acquired the status of customary norms and therefore are applicable to armed conflicts of non-international character (see Henckaerts and Doswald-Beck 2005). There is also a growing body of scholarly opinion indicating the application of all rules to both kinds of armed conflicts (see Crawford 2010; *Prosecutor* v. *Dusko Tadic* 1995). Common Article 3 obligates each party to the conflict to treat humanely 'in all circumstances' and without distinction those who are taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause. Common Article 3 not only protects civilians but also those who had laid down their arms for whatever

reason. Distinction on the basis of religion, colour, race or 'other similar criteria' (for example, nationality) is prohibited (Pictet 1952: 55). Common Article 3 prohibits 'at any time and in any place whatsoever':

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment, and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees.

It is obligatory to collect and care for the wounded and sick. Three broad categories of person may benefit from the provisions of Common Article 3: civilian, *hors de combat* and the wounded and sick.

The Islamic law of *qital* does not make a distinction between a conflict of international and non-international character on territorial basis. Islamic law categorises conflicts on the basis of the religion of parties to an armed conflict. An armed conflict between Muslims and non-Muslims is equivalent to an armed conflict of international character whereas an armed conflict between Muslim armed groups or an armed group and the government is equivalent to an armed conflict of non-international character. There is one set of laws that applies to both kinds of armed conflict. There are, however, few additional rules, which are very kind in nature, and which are applicable to an armed conflict among Muslims. For instance, Muslim rebels can be fought with the aim to subjugate rather than to eliminate them. On the contrary, it is not illegal under the law of armed conflict to aim at eliminating the insurgents and armed groups. Despite the different basis for categorising conflicts and the application of two different set of laws to armed conflicts, principles of the law of armed conflict are compatible with the Islamic law of *qital* as discussed in Chapter 3. There is, however, one aspect of the Islamic law of *qital*, which the law of armed conflict has yet to achieve, i.e. abolishing the distinction between armed conflicts of international and non-international character and to apply all the rules to all kinds of armed conflict.

Armistice

The international law of armed conflict recognises armistice. Armistice is not a peace treaty. Its main objective is to bring about ceasefire. 'An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice' (HR IV, Art. 36; see also Arts 37–41). The Islamic law of *qital* also recognises the principle of armistice as is

clear from the Koran (8:61) and the practice of the Prophet Muhammad (see Hisham 2000; Mubarakpuri 2002). The concept and general principles of armistice in the Islamic law of *qital* and the law of armed conflict are compatible.

Neutrality

The law of armed conflict recognises the principle of neutrality and the role of neutral powers (GC I Art. 4; GC II, Art. 5; AP I, Art. 19). The law of neutrality defines the relationship between states engaged in an armed conflict and those that are not participating in that conflict (Ministry of Defence [UK] 2005: 19). The Islamic law of *qital* also recognises the principle of neutrality. Several verses of the Koran (59:11–12; 60:8–9) indicate this but the most relevant verse is 9:40, discussed in Chapter 2. The main difference between the concept of neutrality in the law of armed conflict and the Islamic law of *qital* is that the former assigns different functions to a neutral power whereas the latter is more focused on the prohibition of fighting those who remain neutral in an armed conflict involving Muslims. The Islamic law of *qital* does not assign any specific role to a Muslim state as a neutral power. It is, however, encouraging that the Islamic law of *qital* does not restrain a Muslim state as a neutral power from performing humanitarian functions. Apart from this difference, the general concept of neutrality in the law of armed conflict and the Islamic law of *qital* is compatible.

Occupation

The law of armed conflict (HR IV, Art. 42) defines occupation of territory when a territory 'is actually placed under the authority of the hostile army'. The law of armed conflict, especially HR IV and GC IV, provides a set of rules that applies to occupied territories. There were cases at the time of the Prophet Muhammad where territories were occupied but each case was treated differently. However, all the incidents of occupation indicate that the aim was to eliminate their hostility towards the Muslim state. Those who agreed to a peace treaty were left on their own. The occupied territories were given powers to govern themselves according to their own standards. In some cases, land tax (*kharaj*) was imposed as a token for accepting the sovereignty of the Muslim state but the rest of the administration was left to the local people. As stated in Chapter 2, the practice of the Prophet Muhammad was to look at each case in its own context but one thing is clear from the treatment of all conquered and occupied territories: in each case, greater freedom was given to the occupied people to govern themselves. The Islamic law of occupation was further developed by the successors of the Prophet Muhammad and classical jurists and therefore is more detailed. It gives more powers of self-regulation to the occupied people. This is one of the areas that can contribute to the expansion of the law of armed conflict. In general, the law of armed conflict and Islamic law of occupation are compatible.

Humanitarian aid

The law of armed conflict allows the distribution of humanitarian aid and protection of humanitarian organisations and workers (see GC I, Arts 18, 26–7; GC II, Arts 24–5; GC III, Art. 125; GC IV, Art. 142). The Islamic legal position, however, is not as clear as the position of the law of armed conflict. The practices of the Prophet Muhammad and successive Caliphs indicate that medical and other humanitarian aid was provided to the Muslim army. The Organisation of the Islamic Conference also has an Islamic Committee for the International Crescent for alleviating suffering caused by natural disaster and war. The Islamic law of *qital* raises two questions: first, whether humanitarian aid can be provided to non-Muslims engaged in an armed conflict with Muslims and, second, whether humanitarian aid organisations and workers can be protected under Islamic law even if they provide aid to the non-Muslim party fighting Muslims. Both these questions could be answered positively. None of the primary sources of the Islamic law of *qital* prohibits providing humanitarian aid to non-Muslims in conflict with Muslims. There is no instance where the Prophet Muhammad denied humanitarian aid to someone because he was a non-Muslim fighter. The primary sources also do not allow attacking humanitarian organisations and workers providing help to non-Muslims fighting Muslims. On the contrary, there is strong evidence in the primary sources that humanitarian organisations can be protected under the Islamic law of *qital*. The Islamic law of *qital* does not allow attacking non-combatants. Humanitarian organisations and workers are non-combatants; hence, they cannot be attacked. A more specific rule, however, could be developed providing protection to humanitarian organisations and aid workers on the basis of the Koranic verses dealing with the protection of non-combatants. The Koranic verse (5:2) 'help each other in righteousness and piety' can be interpreted to provide basis for extending humanitarian aid to non-Muslims even if they were fighting the Muslims (see Hamidullah 1968: 279). This interpretation is in line with the general message of Islam: that Islam is a religion for humankind.

Naval warfare: less clear rules

The law of armed conflict regarding armed conflict at sea is to be found mainly in customary international law (Ministry of Defence [UK] 2005: 348). There are, however, treaties that codify these rules, for example, the GC II and some other twentieth-century treaties which are still relevant. Most rules of the law of armed conflict at land are extended to naval warfare (Roberts and Guelff 2005: 222). In 1995, experts developed *The San Remo Manual on International Law Applicable to Armed Conflict at Sea* which provides a contemporary restatement of the law. In general, the law of armed conflict at sea is not elaborate. Islamic legal rules dealing with naval warfare are very basic. Relatively very little is available on the subject because the Prophet Muhammad and his immediate

successors did not engage in huge naval expeditions. There are instances where boats and ships were used for various expeditions (see Chapter 2) but no separate set of rules seems to have been developed. The general and basic rules of the Islamic law of *qital*, however, apply to naval warfare as well. Islamic law on naval warfare is rudimentary whereas the law of armed conflict is relatively more developed. A common feature between the two legal systems is that the general law of armed conflict applies to naval warfare as well. Islamic law clearly needs to be expanded. Expansion is possible as the primary sources do not prohibit naval warfare; hence, developing rules for it is not prohibited either. The law of armed conflict could provide some guidance in this regard as none of its rules conflicts with Islamic law.

Air warfare: non-existing rules

The basic principles of the law of armed conflict, for example, the principles of distinction, precaution in attack, etc., are applicable to air warfare. There are, however, specific rules that are also applicable to air warfare (see generally AP I, Arts 49[4] and 57[4]). The 2009 *Manual on International Law Applicable to Air and Missile Warfare* is the most up-to-date restatement of existing international law applicable to air and missile warfare as elaborated by an international group of experts. On the contrary, the Islamic law of *qital* does not have a body of rules applicable to air warfare. There were no aeroplanes at the time of the Prophet Muhammad and his immediate successors; hence, no rules were developed to cover this aspect of *qital*. This is why we call it a blind spot of the Islamic law of *qital*. Islamic legal rules to cover air warfare, however, can be developed. The general rules of the Islamic law of *qital*, for example, distinction, humanity, proportionality, etc., are certainly applicable to air warfare. The law of armed conflict could provide some guidance in the development of Islamic legal rules for air warfare as none of its rules conflicts with the Islamic law of *qital* or the broader purposes and objectives of Sharia.

Conclusion

In this chapter, we compared various principles of the law of armed conflict with the Islamic law of *qital*. Most of the principles in both systems are compatible. There are, however, areas in both systems which need further clarification and development. The Islamic law of *qital* would need expansion to cover certain aspects of modern armed conflicts, such as air warfare and certain means of warfare, for example, suicide missions targeting military objects and the use of nuclear weapons. Islamic legal rules can be developed through individual or institutional *ijtihad* as the primary sources of the Islamic law of *qital* do not prohibit developing new rules. The Islamic law of *qital* can also get guidance from the developed areas of the law of armed conflict as none of its rules conflicts with the primary sources of the Islamic law of *qital*.

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Part II

The armed conflict in Pakistan

The purpose of the introduction was to spell out the thesis, its scope and significance. One of its objectives was also to introduce readers to Islamic law and its terminology. Part I focused on the Islamic law of *qital*: rules governing an armed conflict between Muslims and non-Muslims (an armed conflict of international character) and a conflict within a Muslim state between an armed group and government forces or among various armed groups (an armed conflict of non-international character). Part I also compares the Islamic law of *qital* with the law of armed of conflict in order to find out to what extent both legal systems are compatible.

Part I establishes that there is an Islamic law of *qital* governing conflicts of international and non-international character. It also establishes that the Islamic law of *qital* and the law of armed conflict are compatible. The Islamic law of *qital*, however, does not cover every aspect of modern armed conflict, such as air warfare and the rules for naval warfare need expansion. The Islamic law of *qital* is flexible and the current rules can be expanded and new rules can be developed in order to cover all aspects of modern armed conflict.

Part II focuses on the study of the conduct of armed conflict between the Pakistani security forces and Tehrik-i-Taliban Pakistan (TTP), the Pakistani Taliban. Pakistan is an Islamic republic hence the Islamic law of *qital* applies to the security forces of Pakistan. The TTP claims that they follow the Islamic law of *qital* in conducting what they call *jihad.* As both parties to the armed conflict show clear allegiance to the Islamic law of *qital*, it is relevant and reasonable to test their conduct of armed conflict according to the Islamic law of *qital*. The conduct of conflict by both parties is also tested under municipal laws and the law of armed conflict as these laws apply to the Pakistani armed conflict as well.

Very often it is the case that authors engage in studies of Islamic law. It is not a common trend to apply these rules to a concrete case, i.e. case studies. This is more so regarding the Islamic law of *qital*. This is a relatively under-researched area, but the emerging literature suggests renewed interest after the 11 September 2001 attacks in the USA. Most of the authors I have read focus on the analysis of rules rather than applying the rules to concrete cases. In this study, we not only study the rules but also apply them to a live armed conflict in Pakistan.

Using the armed conflict in Pakistan as a case study has several benefits. First, it is to subject the security forces of Pakistan and the TTP to a legal system to which they claim allegiance. Second, the TTP is more willing to be tested and tried under the Islamic law of *qital* rather than the law of armed conflict. It is their turf and if it can be established that the TTP violates the Islamic law of *qital*, it can send a message to the Taliban fighters that what they do is against the Islamic law of *qital* and that they can be prosecuted for it. Third, it can raise the morale of the security forces of Pakistan by showing that the Islamic law of *qital* is on their side in fighting the TTP as the latter always regards what the former is doing is un-Islamic. Finally, it would also help in eradicating false assumption and impression that somehow the Islamic law of *qital* supports every act of the TTP and other Muslim armed groups.

5 Fighting the Taliban

Pakistan is an important battlefield in the war on terror (Bush 2008). The USA has included direct drone attacks in the tribal areas of Pakistan in the new strategy in the fight against Taliban in Afghanistan (Iqbal 2008; Mullen 2008) and has sent more troops to Afghanistan as reinforcement (BBC 2009b). The US forces are increasingly using the Iraqi counterinsurgency tactics in Pakistan and Afghanistan: gathering actionable intelligence and taking out the target (*Dawn* 2008b). The Afghan government wants to go after militants inside Pakistan (Karzai 2008). The Pakistani government said it would not accept from militants anything less than to lay down their arms and accept the writ of government (Gilani 2009a). The Pakistani government made it clear that it wants to expel foreign militants from its tribal areas but would not allow direct military engagement against militants by another country (Kayani 2008a, 2008b). The government of Pakistan thinks itself 'capable of taking an effective action within the boundaries' (Gilani 2008a). The Prime Minister of Pakistan (16 September 2008) has warned the USA to stop violating the Pakistani border as it is not only against the 1945 Charter of the United Nations but is also counterproductive in Pakistan's war against militants. The USA says it has a right to cross the Pakistani border to pursue militants (Gates 2008), but in April 2009 it came to light that both governments have a tacit understanding on the issue of drone attacks inside Pakistan (*The Washington Post*, 15 February 2009). In June 2009, the USA resumed surveillance flights over Pakistan (Schmitt and Mazzetti 2009). In May 2009, the government of Pakistan changed its conciliatory stance towards militants: armed groups shall be fought until they are defeated (Zardari 2009a, 2009b) as they have become a threat to the survival of Pakistan (Gilani 2009a, 2009b). The Pakistani security forces started Operation Rah-i-Rast to 'clear' Swat of militants (Inter Services Public Relations [ISPR] 2009a). Operation Rah-i-Nijat was launched to 'clear' regions of Waziristan of militants (Khan 2009).

The purpose of this chapter is to look at the different laws applicable to the armed conflict in Pakistan. The municipal laws of Pakistan and Islamic law apply to the armed conflict in Pakistan. In order to determine the application of the law of armed conflict, the key question is that whether an armed conflict exists in Pakistan. We argue that based on factual conditions

an armed conflict exists in Pakistan and the law of armed conflict applies to the armed conflict in Pakistan. The three legal systems that are applicable to the armed conflict in Pakistan are municipal law, Islamic law and the law of armed conflict. The TTP does not have its own code of conduct for operations, but we discuss the 9 May 2009 Afghan Taliban's Code of Conduct for Mujahidin as both groups have close link with each other and the TTP relies on it. In the following chapter, the conduct of hostilities by the security forces of Pakistan and the TTP are judged under the three legal systems in order to find out whether they comply with the law.

Parties to the armed conflict

The two main parties to the conflict are the security forces of Pakistan and the TTP. The security forces include the armed forces, the Frontier Corps, the police and in some cases the levies (government forces also known as *khasadars*) of different tribal regions. Most of the operations are conducted under the overall supervision of the army. The local tribal *lashkars* (a group of village fighters), supported by the security forces, also fight the TTP in some areas. The TTP, which is discussed below, has affiliated armed groups which carry out suicide bombings and take part in fighting against the security forces. These groups include Lashkar-i-Jhangvi, Sipah-i-Sahaba Pakistan and Jaysh-e-Muhammad. They have a different origin and history than the TTP and are often described as the Punjabi Taliban (Abbas 2009). These organisations operated under state patronage rather than challenging the writ of the state and were, until very recently, focused on the struggle in Kashmir. In 2002, former President Musharraf banned these organisations but despite that they remained active and some joined the Taliban in Afghanistan and Pakistan. Other sectarian Shia and Sunni groups and criminal gangs, such as the Mangal Bagh Laskar-e-Islam of Dara Adam Khel, also commit violence but their activities are not discussed. The main armed group and party to the conflict is the TTP, which warrants a detailed discussion.

The Tehrik-i-Taliban Pakistan

During the US-led war against the Taliban, prominent Taliban and Al-Qaeda figures found shelter in the tribal areas of Pakistan. Pakistan as an ally of the USA provided an extended support to the US-led coalition. Al-Qaeda branded former President Musharraf of Pakistan as a 'traitor' and called on Pakistanis to rebel against him (Bin Laden 2007; Siddique 2007). The Pakistani forces started military operations to flush militants out of the tribal areas but some tribal figures resisted the Pakistani effort. This initiated a direct conflict between those who now constitute the TTP's leadership and the Pakistani security forces. At the start of the Afghan conflict in 2001, allies and sympathisers of the Taliban in Pakistan were not identified as 'Taliban' themselves. The transition from being Taliban supporters and sympathisers to

becoming a mainstream Taliban force (the TTP) in the tribal areas of North-West Frontier Province (renamed as Khyber Pakhtunkhwa in April 2010) was initiated when many small militant groups operating independently in the area started networking with one another. Soon, many other local groups started joining the TTP's ranks in the tribal areas, some as followers and others as partners. During this process, the Pakistani Taliban never really merged into the organisational structure of the Afghan Taliban under the leadership of Mullah Omar. They, instead, developed a distinct identity. These independent militant groups now banded together created a space for themselves in Pakistan by engaging in military attacks, on the one hand, and cutting deals with the Pakistani government to establish their autonomy in the tribal area, on the other hand (Abbas 2008).

A *shura* (council) of forty senior Pakistani tribal leaders established the TTP as an umbrella organisation (Perlez and Shah 2008a). The late Baitullah Mehsud was appointed as its *amir* (chief) (*Dawn*, 14 December 2007) and Maulana Faqir Muhammad of Bajaur Agency as the Deputy Chief (Khan 2008). Faqir Muhammad is also the Chief of Bajaur group of Taliban. Maulana Hafiz Gul Bahadur is the head of North Waziristan Taliban while Mullah Nazir is controlling the Taliban group of South Waziristan (Wazir 2008). Maulana Fazlullah is the head of the Swat chapter of the Taliban. Maulvi Omer was the spokesperson and was seen as the public face of the TTP (Khan 2008). He was arrested on 17 August 2009 (*Dawn* 2009a), and Azam Tariq was appointed as the new spokesperson of the TTP (*Dawn* 2009b). The *shura* has representation not only from all tribal agencies but also from the settled districts of the Khyber Pakhtunkhwa such as Swat, Bannu, Tank, Lakki Marwat, Dera Ismail Khan, Kohistan, Buner, Mardan and Malakand. The purpose of the formation of the TTP is to 'unite the Taliban against [foreign] forces in Afghanistan and to wage a "defensive jihad" against Pakistani forces' (*Dawn* 2007). The TTP does not want to fight the Pakistani army as it regards it as a 'national institution'. Baitullah Mehsud said that 'the war is not against Pakistan as it is not beneficial for us and Islam' (Rashid 2006). The TTP will fight the Pakistani forces only when the TTP fighters are attacked. The TTP's strategy seems to be to focus on Afghanistan rather than opening a new front in Pakistan.

Baitullah Mehsud was thirty-four years old, slightly short with black beard, a warrior belonging to the South Waziristan Agency. He hailed from the Mehsud tribe. He shunned media and did not want to be photographed, but in May 2008 he invited media to his stronghold in South Waziristan (BBC 2008). He came to prominence in 2005 when he signed a deal with the Pakistani government. As part of the deal, he had pledged not to provide any assistance to Al-Qaeda and other militants and not to launch operations against government forces (Rashid 2005). The deal was short-lived and since 2006 he has established a virtually independent zone in parts of South Waziristan Agency. Mehsud commands a force of around 2,000 militants (BBC 2007) and has moved aggressively against Pakistan's army especially when he captured around 300 soldiers in August 2007 (BBC 2007). The

soldiers were returned only when the government released twenty-five militants associated with Mehsud (Wazir 2007). Of the fifty-six suicide bombings in Pakistan in 2007, thirty-six were against military-related targets, including two against the Inter Service Intelligence (ISI), two against the army headquarters in Rawalpindi, one aimed at the air force in Sargodha and one directed at the facility of the Special Services Group (SSG) in Tarbela. For many of these attacks, the government blamed Baitullah Mehsud and his associates (Abbas 2008). This reveals the TTP's potential that it has additional resources and geographic reach. The then pro-Musharraf government has charged Mehsud with the assassination of Benazir Bhutto (Malik 2008), but Mehsud denied any involvement (Orakzai 2007). The new government of the late Bhutto's party has warned that it is premature to accuse Mehsud (*Dawn*, 14 July 2008). Baitullah Mehsud was killed on 5 August 2009 and Hakimullah took over as the new leader of the TTP (*Dawn* 2009c). The government of Pakistan banned the TTP on 25 August 2008 under the amended 1997 Anti-Terrorism Act but the TTP spokesperson termed the move as ineffective (*Dawn*, 26 August 2008).

To sum up the position of the TTP, it is a relatively newly founded organisation of Pakistani origin based in the tribal areas at the border between Pakistan and Afghanistan. It has the effective control of most of the tribal areas (Perlez and Shah 2008c). It has established Islamic courts in Mohmand, Khyber, Orakzai, Bajaur and South and North Waziristan agencies (*Dawn* 2008a). Any security posts vacated by the Pakistani forces are occupied by the TTP fighters (Orakzai 2008). The TTP's influence is also emerging in other provinces such as Punjab (Sulman 2008) and Sindh (Sabir 2008). The TTP has its own command structure and a clear mission: to fight and expel foreign forces from Afghanistan (Fazlullah 2008). The TTP does not want to fight Pakistani forces, but if fighters of the TTP are attacked or prevented from *jihad* in Afghanistan, it will fight back in self-defence. The government of Pakistan recognises the TTP as a force and had signed several peace agreements with the TTP (Orakzai 2006). These agreements, however, do not affect the TTP's mission in Afghanistan (Hamdani 2008; Kakar 2008).

Applicable legal systems

The two main parties to the armed conflict in Pakistan are the government forces and the TTP. The discussion of the three legal systems: municipal law, the Islamic law of *qital* and the law of armed conflict follows. Other branches of international law such as international criminal law and human rights law are also applicable and are therefore touched upon.

Municipal law

The municipal law of Pakistan applies to the armed conflict in Pakistan covering the activities of the security forces of Pakistan and the Pakistani Taliban.

The Pakistani Taliban are Pakistani citizens with the exception of a few foreign elements. There are several laws that would apply: the 1860 Pakistan Penal Code, the 1898 Code of Criminal Procedure, the 1901 Frontier Crimes Regulation, the 1952 Pakistan Army Act, the 1973 Constitution of Pakistan and the amended 1997 Anti-terrorism Act.

The constitutional provisions are applicable to everyone within Pakistan, but Chapter 2, which deals with fundamental rights, is the most relevant for our discussion. Article 4 states that it is the inalienable right of every individual to enjoy the protection of law and to be treated in accordance with the law. Article 5 states that 'loyalty to the state is the basic duty of every citizen' and 'obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.' Anyone challenging the writ of government in any part of the country can be held accountable for violating Article 5. Article 8 prohibits making law which is inconsistent with or derogating from fundamental rights recognised by the Constitution. Articles 4 and 8 have an overriding effect on any other laws or customs which might conflict with fundamental rights. All citizens are equal before the law and are entitled to equal protection of the law (Art. 25). The Constitution (Art. 9) guarantees the security of person and life. No one shall be arrested and detained without being informed of the grounds for such arrest. An arrested person shall have a right to consult a lawyer of his or her choice and must be produced before a magistrate within twenty-four hours of his or her arrest. This, however, does not apply to those who are kept under preventive detention for acting against the security or integrity of Pakistan. Such a person may be detained for up to three months and his or her detention may be extended only by a review board (Art. 10). The dignity of the individual is inviolable and the use of torture for extracting evidence is prohibited (Art. 14). Those imprisoned shall not undergo compulsory service which is of a cruel nature or incompatible with human dignity (Art. 11). These constitutional provisions are applicable to everyone irrespective of domicile or nationality. These rules, therefore, equally apply to foreign fighters in the tribal areas of Pakistan. The President of Pakistan has the power to declare a state of emergency in case of war or internal disturbance (Art. 232). During such emergency, fundamental rights, specified in the order, may be suspended by Presidential Order but such order must be approved by the joint session of the parliament (Art. 233). At the moment, an emergency is not declared in the tribal areas or any other part of Pakistan and, therefore, fundamental rights and the rest of constitutional provisions remain in force.

Article 245 of the Constitution defines the functions of the armed forces of Pakistan, i.e. 'the Armed Forces shall, under the directions of the Federal Government, defend Pakistan against external aggression or threat of war, and, subject to law, act in aid of civil power when called upon to do so.' This is a very important constitutional provision for the government of Pakistan in its fight against the TTP. If other law-enforcing agencies cannot deal with the threat posed by the TTP, the government can call on the armed forces to 'act

in aid of civil power'. When the armed forces are deployed under Article 245, the writ jurisdiction of the High Court remains suspended. Article 8(3)(a) also allows enactment of special rules for maintenance of public order by the armed forces of Pakistan (see *All Pakistan Legal Decisions* [PLD] 2001 Supreme Court 549). The TTP is acting against Article 5 of the Constitution by picking up guns against the government of Pakistan. All law-enforcing agencies could be mobilised against the TTP in order to suppress them as they are acting in violation of Article 5. The law-enforcing agencies and security forces of Pakistan can arrest and detain TTP's fighters during their various operations. There is nothing in the Constitution of Pakistan to restrain the security forces to suppress the TTP, but the Constitution also requires them to act 'subject to law' in the fight against the TTP. All TTP fighters must be treated according to law during and after military operations.

The 1860 Pakistan Penal Code (PPC [s.1]) takes effect throughout Pakistan. Every person acting contrary to the provisions of the PPC, within Pakistan, shall be liable to punishment (PPC, s.2). The phrase 'every person' comprises all persons without limitation and irrespective of nationality, religion or creed (PLD 1958 Supreme Court [Ind.] 115). Most of the provisions of the PPC overlap with the above constitutional provisions and the principles of Common Article 3 discussed later in this chapter. The most relevant provisions of the PPC regarding fighting the TTP are offences against the state (ss.121–30), offences affecting the human body such as murder (ss.299–338), offences related to kidnapping and abduction (ss.359–68) and offences related to mischief by causing fire or explosives (ss.425–40). Most of the TTP's activities can be caught by these provisions and would allow the law-enforcement agencies and the security forces of Pakistan to take action against the TTP. The PPC also applies to the conduct of the security forces of Pakistan as a general law. The 1890 Code of Criminal Procedure requires the law-enforcing agencies and the security forces of Pakistan to treat all the TTP's fighters according to its rules, i.e. safe detention conditions, allowing bail and fair trial, etc.

The amended 1997 Anti-Terrorism Act (ATA) is a special and perhaps the most relevant law (see Fayyaz 2008) which extends to the whole country. The ATA (s.2) list of definitions covers most of the crimes committed by the TTP, such as hijacking, hostage-taking, kidnapping for ransom and the weapon used in what ATA regards as terrorist activities. The ATA (s.6) has a wide definition of 'terrorism' which covers almost every wrongful act of the TTP. The ATA (s.4) allows the federal and provincial governments to secure the presence of armed forces and civil armed forces in any area 'for the prevention and punishment of terrorist acts'. All the security forces and other law-enforcing agencies are allowed to use necessary force for preventing the commission of terrorist acts subject to 'giving sufficient warning'. The ATA is a special law and shall prevail over other laws.

The 1952 Pakistan Army Act is the most relevant law for the conduct of military operations by the Pakistani army and internal military discipline but the focus of this act seems to be more on the latter. The act (s.8) defines

enemy as 'armed mutineers, armed rebels, armed rioters, pirates, and any person in arms against whom it is the duty of any person subject to this Act to act'. The definition of enemy is wide and clear and would certainly include the TTP's fighters. The security forces of Pakistan can be deployed under different laws discussed above, but the Army Act imposes certain restrictions on the behaviour of armed forces during and outside military operations, i.e. when they are on active military service. For instance, anyone who is on active service and 'wilfully destroys or damages any property' is punishable with imprisonment which may extent to fourteen years (s.25). Similarly, anyone who 'breaks into any house or other place in search of plunder' may be imprisoned extendable up to fourteen years (s.29). The Act (s.41) also punishes anyone who is guilty of 'any disgraceful conduct of a cruel, indecent or unnatural kind' up to ten years. The Act (s.33[2]) punishes the disobedience of a lawful order of superior officer but does not require obeying unlawful orders. This section allows a member of the armed forces to disobey unlawful order by his superior, such as burning houses of the TTP or arresting their family members. The Army Act provides for an elaborate court-martial system to punish disciplinary and other offences (ss.80–118). The court martial also applies Islamic law (s.88[3]; s.8[8a]).

The Islamic law of qital

The Islamic law of *qital*, especially the law of internal armed conflict (see Chapter 3) applies to the armed conflict in Pakistan. Article 1 of the 1973 Constitution of Pakistan declares Pakistan as the Islamic Republic of Pakistan and Article 2 gives Islam official status within Pakistan. Article 227(1) requires that no law shall be made conflicting with the primary sources of Islamic law, i.e. the Koran and the Sunnah and all existing laws shall be amended to confirm to Islamic standards. By virtue of these constitutional provisions and the 1952 Army Act (s.8), the Islamic law of *qital* spelled out in Chapters 2 and 3 applies to the armed conflict in Pakistan. The Koran (49:4) allows military action to be taken against those who challenge the writ of the government. Verse 49:4 also allows others, i.e. people at large, to provide support to the government against those who commit aggression against the latter. The permission given to the government to use force is until the rebels are subjugated or reconciliation is achieved. The verse also requires the government to treat fairly and justly those who lay down their arms. The Islamic law of *qital* is not only on the side of the Pakistani government but also imposes certain restrictions on the conduct of military operations and treatment of the TTP's fighters.

The legal status of tribal areas

Before moving on to the discussion of international law, it is important to clarify the legal status of the tribal areas. There is a great deal of confusion

about the legal status of the tribal areas which raises the question of whether the full range of municipal laws applies to these areas. The main conflict zone in Pakistan is the tribal areas bordering Afghanistan. These areas consist of regions governed by the central and provincial governments. The federally administered tribal areas (FATA) are part and parcel of Pakistani territory under Article 1 of the 1973 Constitution. Chapter 3 of section XII of the Constitution specifically deals with the administration of the tribal areas. The people of FATA are represented in both houses of the Pakistani parliament – the National Assembly (Art. 51) and the Senate (Art. 59) – but administratively it remains under the direct executive authority of the president (Art. 247). Laws passed by the parliament do not apply automatically to FATA as they do in other parts of the country but the President of Pakistan can extend a law or laws to FATA. Most of civil, criminal and laws related to terrorism are extended to FATA (Hussain 2005) through various presidential orders. The president is also empowered to issue regulations for the peace and good governance of the tribal areas (Art. 247). The president has the power to cancel the current status of these areas after consultation with the tribal people through their council of elders (*jirga*). Today, FATA is governed primarily through the 1901 Frontier Crimes Regulation (FCR). The governor of Khyber Pakhtunkhwa administers FATA in his capacity as an agent to the President of Pakistan, under the overall supervision of the ministry of states and frontier regions in Islamabad, the capital of Pakistan. FATA is divided into two administrative categories: 'protected' and 'non-protected'. Protected areas are regions under the direct control of the government, while non-protected areas are administered indirectly through councils of elders of the local tribes. North Waziristan, South Waziristan, Kurram, Orakzai, Khyber, Mohmand and Bajaur are seven tribal agencies.

There is another set of areas in Khyber Pakhtunkhwa which are governed by the provincial government. They are known as the provincially administered tribal areas (PATA). In common parlance, however, both FATA and PATA are referred to as tribal areas. Several frontier regions of the Khyber Pakhtunkhwa and some regions of Baluchistan are also recognised as tribal areas by the Constitution (Art. 246). The main conflict is in the seven agencies of FATA and Swat, an adjacent region of the tribal areas. In contrast to what is generally asserted (McCain 2008; Yusufzai 2003), these regions are neither independent nor lawless. They are under the direct supervision of the President of Pakistan or his agents and the provincial governments (Hussain 2005: 57). The Constitution of Pakistan together with other laws applies to the tribal areas (see 1999 *Supreme Court Monthly Review* 1379).

There is a specific law that applies to the tribal areas, i.e. the 1901 FCR, but this is by no means the only law that applies in FATA. Other laws do apply in FATA; for example, the application of the 1952 Army Act was extended to FATA through the 1965 Tribal Areas (Application of Acts) Regulation (*Extraordinary Gazette of Pakistan* 1965: 1016–18). In addition,

the question of which law applies to the tribal areas has lost relevance because violence has spread to the entire country and the whole country is now a crime scene. Violence may have started initially in the tribal areas but it is certainly no longer confined to tribal areas. Other armed groups, mainly from Punjab province, have joined the TTP's ranks and now the whole country seems to be a base of the TTP or its allied groups.

The 1901 FCR is an old law, a relic of the former British Empire and many of its provisions would be considered draconian by today's legal standards prevailing in the UK. Many provisions of the FCR also conflict with the international human standards, but the FCR per se is not deficient to deal with the threat poised by the TTP and its allied armed groups. The FCR does not prohibit the deployment of armed forces or other law-enforcement agencies to deal with rebellion or terrorism. This is why the Pakistan army is currently engaged in multiple military operations in the tribal areas. The FCR (Art. 21) also allows seizure of property and arrest of any members of any tribe that is hostile or unfriendly towards the government of Pakistan. The arrested persons and seized property, however, must be kept in safe custody. Article 21 also allows the government to bar those members of a tribe who are hostile to the government from entering other parts of Pakistan. Their communication can also be barred. Hostile and unfriendly tribes can also be fined (FCR 1901 Art. 23). Tribal areas are certainly not lawless as is erroneously understood.

International law

Several branches of international law apply to the armed conflict in Pakistan: the law of armed conflict, international criminal law (Cassese 2008; Zahar and Sluiter 2006), international human rights law and international customary law (Abresch 2005; Haye 2008). Within the law of armed conflict, there are two separate sets of rules that apply to conflict of international and non-international character. Therefore, we need to first determine the nature of armed conflict in Pakistan. The application of the law of armed conflict depends on the existence of armed conflict; therefore, in order to invoke this law, it must be shown that an armed conflict exists in Pakistan.

Nature and existence of armed conflict

The question of determining an international armed conflict is not difficult. The four 1949 Geneva Conventions (GC I, Art. 2; GC II, Art. 2; GC III, Art. 2; GC IV, Art. 2) define international armed conflict that occurs between two or more state parties to the conventions. Article 1(4) of the 1977 AP I to the four Geneva Conventions extends this definition to 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination'. In contrast to this, it is more difficult to determine an armed conflict of

non-international character (International Committee of the Red Cross [ICRC] 2005). The law of armed conflict has defined an armed conflict of non-international character in two places: Common Article 3 of the four 1949 Geneva Conventions and the 1977 AP II to the four Geneva Conventions.

Common Article 3 of the four 1949 Geneva Conventions does not clearly define an armed conflict of non-international character but states that Common Article 3 applies to 'armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties'. The traditional understanding, however, is that Common Article 3 applies to armed conflicts in which hostilities may occur between governmental armed forces and non-governmental armed groups or among armed groups (ICRC 2008a: 3).

The 1977 AP II (Art. 1) to the four Geneva Conventions defines an armed conflict of non-international character as a conflict between the 'armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. The Protocol (Article 1[2]) excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' as not being armed conflicts. AP II does not apply to Pakistan as it is not party to it. The definition of AP II is narrower than the notion of an internal armed conflict under Common Article 3 in two aspects. First, it introduces a requirement of territorial control by providing that non-governmental parties must exercise such territorial control 'as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. Second, AP II expressly applies only to armed conflicts between state armed forces and dissident armed forces or other organised armed groups. Contrary to Common Article 3, the Protocol does not apply to armed conflicts occurring among non-state armed groups (ICRC 2008a: 3).

The 1998 Statute of the International Criminal Court (Art. 8[2][f]), for the purpose of its own application, has defined an armed conflict of non-international character as an armed conflict 'that takes place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'. This definition is wider and is in line with Common Article 3, but like AP II it does not cover 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature' (ICC Statute, Art. 8[2][f]).

The International Criminal Tribunal for the Former Yugoslavia (ICTY) (*Prosecutor* v. *Tadic* 1995 paragraph 70) said that 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.' This interpretation is more in line with Common Article 3 and the ICC Statute. It is worth noting that some conflicts might have the elements of both international and non-international armed conflict (see *Prosecutor* v. *Tadic*, 15 July 1999, paragraph 84). Three basic

elements of armed conflict can be gathered from these definitions. First, there should be 'protracted armed violence'. Second, the conflict or violence should be between government forces and armed groups or between armed groups. Third, the conflict or violence must take place within the territory of a state (see also *Prosecutor* v. *Hardinaj et al.* 2008, paragraphs 49, 99). The control of territory by an organised armed group is required for AP II to apply. The first three elements must be present to establish whether an armed conflict of non-international character exists.

The existence of armed conflict is a question of fact. It is a common trend among states that they tend not to recognise the existence of an armed conflict within their borders. They regard most internal armed conflicts as law-and-order situations or terrorism. Therefore, in order to establish the existence of an armed conflict in Pakistan, factual conditions are examined with a view to find out whether the above three conditions are met. The factual conditions on the ground show that an armed conflict of non-international character exists in Pakistan. First, there has been protracted violence in Pakistan since 2002. The TTP and its affiliated armed groups are inflicting heavy losses on the security forces of Pakistan. The Pakistani army claims that more than 2,273 soldiers have been killed and 6,512 injured in conflict with the TTP (ISPR, 1 September 2009). The Pakistani forces are using tanks, jets and gunship helicopters to suppress the TTP's fighters in Swat, Buner, Dir, Kurram Agency and North and South Waziristan. The Pakistan army claimed to have killed 1,592 terrorists in Swat operation in 2009 (ISPR 2009b). Thousands of people have left their homes and taken refuge in the neighbouring areas of Afghanistan and some settled districts of the Khyber Pakhtunkhwa (United Nations High Commissioner for Refugees 2008, 2009). The ICRC (2008c, 2009) has declared Dir, one of the tribal agencies, as a war zone and consistently refers to the situation as an armed conflict. Second, the armed conflict is between the TTP – an armed group – and the security forces of Pakistan. Third, the conflict is taking place within the territory of Pakistan (see Security Council Presidential Statement, 21 August 2008). The conflict in Pakistan possesses the three basic elements of an armed conflict of non-international character. The armed conflict even meets the more stringent requirements of an armed conflict of non-international character under Article 1 of the AP II as the TTP controls different regions and carries out concerted attacks on the Pakistani forces and other targets.

An armed conflict exists in Pakistan and it is of non-international character. Therefore, the law of internal armed conflict applies to the conflict between the Pakistani forces and the TTP. The TTP is not a party to the four 1949 Geneva Conventions or their two APs, but despite that the rules contained therein apply to the conduct of TTP's militant activities. Common Article 3 is meant to apply to an armed conflict of non-international character and it addresses 'each party to the conflict' to comply with the minimum standards of Common Article 3. 'The obligation is absolute for each of the Parties and independent of the obligation on the other Party' (Pictet 1952: 51). The rules

of Common Article 3 are also reflective of customary law and shall apply to the conduct of the TTP (Jaquemet 2001: 655–7). The application of Common Article 3(2) does not 'affect the legal status of the Parties to the conflict', i.e. it does not confer any legal status on the TTP's fighters. The main provisions of Common Article 3 are the humane treatment of those who do not take part in hostilities and those who are *hors de combat* by sickness, wounds, detention and or any other cause. The fundamental principle of humane treatment applies 'without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'. Common Article 3 prohibits the following acts regarding non-combatants and those who are *hors de combat* 'at any time' and 'in any place whatsoever':

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
(e) the collection and care of wounded, sick and shipwrecked.

Three broad categories of person may benefit from the provisions of Common Article 3: civilian, those who are *hors de combat* and the wounded and sick. Common Article 3, however, does not preclude the application of municipal law. Captured militants may be tried for offences they have committed provided the requirements of Common Article 3 are observed (Ministry of Defence [UK] 2005).

Pakistan is not a party to the 1998 ICC Statute, but many principles of Article 8 would apply as principles reflective of customary law to the armed conflict in Pakistan. Many principles of Article 8 overlap with the principles of Common Article 3 which are recognised as customary law (*Nicaragua* v. *The United States of America*, 1986 Merits, paragraphs 218–20; 292(8); *Prosecutor* v. *Tadic*, May 1997 paragraphs 614, 617) and would apply to the conflict in Pakistan. Article 8(2)(c) of the ICC Statute give the court jurisdiction over 'serious violations of Article 3 to the four Geneva Conventions' in the case of an armed conflict of non-international character. Article 8(2)(e) also gives the court jurisdiction over serious violations of the laws and customs applicable in armed conflict of non-international character. The list of crimes includes:

1. intentional attacks against civilians, buildings, etc., using the emblems of the Geneva Conventions, those engaged in humanitarian assistance, places dedicated to religion, etc.;
2. pillaging;

3. rape and sexual slavery;
4. enlisting children under the age of fifteen;
5. displacement of the civilian population;
6. treacherous wounding and killing;
7. refusal of quarter;
8. mutilation and destroying and seizing property not demanded by the necessities of conflict.

Individuals can be held responsible for committing war crimes in an armed conflict of non-international character (*Prosecutor* v. *Tadic*, 2 October 1995 paragraph 129; see also Haye 2008).

As stated above, there are certain principles of customary international law which are applicable to an armed conflict of non-international character (Henckaerts and Doswald-Beck 2005; *Prosecutor* v. *Tadic*, 2 October 1995, paragraph 98). It is not always easy to determine the content of customary law applicable to internal conflict; however, the basic guide should be the principles of military necessity, humanity, distinction and proportionality (Ministry of Defence [UK] 2005). The right of the parties to the conflict to choose the methods and means of warfare is not unlimited (Hague Regulations 1907, Art. 22; AP I 1977, Art. 35). The ICTY said (*Prosecutor* v. *Tadic*, 2 October 1995, paragraph 127) that:

> it cannot be denied that customary rules have developed to govern internal strife. These rules … cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.

The argument that in some cases the law of armed conflict might be ignored to achieve the purpose of the war is obsolete as the modern law of warfare takes into account military necessity (Ministry of Defence [UK] 2005). The principle of humanity forbids inflicting unnecessary sufferings (HR IV 1907, Preamble). All military operations shall be based on the principles of distinction, i.e. a clear distinction must be made between military targets and civilian population and objects (AP I, 1977, Arts 48 and 49[3]). The law of armed conflict, however, does not require that civilians and civilian objects shall never be damaged. For instance, civilian casualties are acceptable if they are proportionate to legitimate military goals. Any military attack must be proportional 'to the concrete and direct military advantage anticipated' (AP I, 1977, Art. 51[5][b]). The principles of Common Article 3; the basic provisions of AP II (*Prosecutor* v. *Tadic*, 2 October 1995, paragraphs 98, 117) and principles of Article 8 of the ICC Statute apply to the armed conflict in Pakistan.

International human rights law is applicable in times of both peace and of war. During national emergencies, state parties may chose to derogate from certain rules in strict proportion to the demands of emergencies for the duration of such emergency. There are, however, a small number of rules from which state parties cannot derogate even during emergencies. These rules are called non-derogable human rights because they have acquired the status of *jus cogens* or peremptory norms of general international law, i.e. customary law. Common examples of *jus cogens* include prohibition of torture, slavery, genocide, racial discrimination and violation of people's right to self-determination. Customary law in the form of *jus cogens* is binding on all states (Office of the UN High Commissioner for Human Rights 2008: 12–13). In no circumstances, can these norms be violated (Borelli 2005; Office of the UN High Commissioner for Human Rights 2008; see Vienna Convention on the Law of Treaties 1969: Art. 53; Statute of the International Court of Justice 1945, Art. 38[1][b]). Pakistan has not ratified or acceded to many human rights conventions but it *has* signed the 1966 International Covenant on Civil and Political Rights and the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on 17 April 2008. The fact that Pakistan has not ratified or acceded to these human rights instruments is less significant as many human rights principles have acquired the status of customary international law or *jus cogens* and are binding on Pakistan. As stated above, most of these human rights principles are recognised by the 1973 Constitution of Pakistan in the form of fundamental rights, hence would apply in the form of constitutional guarantees as well.

Codes of the Afghan Taliban

In addition to the above three legal systems, it is important to discuss and understand the newly issued Code for Mujahidin by the Afghan Taliban. It is a self-regulating code and some of its principles are incompatible with the law of armed conflict. This code neither has the status of municipal or international law nor is it our intention to confer such status on it. We, however, believe that minimum regulation is better than no regulation at all. The Afghan Taliban is a movement separate from the TTP but both are closely linked ideologically, culturally and territorially. The TTP was born, in fact, as a result of the close affiliation of certain individuals with the Afghan Taliban. The aim of both kinds of Taliban is the expulsion of foreign troops from Afghanistan. The TTP does not have its own code of conduct but relies mainly on the Afghan Taliban's codes. This is why the study of the Afghan Taliban's codes is relevant in discussing the conduct of conflict by the TTP.

The Taliban in Afghanistan is engaged in an armed conflict with the International Security Assistance Forces (ISAF) since 7 October 2001. The newly established Afghan security forces have also joined ISAF in its fight against the Taliban. Initially very little was known about the internal

organisation of the Taliban and its rules on the conduct of war. What we knew was based on its actions such as suicide bombing and periodic statements appearing on internet sites attributed to the Taliban. We also knew that the words of its founder Mullah Muhammad Omer were and still are considered final on a given issue and carry the weight of law. In November 2006, the Taliban issued the Afghanistan Islamic Emirate Code of Jihad for Mujahidin. It consisted of twenty-nine rules mainly focusing on the internal organisation of Taliban rather than on its rules on the conduct of war. With the passage of time, the Taliban perhaps felt the need to further strengthen its organisation and spell out its rules on the conduct of *qital* war. Therefore, on 9 May 2009, the Taliban issued the Afghanistan Islamic Emirate Code for Mujahidin. The word *jihad* is not mentioned in the title of the 2009 Code. It is perhaps for the reason that the new code covers a wide range of issues rather than mere rules related to the conduct of *qital*.

2006 Afghanistan Islamic Emirate Code of Jihad for Mujahidin

The 2006 Code has been invalidated by the 2009 Code, but it is important to have an overview of it as it does reflect on the Taliban's organisation and its rules of *qital*. The preamble states that *jihad* is that great worship and deed by which the *ummah* (Muslim community) achieves respect and the words of Allah prevail. It is obvious that to complete that sacred deed and achieve its fruit in this and the next world is only possible when it is conducted in the light of Allah's injunction and within the frame of rules enacted by Allah. The Taliban regards the Afghan government as an Anglo-American puppet which is why it invites those working for the Afghan government to join the Taliban. In return, the Taliban would protect their lives and property (Rules 1–2). The code deals with several issues in random fashion. It states that anyone who works for the enemy but wants to cooperate with the Taliban should not be killed. If he is killed the murderer must stand trial in the Islamic court of the Taliban (Rule 14). A *mujahid* (pl. *mujahidin*) who kills a new Taliban recruit forfeits the Taliban's protection and will be punished according to Islamic law (Rule 5). Anyone who tortures an innocent person should be warned first and expelled if he does not change his behaviour. Searching local houses and confiscating weapons should not be done without seeking permission from a district or provincial commander. *Mujahidin* have no right to confiscate money or personal possessions of civilians (Rules 15–17). The code bars those from joining the Taliban who have had a bad reputation, who have killed civilians or who are guilty of other crimes during *jihad* (Rules 21–2). A *mujahid* is not allowed to exchange a prisoner for money or for other prisoner. Taliban fighters were not allowed to use *jihad* equipment for personal use or to sell it. Weapons and equipment taken from the enemy must be fairly distributed among *mujahidin*. The code states that every Talib (pl. Taliban) is responsible to his superior for all monetary transactions. The code

is against teachers working for the puppet regime. The code states that they should be warned to stop working for the government. If the warning is not heeded, they should be beaten. If they still continue teaching, killing them is permitted. Working with non-governmental organisations is not allowed. Those accused of espionage should be dealt by the district commanders only. The witnesses against suspected spies must be trustworthy, with good psychological condition and untarnished religious reputation (Rule 27). Low-level commanders were not allowed to interfere in disputes among the local population.

2009 Afghanistan Islamic Emirate Code for Mujahidin

The 2009 Code is a fairly elaborate document. It consists of thirteen sections and sixty-seven articles. It has a preamble and a section called 'Notes' defining terms such as '*imam*' and 'guarantee'. The blurb consists of six rules summarising the gist of the code. The 2009 Code does restate some of the old rules. The code has four main themes:

1. the organisation of Taliban movement and accountability of its members;
2. the Taliban's relationship with the local people;
3. the Taliban's relationship with the Afghan government;
4. the Taliban's relationship with the foreign forces.

In addition, the code also deals with issues such as suicide missions, the treatment of spies and precautions in carrying out military operations. The sum of all themes is the expulsion of foreign forces from Afghanistan.

The four main themes of the code are analysed below.

Organisation and accountability

The code organises the Taliban movement in a fashion wherein the *imam* or *imam*'s assistant is the central and final authority. The code declares the *imam* (Mullah Muhammad Omer) as the final authority followed by the *imam*'s assistant (Rule 1). The code requires *mujahidin* to obey commanders, commanders to obey district general leaders, district general leaders to obey provincial general leaders and provincial general leaders to obey the *imam* and *imam*'s assistant. If there is any disagreement, such may be discussed and solved according to Islamic rules (Rule 34). The code also establishes provincial and district authorities. After the *imam* and *imam*'s assistant, great authority is delegated to provincial authorities. It seems that the *imam* is the final authority – but only in limited things such as deciding on the death penalty and disputed issues among provincial authorities. The provincial authority must be organised by well and knowledgeable people and should consist of at least five people. The provincial authority and district authority should make organisations that have people from both sides (Rule 27). The provincial authority is responsible for the education of *mujahidin* and their

personal behaviour with local people. The *mujahidin* have to resolve their personal problems according to the Islamic Emirate of Afghanistan rules and regulations. If they do not obey, they will be punished by the provincial governor (Rule 28). The code states that the provinces that have a lot of *mujahidin* activities should have a general commander. The general commander should have less military responsibility and should be easy for the *mujahidin* to find (Rule 29). Making new groups is prohibited. If a new group is needed, the provincial authority should be consulted, which must in turn talk to the high-ranking authority. The provincial authority will make official groups. If any group does not obey this rule, it will be unarmed and excluded from the Taliban (Rule 30). All positions among the *mujahidin* will be appointed by the high-ranking individual of the Islamic Emirate of Afghanistan. The code requires that every province must establish a court with one judge and two Islamic experts so they can solve problems that the leader and elders cannot solve (Rule 32). The appointed director and governor can change the provincial authority and the governor can make changes in district organisation. In case of disagreement on changes, they have to talk to the appointed director and the governor. If the director does not agree with the changes, they have to talk to the high-ranking individual of the Islamic Emirate of Afghanistan (Rule 33). The Taliban also have a white flag and uniform but the code advises *mujahidin* to 'always have the same uniform as the locals because it will be difficult for the enemy to recognize them, and also it is easy for the *mujahidin* to go from one location to another' (Rule 63). The code also provides for recruitment and training policies for *mujahidin* (Rules 58, 42). The Taliban movement has a command structure and accountability system based on its understanding of Sharia and Afghan culture. The accountability system covers the relationship amongst the Taliban and the Taliban's relationships with the local people, Afghan government employees and foreign forces.

Relationship with local people

The second main theme of the code is to have good relationships with the Afghan people. The code urges the *mujahidin* to 'have good relationships with local people' (Rule 46). If local people come to *mujahidin* with their personal problems, the leader of the group has no right to get involved. Only the provincial authority and district authority will consider these issues. They will try to have tribal leaders solve the problem. If this is not possible, then they have to take the issue to the provincial court (Rule 44). If someone from the *mujahidin* uses the name *mujahid* and creates problems for people, he should be warned. If he does not stop, he should be expelled from the *mujahidin* ranks (Rule 47). The code also prohibits forcing local people to donate money to the Taliban (Rule 52) and taking weapons by force from the local people (Rule 48). The *mujahidin* are not allowed to search local people's houses without the permission of provincial authority and the taking of two local

elders with them to carry out the house search. Kidnapping people for money is also prohibited (Rule 54). The code requires *mujahidin* to be careful in carrying out military operations suggesting that precautions must be taken to ensure civilian protection. The blurb of the code sums up the mission statement of the Taliban on the issue thus: 'to keep people and their property safe'.

The Afghan government and foreign forces

The treatment of Afghan government employees and its property is the third theme of the code. The fourth theme is the treatment of foreign forces and foreign property. Both themes are discussed together. The code urges the Taliban to invite government officials to join the Taliban (Rule 1) but they can be killed or captured if they do not stop working and supporting the government. The code is silent on distinction between civilian employees and those working in the security forces fighting the Taliban. In case of capture, their treatment is left to the discretion of the provincial authorities. If the prisoner is a high-ranking person, the *imam* or *imam*'s assistant will decide the matter. The *mujahidin* must not release prisoners for money. If a member of Afghan National Army is captured, it is for the *imam* or *imam*'s assistant to decide whether to release him, to use him for prisoner exchange or to exchange him for money. Those members of Afghan army and police who surrender should not be killed. They should be treated well even if they come with weapons. If the *mujahidin* take hostage infidel fighters or government workers and they cannot be taken to *mujahidin*'s safe place, they should be killed. In case of doubt about their identity, i.e. whether they are enemy persons, they should be freed. Enemy persons sentenced to death by a judge or provincial authorities cannot be killed without permission by the *imam* or *imam*'s assistant (Rules 7–12).

Foreign forces are not treated differently either. All foreigners are legitimate targets. The code is silent on distinction between combatants and non-combatants. The fate of the captured foreign contractors, drivers and workers of construction companies shall be decided by the provincial authority (Rules 20–1). The code leaves their treatment to the discretion of the *imam* or *imam*'s assistant during captivity. In case of doubtful identity, captives should be released in certain circumstances (Rule 10). The code states that any issue not covered by the code would be dealt with according to the Islamic law of the Emirate of Afghanistan (Rule 4, 34). The Taliban follows the Hanafi School of Islamic jurisprudence, therefore it is assumed that foreign captives will be treated according to the Hanafi School of law. The Hanafi law does distinguish between combatants and non-combatants (see Marghinani 2005: 446–7).

The code identifies different types of property – the property of the Afghan government and foreign property including weapons, etc. – and offers different treatment for each category. Personal vehicles of foreigners should be burned but the *mujahidin* are not allowed to use them for personal affairs (Rule 19). Weapons captured belonging to foreigners or their supporters should be divided into five portions. Four portions are divided among the

mujahidin and the fifth portion is for the Taliban's treasury (Rule 22). Weapons, vehicle and money that do not fall under Rule 22 belong to the treasury of the Taliban. Captured items that are from outside the country also belong to the treasury (Rules 23–4). Money that belongs to the Afghan government but is intended for government employees or local people can be captured and distributed according to the formula laid down in Rule 22. But once the money is distributed among employees or local people it cannot be taken away. Similarly those who join the *mujahidin* but who during their time working with the government took people's personal property or money should return it (Rule 2). The focus seems to be on capturing the property of the Afghan government and foreign forces and companies. The code carefully safeguards the property of the local people.

In addition to the four main themes, the code also deals with issues relevant in the context of Afghan conflict, i.e. spies, suicide missions and a list of other prohibited acts. These issues are of direct relevance to the practices of the TTP in Pakistan.

Spies

The code has a set of rules on the treatment of spies. The code rules out punishing spies based on mere suspicion. The code asks for evidence before a suspect is handed over to provincial authority for decision on his fate. The code empowers the *imam* or *imam*'s assistant to award death penalty to spies (Rules 13, 16). The code spells out evidential standards in order to establish the guilt of espionage: testimony of two witnesses or confession of the accused. Evidence such as equipment used for espionage found on the accused is considered sound evidence. Not everyone is allowed to make a decision regarding the equipment and its evidential value. The equipment shall be taken to the expert for expert opinion. If all evidence conclusively proves that the person is a spy, one must speak with the *imam* or *imam*'s assistant regarding his death penalty (Rule 14).

A confession obtained through force or torture is not admissible and the suspect cannot be punished on the basis of forced confession:

> It is prohibited for a *mujahid* to promise to someone that if he admits then he will not be killed, will be released, or will not be tortured. There are two kinds of promises: the first is forcing, like you are telling him if you admit then we will let you go or we are not going torture you or put you in jail. If force is used to cause admission, this is not legitimate. Second, you do not use force but you tell him that if you admit we will give you money or a high ranking position. This method also is not legitimate.
>
> (Rule 15)

Suspected persons should be reported to the provincial authority. If someone is accused of being a spy but there is no proof, he should be released on

providing someone well known as his guarantor. If he has no guarantor, he should leave the area (Rule 17). If a spy is finally convicted, he should be killed by gun. Photographing the execution is prohibited (Rule 18).

Suicide missions

The 2009 Code allows suicide missions and lays down (Rule 41) four conditions for carrying out suicide missions:

1. before the bomber goes for the mission, he should be very educated in his mission;
2. suicide attacks should be done always against high-ranking people;
3. the killing of local people should be avoided where possible;
4. unless they have special permission from higher authority, every suicide attack must be approved by the provincial authority.

Like suicide missions, the code requires precautions in carrying out military operations but it can be inferred from its reading that collateral damage is acceptable.

The suicide-bombing missions seem to be at the core of the Taliban's war strategy and warrant careful analysis. Very trusted people in the Taliban movement are in charge of suicide missions. Our understanding of suicide missions is that the Taliban recruit suicide bombers in two ways. First, they brainwash teenage boys who are already studying in unofficial religious institutions (*madrassa*) and convince them to carry out a specific suicide mission (see Guerin 2009). Second, the Taliban deceives young boys and their families by asking them to do a noble and innocent task for them in return for paying them or their families (a payment which, by local standards, is reckoned a handsome amount). These boys are usually from poor and illiterate backgrounds. They may be already studying in a local religious institution or the Taliban may target poor and illiterate families in the areas they control. These young boys and their families are kept in the dark about the true nature of their intended missions. The recruiter comes in the guise of a normal employer taking young boys for jobs to cities or to other regions. Sometimes advance payment is made to the family of the boy. In most of these instances, the local population are scared by the Taliban and have no real power to resist them. In many cases, once these boys are sent on a mission they have little control of the situation as the explosives they are carrying are remote controlled.

Prohibited acts

The code contains lists of prohibited and recommended acts. The list of recommend acts adds to one of the main themes of keeping the Taliban united and organised. The prohibited acts include not taking local Muslims'

personal weapons by force (carrying a weapon is common in Afghan culture). Youngsters who have no beard are not allowed to be taken for *jihad*. Cutting noses, lips and ears off people is completely prohibited. Forcing people to donate money is not allowed. Searching local people's houses is not allowed. If it is necessary to search someone's house it must be authorised by the provincial authority. Searches must be carried out in presence of two elders of the area. Kidnapping people for money is prohibited. lf someone uses the name of Islamic Emirate and does things like this, they will be unarmed and punished by the provincial authority. *Mujahidin* are not allowed to smoke (Rules 48–54).

Conclusion

An armed conflict exists in Pakistan. Three legal systems are applicable to it: municipal law, the Islamic law of *qital* and international law, especially the law of armed conflict. All three legal systems allow the government of Pakistan to fight the TTP but these legal systems also impose certain restrictions on the conduct of military operations against the TTP. These restrictions, however, in no way prevent the security forces of Pakistan from fighting the TTP effectively or hampering their way to achieve their military objectives. These laws also bind the TTP. The application of the law of armed conflict or other branch of international law does not confer any legal status on the TTP. The law is sufficient for dealing with the TTP and is on the side of the Pakistani government in its fight against the TTP. The threat posed by the TTP is genuine and serious but the key is to defeat it while staying within the law.

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6 War crimes in the armed conflict in Pakistan

In the preceding chapter, it was established that three legal systems applicable to the armed conflict in Pakistan are municipal law, the Islamic law of *qital* and international law (the law of armed conflict, international criminal law, human rights law and customary international law). The purpose of this chapter is to examine the conduct of armed conflict by the security forces of Pakistan and the TTP under these laws in order to find out whether they comply with them. As discussed in the preceding chapter, the self-regulating code of the Afghan Taliban has the status neither of national nor international law but it is important to see whether the TTP, a close ally of the Afghan Taliban, complies with it. There is an unusual element to the armed conflict in Pakistan: the drone attacks (i.e. unmanned aerial vehicles [UAVs]) by the Central Intelligence Agency (CIA) of the USA in the tribal areas of Pakistan (see Koh 2010). As we shall see later, these drones attacks have killed hundreds of civilians, and any discussion of war crimes in the armed conflict of Pakistan without touching on the drone attacks would be incomplete. Two aspects of the drone attacks are briefly discussed: their legality and how these attacks are conducted. Most of the world media, human rights organisations and experts focus less on the conduct of conflict by the security forces of Pakistan and the CIA. The focus tends to be more on the conduct of conflict by the TTP and its affiliated armed groups. As a result of this tendency we see partial exposure and analysis of the legal violations. We need full exposure and analysis of how this conflict is conducted by all parties: the TTP, the security forces of Pakistan and the CIA. We argue that all parties have violated rules of one or more of the above-mentioned laws. At the end of the chapter we turn to the natural question: have the war criminals been prosecuted or is there a real prospect of their prosecution?

War crimes by the Taliban

The media in Pakistan, but more particularly the Western media, tend to attribute most incidents of violence (especially suicide bombing) to the TTP. In some cases the TTP and its affiliated armed groups are referred to as

militants and extremists. The government of Pakistan shares this tendency with the media rather than waiting to investigate a particular incident and then come up with a response based on evidence. The best example to illustrate this attitude of the government is its reaction to the assassination of Benazir Bhutto discussed later in the chapter (see Stratton 2007). In return, Al-Qaeda and the TTP (*Dawn* 2009c) regard 'the mercenaries of the ISI [Inter-Services Intelligence of Pakistan], RAW [Research and Assessment Wing, i.e. Indian external intelligence agency], CIA or Blackwater' as the 'real culprits behind these senseless and un-Islamic' suicide bombings. It is very difficult to pinpoint who is behind a particular incident of violence without looking at conclusive proof. We examine those incidents for which the TTP has claimed responsibility. Since early summer 2008, the TTP has stepped up its activities against the government forces. The modus operandi is that the TTP would give a warning to the government to stop an operation in a particular area against the TTP. If the warning is not heeded, the TTP would attack various targets: the security forces, civilians and civilian objects (Omer 2008).

Targeting civilians

The TTP has targeted and killed hundreds of civilians since 2002. In some cases, killing civilians is deliberate while in others civilian are killed and property destroyed as a result of indiscriminate firing and suicide bombing. Targets have included government officials, pro-government tribal elders, health and foreign aid workers. It is difficult to note all such incidents but a few are stated here by way of example. Those killed are either kidnapped or shot dead on the spot. On 9 November 2007, the then Federal Minister Amir Muqam's house was hit by a suicide bomber killing four people including three security guards. He was threatened a few days before the attack (Yusufzai 2007). On 2 April 2006, the dead body of Zahir Shah, a pro-government religious scholar, was found in South Waziristan. Several bullet wounds were found on his body (Kakar 2006). On 28 April 2007, the then Federal Interior Minister Aftab Sherpao's election rally was attacked in Charsada where thirty-one people died and dozens were injured (Khan and Khan 2007). On 27 January 2007, a suicide blast in Peshawar killed thirty-one people and wounded thirty others. The Deputy Inspector General of Police, Peshawar, and two local council chairpersons were among those killed in the blast (*Dawn* 2007a). In February 2007, Doctor Abdul Ghani of the Health Ministry of Khyber Pakhtunkhwa province was killed during a anti-polio campaign in Bajaur Agency. In August 2008, the TTP commanders in Swat valley threatened several pro-government politicians and officials to put pressure on the government to spot operations against the TTP. The members of the Awami National Party, which heads a coalition government at provincial level, were specific targets. The TTP attacked the house of the brother of a ruling party member of provincial assembly with rockets in Shah Derai

area of Tehsil Kabbal, Swat, killing ten people. The TTP spokesman for Swat chapter, Muslim Khan, said that the attack was a revenge for innocent people killed in the Kabbal, Swat, operation (*News International*, 25 August 2008). On 9 June 2009, militants attacked Pearl Continental Hotel in Peshawar, killing eleven people and wounding another fifty-five (Khan and Masood 2009). After two days, the TTP took responsibility for the bombing and said it was in retaliation to shelling on seminaries in Hangu and Orakzai few days before (*Dawn* 2009a). The killing of government officials and pro-government tribal leaders continued in 2010. On 14 January 2010, Malik Muhammad Akbar was killed by a remote control bomb planted by the TTP (Orakzai 2010a).

Targeting civilian objects

The TTP follows a deliberate policy of targeting civilian objects. The TTP has attacked several schools (mainly girls' schools), music shops, hotels, non-governmental organisations and telephone exchanges in different tribal agencies. These attacks are systematic and seem to be part of a deliberate policy. The modus operandi of these attacks is, however, different from those of the Afghan Taliban in that these schools are attacked during the night when no civilians are present at the premises. On 2 August 2008, two girls' schools were blown up. The TTP's spokesperson for Swat, Muslim Khan, accepted responsibility (Kakar 2008c). On 30 July 2008, the Swat chapter of the TTP took responsibility for blowing up a girls' school, an army guesthouse and a tourist hotel. In a separate attack on a girls' school, a letter was left warning parents not to send their children to these schools because English/Western-style education is given in them (Kakar 2008b). Letters of this kind are distributed during the night and are known both in Pakistan and Afghanistan as 'night letters'. Four schools were set ablaze in Dir district in June 2008 (Kakar 2008b). 'At least 39 girls' schools were blown up or set ablaze by militants in Swat [in June 2008]' (Khan 2008b). Attacking music shops has become a routine in the Khyber Pakhtunkhwa province wherein several civilians are either killed or wounded. On 6 October 2009, the TTP attacked the United Nations World Food Programme offices in Islamabad which killed five civilians. The TTP's newly appointed spokesperson, Azam Tariq, accepted responsibility for the attack (BBC 2009a). Other civilian targets include attacks on the Peshawar Press Club (BBC 2009b), a telephone exchange in Khyber Agency (Kakar 2009) and six shrines in Orakzai Agency (*Dawn* 2010b). The attacks on schools continue (Orakzai, 1 March 2010). On 7 February 2010, a local hospital was destroyed (Wazir 2010a). Targeting civilians and civilian objects continued in 2010 as on 11 March 2010, World Vision, a Christian charity office, was attacked in Mansehra (*Dawn* 2010i). Intentional attacking of civilians and civilian objects is against municipal law, the Islamic law of *qital* and the law of armed conflict.

Suicide missions

Suicide bombing in armed conflicts has a very long history. It has been committed by the followers of many religions and in different times and regions of the world (Pape 2005):

> Suicide attacks are increasingly becoming alien to nowhere and no people. Worldwide, the number of terrorist groups employing them has grown over the past twenty-five years. In some of the world's conflict areas they have come to be widely accepted, and even supported, by populations who presumably might once have recoiled at the idea.
>
> (UN Assistance Mission in Afghanistan 2007: 3)

More than 1,200 people have been killed in mainly suicide attacks in Pakistan since the beginning of 2008 (*News International*, 20 September 2008). The TTP recruits and trains individuals, mostly youths, for suicide missions and proudly claims that it has a large number of suicide bombers waiting for orders to go and kill (Fazlullah 2008; *Dawn* 2009e). The TTP's suicide bombers are known as 'Fidayeen Squad' (Khan 2008c). The TTP started suicide bombing as a tactic against the Pakistani forces in 2002. There were terrorists' attacks and bomb blasts before 2002 but these were of a sectarian nature: Shia and Sunni groups attacking each other (Sohail 2006; Hamdani 2007; Reuters 2007). But since 2002, suicide bombing seems to have become the new face of militancy (BBC Urdu 2002). The TTP's targets are usually military objects to achieve military objectives. The attacks on military targets results in some civilian casualties as well. There are, however, many instances where civilians were targeted intentionally. The common features of these incidents are: intentional killing and injuring dozens of civilians and the TTP taking responsibility describing it as a revenge for killing TTP's fighters. Three major incidents of brutal suicide bombing follow. On 21 August 2008, Pakistan Wah Ordnance Factory was hit by two suicide bombers when civilian employees were leaving the main gates immediately after closing hours. The blasts killed seventy people while injuring sixty-nine others. The TTP claimed responsibility saying that the TTP is sad over the deaths of civilians but the government forces are killing the women and children of the TTP (Iqbal and Asghar 2008). The ordnance factory is a military target but the TTP chose the time and spot of attack when the dominant number of people were civilians. In addition, civilians working in an ordnance factory do not lose their civilian immunity. They might be at risk of being attacked but they cannot be targeted deliberately (see Ministry of Defence [UK] 2005). On 20 August 2008, a hospital in Dera Ismail Khan was attacked by a suicide bomber, who killed thirty-two people and injured twenty-six others. The TTP took responsibility and threatened more attacks if the government failed to halt operations against the TTP (Nawaz 2008; Mughal 2008). The most recent and devastating suicide attack was on the Marriot Hotel Islamabad,

which killed fifty-seven people including some foreigners. It is not surprising that fingers were pointed at the TTP, but after two days a lesser known organisation, Fidayeen Islam, accepted responsibility for carrying out the attack while threatening further attacks (Mehr 2008). Fidayeen Islam is believed to be an auxiliary group of the TTP, which had claimed responsibility for suicide bombing in the past (Rashid 2007a).

Attacking civilians and civilian objects is prohibited under customary international law and under the four 1949 Geneva Conventions. The TTP's argument that the security forces of Pakistan are killing their fighters as well as their innocent family members is not tenable. As we shall see later, the TTP is correct about the killing of civilians by the security forces of Pakistan but this does not allow the TTP to act outside the law. The immunity of civilian is absolute until they engage in hostile activity, which strips them of their immunity.

The TTP's suicide bombers are feigning to be civilians when they walk in the middle of public places or attack the security forces of Pakistan. Their behaviour is perfidious, and perfidy is a war crime (HR IV 1907, Art. 23[b]). The indiscriminate killing of people through suicide bombing violates the principle of distinction. Targeting protected civilian objects such as girls' schools is a war crime. The legality of suicide missions under Islamic law is not clear and it would be appropriate to state that there is no consensus view on the matter. Three aspects of suicide missions need to be considered. First, the question of suicide per se. Sharia is clear on the point, i.e. suicide is not allowed. Second, suicide missions targeting civilians such as exploding oneself in the middle of a busy local bazaar. The Islamic law of *qital* does not allow targeting civilians. Third, suicide missions targeting military objectives to gain military advantage. It is this aspect of suicide missions where consensus does not exist. We see very often that Islamic scholars denounce suicide missions, but it is not always clear which type of suicide missions is denounced.

Hostage-taking and kidnapping

Hostage-taking and kidnapping by the TTP has become a common practice since 2004 (Orakzai 2008a). Its members kidnap members of the security forces, government officials and those who they regard as pro-government individuals. Some foreigners have also been kidnapped. The majority of hostages are killed but the lucky ones might get swapped for TTP fighters in the government's captivity or in some cases by paying a ransom (Wazir 2008a). The government usually denies paying ransoms and tries to attribute the release to the bravery of the security forces, which most Pakistanis doubt. In many cases, torture and inhuman treatment are reported. The list of abduction incidents is long but some cases of civilian abduction are mentioned by way of example. On 2 September 2008, the TTP claimed that four missing Chinese engineers were in its custody and that its *shura* (council) was

preparing a list of demands for the government of Pakistan to meet (Khan 2008d). They were released in 2009 but only, it is believed, after payment of a ransom by the government. Tariq Azizudin, Pakistan's Ambassador to Afghanistan, was kidnapped on 11 February 2008 while on his way to Afghanistan. The TTP took responsibility by issuing a videotape asking the government of Pakistan, through the ambassador, to meet the TTP's demands (Kakar 2008a). He was released on 18 May 2008 under a deal with the local Taliban but the government of Pakistan denied any such deal (Khan, 18 May 2008). A Polish engineer was kidnapped in Pakistan on 2 October 2008. The TTP claimed that he was in its captivity. On 15 October 2008, in a video released by his captors, he said: 'I'm in the hands of the Pakistani Taliban … I demand that all those watching and listening to me, including Poles, put pressure on the [Pakistani] government to free those [Taliban] who are jailed. In this way, I will also be freed' (*News International*, 15 October 2008). He was killed in early 2009. On 31 March 2010, an Iranian diplomat abducted by the TTP on 13 November 2008 was recovered after an alleged payment of a ransom (*Dawn* 2010j). On 8 April 2010, a Greek hostage, Athanassios Lerounis, was released after months in captivity (*Dawn* 2010m). He was kept in the Nuristan province of Afghanistan, and the Taliban had demanded ransom and the release of three Taliban leaders held in Pakistan. The Pakistani officials, however, said that he was released unconditionally. It was not clear who actually abducted him, but it seems that both the TTP and the Afghan Taliban were involved. Hostage-taking is specifically prohibited by Common Article 3 and is an offence under the 1997 Anti-Terrorism Act and the 1860 Pakistan Penal Code.

Treatment of spies

A common pattern of killing of suspected spies by the TTP has emerged. The trend is on the rise in the tribal areas of Pakistan (Human Rights Watch 2007a) and has become a daily scene in the TTP-controlled areas. In the past four years, around 400 people have been killed in South Waziristan alone on the ground of spying for the USA (Rashid 2006; Wazir 2008b). The tactic is used to deter people from giving information about the TTP's activities to the government of Pakistan, Afghanistan or foreign troops. These killings and abductions serve an additional purpose: spreading terror among the local population. Suspected spies are either shot dead or beheaded. The majority of dead bodies have signs of torture and brutality. Usually, the TTP takes responsibility for these killings by attaching a note explaining why that particular person was killed. The note also, in many cases, gives a warning to potential spies. In South Waziristan, three dead bodies, full of bullet wounds, were found. A letter in Pashto, the local language, attached to the dead bodies said that they were American spies (Human Rights Watch 2007b; Wazir 2008b). On 27 June 2008, in the aftermath of the Dama Dola village attack in Bajaur Agency, two men were shot dead in public on the allegation

of spying for the USA. It was alleged that the information they provided led to the attack on Dama Dola that killed TTP fighters. The Taliban accepted responsibility for killing these people (Khan 2008a). A woman was killed on the grounds of spying for the USA in Bajaur Agency. The killing of suspected spies continued in 2010 as in February two bodies of suspected spies were recovered from North Waziristan (*Dawn* 2010g).

Under the customary law of armed conflict, spies are at the mercy of the capturing power but they must be treated humanely and have the right to a fair trial (HR IV 1907, Arts 29–30). The TTP does have its own courts (usually a council of a few men) in areas under its control. It usually claims that the spies confessed before the TTP's council to their crime of spying. The TTP's treatment of spies raises questions. First, it is not clear whether a spy in question is tortured or coerced to confess. Second, the trial by the TTP's court does not meet other guarantees and safeguards necessary for a fair trial under Pakistani law, Islamic law and international law.

The TTP has committed serious war crimes of different kinds (see Amnesty International 2010). It has also violated the laws of Pakistan and the law it regards as its own, i.e. the Islamic law of *qital*.

The Pakistani forces and war crimes

Since 2002 when small- and large-scale operations against militants in tribal areas began, the public has been given the impression that the security forces of Pakistan are engaged in a war for the security of Pakistan, and the implied message was that everything they did should not be questioned. Militants were painted as the enemies of Pakistan who needed to surrender or be killed to save the country. This sense of Pakistan's security being on the line made it difficult for commentators openly to question the conduct of various military operations and whether these are within the limits of applicable laws. Commentators also do not want to run the risk of being branded as pro-militants and get into trouble with the security forces and intelligence agencies. Militancy is a genuine and serious problem but we also need an objective examination of the way the security forces conduct operations against militants. The purpose here is not to discuss whether Pakistan should fight militants but it is to see how different military operations are conducted. The duty of the security forces of Pakistan is to provide security to the people of Pakistan while staying inside the law. If they act outside the law, there would be no difference between the TTP and the security forces of Pakistan. What follows is a brief account of how the war against the TTP is conducted and certain laws violated.

Indiscriminate killing

The security forces have conducted several operations in different regions of the tribal areas. One of the common features of all these operations is

indiscriminate killings. On many occasions the security forces target places which they think are used by militants resulting in the killing of dozens of civilians. The only information provided to the public by the Pakistani army is the number of killed whom they regard as militants. The Inter Service Public Relations (ISPR) of the Pakistani army issues brief statements giving the number of suspected militants killed, for example, 'eleven militants have been killed and 15–20 injured in an exchange of fire with Security Forces in South Waziristan Agency' (ISPR, 27 August 2008). On 2 September 2008, the Pakistan army said that the mission in Bajaur Agency was completed and its objectives achieved: the security forces had killed 560 militants (*Dawn* 2008b; see Perlez and Shah 2008a). Between 10 and 15 September, the security forces claimed to have killed 117 fighters of the TTP (Orakzai 2008a). On 26 September 2008, the Pakistani army claimed it had killed at least 500 militants in the Bajaur operation (BBC Urdu 2008b). On 1 April 2010 a government official said that 'troops stormed militant positions and helicopters destroyed vehicles carrying insurgents near the Afghan border Thursday, killing 28 suspected militants' (*Dawn* 2010k).

The problem with these killings is that the security forces do not explain how many were militants and how many were civilians. They also remain silent over whether civilians were killed and if they were whether such incidental killing was necessary for achieving military objectives. Independent sources indicate that on many occasions civilians, including women and children, were killed (Khan 2008). On 30 October 2006, Pakistani army jets bombed a religious school (*madrassa*) in Bajaur Agency, killing eighty people. Most of them were students from the local area (Rashid and Orakzai 2006). The Pakistan army claimed that militants were hiding inside the school. The school put all the dead bodies on display to show the people of Pakistan and the world that there were no militants. Also, no foreign militants among the dead were identified. There is also no record whether the bodies of those foreign militants were handed over to their respective countries. No one can tell where they are buried. A local journalist who was covering the negotiation between the government and the TTP gave this account of the incident (see Fisk 2010):

> I was in Damadola when the planes came. They killed more than 80 teenagers – all students – and, yes they were learning the Koran, and the madrasah, the Islamic school, was run by a Taliban commander. But 80! Many of them came from Bajaur, which would be attacked later. Their parents came afterwards, all their mothers were there, but the bodies were in pieces. There were so many children, some as young as 12. We didn't know how to fit them together.

After launching operations Rah-i-Rast in Swat and Rah-i-Nijat in Waziristan in May–June 2009, the Pakistan army said: 'so far 1592 terrorists have been killed' (ISPR, 22 June 2009). No one has seen the bodies or graves or weapons

of these militants. The security forces also demolished houses of suspected militants (Asad 2009). The government also claimed to have arrested the family of Fazlullah, the chief of the Taliban in Swat (BBC Urdu 2009). The security forces attacked two *madrassas* in Hangu districts wherein five women and several children were killed. The local people protested against the loss of civilian lives (Paracha 2009). Human Rights Watch (2009b) called on both the TTP and the security forces to minimise harm to civilians.

It seems that on many occasions the intelligence regarding militants is not sound and that the security forces act on doubtful evidence. If the Pakistani security forces kill an important militant but civilians are also killed during the attack, such incidental loss of civilians is permitted, but the principle of proportionality needs to be strictly followed. The incidental loss of life and property must not be excessive in the realisation of concrete military advantage.

Operation Silence: Red Mosque (Lal Masjid) Operation

One of the operations during which the most serious violations of the law of armed conflict and human rights occurred was Operation Silence or the Red Mosque Operation. The security forces started operations against alleged militants inside the Red Mosque early in the morning on 10 July 2007. During the operation, around eight security personnel were killed whereas over 100 students, including the *imam* of the mosque, were also killed (Rashid 2007b; see also *Dawn* 2007b). The security forces did not give exact figures of how many were militants and how many were civilians. Several dead bodies were buried in a single mass grave during the night by government personnel (Mehr, 12 July 2007). Not a single militant was identified among the dead bodies. On 3 June 2008, General (Rtd) Gulzar Kayani said that phosphorus bombs were used against the students, which was cruel and unnecessary and called for an inquiry (BBC Urdu 2008a). The Human Rights Commission of Pakistan (HRCP) (2007) also joined the call for inquiry into the loss of civilian lives as the then Musharraf government tried to cover it up. The *imam* of the Red Mosque, Abdul Rashid Ghazi, was killed during the siege. His students have formed an organisation called Ghazi Force which is currently engaged in carrying out deadly suicide attacks on security forces and government installations (*Dawn* 2010n).

Missing persons

After the attack on Afghanistan on 7 October 2001, the Bush Administration offered hundreds of thousands of dollars as head money for arresting or killing key Al-Qaeda and Afghan Taliban figures. Later on, head money was offered for the key figures of the TTP as well. The government of Pakistan, as an ally, started arresting suspected militants and cashed in thousands of dollars. 'We have captured 672 and handed over 369 to the United States. We have

earned bounties totalling millions of dollars' (Musharraf 2006). 'The phenomenon started with the great sweeps for al-Qaida suspects after September 11, but has dramatically increased in recent years, and now those who disappear include home-grown "enemies of the state" – poets, doctors, housewives and nuclear scientists, accused of terrorism, treason and murder' (Walsh 2007). Under the law of armed conflict and domestic laws of Pakistan, the security forces are allowed to detain militants but they should keep record of those arrested and let their relatives know the whereabouts of the detainees. There is no government record available to show the whereabouts of these people, which is why these detainees are called 'missing persons'. Amina Masood Janjua's husband, Masood Janjua, was apprehended by Pakistani security forces in July 2005, along with another man, Faisal Faraz. The security forces have detained them since without filing any charges against them and, on some occasions, even denying their detention. The two men (and even some children) are among hundreds of victims of enforced disappearance in Pakistan, held beyond the reach of the law or any outside monitoring. Their families continue to fear for the lives of their loved ones, aware that torture and other ill-treatment are routine in Pakistani places of detention. Those forced to fear for the fate of the 'disappeared' are also victims of Pakistan's plague of enforced disappearances (Amnesty International 2006, 2008). There are reports that some terror suspects in the custody of Pakistani intelligence agencies were tortured (Cobain and Norton-Taylor 2009). Currently, the Supreme Court of Pakistan (*Dawn* 2010c) is looking into the case of missing persons and has declared that 'missing persons are only those who have been picked up by intelligence agencies as we cannot include every case of ransom, abduction or enmity into the category of missing persons.' The government officials and the intelligence agencies are not cooperating with either the Supreme Court or the high courts to recover the missing persons. On 28 January 2010, the Supreme Court (*Dawn* 2010f) dismissed a report by the Secretary of Defence on missing persons cases calling it a 'vague, one-sided and a few lines report' which does not 'serve any purpose'. The Peshawar High Court 'rebuked the ministries of defence and interior as well as the intelligence agencies for their non-cooperation' in the cases of missing persons (*Dawn* 2010e).

Extrajudicial killings and army abuse

The HRCP (2009) conducted its own investigation in Swat after the military operation. Its investigation found mass graves and evidence of torture and extrajudicial killings. Rather than understanding the seriousness of the allegation and launching a full investigation, the army rejected the allegation as baseless (*Dawn* 2009b). After the Swat operation in summer 2009, a video clip was put on YouTube showing Pakistani soldiers beating fighters of the TTP (Hasan 2009). This caused real concern among the people of Pakistan, and, perhaps under pressure from the public and the fact that it was difficult to deny the soldiers' abuse, the Pakistani army said that it was investigating

the matter. As of 2 April 2010, the army has not come up with any result on the matter. On 1 September 2009, forty-one corpses, some beheaded, of TTP fighters were found in Swat where the Pakistani army was in control. The army is said to be linked to these killings (Perlez and Shah 2009). Two European humanitarian workers told Fisk (2010):

> There were dozens – perhaps hundreds – executed by the army. They were revenge killings by the soldiers, no doubt about it. A number of people we had reported to us as arrested – they were later found dead. What does that mean? The Americans and the Brits were aware of this, of course they were, and they intervened with the government. But what does this say about the army? In one village, two bodies lay in the street for two days – it was a way of showing the local people what would happen to them if they supported the Taliban.

The incidents of extrajudicial killing continued in 2010. On 1 March 2010, the bodies of two TTP commanders were found in Swat. It is alleged that one of the commanders was in the custody of the government agencies (Orakzai 2010b).

Torture

Pakistan has a long and well-documented history of arbitrary arrests and detention, enforced disappearance, torture and other mistreatment by government security forces. These practices are systematic and routine, whether in ordinary criminal matters or in more sensitive intelligence and counterterrorism cases. Human Rights Watch (2009a) has documented extensive accounts and evidence demonstrating a policy of torture employed by Pakistani intelligence agencies and law-enforcement personnel. The full extent of the torture endured by citizens of Pakistan is unknown, but cases of torture of British citizens in Pakistan were exposed by the Human Rights Watch. Among the ten identified cases of British citizens and residents mentioned in the report is Rangzieb Ahmed, thirty-three, from Rochdale, who claims he was tortured by Pakistani intelligence agents before being questioned by two MI5 (British internal intelligence service) officers. Ahmed's description of the cell in which he claims he was tortured closely matches that in which Salahuddin Amin, thirty-three, from Luton, says he was tortured by ISI (Pakistani Inter-Services Intelligence) officers between interviews with MI5 officers (Towsend 2009). The British government has denied complicity of MI5's agents in cases of torture (Christian 2009) but the Pakistani government does not seem to be bothered by these most serious allegations.

Local lashkars

The security forces of Pakistan also rely on local *lashkars*. A local *lashkar* is a group of armed men who get together to defend themselves or to take

revenge for wrong done to them by the TTP. A *lashkar* consists of young men carrying whatever arms they can lay their hands on and are guided by motives of self-help and revenge. A *lashkar* is usually led by tribal leaders or other community figures. In the past, the government has tried to empower such *lashkars* (Ashraf 2009) by providing arms, while no training on the laws of war or use of weapons is given. 'The government had engaged locals to fight off the militants, something which the villagers accepted without assessing the threat to themselves' (Ashraf 2010). 'This has brought civil society face to face with highly trained, hostile and armed-to-the teeth militants' (Ashraf 2010). In many cases, the TTP came back and killed many members of the *lashkar*. On 5 June 2009, the TTP's suicide bomber killed thirty-three worshippers in a mosque in Upper Dir. As a response, the local people formed a *lashkar* of 700 men to avenge the deaths of their loved ones (Jan 2009; Walsh 2009). The *lashkar* claims to have killed dozens of militants, burnt their houses and the houses of their sympathisers (Ashraf 2009). In August 2008, the TTP killed six policemen, took their weapons and disappeared into the mountains of Buner. The people of Buner formed a *lashkar* and attacked militants' hideouts and killed most of them. 'A video made on the cell phone showed six militants lying in the dirt, blood oozing from their wounds' (Perlez and Shah 2008b). On 29 December 2008, the TTP struck back: a suicide car bomber set off an explosion in a school where polling was taking place for the election of the National Assembly of Pakistan. More than thirty people were killed and more than two dozen wounded (Oppel and Shah 2008).

The problem with the *lashkars* is that they are not part of the security forces of Pakistan. They do not have any formal or informal training in the law of armed conflict or use of weapons but the government encourage local tribesmen to raise arms against the militants. The TTP is working outside the law and so are *lashkars* by taking the law into their own hands. As their only motive is revenge, there is a greater risk that the law of armed conflict and human rights law would be violated. This can be seen in instances where the *lashkars* killed even the sympathisers of the TTP. As retaliation, militants attack villages and kill indiscriminately. In many cases, the security forces did not come to the aid of *lashkars* when the TTP attacked them (Taverinse and Ashraf 2009). The worst attack by the TTP was on the audience of a volleyball game in Shah Hassan Khel village, Lakki Marwart on 1 January 2010. The suicide attack killed ninety-seven, and forty were injured. 'The atrocity was an act of vengeance: six months earlier the people of Shah Hassan Khel had ejected the Taliban from their village, turning 24 militants over to the army' (Walsh 2010). 'But revenge runs in both directions in this rough, tribal land. Now that the traditional 40 days of mourning are coming to an end, the villagers are striking back' (Walsh 2010). The media portrayed this attack as an attack on civilians, which is not correct. The players were part of a local *lashkar*, which acted as a militia in the morning and in the evening played volleyball while their guns lay nearby. For the TTP they were a legitimate

target as under the Islamic law of *qital* civilian loses their protection by engaging in hostile activity – and picking up guns against the TTP is certainly a hostile activity. As the *lashkars* do not have a distinctive uniform, it is difficult to distinguish who is an active member of a *lashkar*. It is the duty of the government of Pakistan to protect civilians rather than encouraging them to pick up guns and take revenge. It amounts to promoting lawlessness which has led and could lead to the commission of war crimes.

The security forces of Pakistan have used jets and gunship helicopters in the fight against militants. On many occasions, sound intelligence was not collected, which led to hitting the wrong targets, killing civilians. On numerous occasions, disproportionate force was used. The firing was indiscriminate, resulting in the deaths of civilians and the destruction of civilian property. Hundreds of persons were arrested and detained without charges. The relatives of those detained do not know their whereabouts. Most of these people were kidnapped or picked up by the Pakistani intelligence agencies. Torture is reported in several cases. Indiscriminate firing and use of excessive force is against customary international law. Torture and inhumane treatment is against Common Article 3 and customary international law. Detention without charge and trial is against the fundamental rights recognised by the Constitution of Pakistan and international human rights law. The Security Council (Presidential Statement, 22 August 2008) has consistently condemned acts of terrorism in Pakistan. It has, however, at the same time, consistently stressed that 'any measures taken to combat terrorism comply with all their obligations under international law, in particular international human rights, refugee and humanitarian law'.

CIA drone attacks

The CIA drone attacks inside Pakistan engage two legal systems: the law on the use of force under the 1945 Charter of the United Nations and the law of armed conflict. The first legal system is concerned with the legality of the drone attacks whereas the second one is concerned with the way in which these attacks are carried out.

The legality of drone attacks

The government of Pakistan has, on several occasions, said that the US drone strikes in the tribal areas of Pakistan are against the 1945 Charter of the United Nations. The US Secretary of State, Robert Gates, said that the USA has the right of self-defence against the TTP fighters as they are attacking the US troops in Afghanistan (Perlez and Shah 2010). For years, US legal advisers remained silent on the legality of drone attacks inside Pakistan but the legal adviser of the Department of State (Koh 2010) said that the USA 'has the authority under international law … to use force, including lethal force, to defend itself, including by targeting persons such as high-level al-Qaeda

leaders'. The US missile strikes inside Pakistan are illegal for the following reasons unless Pakistan has a tacit agreement with the USA giving approval for these attacks (see also Alston 2009). The governments of both Pakistan and the USA are neither accepting nor denying the existing of such an agreement, but media reports suggest that there is a tacit agreement (see Murphy 2009).

International law allows the use of force in self-defence or the use of force authorised by the UN Security Council. A customary principle of international law is emerging which allows the use of force for preventing humanitarian catastrophe called humanitarian intervention (see Wood 2009; Shah 2008). The USA is relying on the use of force in self-defence, which needs some discussion. Article 2(4) of the Charter of the United Nations prohibits 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'. There are two exceptions to this rule. The first exception is the limited right to use force in self-defence under Article 51 of the Charter: 'nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations'. The second exception is when the Security Council authorises the use of force as an enforcement measure under Article 42 after all other means of enforcing its decision are exhausted.

The USA is relying on the first exception, i.e. the use of force in self-defence under Article 51. Traditionally, the right of self-defence was interpreted as a right available to states when the forces of one state cross a border intending an armed attack against another state (International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004). The wording of Article 51, however, does not specify the attacker: it can be one state attacking another state or a non-state actor such as an armed group mounting attack on another state. On this interpretation, the right of self-defence is available to the USA against a non-state actor.

There are, however, three conditions which must be satisfied before force can be used against a non-state actor inside another sovereign state. First, there must be an 'armed attack' against the state which relies on the use of force in self-defence. The key question here is what constitutes an armed attack. The severity and scale of damage done by the attack of a non-state actor must be such that it would amount to an armed attack had it been carried out by the regular forces of a state. Second, there must be a link between the non-state actor and the host state. The International Court of Justice (*Nicaragua* v. *USA*, 1986, paragraph 115) has held that the host state must exercise an 'effective control' over the non-state actor to trigger the right to use force in self-defence. The standard of effective control was slightly lowered by the International Criminal Tribunal for Former Yugoslavia (*Prosecutor* v. *Tadic*, 1999, paragraphs 117, 120, 146) to an 'overall control' standard. Article 8 of the 2001 International Law Commission's Articles on the Responsibility of States for International Wrongful Acts also states that

the 'conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. The current law is that the host state must have either (a) an effective control or (b) an overall control over the non-state actor to trigger the right to use force in self-defence. The factual link between the host and non-state actor must be established before resorting to the use of force in self-defence. Third, the 'unwillingness' and or 'unability' test must be met, i.e. the host state shall not be either willing or unable to control the non-state actor. Once these conditions are met, then proportionate use of force is permitted. The targets hit must be contributing to military objectives, i.e. only military targets shall be hit (see International Court of Justice, *Iran* v. *USA*, 2003).

Let us turn to the US claim of self-defence against the TTP. The US claim is untenable as it does not meet the above three conditions. First, the TTP was born in December 2007 whereas the USA was attacked on 11 September 2001. The TTP's fighters are allegedly helping the Afghan Taliban in its fight against the International Security Assistance Force (ISAF). The Afghan Taliban did not attack the USA either but it is alleged that the non-state actors who attacked the USA originated from Afghanistan at the time when the Taliban was its de facto ruler. Individuals joining the Afghan Taliban do not constitute an armed attack on the USA in the sense required by international law. The TTP's fighters, however, can be targeted if they cross the border into Afghanistan and join the fight against the ISAF, but to attack them inside Pakistan the clear consent of Pakistan is needed. The argument that TTP fighters are posing security threat to the US forces inside Afghanistan also does not justify the US drone attacks in the tribal areas of Pakistan (see International Court of Justice, *Iran* v. *USA*, 2003).

Second, Pakistan has neither effective nor overall control over the TTP in its tribal areas. On the contrary, the TTP is banned and the security forces of Pakistan are fighting the TTP and its affiliated armed groups. Both are actively engaged in an armed conflict. Hence, the required factual link is missing.

Third, the argument that Pakistan is not willing to do enough to control the TTP and its affiliated armed groups inside its borders is incorrect. Hundreds of the TTP's fighters and Pakistani troops are killed in the ongoing armed conflict between the two. The number of Pakistani troops killed in fighting the TTP is higher than that of US troops killed in fighting the Afghan Taliban (ISPR, 15 February 2010). This shows that Pakistan is willing to fight the TTP. If Pakistan has not defeated the TTP so far, this must not be construed as its lack of ability. ISAF and the US forces are also unable to defeat the Afghan Taliban and Al-Qaeda inside Afghanistan since October 2001. Bin Laden and Mullah Omer are alive, inflicting great harm on US and ISAF forces. Can we interpret ISAF–US failure to defeat the Afghan Taliban and Al-Qaeda as their unwillingness or lack of ability? From the

ground reality, it seems that so far all countries engaged in this fight are making efforts but none has been able to defeat the Afghan Taliban or the TTP. Given that all the three conditions required to trigger the use of force in self-defence against the TTP are absent, the US drone attacks against the TTP are against the Charter of the United Nations.

The conduct of drone attacks

Once an armed conflict of international or non-international character begins, the application of the law of armed conflict as a special law is triggered. The application of the law of armed conflict does not depend on the legality or illegality of the armed conflict. Neither does it depend on the declaration or recognition of a war by one or all parties (GC I–IV, 1949, Art. 2). Two aspects of the US drone attacks need examination under the law of armed conflict: who and how these attacks are conducted. Under the law of armed conflict, the armed forces and affiliated forces of a state are allowed to take part in hostilities. In case of arrest they are entitled to the status of a prisoner of war. Non-combatants are not allowed to take part in hostilities and are immune from attack. If they engage in any hostile act, they lose their immunity and can be targeted and upon capture are not entitled to the status of the prisoner of war (HR IV, 1907, Arts 1–3; GC III, 1949, Art. 4; AP I, 1977, Arts 43–5). They are also liable to trial and punishment if they commit a hostile act (Ministry of Defence [UK] 2005: 37). The CIA conducts drone attacks inside Pakistan (Perlez and Shah 2010; Rubin and Mazzetti 2009). The CIA is a civilian intelligence agency and is not allowed, under the law of armed conflict, to take part in fighting against the TTP. The predator drones or UAVs are wartime weapon systems to be used by US military. The CIA is not part of the US military. The engagement of civilian agency in a military activity breaches the law of armed conflict (see O'Connell 2009).

In addition, by engaging in hostile actions, the CIA has become a legitimate target for the TTP. The TTP believes that CIA operatives are based in the US embassy in Islamabad and its consulate in other Pakistani cities. On 5 April, the US consulate in Peshawar, Pakistan, was attacked. The TTP accepted responsibility for the suicide attack (*Dawn* 2010l). The incident was reported as an attack on civilians.

The USA claims that all applicable laws are followed in conducting drone attacks. The legal adviser of the State Department of the USA, Harold H. Koh, said (2010) that 'targeting practices, including the lethal operations conducted with the use of unmanned aerial vehicles (UAVs), comply with all applicable law, including the laws of war.' He added that 'these operations are conducted consistently with law of war principles … distinction' and 'proportionality' (Koh 2010).

The CIA drone attacks started in 2004 with the killing of Nekk Muhammad, a tribal leader and a fierce fighter. Since then dozens of attacks have happened

in various parts of the Pakistani tribal belt. As a routine, drones attack suspected militants' hideouts and militants themselves but in most cases civilians are killed. The exact number of civilians killed is not known but estimates run from 500 (Perlez and Shah 2010), to 700 (Woodward 2010) to 708 (*Dawn* 2010a). The HRCP (2010: 62) said that '98 people were killed … in 2006, 67 more were killed … in 2007, another 385 people were killed in 34 attacks in 2008 and 708 more lost their lives in 44 drone attacks in 2009'. 'The success percentage for the drone hits during 2009 was hardly 11 per cent. On average, 58 civilians were killed in these attacks every month, 12 persons every week and almost two people every day' (*Dawn* 2010a). On 3 September 2008, US forces attacked a border village, Angor Ada in South Waziristan, killing twenty civilians including women and children (*Dawn* 2008c; Schmitt and Perlez 2008). 'Three US helicopters landed in the plains at around 4am, troops disembarked from them and attacked a house, killing 10 people. … The troops then opened fire on villagers who had come out of their homes, killing another 10 people' (*Dawn* 2008c). These figures by independent sources do not suggest that the USA is complying with the principles of distinction or proportionality as stated by the legal adviser of the State Department (see Alston 2010).

The drone attacks have also caused confusion and fear among the civilian population of Pakistan. Khayal (2010) has poetically summarised the fear and mystery of drones or what the American call 'Shadows' in the following words:

> The masses wonder if the drones neither use Afghanistan nor Pakistani territories then from where do they come. The masses are piteously ignorant. They just don't know that the drones are not material creatures. Actually, they are spiritual beings. They don't need earthly runways for taking-off. Nor do they need petrol for accomplishing their mission. They live in outer space beyond the international boundaries of Afghanistan and Pakistan. When they feel hungry, they swoop down and kill innocent Afghani women and children. They eat the corpses and fly back to their spatial residences for having a siesta. When they again feel hungry, they again swoop down and kill another lot of innocent women and children. Having devoured the dead bodies, they fly back to their bedrooms in space. It has been going on and on like this for years.

Causing fear among civilian population is against the law of armed conflict.

Prosecution of war crimes

It is clear from the above discussion that war crimes and crimes against domestic laws are committed by the TTP, the security forces of Pakistan and the CIA. The key question to examine is whether those accused of war crimes are prosecuted. The security forces of Pakistan were able to arrest key members of

the TTP but unfortunately none of them has been either charged or prosecuted for war crimes. They were kept in captivity for a few days or weeks and then were either mysteriously released or swapped for members of the security forces imprisoned by the TTP. The top lieutenant of Baitullah Mehsud, Rafiuddin, was arrested but released after cutting a deal with the government for releasing ten government officials (Paracha 2009). Some commanders of the TTP are declared 'proclaimed offenders' under the 1898 Code of Criminal Procedure of Pakistan for not attending the court to answer terrorism-related charges against themselves but the most important commanders are not on the most wanted list of the government (*Dawn* 2010h).

There is no reasonable prospect for the prosecution of war crimes for two reasons. First, the security forces believe that they are fighting for the security and future of Pakistan. Whatever damage they can inflict on the TTP is legal. Their view is supported by the civilian government. This might be true, but the question is not whether the TTP is a legitimate target. The question is to prosecute those who violated applicable laws in carrying out operations against the TTP. The second reason is that the TTP is a lethal force. The fighters of the TTP routinely kidnap government officials and members of the security forces. The TTP usually asks the government to release the detained TTP's fighters in return for the release of government officials. The government is usually inclined to swap captives with the TTP. In some cases, ransom is paid to the TTP. This sense of *quid pro quo* prevents the successful prosecution of the TTP's members involved in war crimes. The government also understands and fears that prosecuting a top TTP commander will cause strong retaliation from the TTP.

The USA has also not initiated investigation or indicated that it intends to prosecute those involved in the killing of civilians during its Special Forces assault on Angor Ada, South Waziristan. The prosecution of war crimes by the ICC seems unlikely as both Pakistan and the USA are not parties to it and any such move would be strongly resisted by both country.

Conclusion

The conflict in the tribal areas of Pakistan is bitter and violent. Principles of the three legal systems and in some cases the rules of the code of the Taliban are violated. The conflict seems to be intensifying further, raising the possibility of more war crimes. The portrayal by media and governments of countries such as Pakistan and the USA tends to be that it is only the TTP who violate the law. This is only a half-truth. All parties to the conflict have violated and continue to violate the applicable laws. Militancy in the tribal areas is serious and genuine, which must be eliminated but all applicable laws need to be followed. No matter how much we dislike or disagree with the TTP's agenda, we still need to play by the rules to defeat it. Once the law is violated, it must be accepted, investigated and prosecuted. Otherwise, it would look as if war crimes are not only committed but also condoned.

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Part III

Concluding remarks

7 Concluding remarks

We believe that international law can be applied in Muslim states in a fashion that is compatible with Islamic law. This is possible for three reasons. First, international law is neither exclusionary nor triumphalistic in nature. It is rather accommodative of other legal systems such as the Islamic legal system. Islamic law is also not exclusionary in nature. Therefore, the exclusionary and triumphalistic theories are untenable. Second, the most fundamental principles of international law (*jus cogens*) and Islamic law (*nusus*) are compatible. Therefore, the question of triumphalism does not arise. Third, some principles of *fiqh* and the statutory Islamic laws of Muslim states might conflict with some principles of international law. However, the conflict among these principles could be resolved through using the different mechanisms available in international law such as reservations, following the most favourable principle interpretation and mechanisms available in Islamic law such as following an interpretation that favours public welfare. *Fiqh* rules are not infallible and are open to reinterpretation. As *fiqh* is a juristic understanding of what the law is, a new understanding of the law, i.e. a new *fiqh* for our age, could be developed through *ijtihad*.

Within this broader framework of compatible application of international law in Muslim states, this study has established that the Islamic of *qital* and the law of armed conflict are compatible with each other and that the former can complement the latter at national and regional levels. The grey areas of Islamic law need expansion and clarification and new rules need to be developed to cover the blind spots of the Islamic law of *qital*. The Islamic law of *qital* and the law of armed conflict could contribute to one another in certain areas as such a contribution is not prohibited by Islamic law or by international law. We do not aim to oust or minimise the application of the law of armed conflict but rather aim at strengthening it so that human suffering could be minimised in armed conflicts.

In addition, we apply the Islamic law of *qital* and the law of armed conflict to a live armed conflict in Pakistan in order to see whether these laws together with other applicable laws are complied with or not. The applicable laws are international law, especially the law of armed conflict, the Islamic law of *qital* and Pakistani laws. We recognise that militancy is a genuine and serious

problem in Pakistan. The applicable laws to the armed conflict are on the side of the Pakistani security forces to fight the TTP but these laws also impose certain restrictions which must be complied with. It is established that all parties to the conflict, i.e. the security forces of Pakistan, the Taliban and the CIA, have violated one or more of the applicable laws.

It is not enough for states to have a set of laws, municipal or international, per se. Laws must be followed in all circumstances. Difficult times do not condone violations of laws. In fact, the real test lies in following the laws in difficult times and circumstances. Some laws are made specifically for difficult times such as the law of armed conflict and the anti-terrorism law. In this sense, these laws are the normal laws for difficult circumstances as due consideration has been given to the circumstances in which these laws are intended to be applied. States must show to their citizens that they are not only the makers of laws but that they follow them too. Otherwise, it is very unlikely that people will obey the law and they might turn to those who offer a better option in terms of protection, justice, etc., or rely on self-help. People respect laws and the state because the state is providing protection and security in various forms. States offer a forum for redressing people's problems.

We have observed three kinds of reaction to the destruction and misery caused by war in Afghanistan and Pakistan. Before getting to these reactions, a brief sketch of the situations in each country might be not out of place. Afghanistan was first invaded in December 1989 by the former Soviet Union. The war lasted for a decade. Different countries and Afghan armed groups played different roles, each vying for a specific goal. The ultimate price was paid by the ordinary Afghans: thousands died, their property was destroyed and thousands were left without limbs and maimed. No compensation was paid by the actors involved and Afghans were left at the mercy of warlords.

The Taliban emerged in 1994–6 with its repressive brand of government and was routed from Kabul in late 2001 by the US-led coalition. Since 2001, the fate of millions of Afghans is no better than it was before and the old saga of death, destruction and maiming continues. The US-led coalition came into Afghanistan to get Osama bin Laden but he is still at large and his organisation is still up and running. There is no sign of compensation or a hope of a better future for Afghans. They are just living in the theatre of war where new actors play the same old roles: allegiance with regional states and superpowers at the cost of human suffering and destruction of Afghan property. Economic and political interests take priority over human security. Innocent Afghans are killed and their property destroyed but there is no investigation and prosecution for these offences. There is no hope of compensation for the losses of Afghans.

In the context of Pakistan, the security forces and intelligence agencies of Pakistan arrest and detain people suspected to be militants or to have links with the militants. There is no record of these arrested people, which is why they are called missing persons. Detainees are tortured and humiliated in custody. There are incidents of extrajudicial killing. Property is destroyed in

different military operations. Laws are violated on a regular basis but these violations are not prosecuted. There is no compensation for the loss of human life or property. In some cases, compensation is paid but the amount paid is enough to buy a lamb in an animal market. The price of a human life is equal to that of a lamb.

The first group of people feel helpless and suffer the pain hoping that some day God will come to their rescue. The second group of people join hands with different actors and make the best out of people's helplessness and the opportunity offered by the interested actors, usually foreign governments. The third group of people want to take action, hoping to rectify the situation, i.e. they turn to self-help. They cannot stand for the loss of their loved ones and destruction of their property and country. They cannot bear to see their women and children without shelter exposed to risks such as abduction and rape. They understand that the state has failed to deliver. In these circumstances, it is not surprising that some people turned to the Taliban because the state is not offering anything better. At the end it becomes a matter of available options in given circumstances. This is the point we have been trying to make that state(s) should offer better options: follow the laws themselves and provide a forum for solving people's problems. The Law may not solve every problem but there should be a system upon which people can rely. For instance, when a wedding ceremony is hit by the US-led coalition killing 100 civilians, there should be a system in place to enable justice to be done. Regular drone attacks are conducted in the tribal areas of Pakistan and have killed hundreds of civilians, but there is no compensation for the loss of civilians. States' failure is forcing people to explore other options. States need to rescue the people and one of the ways to help people is to respect the law themselves. Once a law is violated, it must be followed by an investigation and prosecution and in deserving cases compensation must be awarded.

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