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“Lone Wolf” Terrorism and the Classical *Jihad*: On the Contingencies of Violent Islamic Extremism

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I. INTRODUCTION

It is nearly impossible to describe Muslim expansionism in the centuries following the death of the Prophet Muhammad—broadly undertaken in service of the Islamic doctrine of *jihad*—as being somehow compatible with modern norms of international relations, including self-determination and the noninterference in the affairs of other states.¹ At first glance, this might seem to suggest a certain tension in modern Muslim thought that *jihadist* movements, and in particular the current *bête noire* of the United States, the Islamic State,² have been able to exploit. Modern Muslim intellectuals, that is, are forced to somehow reconcile an expansionist past, which was not only tolerated by classical jurists of the medieval era interpreting Islam’s sacred texts, but indeed exhorted by them as a duty of the Muslim community, with

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¹ This is the subject of Part II of this paper.

² The Islamic State owes its origins to the Al Qaeda affiliate in Iraq, led by Abu Mus’ab al-Zarqawi until his death. Will McCants, *State of Confusion: ISIS’ Strategy and How to Counter It*, FOREIGN AFFAIRS (Sept. 10, 2014), <https://www.foreignaffairs.com/articles/iraq/2014-09-10/state-confusion>. A few years later, his successor and the Islamic State’s current leader, Abu Bakr al-Baghdadi, declared himself Caliph and the organization began to call itself the Islamic State, claiming that it was the resumption of the historic Sunni Caliphate. Graeme Wood, *What ISIS’s Leader Really Wants: The Longer He Lives, The More Powerful He Becomes*, NEW REPUBLIC (Sept. 1, 2014), <http://www.newrepublic.com/article/119259/isis-history-islamic-states-new-caliphate-syria-and-iraq>. After the Islamic State managed to overrun the Iraqi city of Mosul and began to threaten the Kurdish city of Erbil, the United States initiated a series of air strikes against it. Isabel Coles, *Iraqi Kurds Liberate Hundreds Trapped by ISIS on Sinjar Mountain*, REUTERS (Dec. 18, 2014), <http://www.reuters.com/article/2014/12/18/us-mideast-crisis-sinjar-idUSKBN0JW22G20141218>. Shortly thereafter, the Islamic State reacted by killing American hostage James Foley, leading President Obama to denounce it in extremely strong terms. President Barack Obama, Statement on the Murder of James Foley (Aug. 20, 2014), <https://www.whitehouse.gov/photos-and-video/video/2014/08/20/president-obama-delivers-statement-murder-james-foley> (follow “Read the Transcript” hyperlink) (describing the Islamic State as “terroriz[ing] their neighbors and offer[ing] them nothing, but an endless slavery to their empty vision, and the collapse of any definition of civilized behavior”).

modern realities, where the *jihad* as it was historically understood has become something of an embarrassment.³ In so doing, the argument runs, they leave themselves exposed to the “strict” and “literalist” claims of the defenders of the Islamic State,⁴ who can, and do, call up such classical juristic sources at will to demonstrate the true Islamicity of their actions⁵ relative to modernists, who can only rely on abstract principles, optimistic contextualizations, and vague apologies that sound suspiciously Western.

The purpose of this paper is to explore the fallacy of this conclusion. There is nothing “strict” or “literal” about modern *jihadism*, and in particular the *jihadism* of the Islamic State. The complex question of how Muslim polities are supposed to organize themselves in the context of a multipolar international system governed by norms of respect for territorial integrity that could scarcely have been imagined in the premodern era can hardly be approached in such a textualist fashion.

Rather, *jihadism* must be seen as a modern Islamic response, one among many, to the modern circumstances in which Muslims find themselves. The point is not that the normative system developed by *jihadist* organizations is somehow an entirely implausible reading of the tradition, for it is not. Yet it is no more plausible, *and no more “strict” or literal*, than those (far more popular) readings that have found resources in the deep Islamic tradition from which to develop a conception of tolerance and mutual respect for non-Muslim polities. Reference to *jihadism* as “literal” application of *shari’a*—with the concomitant implication that the practices of modern Muslim nation states are somehow not “strict” or “literal” derivations of *shari’a*—confer a legitimacy on extremist movements that they hardly deserve.

This short paper expounds on these themes through the examination of one of the most dangerous forms of terrorism in our times—that of “lone wolf” terrorism. The paper will show that while broadly accepted as a type of obligatory *jihad* by the world’s most extreme Islamist organizations, very much including the Islamic State, the practice suffers from its own tensions

³ One of the most salient attempts at such reconciliation appears in Sherman Jackson, *Jihad and the Modern World*, 7 J. ISLAMIC L. & CULTURE 1 (2002), discussed in Part IV of this paper. Jackson’s core argument is that the historical classical division of the world into two “houses”—one, the House of Islam, where the Muslims live, and the other, the House of War, that the Muslims sought to conquer—was more a description of historical reality than a prescriptive Islamic demand to create such a world, or recreate it, as the case may be. *Id.* at 15-18.

⁴ The repeated references to the most extreme manifestations of Islamism as being either “strict” or “literalist” is a problem I have also discussed in the context of family law. Haider Ala Hamoudi, *The Political Codification of Islamic Law: A Closer Look at the Draft Shi’i Personal Status Code of Iraq*, 32 ARIZ. J. INT’L & COMP. L. 2, 4-5 (2015).

⁵ Cole Bunzel & William McCants, *Experts Weigh In (Part 1): How Does ISIS Approach Islamic Scripture?*, BROOKINGS (March 24, 2015, 9:05 AM), <http://www.brookings.edu/blogs/markaz/posts/2015/03/24-isis-approach-to-islamic-scripture-part-one-bunzel>.

with the classical tradition. Thus, a modern Muslim intellectual seeking to normalize the modern international system on its own terms must contend with a tradition that assumes perduring hostility between a House of Islam and a House of War. However, an advocate of modern *jihadism* must similarly explain how the fundamentally *conservative* doctrine of classical *jihad*, designed to preserve the internal political order of the universal Muslim state and ensure its continuous expansion in a systematic and orderly fashion, could possibly justify the type of randomized and atomized form of individual violence that lone wolf terrorism represents. Explanations may be available, but they are likely to strike the modern Muslim more enamored of the current global order as artificial concoctions haphazardly patched together to justify on religious grounds violence that is fundamentally the product of psychopathy rather than religious argument. This is in fact not terribly dissimilar to accusations on the part of *jihadists* to the Muslim mainstream that any sort of Islamic justification of the existing global order is some sort of capitulation to colonialist Western interests.

In the end, in other words, the issue does not center around which of the competing Islamic visions—one broadly compatible with international norms as reflected in the United Nations Charter and the other dedicated to the perpetration of violence of nearly any sort against non-Muslim polities and their inhabitants—is more “strict” or “literal.” It does not even center around which happens to be more plausible. The debate is almost entirely a normative and political one, concerning preferences for different worldviews. The classical doctrine is merely the mask beneath which this ideological contestation takes place.

Following this Introduction, Part II of this paper offers a brief and necessarily reductive review of the classical doctrine of *jihad*. It will show that the earliest treatment of classical *jihad* presumes a Manichean universe, with the entire non-Muslim world reduced into a “House of War” that is fit to be conquered. At the same time, and less remarked upon, is the fact that the doctrine is also deeply and fundamentally conservative and meant very much to preserve an internal Islamic *status quo* within the other polity, the “House of Islam.” It is not that war is shunned, but rather that violence is initiated and organized in a systematic and thorough fashion under the leadership of the caliph. Part I also describes the manner in which classical thought evolved over time from this early vision in two different directions. First, the tradition began to include conceptions of defense, in particular following the Crusades in the West and the Mongol invasions in the East, as Muslim empires began to suffer significant setbacks after centuries of unbridled expansion. These conceptions involved violence directed at an enemy on a more localized scale, not necessarily approved, directed or managed by the caliph. Second, the recognition of non-Muslim polities on a

more permanent basis developed more salience as it became obvious that they were not likely to fall subject to Islamic rule within any reasonable period of time.

Part III will show the manner in which Muslim states used the second of these trends in order to evolve in a manner that permitted them to participate broadly in the rise of an international order that is currently based not upon subjugation and conquest, but rather (at least in theory) upon territorial integrity and the right of self-determination.⁶ It will demonstrate specifically the Islamic justifications that underlie this significant shift in perspective, broadly adopted by the vast majority of the world's Muslims.

In Part IV, I turn to the *jihadist* critique of this approach as effectively an elaborate apologia to the infidel's system of international governance. This Part lays out the manner in which *jihadism* has developed its own rules of orchestrated violence on a far more individualized scale, drawing on the first of the evolutionary trends described in Part II. Part IV also demonstrates, however, that even if the *jihadists* have managed to reassert the early classical Manicheism, they have done it in a manner that glorifies a form of individualized and self-directed violence—lone wolf terrorism—that stands in stark tension with the classical tradition. For that tradition called for the expansion of the House of Islam in an organized and systematic fashion, not the killing of enemies wherever and however they could be found, irrespective of the manner and the cost.⁷ The point, as Part IV makes clear, is that there is no such thing as a “literal” application of classical *jihad* in the modern world. The doctrine developed in a place and time very different from our own, and as such any effort to apply it would involve some level of license to render it sensible and responsive to modern contingencies. As to whether that license should be deployed to harmonize Islamic law with the modern law of nations, or whether it should be used to reject and resist that order in the most violent manner imaginable is of course an important

⁶ After the U.S. invasion of Iraq in 2003, the idea that global powers generally, and the United States in particular, respect territorial integrity or national self-determination in the manner demanded by international law has been subject to criticism and scrutiny. See, e.g., Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 180-236 (2004) (indicating that the invasion of Iraq proceeded on legal bases that were dubious at best). Indeed, the reason for the popularity of *jihadism* may be due to such actions, which are perceived by many in the Muslim world as a form of colonialism that must be resisted. See Haider Ala Hamoudi, *The Muezzin's Call and the Dow Jones Bell: On the Necessity of Realism in the Study of Islamic Law*, 56 AM. J. COMP. L. 423, 463-67 (2008) (describing “resistance” to foreign aggression, occupation and colonialism as the *raison d’etre* of many Islamist movements). It is important to note that this criticism is orthogonal to the themes of this paper, which is attempting to contrast a classical *theory* of international relations with a modern one, in order to show that no modern international practice could in fact sensibly resurrect the classical theory because of its irrelevance to modern conditions. On the question of whether or not international practice in fact follows the modern norms and principles espoused in the U.N. Charter, this paper is entirely agnostic.

⁷ See *infra* notes 30-31 and accompanying text.

question. However, it is at heart a political one more than a doctrinal one. As is often the case, the law merely supplies the rhetoric for the underlying political argument.

II. UNDERSTANDING THE CLASSICAL *JIHAD*

A. Early Conceptions

It would be a severe categorical error to treat classical Islamic law as some sort of monolithic whole that admits no variation in approach. In fact, it is structurally pluralistic,⁸ an almost undiluted form of jurists’ law, to paraphrase one of the premier Islamic law scholars of the twentieth century.⁹ Classical Sunni Islamic law is an oft-conflicting and largely overlapping corpus of material developed by a variety of different jurists over the course of centuries working within four primary schools of thought, deriving their various rules from the broadly accepted foundational sources of Islamic law, which are the Qur’an, or the Revealed Book of God, and the Sunna, or the statements and actions of the Prophet Muhammad.¹⁰

In light of this structural pluralism, it would be impossible to describe in an absolutely precise fashion what classical Islamic law had to say about anything at all, very much including the highly charged subject of *jihad*. Nevertheless, certain broad themes are identifiable from the works of the more influential jurists writing on the subject. These are described below.

One of the most historically influential juristic compendia on the subject of international relations is authored by Muhammad ibn Hasan al-Shaybani, an immediate disciple to one of the eponyms of one of the four Sunni schools, the renowned Abu Hanifa.¹¹ Shaybani’s influence is so immense that he has been commonly referred to as the Hugo Grotius¹² of Islamic law.¹³ While the claim is at the very least reductive,¹⁴ there is little doubt that his work deeply influenced, and continues to influence, generations of jurists long after him. I therefore begin with a brief review of Shaybani’s description of

⁸ Hamoudi, *supra* note 6, at 434-35.

⁹ JOSEPH SCHACHT, AN INTRODUCTION TO ISLAMIC LAW 5 (1982).

¹⁰ Hamoudi, *supra* note 6, at 434-35.

¹¹ MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR 29-30 (1966).

¹² Hugo Grotius was a seventeenth century Dutch scholar and diplomat most commonly credited with founding modern international law. MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 3 (2008).

¹³ Philip C. Jessup, *Foreword* to MAJID KHADDURI, THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR, at ix-x (1966).

¹⁴ *See id.* at x (quoting Khadduri to the effect that “to identify the names of Shaybani and Grotius . . . will not add laurels necessarily to a classical author whose place in the history of jurisprudence is assured.”).

international relations generally before proceeding to describe the subsequent evolution of thought during the classical era, and after it ended.

By way of introduction, early classical jurists, very much including Shaybani, envisioned the world as largely divided in a rather Manichean fashion between a single, unified Muslim polity on the one hand, the House of Islam, and the entire mass of humanity on the other, located in the House of War.¹⁵ The ultimate aim of the House of Islam was to bring the entire world within the House of Islam.¹⁶ War, or the *jihad*, is no more and no less a means to this end in Shaybani's vision, one that is only taken when and where the enemy has refused to submit to Islam's call and it is military advantageous to launch an attack.¹⁷ Pursuant to this, Shaybani lays out elaborate rules for the *jihad*, both in terms of the manner in which it is to be initiated—what would in the modern discourse of international law be described as *jus ad bellum*—as well as the manner it was to be conducted once it had been initiated, referred to in modern international law as *jus in bello*.¹⁸ These details have been recounted at length by various academic commentators and hardly require comprehensive elaboration here.¹⁹ However, some observations may be made concerning Shaybani's work that in many ways help to contextualize his conception of international relations in Islam.

The first is that Shaybani lived during the Abbasid caliphate.²⁰ Up to that time, Islam as a polity had only known expansion.²¹ It seemed too obvious to Muslims at the time, and indeed to many of their enemies, that it was the “manifest destiny” of the House of Islam, and indeed the fulfillment of the Will of God, that the House of Islam would continue to so expand until it spanned the globe.²² Accordingly, Shaybani's focus is on the manner in which Muslim armies conduct themselves in attacks on enemy territory.²³ The “defensive *jihad*” that consumes the attention of later classical jurists,²⁴

¹⁵ See KHADDURI, *supra* note 11 at 11. Shaybani himself uses this distinction extensively in his work. See, e.g., KHADDURI, *supra* note 11 at 130-33 (discussing trade between House of War and House of Islam).

¹⁶ See *id.* at 12.

¹⁷ JOHN KELSAY, ARGUING THE JUST WAR IN ISLAM 100-01 (2007); KHADDURI, *supra* note 11 at 95.

¹⁸ See KHADDURI, *supra* note 11, at 95-102; KELSAY, *supra* note 17, at 100-10.

¹⁹ See KHADDURI, *supra* note 11, at 95-102; KELSAY, *supra* note 17, at 100-10.

²⁰ See KHADDURI, *supra* note 11, at 28.

²¹ See AMIRA K. BENNISON, GREAT CALIPHS: THE GOLDEN AGE OF THE 'ABBASID EMPIRE 4-5 (2009).

²² *Id.* at 4.

²³ See KELSAY, *supra* note 17, at 114.

²⁴ See notes 35-42 *infra* and accompanying text.

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and indeed nearly all contemporary *jihadist* movements,²⁵ is simply not important to Shaybani in his context.

Perhaps for this reason, Shaybani, and indeed nearly all early classical jurists, envision the duty of *jihad* as being a communal duty rather than an individual one.²⁶ Indeed, as late as the early twelfth century C.E., the noted Maliki scholar Ibn Rushd could write in his own work on *jihad* that “scholars agree that the *jihad* is a collective and not a personal obligation,” noting as exception only the circumstance where nobody else is available to take part in it.²⁷ This means that while it is the obligation of the community as a whole to conduct it, not every single individual needs to be involved in it.²⁸ Some *cannot* take part even if they would like to. Permission from parents, for example, is required, and at least according to some accounts, permission from creditors.²⁹

Moreover, and equally importantly, Shaybani envisioned it to be exclusively the role of the leader of the Muslim community to organize, direct and manage the fighting.³⁰ The caliph would determine how many fighters might be needed, where they might be deployed, when fighting would be initiated, and how it might be ended. Given this, loyalty to obey army commands was an important prerequisite for participation in the *jihad*.³¹

Thus, Shaybani’s *jihad* was certainly a central feature of the House of Islam, but it could hardly be described as all-consuming. It was an obligation of the Muslim community as a whole to undertake as a means to expand the House of Islam until it encompassed the globe. However, it was not one that would necessarily affect the lives of each individual. A significant number of able-bodied Muslims could very well never in their lives take up arms, and this would not in any way detract from the fulfillment of the communal obligation, so long as the caliph’s calls for fighters to partake in a *jihad*, when made, were fulfilled by sufficient numbers within the community. Indeed, the very fact that at times the married would not participate,³² that prospective fighters needed their parents’ permission,³³ and that debtors without means

²⁵ Hamoudi, *supra* note 6, at 428-29.

²⁶ See, e.g., KHADDURI, *supra* note 11, at 85 (noting that married men were not called for the *jihad* in the time of the Second Caliph, but asked to supply horses for it); see also MAJID KHADDURI, WAR AND PEACE IN THE LAW OF ISLAM 60-61 (1955).

²⁷ ABU AL-WALID MUHAMMAD IBN MUHAMMAD IBN RUSHD, *The Chapter on Jihad From Averroes’ Legal Handbook ‘Bidayat Al-Mudjtahid’*, in JIHAD IN MEDIAEVAL AND MODERN ISLAM 9-10 (Rudolph Peters trans., E.J. Brill, Leiden 5th vol. 1977).

²⁸ See KHADDURI, *supra* note 11, at 61; IBN RUSHD, *supra* note 27, at 9.

²⁹ See IBN RUSHD, *supra* note 27, at 9; KHADDURI, *supra* note 26, at 85-86.

³⁰ See KELSAY, *supra* note 17, at 101; KHADDURI, *supra* note 11, at 61.

³¹ See KHADDURI, *supra* note 26, at 86.

³² See KHADDURI, *supra* note 11, at 85.

³³ See IBN RUSHD, *supra* note 27, at 9; see also KHADDURI, *supra* note 26, at 85-86.

to pay their debts were not supposed to participate either,³⁴ suggests that the community recognized values of a commercial and familial nature alongside the *jihad*.

B. The Rise of Defensive *Jihad*

Long before the end of the classical era, Shaybani's assumptions respecting Islam's inevitable expansion began to appear increasingly less plausible. In particular, the Crusades in the Muslim West and the Mongol invasions from the East caused at least some jurists to think more deeply about the concept of defensive *jihad*.³⁵ It might very well make sense to leave the coordination of an expansionist campaign to the discretion of a political leader, and to limit those who are participating in it so as to realize other societal values. However the same was almost surely not true in the case of non-Muslim forces invading Muslim lands. In such instances, there seemed to be greater urgency to respond to the threat than Shaybani's rules anticipated.

Much of this reached its apotheosis with a prominent early fourteenth century Hanbali scholar, Ibn Taymiyya, who has proved to be something of an inspiration to contemporary *jihadist* movements.³⁶ Part of the reason for this arises out of his seeming obsession with directing violence at Muslims who were insufficiently pure, with his particular contemporaneous example being the Mongols.³⁷ It is not difficult to see why Ibn Taymiyya's strident railing against the Mongols for their alleged impurities respecting the faith could prove as inspiration to any number of *jihadist* groups in the Muslim world attacking states, institutions and people who are overwhelmingly Muslim.³⁸

More importantly for the purposes of this paper, Ibn Taymiyya also played a critical role in developing the idea, soundly rejected by earlier scholars from Shaybani through to Ibn Rushd, that *jihad* could in certain circumstances be an individual duty. Specifically, Ibn Taymiyya indicated,

³⁴ See IBN RUSHD, *supra* note 27, at 9; KHADDURI, *supra* note 26, at 85-86.

³⁵ See, e.g., KELSAY, *supra* note 17, at 115-22.

³⁶ See JOHN L. ESPOSITO, UNHOLY WAR: TERROR IN THE NAME OF ISLAM 45 (2002).

³⁷ See *id.* at 46.

³⁸ One of the starkest examples of this stridency of extremist Islamists against fellow Muslims lies in the case of Al Qaeda. While it may be best known in the West as the perpetrator of the 9/11 attacks in New York and Washington, the 7/7 attacks on the London subway, and the Madrid train bombings, the fact is that between 2006 and 2008, non-Westerners in overwhelmingly Muslim states were 38 times more likely to be killed by Al Qaeda than Westerners. See Yassin Musharbash, *Surprising Study on Terrorism: Al-Qaida Kills Eight Times More Muslims Than Non-Muslims*, SPIEGEL ONLINE INTERNATIONAL (Dec. 3, 2009), <http://www.spiegel.de/international/world/surprising-study-on-terrorism-al-qaida-kills-eight-times-more-muslims-than-non-muslims-a-660619.html>.

when Muslims are attacked, the individual obligation is triggered, *not only by those directly affected by the attack, but rather by each individual Muslim*, whether or not a professional soldier.³⁹

While this will be discussed in more detail in Part IV, it might be noted that there is still considerable distance between this vision and that of the lone wolf terrorist attack. The principle of individual duty, being expounded in the context of Mongol invasion and Crusade alike, does not seem to implicate atomized and disorganized violence, because it is difficult to see how that would in fact drive out either invading force. Rather, the matter seemed to derive as response to the urgency of supplying necessary numbers of fighters to an organized army to repel an attack. Hence, Ibn Taymiyya relies upon the fabled Islamic example of the Battle of the Trench, where each individual in the entire community was obligated by the Prophet Muhammad to participate in the *defense* of Medina from an enemy siege, but was under no obligation to pursue the enemy once the siege was broken.⁴⁰ At that point, the fighting became voluntary again, and presumably only those with sufficient knowledge of warfare would continue to participate.⁴¹

In fact, one might find some congruity between Ibn Taymiyya’s notion of the individual duty of *jihad* and Ibn Rushd’s insistence on the *jihad* as a collective one. After all, even Ibn Rushd indicated that if there was nobody left to carry out the *jihad*, then an individual had to participate.⁴² Ibn Rushd may have imagined a circumstance where an attack was called, and yet there were insufficient numbers of fighters in a given area to carry it out. However, his exception to the principle of collective duty, limited as he might have imagined it, could easily be extended to circumstances, like the Mongol sack of Baghdad, where as many fighters as possible were needed to protect territories within the House of Islam that were under direct threat.

C. Recognition of Non-Muslim Polities

The previous section seems to describe a Muslim community that grew continuously more suspicious of non-Muslim polities over the course of centuries and developed doctrines to reflect that hostility. This, however, is incorrect, for even as the ideas of individual *jihad* were being refined, so too were there broad trends in favor of increasing recognition of non-Muslim states that might not be in some sort of permanent state of war with Islam. The primary means to expand these principles had their origins in Shaybani’s work. They are, first, the possibility of treaties with non-Muslim states, and

³⁹ See KELSAY, *supra* note 17, at 117.

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² See IBN RUSHD, *supra* note 27, at 9.

second, the principle of a covenant of safe passage, or *aman*, on the part of a non-Muslim in the House of Islam, and vice versa.

As Shaybani envisioned these concepts, they were circumscribed, and in a manner that would make it nearly impossible to presume any sort of permanent peace or amicable relations between the House of Islam and the House of War. Shaybani classifies treaties into different types. First, there were the treaties that were imposed upon those monotheistic communities known as “People of the Book.”⁴³ According to Shaybani, this sort of treaty effectively involved the requirement of that community to pay a tax and then to live under the protection of the House of Islam.⁴⁴ A treaty with communities in the unsubjugated House of War was also possible, but only so long as the leader of the Muslim community “has considered the situation and has found that the inhabitants of the territory of war are too strong for the Muslims to prevail against them and it would be better for the Muslims to make peace with them.”⁴⁵ Early classical jurists generally limited the time period for such treaties to no more than ten years.⁴⁶ One imagines an arrangement of this sort to resemble a cease fire in modernity more than any sort of permanent recognition of the non-Muslim state.

The other concept discussed by Shaybani and developed by later jurists was known as the *aman*. Those individuals from the House of War who have been granted an *aman*, known as the *mustaminun*, were free to enter the House of Islam and reside and travel freely within it until so long as the covenant lasted.⁴⁷ Similarly, Muslims granted an *aman* by the House of War were free to travel within it as well.⁴⁸ In either case, there was a strict obligation on the part of the *musta'min* to neither engage in any sort of fraud, cheating, or dishonesty, nor to violate any of the terms of the *aman*.⁴⁹ Early classical jurists tended to limit the duration of the *aman* to a year.⁵⁰ In other words, the residence of a Muslim in non-Muslim lands was generally viewed as temporary. One prominent jurist of the Hanafi school went so far as to insist that a person should not even have marital sex in the House of War because this might lead to the conception of a child, which could lead the

⁴³ KHADDURI, *supra* note 11, at 142.

⁴⁴ *See id.*

⁴⁵ *Id.* at 154.

⁴⁶ *See* Shaheen Sardar Ali & Javaid Rehman, *The Concept of Jihad in Islamic International Law*, 2005 J. CONFLICT & SEC. L. 1, 14 (2005).

⁴⁷ *See* KHADDURI, *supra* note 11, at 158-62; *see also* Majid Khadduri, *War and Peace IN THE LAW OF ISLAM* 164-65 (1955).

⁴⁸ *See* ANDREW MARCH, *ISLAM AND LIBERAL CITIZENSHIP: THE SEARCH FOR AN OVERLAPPING CONSENSUS* 186 (2009).

⁴⁹ *See id.* at 186. As March indicates, contemporary jurists use these principles to obligate Muslims living in non-Muslim states to obey all relevant laws.

⁵⁰ *See* KHADDURI, *supra* note 26, at 168.

believer to want to settle there, a presumed serious sin.⁵¹

It does not take a great deal of imagination to expand these concepts into ones that involve more robust recognition of non-Muslim states, and non-Muslim inhabitants of those states. In particular, the notion of treaties lasting no more than ten years came under increasingly significant pressure in light of the fact that there was no explicit Prophetic prohibition against longer term treaties.⁵² The reasoning in favor of a ten year limit, that the Prophet Muhammad had not concluded a longer term treaty, might have appeared sensible to early jurists who had every reason to believe that ultimately the entire world would be subsumed within the House of Islam.⁵³ It started to appear a rather flimsy basis not to permit longer treaties in subsequent eras, when it was obvious that conquest of the entire non-Muslim world was not possible, and relationships of a more lasting nature needed to be established.⁵⁴ From this, it is rather easy to add a third part of the world in addition to the House of War and the House of Islam—that of the House of Reconciliation, or the *Dar al-Sulh*, to use the Arabic. This referred to that part of the world that did not accept the authority of the House of Islam, and was not in any sort of war with it.⁵⁵ Rather, relations were amicable.⁵⁶

Similarly, the concept of the *aman* can readily be developed in a fashion that permits considerable interaction and coexistence as between Muslims and non-Muslims. Hence, for example, what began as a plainly recognized, but temporary, right to travel to the House of War to trade and engage in other similar activities developed into a more robust juristic recognition of permanent residence in non-Muslim states.⁵⁷ Similarly, but in reverse, as early as the sixteenth century the Ottoman empire widely granted revocable “ahdnames” pursuant to which European merchants enjoyed covenants of security.⁵⁸ The seeds of a new, more interdependent world were already sown

⁵¹ See MARCH, *supra* note 48, at 106.

⁵² See Ali & Rahman, *supra* note 46, at 14.

⁵³ See *id.*

⁵⁴ See *id.* at 14-15.

⁵⁵ See M. Cherif Bassiouni et al., *A Survey of Islamic International Law*, 76. AM. SOC. INT. L. PROC. 56, 57 (1982).

⁵⁶ See *id.*

⁵⁷ See MARCH, *supra* note 48, at 184-86.

⁵⁸ Feroz Ahmad, *Ottoman Perceptions of the Capitulations 1800-1914*, 11 J. Isl. Stud. 1, 2 (2000); Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 475, 552 (2010). Later, as the Ottomans grew weaker and Europe stronger, these started to take on the form of capitulations that bred no small amount of resentment. See Ahmad, *supra* at 1-3. The point for these purposes, however, is that the precedent in favor of the idea of a Muslim ruler granting protection, and even rights of residence, to non-Muslims from non-Muslim states pursuant to the concept of the *aman* had already been established well before such capitulations were imposed on a reluctant Ottoman empire.

by that time.

Thus, to summarize, it is true that the most influential early Muslim jurists, and in particular the highly influential Ibn Hasan al-Shaybani, envisioned a bipolar world, and considered war a primary, but not exclusive or even preferred, means by which to expand Islam until it conquered the globe. At the same time, it is fair to say that changes over the course of centuries throughout the vast and varied Islamic world caused considerable reevaluation of some of Shaybani's core hypotheses. The major change I have examined is the realization on the part of the House of Islam that it could lose wars just as much as it could win them, and that therefore it was surely not the case that the House of Islam was likely to encompass the globe by virtue of military conquest within any reasonably foreseeable time period. Indeed, at times, war might arise not so much because of a desire to expand the House of Islam, but to defend it from collapse or at least a significant military defeat. This led to two primary developments from the standpoint of Islamic international relations in the classical period. The first of these was to strengthen the concept of *jihad* so as to include within it the idea of an individual duty on the part of each and every Muslim to fight when the House of Islam was under attack. The second was the recognition that there needed to be some means to get along with that substantial part of the globe, and the people residing in it, in a manner that was not premised on the existence of permanent hostility.

The next section will show how these concepts have been developed by contemporary jurists generally to justify current geopolitical realities, and Part IV will show how that acceptance has been challenged by rising *jihadist* groups. Yet, equally importantly, that final Part will also show how the *jihadist* challenge is in the end no more "literal" in its application of classical norms than the broadly accepted modernist approach. It merely privileges different parts of the tradition.

III. MODERN MUSLIM INTERNATIONAL RELATIONS

From the previous section, it is easy to discern the manner by which the normalization of relations between Muslim states and non-Muslim states is justified. The United Nations Charter, after all, is a *treaty*. Admittedly, it lasts longer than ten years, but as we have seen, the position that a treaty last no more than a decade had already largely eroded centuries before the establishment of the United Nations following the Second World War.⁵⁹ Similarly, the permanent presence of Muslims into non-Muslim territories

⁵⁹ See *supra* notes 52-56 and accompanying text (describing rejection by later classical jurists of ten-year limitation).

and the reverse is in many ways an extension of the *aman*, which long permitted Muslims to travel to non-Muslim lands, and the reverse, so long as they did so pursuant to a covenant granted by the territory in question.⁶⁰ If the covenant might be imagined as a travel visa or even a right of permanent residency, and adherence to the laws of the non-Muslim state the conditions pursuant to which that covenant is issued, then obedience to law on the part of Muslims in non-Muslim states, and indeed loyalty to those states, enjoys considerable justification from classical era authority.⁶¹

Indeed, the evolution has in many ways proceeded so naturally and so comfortably *that even many groups deploying violence in the name of jihad largely adopt its normative presumptions*. As I have written elsewhere, Islamist militant organizations from *Hamas* to *Hezbollah* appear to derive their justifications for violence almost as readily from principles of radical anti-colonialism as they do from *shari'a*.⁶² Hence they make repeated references to “resistance” to foreign occupation as being their *raison d’etre*, a concept so deeply ingrained that the Arabic term for resistance appears in the website of *Hezbollah*, and is part of the acronym of the name “*Hamas*” which, fully translated, is “The Movement of the Islamic Resistance.”⁶³ That these notions of anti-colonialism and resistance to occupation are broadly popular in the Muslim world is well demonstrated by the fact that the Organization of Islamic Cooperation (formerly known as the Organization of the Islamic Conference), an organization comprising nearly all of the Muslim majority nations in the world, issued a declaration in Kuala Lumpur specifically exempting from any definition of terrorism “resistance to foreign aggression and the struggle of peoples under colonial or alien domination and foreign occupation for national liberation and self-determination.”⁶⁴ Plainly, the idea that a people have the right to resist occupation when their lands are taken by colonialists and other foreign aggressors was not one that was remotely recognizable in Shaybani’s time. The very *point* of the *jihad*, after all, was to bring other lands and other peoples within the House of Islam, and thereby subject them to Islamic domination.⁶⁵ This principle of self-

⁶⁰ See *supra* notes 57-58 and accompanying text (discussing the expansion of the concept of the *aman* over the course of the classical era).

⁶¹ This is, to be clear, a significant reduction of the intricate legal and ethical questions that would surround the extent of Muslim loyalty to a non-Muslim state under the classical conception of the *aman*. For a richer account, one which would necessarily lie beyond the scope of this paper. See MARCH, *supra* note 49, at 183-96.

⁶² See Hamoudi (*Muezzin*), *supra* note 6 at 428.

⁶³ *Id.* at 464.

⁶⁴ *Id.* at 465; see also Organization of Islamic Cooperation, *Kuala Lumpur Declaration on International Terrorism*, art. 8 (Apr. 3, 2002), http://www.oic-oci.org/english/conffm/11_extraordinary/declaration.htm.

⁶⁵ See *supra* notes 15-16 and accompanying text.

determination instead owes its origins to very modern ideas espoused in the United Nations Charter.⁶⁶

At the same time, there is some unmistakable tension with classical norms and understandings that arise in these approaches, as reputable commentators have indicated.⁶⁷ The evolutionary broadening of the scope and duration of treaties and covenants may be natural, but when the end result is the establishment of an ethos of mutual recognition and respect, it obviously is somewhat discordant with past positions in a manner that can be difficult to justify. It is one thing, after all, to suggest that a temporary truce with a non-Muslim state can last more than ten years, and that its terms must be respected because of an obligation on the part of Muslims to adhere to their contracts. It is quite another to establish on the basis of this a principle that it is ethically forbidden to attack *any* non-Muslim state *at any time* if the end is to bring it within the House of Islam. Similarly, it is one thing to suggest that Muslims can stay for lengthy periods of time in a non-Muslim state under a covenant of security. It is quite another to suggest that this covenant can then establish bonds of loyalty to a non-Muslim state, to the extent that it obligates the Muslim to take up arms on behalf of the state against a Muslim polity.⁶⁸

Modernist justifications take two different forms. The first, dominant approach is to more or less ignore the problematic classical material and argue directly from Qur'anic text.⁶⁹ This hermeneutical approach proves to be quite convenient because there is no shortage of Qur'anic verse that seems to support principles of mutual tolerance and nonaggression toward non-Muslims and non-Muslim polities.⁷⁰ Indeed, the chapter of the Qur'an that is entitled "The Disbelievers" ends with God instructing the Prophet to tell those who do not believe in his Apostleship, "for you is your religion, and for me is my religion."⁷¹

The problem is, as the first section of this paper makes clear, it is perfectly obvious that the jurists of Shaybani's time, and those who lived for centuries afterwards, throughout the classical era, did not regard these verses as propounding the type of ethical tolerance that modernists claim. Ignoring

⁶⁶ See U.N. Charter art. 2, para. 4 (respecting territorial integrity and noninterference).

⁶⁷ See, e.g., MARCH, *supra* note 48, at 184-86, 199.

⁶⁸ March maintains that it is nearly impossible to justify on the basis of classical doctrine a duty of national loyalty to a non-Muslim state that would involve taking up arms against an Islamic state. See *id.* at 114-15. As I have indicated elsewhere, however, traditionalist scholars in the contemporary era have identified precisely such a duty in various circumstances. Haider Ala Hamoudi, *Book Review: Islam and Liberal Citizenship*, 26 J. L. & REL. 387, 395-96 (2010).

⁶⁹ See MARCH, *supra* note 48, at 197-99.

⁷⁰ See *id.* at 197 (offering a sampling of such material).

⁷¹ Qur'an 109:6 (Sahih International Translation).

that classical authority may in some ways free the modernist scholar, but it hardly avoids the tension. Certainly, it provides no answer at all to any *jihadist* group, which points to such authorities as representing an authentic tradition spanning centuries that the modernist is neglecting. Thus, in the end, ignoring the classical doctrine has had its benefits—if nothing else, it demonstrates that Islam’s sacred texts can be read in a wide variety of different ways, and that the classical readings are the product of political, social, and economic contingency rather than antiseptic and necessitarian deductive reasoning. However, ignoring the classical tradition also has its limits, in particular in responding to the challenge that recognizing non-Muslim states and their right to exist is at stark odds with the positions held by authoritative jurists for over a millennium.

That said, there have been efforts to somehow reconcile a classical past with current conceptions of international law. Speaking broadly, and some might say reductively, these varied approaches all tend to emphasize that the classical Manichean division was a response of sorts to prevailing political conditions. In a world where there was no such thing as a principle of mutual recognition in international relations, and the normal state of affairs was a perduring “state of war,” the only choices were extermination or conquest.⁷² To quote one of the most rigorous works along these lines:

Muslim juristic writings . . . reflect[ed] the principle that only Muslims would permit Muslims to remain Muslims. They continued to see *jihad* not only as a means of guaranteeing the security and freedom of the Muslims, but as virtually the *only* means of doing so. For even peace-treaties were usually the result of one’s surrender to demands that had been imposed by a real or anticipated defeat by the sword.⁷³

The approach is plausible enough, though the criticism of it as “optimistic” certainly has some purchase.⁷⁴ The real problem, however, is

⁷² Sherman Jackson, *Jihad and the Modern World*, 7 J. ISLAMIC L. & CULTURE 1, 14-17 (2002).

⁷³ *Id.* at 17. As Ali and Rehman have indicated, other approaches seeking to reconcile the juristic tradition with modern norms of mutual recognition and tolerance similarly emphasize that the “age of expansion” within juristic thought, which subdivided the world into a House of Islam and a House of War, “was necessitated by prevailing conditions and a sense of insecurity among the fledgling Muslim community.” *Id.* at 14.

⁷⁴ MARCH, *supra* note 48, at 201. As we have seen, Shaybani insists that there is an obligation to subject non-Muslims to *jihad* in particular when they are weak, refraining from doing so only when the Muslims are not able to defeat them. This seems more like an ethical obligation to subjugate any polity that can be subjugated than it is the expression of a fear that in the future, somehow that polity will become so powerful as to pose a threat to the House of Islam. If the fear were the eventual subjugation of the Muslims, one would have expected a more extended treatment by jurists in Shaybani’s era of defensive *jihad*. Yet, as we have seen, there was none, precisely because losing wars continuously did not seem to

that a *jihadist* approach *appears* more direct and literal than such contextualization can ever hope to. That is, a terrorist organization claiming to recreate an ideal Islamic State and promising to expand it until it encompasses the earth *sounds* like precisely what Shaybani was seeking. It is of course entirely reasonable to place Shaybani's words in a particular context, to suggest that Shaybani's proscriptions related exclusively to that context, and to try to draw different principles for a different world. That entirely reasonable approach may indeed prove compelling to large parts of the Muslim world already content with the normative principles espoused in the United Nations Charter, including very much violent groups who claim to be engaged in some sort of resistance to occupation, as earlier discussed. However, the argument may fairly run, for those malcontents who seek to challenge existing geopolitical norms, and use violence to do it, centuries of juristic texts exhorting eternal violence against the House of War lie conveniently waiting. This, it might be argued, is precisely why a group of psychopaths calling themselves the Islamic State roaming the currently defunct national border between Iraq and Syria have proven so spectacularly successful at raising recruits from across the world, as Al Qaeda was before it.⁷⁵

IV. JIHADISM AND THE PROBLEM OF THE LONE WOLF

Thus, *jihadism* might very well be deemed to be "direct" or "literal" as concerns some parts of the tradition. However, there are other parts where it decidedly is not. That is to say, in its idea of the resumption of the caliphate, its Manichean division of the world into a House of War and a House of Islam, and its pronouncement of what appears to be a ceaseless war against unbelief, it sounds in the first instance to be that which Shaybani and his contemporaries were calling for. However, *jihadists* depart from the classical models in other ways, and in no less significant a fashion than any modernist does. There are many examples that could be raised.⁷⁶ However, for the

lie within their imagination.

⁷⁵ Both ISIS and Al Qaeda have proven quite appealing to certain segments of Muslims internationally. While estimates vary, the number of foreign fighters in Syria and Iraq almost certainly lies in the tens of thousands. The vast majority are from the Middle East and North Africa, but the number also includes several dozen from the United States, several hundred from the United Kingdom, and perhaps as many as one thousand from France. See Jessica Stern & J.M. Berger, *ISIS and the Foreign Fighter Phenomenon*, THE ATLANTIC (Mar. 8, 2015), <http://www.theatlantic.com/international/archive/2015/03/isis-and-the-foreign-fighter-problem/387166/>. While of course this represents only a small fraction of the number of Muslims in those countries, let alone the number of Muslims in the world, the broader point remains that these organizations are able to recruit quite well internationally.

⁷⁶ Beyond lone wolf terrorism, the subject of this paper, the most obvious problem with extremist groups is that so much of their aggression is directed against Muslim polities. See note 39 *supra* and accompanying text. The territory that ISIS is contesting lies entirely within nations, such as Iraq, Syria,

purposes of this paper, I focus on one—a method of terrorism that knows no classical counterpart and yet one on which international *jihadi* groups like Al Qaeda and ISIS rely heavily. This is so-called “lone wolf” terrorism.

The appeal of lone wolf terrorism to a *jihadi* group is relatively easy to understand. Strong and effective states such as the United States can initiate air strikes against terrorist organizations, and their law enforcement agencies can penetrate and break up terrorist cells. These techniques are much less effective, however, against “lone wolves,” who by definition carry out their operations without consultation with or planning by a higher central organization.⁷⁷ Hence major law enforcement figures from FBI director Robert Mueller to CIA director Leon Panetta to Homeland Security Secretary Janet Napolitano have expressed serious concern about the threat of lone wolf terrorism.⁷⁸ President Obama in fact described lone wolves as “a risk” over which he was “especially concerned” because of the damage that such individuals could exact and the difficulty of detecting them.⁷⁹

Noticing the advantages it provides, groups like Al Qaeda have extolled lone wolf terrorism for years, with Bin Laden going so far as to describe the aims of the organization as follows: “Al Qaeda wants to keep *jihad* alive and active and make it part of the daily life of the Muslims. It wants to give it the status of worship.”⁸⁰

Muslims pray five times a day, and by necessity, given their frequency, the vast majority of those prayers for most people are done privately, without consultation or coordination with any broader organization. Given this, what Bin Laden seems to have in mind is over a billion individuals considering on a daily basis and perhaps several times a day different ways in which violence might be perpetrated against an infidel enemy. One can only imagine the kind of havoc that could be unleashed if this call were heeded by large numbers of Muslims.

While the matter of lone wolf terrorism is less pronounced in the case of ISIS, which of course is seeking to draw recruits to travel to its “caliphate”

and Egypt, that are Muslim. Early classical jurists certainly never imagined a caliphate formed out of the thin air that directed its efforts against existing *Muslim* loci of power, and efforts to define such efforts as a form of legitimate rebellion are contentious at best. See Kelsay, *supra* note 17, at 194-95.

⁷⁷ See Fred Burton & Scott Stewart, *The ‘Lone Wolf’ Disconnect*, SECURITY WEEKLY (Jan. 30, 2008), https://www.stratfor.com/weekly/lone_wolf_disconnect (“The theory is that this distance [from a terrorist organization] will prevent disclosure of attack planning to informants or technical surveillance and therefore provide superior operational security.”). Burton and Stewart define a “lone wolf” terrorist as “a person who acts on his or her own without orders from—or even connections to—an organization.” See also RAMON SPAAIJ, UNDERSTANDING LONE WOLF TERRORISM: GLOBAL PATTERNS, MOTIVATIONS AND PREVENTION 16 (2012) (describing this definition as “the most frequently cited”).

⁷⁸ See Spaaij, *supra* note 77, at 2-3.

⁷⁹ *Id.* at 2.

⁸⁰ FAISAL DEVJI, LANDSCAPES OF THE JIHAD: MILITANCY, MORALITY, MODERNITY (2005).

and fight there in a more organized fashion,⁸¹ it is by no means averse to using lone wolves to advance political aims. Hence, for example, it called for a “month of disaster” during Ramadan of 2015, urging Muslims everywhere to redouble their efforts towards *jihad*, leading to a series of attacks throughout the Muslim world, including a single suicide bomber killing dozens at a Shi’i mosque in Kuwait, and a lone wolf attack on a gas factory in Lyon, France, accompanied by a beheading of a local businessman.⁸²

The end result of all of this is the legitimation of a position that creates just as much tension with classical thought as the mainstream approach of normalizing modern international law does. If classical Islamic law is dominated by the idea of subjugating a House of War, it is also dominated by the idea of an ordered method to do it. The *jihad* is conducted under the auspices of the caliph, by the number of soldiers required by the caliph, with attacks and truces determined ultimately by the caliph, and using soldiers who obey army commands strictly. Everyone else in the social order is not expected to participate, as the duty is communal, meaning that for many individuals, not only is the *jihad* not part of their daily lives, as Bin Laden would like it to be, but it is not a *meaningful part of their lives at all*.

And if it is the case that the *jihad* becomes in the later classical period an individual duty, that merely refers to the obligation of each individual to join the Muslim armies, temporarily, until the enemy is repelled. It does not in the classical era ever seem to refer to random individualized and atomized violence. Nor was individual *jihad* ever deemed to be permanent. Even Ibn Taymiyya, as vigorous a defender of the notion of individual *jihad* as might be found, refers to the obligation of everyone to fight when the Muslims are attacked, *even those who are not professional soldiers*. The presumption is necessarily a war of limited duration. Otherwise, every person is by definition a professional soldier.

Finally, when *jihadist* violence is conducted by a Muslim resident in a non-Muslim state, that position requires one not only to abandon the idea of the organized *jihad*, but it also all but destroys any conception of the covenant of security. It is one thing to urge Muslims to leave a non-Muslim land where they enjoy a covenant to rejoin the House of War to conduct a *jihad*. It is quite another to tell them to perpetrate acts of violence in the place where they have been granted a covenant, as that is as obvious a breach of the covenant as might be imagined. There is very little in classical Islamic law

⁸¹ Stern & Berger, *supra* note 75.

⁸² Sam Jones & Erica Solomon, *ISIS Preoccupied by Holy Writ, but Nothing is Sacred*, FIN. TIMES (June 26, 2015, 8:21 PM), <http://www.ft.com/cms/s/0/c7f8cc98-1c1d-11e5-8201-cbdb03d71480.html#axzz3r3ZsFSoe>.

that would seem to justify this, and yet, without undertaking a covenant, probably in a duplicitous fashion, and then breaking it, it is hard to imagine how the lone wolf terrorist could ever be successful.

In sum, classical *jihad* was largely communal, where lone wolf terrorism urges the cessation of any communication with an organized force at all. Classical *jihad* was focused on preserving the authority of the caliph, and lone wolf terrorism is about disassociated violence. Classical *jihad* sought to render war one of many objectives of the good state, and lone wolf terrorism is in furtherance of an ideal wherein everyone thinks about how to conduct violence, all of the time. And classical *jihad* takes covenants seriously,⁸³ where lone wolf terrorism *relies upon* the breaking of a covenant through deception to succeed.

To the extent that any of this can be justified, at all, one of two approaches might be taken. The first would be to attempt to locate within sacred text some sort of justificatory material, irrespective of what the classical tradition might have to say. Bin Laden certainly seems to adopt this approach at times, showing near contempt for the intricacies of classical law.⁸⁴ The similarity to modernists turning to Qur’anic verse to justify modern international relations while ignoring the corpus of Islamic law on classical *jihad* is striking.

The other, even more interesting, approach would be to undertake an exercise in *contextualization*. The argument would run that Shaybani and his contemporaries never considered defensive *jihad* in any detail because they never thought they would lose many wars. Later jurists writing at the time of the Crusades and subsequently the Mongol invasions were acutely aware of the problem and sought to address it by rendering *jihad* an individual duty so long as Muslim lands were under attack.⁸⁵ However, even they lived in different circumstances, for once the threat subsided, then the normal state of affairs could resume, where *jihad* was an obligation of the community, and not every individual in it.

Yet in the current circumstances, the *jihadist* argument runs, Muslim states are so weak as to be in a state of *pervasive and near entire occupation by non-Muslim powers and their apostate puppets*—that, in effect, the colonial powers are deepening the incursion into Muslim lands that was begun at the time of the Crusades.⁸⁶ Thus, defensive, individual *jihad* is not temporary under such a hypothetical approach, but perpetual, at least for so

⁸³ See *supra* notes 57-58 and accompanying text.

⁸⁴ See Devji, *supra* note 80.

⁸⁵ See *supra* notes 35-39 and accompanying text.

⁸⁶ *Hamas* appears to take this view. See KELSAY, *supra* note 17, at 133-34.

long as this occupation continues.⁸⁷ Moreover, given the weakness of the Muslim states, which can barely organize the resources necessary to sustain the House of Islam, the *jihad* no longer need be conducted under the auspices of any religious or political leader at all, but in fact it is as individually organized as it is individually obligated.⁸⁸

There may be dispute over whether that type of contextualization is plausible, but I will only note that in the form of argument, it resembles very much the positions of modernists in defending modern international relations with non-Muslim states, and it is vulnerable to the very same attacks and criticisms. It is hardly the direct or literal application of any classical rules, and in fact in many cases seems facially at odds with many of them. It merely is justifying different rules based on alternative contexts un contemplated by classical forebears. Whatever that is, it is not literalism, and *jihadists* are therefore not textualists. They merely insist on strict application of texts that suit them, and contextualize everything else. Which, in the end, is precisely what liberals, reformists, and modernists do as well.⁸⁹

CONCLUSION

The purpose of this paper has been to expose a fallacy respecting the justification of using the classical Islamic concept of *jihad* to perpetrate violence against non-Muslim polities in modernity. This fallacy is that there is a broad classical condoning of such practices, and that as a result, the *jihadist* is at something of an advantage in justifying violence, as the *jihadist* merely needs to figuratively wave authoritative texts in the face of any modernist and demand their “direct” and “literal” application. The problem is that even if a modernist position justifying the recognition of non-Muslim states on the basis of mutual respect and tolerance is not one found in classical texts, it is similarly not the case that many of the types of violence that predominate in modern *jihadism*, and in particular lone wolf terrorism, can be found in any sort of “direct” or “literal” fashion in classical texts either. In the end, reformists and modernists are more likely to insist on a more direct reading of sacred text as concerns conduct *in* war, while seeking contextualization on when war should take place. By contrast, *jihadists* necessarily need to contextualize conduct in war, and insist on the direct application of the principle of eternal war against and the ultimate subjugation of the unbelievers who populate the House of War. Neither approach is more “literal” or “strict.” Both are manipulating doctrine to respond to preexisting political and ideological commitments, as legal actors

⁸⁷ See *id.* at 135-36.

⁸⁸ See *id.* at 138-39 (describing Bin Laden).

⁸⁹ See *supra* notes 74-75.

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always do.