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Elsewhere,¹⁰ Koskenniemi has discussed international law as “a structure of argumentative moves and positions” (p. 1)—a notion that could, I suppose, be as plausibly applied to domestic law, too (though it would bring scant comfort to those in prison, who might well wonder why they were languishing there). In the epilogue, Koskenniemi—who uses the term “formalism” to refer to the ideal of the rule of law—expresses some anxiety over the conclusion that this ideal cannot be properly captured or explained in any legal theory such as his. Koskenniemi’s further response is to argue that in spite of the realists’ assault on the conception of the rule of law, what he calls a “culture of formalism” remains possible—that is, “a culture of resistance to power, a social practice of accountability, openness, and equality whose status cannot be reduced to the political positions of any one of the parties whose claims are treated within it” (p. 500). I do not find his argument here at all easy to follow, and its presentation would have been much improved by relating it to some concrete examples. But the basic idea, as I understand it, is that there is merit in analyzing specific problems in terms of general or universal rules even if what is involved is the pursuit of an ideal that will never be fully realized. Moreover, the value derives from bringing into focus defects in the analysis: “[W]hat is it that we lack? *The ability to articulate this lack, and to do this in universal terms, is what the culture of formalism provides*” (p. 506). It seems to me, however, that in putting forward this very difficult thesis, Koskenniemi has too readily conceded victory to the realists. It is, to me, simply ridiculous to suppose that they have somehow demonstrated the vacuity of the idea that the conduct of individuals and groups can be restrained through the disinterested application of general rules. But the basic idea of treating commitment to the rule of law as a cultural phenomenon is attractive, and it may well be that in the absence of such a culture, law—as understood in European society—is simply impossible.

In conclusion, there is a puzzle about these essays. Whatever the theoretical problems that bedevil public international law, there has surely never been a time when, as more of us move ourselves, our families, and our business transactions across frontiers, transnational law (to use a different term) has been of more practical impor-

tance to lawyers. Transnational law is on the rise, not falling. In my own law school, in response to pressure from alumni, the course on this subject is now compulsory. There nevertheless remains, as Koskenniemi’s *Gentle Civilizer of Nations* makes all too apparent, a lack of fit between theoretical elaboration and down-to-earth reality. Somehow or other, the definition and boundaries of the subject continue to elude us.

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Is Jihād a Just War? War, Peace and Human Rights Under Islamic and Public International Law. By Hilmi M. Zawati. Lewiston NY: Edwin Mellen Press, 2001. Pp. xii, 218. \$109.95.

The word *jihād* means “struggle” in Arabic, and its application is as varied as that of its English counterpart. It applies to individuals and to collectivities, and ranges from spiritual to armed struggles.¹ Emphasizing the spiritual aspects of *jihād*, Prophet Muhammad referred to war as the smaller *jihād*, in contrast to the struggle against oneself (for goodness and piety) as the greater *jihād*.² Commenting on this diversity of views on *jihād*, Hilmi Zawati states in *Is Jihād a Just War?* that

[i]n the course of discussing the theory of *jihād*, a considerable number of contemporary scholars have confused the types and modes of *jihād*. Nevertheless, while Ibn Qayyim al-Jawziyya distinguished four types of *jihād*: the struggle against the self; the struggle against evil; the struggle against non-believers; and the struggle against hypocrites, al Māwardī, for his part, divided *jihād* into two general categories: wars of public interest, and wars against polytheists and apostates. In a similar vein, other Muslim jurists spelled out two types of *jihād*: the greater *jihād* and the lesser *jihād*. The first type deals with the struggle against the self and evil, and may be performed by heart; and the second type deals with the strife against apostates and non-believers, which can be accomplished by tongue, wealth and self. Based on the above categorization, and taking into consideration the current adaptation of the

¹ *Jihād*’s warlike aspect is the counterpart of Christianity’s “just war” concept and Roman law’s concept of *bellum justum*.

² From the *Qur’ān*: “Whoever strives (*Jahada*), he only strives for [his] own self” (Q.29:6); “To strive for Allah [is] true striving (*Jihād*)” (Q.22:78). See also Q.29:69; Q.22:78.

¹⁰ MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

*Shari'a*³ in contemporary vein, types of *jihād* can be subsumed under two categories: the moral struggle (greater *jihād*) and the armed struggle (lesser *jihād*). The first type is directed against the self and evil, while the second type deals with Muslims (highway robbers, rebels, apostates and unjust rulers), and with non-Muslims (polytheists and scripturaries). Since this study is based on the rules of Islamic and public international law, it is best to concentrate on the armed *jihād*; which includes the struggle against Muslim dissidents and unjust rulers even if they claim to be Muslims; and the struggle against non-Muslims: polytheists and scripturaries. It is clear that the first type of fighting (against Muslims) falls within humanistic law, which deals with the rights of civilians and fighters in times of peace, while the other type (against non-Muslims) falls under humanitarian international law, which deals with the rights of civilians and combatants in times of international conflict. (Pp. 29–30, footnotes omitted)

Detractors of Islam,⁴ as well as orientalist,⁵ have almost exclusively focused on the warlike aspect of *jihād*. Even Muslim scholars—from earlier periods of Islam⁶ up to and including our contem-

porary era⁷—have given disproportionate emphasis to the warlike, rather than the spiritual and social, aspects of *jihād*.⁸

The reasons for this emphasis are the many references to *jihād* in the *Qur'ān* and the *hadith* (sayings of the Prophet).⁹ The formative period of Islam—from 610 to 632 C.E.¹⁰—was one characterized by war between the Muslims and other tribes in the Arabian Peninsula, and it was also one during which Islam's survival as a religion and as an *umma* (nation) was at stake. During that time, the distinction between *Dar el-Selm* (the land of peace) and *Dar el-Harb* (the land of war) was clear and unambiguous. *Dar el-Selm* was the territory controlled by Muslims or where Muslims could freely practice and proselytize Islam, and *Dar el-Harb* was the territory controlled by non-Muslims, who, if they had no treaty with the Muslims and prohibited the peaceful propagation of Islam, were presumed to be enemies of Islam. *Dar el-Harb* was where warlike *jihād* was to take place, subject to many exceptions. These included the existence of treaties; whether the land was inhabited by

³ [Author's Note: *Shari'a* refers to the body of law that identifies the norms of Islam that are applicable to Muslims, and by Muslims to non-Muslims. See M. Cherif Bassiouni & Gamal M. Badr, *The Shari'ah: Sources, Interpretation, and Rule-Making*, 1 UCLA J. ISLAMIC & NEAR E.L. 135 (2002).]

⁴ Such detractors include Bernard Lewis (*The Political Language of Islam* (1988)), Judith Miller (*God Has Ninety-Nine Names* (1996)), Martin Kramer (*Political Islam* (1980)), Milton Viorst (*Sand Castles: The Arabs in Search of the Modern World* (1994)), Martin Peretz (in *The New Republic*), and Morton Zuckerman (in *The Atlantic*). For a critique of these and other writers, see EDWARD SAID, *COVERING ISLAM* (1997).

⁵ For a description of this genre of literature, see EDWARD SAID, *ORIENTALISM* (1979).

⁶ The first authority was Iham Malik (d. 796). See MALIK IBN ANAS: THE FIRST FORMULATION OF ISLAMIC LAW (Aisha Aburrahman Bewky trans., 1989). He was followed by the most noted legal authority, Muhammad al-Shayhani (d. 804), whose *Kitab al-Siyar* codified the laws and customs of war in accordance to *Shari'a*. His work was translated by Majid Khaddury in *THE ISLAMIC LAW OF NATIONS: SHAYBANI'S SIYYAR* (1966). See also TAQI AL-DIN IBN TAYMIYYAH (d. 1328), *AL-SIYASA AL-SHARIYYA FI ISLAH AL-RA'IA AL RA'IIYA* (Governance according to God's Law in reforming both the ruler and his flock). Ibn Taymiyyah is considered to be an early fundamentalist who started the movement "*al salef al saleh*" (the righteous path). For a contemporary critique, see M. Cherif Bassiouni, *A Search for Islamic Criminal Justice: An Emerging Trend in Muslim States*, in *THE ISLAMIC IMPULSE* 244 (B. Stowaser ed., 1983), reprinted in *NEW PERSPECTIVES ON ISLAM AND POLITICS IN THE MIDDLE EAST* 249 (B. Stowaser ed., 1987).

⁷ See MUHAMMAD HAMIDULLAH, *MUSLIM CONDUCT OF STATE* (6th rev. ed. 1973); MAHMUD SHALTUT, *AL-QUR'AN WA L QITAL* (1948) (*The Qur'ān and war*); 'ABDULLAH MUSTAFA EL-MARAGHI, *AL-JIHAD* (1950). This shortcoming is also apparent in the works of contemporary fundamentalist Muslim writers such as Abū'l Alā' al-Mawdūdī (d. 1976).

⁸ For a succinct, yet comprehensive, survey, see RUDOLPH PETERS, *JIHAD IN CLASSICAL AND MODERN ISLAM* (1996).

⁹ The complete record of the *Sunna* was compiled by Ishaq ibn Yassar 136 years after the death of the Prophet in 11 A.H. (A.H. refers to *Anno Hajra*). 1 A.H. corresponds to the year 622 C.E., which is the year of the Prophet's flight from Mecca to Medina. The most reliable sources of the *Sunna* are MUHAMMAD IBN ISMA'IL IBN IBRAHIM AL-MUGHIRA AL-JA'FI AL-BUKHARI, *SAHIH AL-BUKHARI* (Iman al-Nawawi ed., 1924), which contains 7,275 confirmed *hadith*, and MUSLIM IBN HAJJAJ AL-QUSHAYRI, *SAHIH MUSLIM* (Abdul Hamid Siddiqui trans., n.d.). Bukhari and Muslim, who were contemporaries, died in A.H. 257 and A.H. 261, respectively, and their works have endured the passage of time. Bukhari notes that there is agreement concerning the 7,275 *hadith* contained in his *sahih*, but that, because of repetition and overlaps, there are actually only 2,762 separate *hadith*. AL-BUKHARI, *supra*. At that time, there were 200,000 alleged *hadith* in circulation. The debate over what *hadith* are *sahih*, meaning true, is as extensive as the one over the interpretation of each *hadith*. The reconciliation of inconsistent and contradictory *hadith* is another complex issue; it is best addressed in ABD ALLAH IBN MUSLIM IBN QUTAYBA, *TA'WIL MUKHTALAFAT AL-HADITH* (Interpretation of differences in the *hadith*) (1936). For an analytical study on the technique of *Sunna* interpretation, see ABU ALI FARISI, *JAWAHIR AL-USUL, FI ILM HADITH AL-RASUL* (1969).

¹⁰ From the first Revelation upon Prophet Muhammad, to his death.

dhimmis, or people of the Book (namely, Christians and Jews who paid tribute, or *jizya*, to the Muslims); and several others that emerged in the Practice of the Prophet and in that of the first four Righteous Khalifas that followed him (633–61 C.E.).¹¹ The author refers to some of these exceptions in chapter four.

As the threat to the Islamic nations' existence abated between the eighth and twelfth centuries C.E., and more friendly relations developed with other nations, new doctrinal limitations were imposed on the resort to *jihad*. Thus, the propagation of Islam by peaceful means (as the Prophet's *hadith* had preferred) became the rule and not the exception. This reflected the true spirit of Islam as expressed in the following passage of the *Qur'an* rejecting compulsion in conversions:¹² "There is no compulsion in religion" (Q. 2:256). And also in the passage of the *Qur'an* addressing the people of the Book (Jews and Christians): "Those who believe, and those who are Jews, Christians and Sabians—whoever believe in God and the Last Day and doeth right—surely their reward is with their Lord, and there shall no fear come them, nor shall they grieve" (Q. 2:62).

From the days of the Prophet, *jihad* was subject to conditions as to its rightfulness, but it was also

subject to limitations with respect to who could order it, whether it was an individual or collective duty or merely a right, and how it should be conducted. In general, *jihad* prohibited violence against women, children, the elderly, the sick and wounded, clerics, and places of worship of Christianity and Judaism.¹³ The author deals with these aspects in chapters one and two, but does not refer to certain historical periods during which these limitations were not observed.

Warlike *jihad* originated as a right of self-defense. When the Prophet and his followers were forced to leave Mecca (622 C.E.), they were attacked by non-Muslims, and a verse of the *Qur'an* was revealed about the right to self-defense against aggression: "Sanction is given unto those who fight because they have been wronged" (Q. 22:39). Later the *Qur'an* was more explicit:

Fight in the way of God against those who fight against you, but do not begin hostilities for God does not love aggression. And slay them wherever you find them [the aggressors], and drive them out of their places whence they drove you out, for persecution is worse than slaughter. And fight not with them in the Inviolable Place of Worship until they attack you, then slay them. Such is the reward of disbelievers. (Q. 2:91–92 (emphasis added)).

The *Qur'an* further states that "if they incline to peace, incline then also to it" (Q. 8:61).

Between the seventh and twelfth centuries C.E., the four major *Sunni* schools of jurisprudence (and their various subschools) and the *Shi'a*, whose approaches to the interpretation of the *Shari'a* are different from the *Sunni*,¹⁴ developed various, though similar, doctrines of *jihad*. In time, however, the different schools and subschools in both *Sunni* and *Shi'a*' traditions came to different exegeses of *Qur'an* and *hadith* texts.¹⁵ Most of these doctrines extended *jihad* to justifiable aggression. These differences have been exploited of late by political fundamentalists, as explained below. The doctrinal evolution is not, however, covered in this book.

In the four chapters of *Is Jihad a Just War?* Zawati compares Islamic law doctrines on the rightfulness of waging war, on who can declare war, and on the manner in which it is to be waged,

¹³ There were also instances where it was extended to others, such as to Zoroastrian clerics and their temples.

¹⁴ See Bassiouni & Badr, *supra* note 3; WAEL B. HADAR, A HISTORY OF ISLAMIC LEGAL THEORIES (1997).

¹⁵ Notwithstanding these divergences, almost all doctrines focused more on *jihad*'s warlike aspects than on its societal and spiritual aspects.

¹¹ These practices were deemed authoritative.

¹² It should be noted that the *Qur'an* has several explicit verses prohibiting compulsion in religious conversion. The Muslim's duty/right is freedom of religion, including freedom to propagate it. Only when that is prohibited by non-Muslims can there be a call for *jihad*. Nevertheless, it should be noted that early interpretations of the right to propagate were basically equivalent to "convert or submit," which was a form of compulsion. There was, however, the exception of the people of the Book, if they paid *jizya* or if they had a treaty with the Muslim nation. The following *hadith* of the Prophet refers to his orders to commanders of any armies or of any expedition:

When you meet your heathen enemies, summon them to three things. Accept whatsoever they agree to, and refrain then from fighting them. Summon them to become Muslims. If they agree, accept their conversion. In that case, summon them to move from their territory to the abode of the immigrants [Medina]. If they refuse that, let them know that then they are like the Muslim Bedouins, and that they share only in the booty, when they fight together with the [other] Muslims. If they refuse conversion, then ask them to pay *jizya*. If they agree, accept their submission. But if they refuse, then ask God for assistance and fight them

Later, Abu al-Walid Muhammad ibn Muhammad ibn Rushd (d. 1198) (Averroes) was more inclined toward the spirituality of *jihad* and argued that Islam's expansion was intended to be by peaceful means. FATAWA'IBN RUSKI (Mukhtar ibn Tahir al-Tabibi ed., 1978).

with contemporary international law doctrine. This undertaking is a large one, and the author gives us only a glimpse of it. Considering that the book has a mere 111 pages of text,¹⁶ it is more of a general introduction than an in-depth analysis of the subject.¹⁷ The author's quest—namely, to show *jihād* under its best light to Western readers—is laudable, but it does not reflect the full spectrum of doctrinal diversity and the associated applications throughout the fifteen centuries of Islam.¹⁸ Likewise, the author's efforts to present *jihād* in a countervailing way to those who abuse it—whether fundamentalist Muslims fighting regimes that they deem corrupt or detractors of Islam who seek to portray it as a backward, cruel, and warlike religion,¹⁹ both convinced of an inevitable clash with the Western-Christian world²⁰—are also laudable, but the work is, alas, too sketchy to accomplish that goal.

The book's organization could have been improved. Some of the chapters' contents overlap, and it is not always clear why topical coverage is scattered in different sections. For example, chapter one starts with war *and* belligerent occupation, though they deserve separate treatment. Chapter one also includes the different types of *jihād*,²¹ a subject that would have been better served as a distinct first chapter in order to acquaint the reader with the intricacies of the subject. *Jihād* as a just war is covered in chapter four following chapter two, which deals with "*Jihād* and International Relations" under the headings of treaties, reciprocity, arbitration, neutrality, diplomatic ex-

change, and foreign trade.²² Other limits on the use of violence, the *jus in bello*, are found throughout chapters one and two. Chapter three is more of a comparative chapter on human rights law, with scant connection to *jihād*, aside from its possible limits under contemporary norms of human rights law and general principles of Islamic law.

Jihād in the first century of Islam was predominantly warlike in nature. There is no reason fifteen centuries later for the defenders of Islam, like this author, to mitigate such a historical fact—it was simply dictated by the contextual exigencies of that time. But also during that period, Islam advanced the values of what we now call international humanitarian law,²³ and the author correctly points that out throughout the book. Yet, while we can extol the virtues of that contribution at the time it occurred, we cannot equate it with our contemporary normative standards, as the author does, even when there are several similarities.

Notably absent from this book is the evolution of *jihād*, particularly those aspects regarding decolonization, the Palestinian-Israeli war, and Islamic political fundamentalism, which resorts to *jihād* for violence against Muslim regimes that they deem corrupt. Admittedly, these are controversial topics, but they are too important to be overlooked.

The recent evolution of doctrinal pronouncements and *jihād* practice is as noteworthy as it is revealing. For all practical purposes, *jihād* had all but disappeared as the basis of a just war during the period of the Turkish Ottoman Empire (1327–1924 C.E.), though the Sultans of that empire sometimes invoked it for exhortative purposes to rally the masses behind a given military campaign. But *jihād* surfaced again in the colonial era following the First, and especially the Second, World War. The nationalist movements in Arab countries, as well as in Asian Muslim countries, were

¹⁶ It also has appendices (from pages 113 to 164) that contain translations of five significant treaties in the history of Islam and two contemporary Islamic human rights declarations. Presumably, the author wants to show that there is no substantial contradiction between Islam and contemporary human rights.

¹⁷ The book is an adaptation of the author's doctoral dissertation at McGill University School of Law, whose dean wrote a short preface.

¹⁸ See, in contrast, the comprehensive approach of PETERS, *supra* note 8.

¹⁹ See *supra* note 4.

²⁰ See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1998); cf. JOHN ESPOSITO, *THE ISLAMIC THREAT: MYTH OR REALITY* (1992).

²¹ The author refers to it as a doctrine, but there are many different doctrines of *jihād*, depending upon the *Madhahib*, the doctrinal schools of thought (there are four major schools for the *Sunni*, and three major schools for the *Shi'a*). See PETERS, *supra* note 8, and his bibliography. See also Bassiouni & Badr, *supra* note 3, for the schools of interpretation, and WAEL B. HALLAQ, *A HISTORY OF ISLAMIC LEGAL THEORIES* (1997).

²² These exceptions illustrate the proposition that resort to war under the concept of *jihād* has legal and political limits that are dictated by considerations other than epistemological. While there are many examples during Islam's fifteen centuries of pragmatic considerations and political reasons for which the various ruling regimes have gone to war or refrained from it, these examples evidence the use of the concept of *jihād* for political purposes and for exhorting the Muslim masses to war. See also Bassiouni & Badr, *supra* note 3, at 178 ("Chronology of Major Dates in the History of the Islamic State(s)").

²³ See M. Cherif Bassiouni, *Evolution of International Humanitarian Law and Arms Control Agreements*, in *A MANUAL ON INTERNATIONAL HUMANITARIAN LAW AND ARMS CONTROL AGREEMENTS 3* (M. Cherif Bassiouni ed., 2000).

dominant, however, and those who adhered to Islamic fundamentalist organizations in these countries were few in number. As a result, the concept of *jihād* was not particularly salient, though scholars of that time sought to give it a modern interpretation.²⁴ *Jihād* instead became useful more recently as a justification for those who wanted to fight against established Muslim regimes.

Since the end of World War II, Islamic fundamentalism has grown throughout the fifty-three member-states of the Organization of the Islamic Conference. Certain groups have invoked the concept of *jihād* in order to justify their violent struggle against regimes that they deem corrupt and also against regimes that they judge are not properly applying the *Shari'a*. These groups selectively use earlier doctrinal writings on *jihād*, as well as their own exegeses of *Qur'ānic* and *hadith* texts, in order to legitimize their revolutionary and violent activities. In so doing, however, they ignore the correlative obligations that provide for limitations on the permissible use of violence and on the targets against which such violence can be applied. In short, the right to resort to violence, as these groups justify it under some extrapolation of *jihād*, overshadows the limits of resort to violence.

As these violent, revolutionary groups broke up into smaller ones, each one proclaimed its own brand of *jihād* doctrine and pursued violence by unjustified means. Such groups simply declared a given ruler or regime to have become *kafir*—meaning that they had strayed away from Islam, which is equivalent to committing *hudud* crimes,²⁵ punishable by death.²⁶ In this way the groups justified the assassinations and other acts of impermissible violence in which they had engaged.

Jihād became the legitimization of those Islamic organizations' resort to unlawful violence as a means either of achieving the ultimate goal of the ideal Islamic state or of fighting the enemies

of Islam.²⁷ It has been carried out not only against domestic regimes,²⁸ but also on an international scale, as evidenced by Osama bin Laden's call for *jihād* against the United States—which resulted in such attacks as those against the U.S. embassies in Dar es Salaam (Tanzania) and Nairobi (Kenya), against the USS *Cole* off the coast of Yemen, and against the World Trade Center and the Pentagon.²⁹ These acts of violence are unjustified in Islam.

Jihād is also invoked in the Palestinian-Israeli conflict by such organizations as Hamas, Hezbollah, and Islamic Jihād.³⁰ All three believe that they have a right to resort to armed struggle against Israel's occupation of Palestine, and in that respect, they are correct. But that is not *jihād*, since the dispute between Palestinians and Israelis is not over the free exercise of Islam as a religion or over its propagation. It is simply an armed conflict concerning Palestinian independence. Nevertheless, under both contemporary law of armed conflict and Islamic law, there are limits to the use of force. All three groups claiming to operate in accordance with Islamic law have, however, resorted to means that include unlawful violence against civilians, which both Islam and contemporary international law condemn, irrespective of the behavior of their opponents.³¹ Theirs, however, is not a unique experience. Almost every decolonization conflict and conflict of a non-international character since World War II has involved the use of unlawful violence by the insurgent group,³²

²⁷ See, e.g., AHMED RASHID, *JIHAD: THE RISE OF MILITANT ISLAM IN CENTRAL ASIA* (2002); MARY ANNE WEAVER, *A PORTRAIT OF EGYPT: A JOURNEY THROUGH THE WORLD OF MILITANT ISLAM* (2000).

²⁸ See M. Cherif Bassiouni, *The Face of Terror*, CHICAGO TRIBUNE, October 21, 2001, §2, at 1.

²⁹ See, e.g., M. Cherif Bassiouni, *Legal Controls of International Terrorism: A Policy-Oriented Perspective*, 43 HARV. INT'L L.J. 83 (2002).

³⁰ For an insightful recent book that goes into the religious background of the conflict, see ROSEMARY RADFORD REUTHER & HERMAN J. REUTHER, *THE WRATH OF JONAH: THE CRISIS OF RELIGIOUS NATIONALISM IN THE ISRAELI-PALESTINIAN CONFLICT* (2002).

³¹ Reprisals that constitute violations of international humanitarian law are prohibited. See FRITZ KALSHOVEN & LISBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* (3d ed. 2001). The same substantive rules did not, however, clearly exist under the Islamic law of armed conflict, although there are some constructions to the contrary. See, e.g., KHADDURY, *supra* note 6.

³² See Jennifer Balint, *An Empirical Study of Conflict, Conflict Victimization and Legal Redress 1946–1996*, in *REIGNING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS:*

²⁴ Among them Sheikh Mahmud Shaltut, Al-Azhar's rector, see *supra* note 7, Sheikh Mustafa El-Maraghi, see *supra* note 7, and Sheikh Muhammad Abu Zahra, the University of Cairo's professor of *Shari'a* and a leading expert whose many writings were published between 1950 and 1970. They followed the lead of the great contemporary reformer Sheikh Mohammed Abdou, for whom the propagation of Islam was to be by peaceful means, thus implicitly rejecting the early notion of *jihād* that some doctrines espoused when religious differences between peoples meant war.

²⁵ Aly Aly Mansour, *Hudud Crimes*, in *THE ISLAMIC CRIMINAL JUSTICE SYSTEM* 195 (M. Cherif Bassiouni ed., 1982).

²⁶ See M. Cherif Bassiouni, *Death as a Penalty in the Shari'a*, in *THE DEATH PENALTY: CONDEMNED* 65 (International Commission of Jurists, 2000).

primarily because of the military imbalance and power asymmetry between these groups, on the one hand, and the occupying power and established regimes, on the other. Resorting to unlawful use of violence becomes a means of redressing that imbalance and also of attracting attention to the problem underlying the conflict. In these conflicts, however, the opposing sides seek legitimacy through labels, particularly in order to cover up for their unlawful acts of violence. Thus, what is *jihād* to some is terrorism to others, and what is self-defense to some is also terrorism to others.³³ But self-characterization is not enough to justify the unlawful use of violence by any party to a conflict, no matter how legitimate the cause may be.³⁴ Although the author does not address these recent phenomena, he deserves credit for explicating the legal dimensions of *jihād* and its constraints, and for thereby explaining why extremists' use of that concept is unjustified, and their use of violence, unlawful.

What needs to be emphasized is that the resort to force as part of *jihād* in the early days of Islam was justified on the basis that there was no freedom to propagate Islam or for Muslims to practice it freely in non-Muslim countries. This explains why that period of Islam—and for that matter, most of its first twelve centuries—was characterized by recurring violence. To argue otherwise is revisionist history. But whatever justifications may have existed throughout the history of Islam, *jihād* in the name of the propagation of the faith can no longer be sustained in an era where freedom of religion, practice, thought, and speech are internationally guaranteed human rights.³⁵ Thus, conflicts such as the Palestinian-

Israeli one, as well as the one between Chechens and Russians, and earlier between Afghans and Russians, cannot be characterized as *jihād*, since they do not involve religious freedom. These conflicts are therefore controlled by other aspects of Islamic law, which fully recognizes the applicability of positive law, which in this case would be international humanitarian law.³⁶ This era of worldwide freedom of religion is the era of globalization, which is expressed in the *Qur'ān*: "O Mankind, We have created you male and female, and made you into tribes and nations, that you may know one another (not that you may despise each other). Surely, the noblest among you in the sight of God is the most righteous of you. God is All-knowing, All-aware" (Q. 49:13).³⁷

In June of this year, a Palestinian-American was chosen as one of Harvard's commencement speakers.³⁸ He chose as his topic "My American *Jihād*," which was inspired by the words of the Prophet that the struggle against self is the greatest of all *jihāds*. Shockingly, the speaker was opposed by some student organizations and others, mainly on political grounds. They claimed that the word *jihād* was equivalent to a rallying cry for attacks on Israel. In their ignorance and intolerance, they prevented this brilliant student from sharing with his classmates and others the nobler meaning of *jihād*. Paradoxically, it is these attitudes of intolerance, much like the injustice inflicted upon Palestinians, and much like the corrupt and ineffective Muslim regimes that oppress their people, that breed violent, political *jihād*.

This is why we need more literature on *jihād* and on Islamic law, which is so misunderstood in this country, and so misapplied in Muslim countries. This is why Zawati's book is welcome, notwithstanding its limitations.

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PROCEEDINGS OF THE SIRACUSA CONFERENCE, 17–21 SEPTEMBER 1998, at 110 (M. Cherif Bassiouni & Christopher C. Joyner eds., 1998); STATES IN ARMED CONFLICT 2000, at 28 (Margaretta Sollenberg ed., 2001); A. J. JONGMAN, PLOOM, WORLD CONFLICT & HUMAN RIGHTS MAP 2001/2002 (2002); INTERNATIONAL INSTITUTE OF STRATEGIC STUDIES, 2000 Chart of Armed Conflict, in THE MILITARY BALANCE 2000–2001 (2000).

³³ See Bassiouni, *Legal Controls of International Terrorism*, *supra* note 29, at 101; M. Cherif Bassiouni, *Perspectives on International Terrorism*, in INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS 1937–2001, at 1, 15 (M. Cherif Bassiouni ed., 2001).

³⁴ In other words, protagonists to a given conflict cannot self-define their conduct and that of their opponents to characterize one or the other as lawful or unlawful. See, e.g., HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES (1993).

³⁵ Paradoxically, countries that profess to be Islamic are the ones restricting freedom of religion, whether

by people of the Book, which is prohibited by Islam, or others (in particular, the Baha'is). See M. Cherif Bassiouni, *Freedom of Religion in Egypt: The Baha'is' Case*, in CRIMINOLOGIA Y DERECHO PENAL AL SERVICIO DE LA PERSONA (José Luis de la Cuesta, Iñaki Dendaluze, & Enrique Echeburúa eds., 1989).

³⁶ See Bassiouni, *Evolution of International Humanitarian Law and Arms Control Agreements*, *supra* note 23.

³⁷ Other verses also refer to the universality of humankind, notwithstanding its diversity.

³⁸ See Kate Zernike, *Harvard Student Drops "Jihad" from Speech Title*, N.Y. TIMES, June 1, 2002, at A10.