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# Islam and International Criminal Law and Justice

Tallyn Gray (editor)

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## Non-International Armed Conflicts under Islamic Law: The Case of ISIS

Ahmed Al-Dawoody\*

### 6.1. Introduction

At the time of writing, 13 of the 16 United Nations ('UN') Peacekeeping Operations and two thirds of the International Committee of the Red Cross's operations take place in the Muslim world.<sup>1</sup> Most of the current conflicts taking place in the Muslim world are non-international armed conflicts, which are largely caused by the post-colonial state structure, dictatorship, and poor distribution of wealth and power. According to Common Article 3 of the Geneva Conventions of 1949 and Article 1 of Additional Protocol II,<sup>2</sup> a conflict is classified as a non-international armed conflict if it satisfies the following four requirements:

1. The conflict takes place "in the territory of one the High Contracting Parties";
2. The conflict is between the governmental armed forces and armed groups, or between non-governmental armed groups;
3. The conflict reaches a level of intensity such that military forces are used and not merely the police; and

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<sup>1</sup> See United Nations Peacekeeping, "Peacekeeping Operations", available on the web site of the United Nations.

<sup>2</sup> See, for example, Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, in force 21 October 1950, Article 3 (<http://www.legal-tools.org/doc/baf8e7/>).

4. The armed groups possess organised force under a leader and exercise control over a certain territory.

Although classical Islamic law books did not use the categorisation international versus non-international armed conflicts, they treated their international armed conflicts under the chapters of *al-jihád* or *al-siyar* and, due mainly to certain historical precedents during the first four decades of the Islamic era, they treated four specific forms of non-international armed conflicts, namely: (1) fighting against *al-murtaddún* (apostates); (2) fighting against *al-bugháh* (armed rebels, separatists); (3) fighting against *al-Khawárij* (roughly, violent religious fanatics); and (4) fighting against *al-muḥáribún* (highway robbers, bandits, pirates, terrorists). The first three forms of conflicts fall under the definition of non-international armed conflicts under international humanitarian law, while the fourth could be also treated likewise if it includes the above requirements.

Fighting against *al-murtaddún* is used exclusively in Islamic law and history to refer to the incidents of groups apostatising from Islam or rejection of the payment of *zakáh* (poor due) by the tribes in Arabia following the death of Prophet Muḥammad in 632<sup>3</sup> and, therefore, Muslim scholars relate any form of organised use of force among Muslims to any of the remaining three forms of non-international armed conflicts. Therefore, this chapter studies briefly the characteristics or conditions of rules of engagement with, and the punishment if any for, those who take part in these remaining three forms of non-international armed conflicts in order to find out, first, if the case of the militants of the Islamic State of Iraq and Syria ('ISIS') can be categorised in any of these three forms of conflicts. Second, if the answer is positive, then will there be any grounds for prosecuting the ISIS militants in a fictitious *Sharí'ah* court that applies exclusively classical Islamic law and what would be the punishment, if any? The Islamic rules regulating these three forms of non-international armed conflicts will be studied here in order to find out, on the one hand, how far the conflicting Muslim parties abide by the Islamic restraints on the use of force and, on the other hand, how far these classical Islamic rules on the use of force correspond with the modern international humanitarian law. This chapter argues that the confusion between the laws of fighting

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<sup>3</sup> See, for example, Michael Lecker, "Al-Ridda", in Peri Bearman *et al.* (eds.), *Encyclopaedia of Islam*, rev. ed., Brill, Leiden, 2004, vol. XII, pp. 692–94; Muḥammad Ibn Idrís Al-Sháfi'í, *Al-Umm*, 2nd ed., Dár Al-Ma'rifah, Beirut, 1973, vol. 4, p. 222.

against *al-bugháh* and *al-Khawárij* has been used and abused to criminalise opponents of the state.

## 6.2. Fighting Against *Al-Bugháh*

Examining the scriptural basis or historical background of the emergence and development of these four forms of non-international armed conflicts can largely help in avoiding the confusion and misuse of categorising any of these conflicts. Fortunately, the law of armed rebellion is based on the Qur'anic text 49:9 and developed by the classical Muslim jurists following the precedents set by the Fourth *Caliph* 'Alí Ibn Abí Ṭálib in his treatment with those who rebelled against him in the battles of Al-Jamal (in 656) and Šiffín (in 657).<sup>4</sup> But the main reasons for confusing the law of fighting against *al-bugháh* with the law of fighting against *al-Khawárij* are that both cases of armed conflicts contain *khurúj* (using armed force) against the state authorities and the details regulating both cases emanated from the fighting that took place between the Fourth *Caliph* and those who took up arms against him. Moreover, the naming of this armed conflict as a war against *bugháh* (transgressors), which is usually inaccurately understood to refer to armed rebels/secessionists and not to state authorities, gives the wrong indication that armed rebellion is altogether prohibited in Islam. Although Ibn Taymiyyah, other *Hanbalí* jurists, and *Sháfi'í* jurists state that *baghí* (armed rebellion) is not a sin, strangely enough, the *Málíkí* and *Hanbalí* schools of law mistakenly listed and treated armed rebellion among the *hudúd* crimes<sup>5</sup> (crimes for which punishments are prescribed in the *Qur'án* or *hadíth*), albeit that, because of the very nature

<sup>4</sup> See Muḥyí Al-Dín Ibn Šaraf Al-Nawawí, *Al-Majmú': Sharḥ Al-Muhadhdhab*, Beirut, 2000, vol. 20, p. 337; 'Alí Ibn Muḥammad Ibn Ḥabíb Al-Máwardí, *Al-Ḥawí Al-Kabír: Fí Fiqh Madhhab Al-Imám Ash-Sháfi'í Radí Allah 'anh wa huwa Sharḥ Mukhtaṣar Al-Muznī*, Dár Al-Kutub Al-'Ilmiyyah, Beirut, 1999, vol. 13, p. 104.

<sup>5</sup> See, for example, from the *Málíkí* school, Aḥmad Ibn Idrís Al-Qaráfí, *Adh-Dhakhírah*, Dár Al-Gharb Al-Islamí, Beirut, 1994, vol. 12, pp. 5–206; Muḥammad Ibn Yúsuf Ibn Abí Al-Qásim Al-'Abdarí, *At-Táj wa Al-Iklíl: Sharḥ Mukhtaṣar Khalíl*, 2nd ed., Dár Al-Fikr, Beirut, 1977, vol. 6, pp. 229–319; Muḥammad 'Arafah Al-Dísúqí, *Háshiyah ad-Disúqí 'alá Ash-Sharḥ al-Kabír*, Dár Al-Fikr, Beirut, 2013, vol. 4, pp. 237–358. See, for example, from the *Hanbalí* school, 'Alí Ibn Sulaymán Al-Mirdáwí, *Al-Inšáf fí Ma'rifah ar-Rájiḥ min al-Khiláf 'alá Madhhab al-Imám Aḥmad Ibn Hanbal*, Dár Ihyá' Al-Turáth Al-'Arabí, Beirut, 1986, vol. 10, pp. 150–353; Manšúr Ibn Yúnus Ibn Idrís Al-Buhúttí, *Ar-Rawḍ al-Murbi': Sharḥ Zád al-Mustaḥqni'*, Maktabah Al-Riyadh Al-Ḥadíthah, Riyadh, 1970, vol. 3, pp. 304–45; Al-Muṣṭafá Al-Suyúttí Al-Rahaybání, *Maṭálib Ulí an-Nuhá fí Sharḥ Gháyah al-Muntahá*, Al-Maktab Al-Islamí, Damascus, 1961, vol. 6, pp. 158–308.

of *hudúd* crimes, they did not and could not give a specific scriptural punishment for armed rebels since there is no such punishment prescribed in these two scriptural sources. This confusion is recurrent even more among many contemporary Muslim scholars, in particular the *Wahhábí* school, who prohibit not only armed rebellion, but also peaceful demonstrations and even criticism of the rulers arguing that this is a form of *khurúj* against the state authorities, although *khurúj* as used by classical Muslim jurists generally refers to actual use of armed force, as explained below.

The scriptural basis of regulating the law of fighting against *al-bugháh* refers generally to fighting between two Muslim groups and requests the rest of the Muslims to bring about reconciliation between the fighting groups and if one of these groups transgresses against the other, then Muslims are required to fight against the transgressor, but it does not mention any punishment for the transgressor. The Qur'anic text 49:9 reads:<sup>6</sup>

And if two parties of the believers fight each other, then bring reconciliation between them. And if one of them transgresses against the other, then fight against the one who transgresses until it returns to the ordinance of God. But if it returns, then bring reconciliation between them according to the dictates of justice and be fair. Indeed God loves those who are fair.

Although this text does not specify the nature of the conflict or the warring parties, classical Muslim jurists used it to regulate armed conflicts between rebels and secessionists and the state as can be deduced from their identification of the *bugháh* below. In their deliberations for the identifications of the *bugháh*, classical Muslim jurists of the four schools of Islamic law, stipulated three conditions for a group of Muslims to be treated as *bugháh*.

First, the armed group must possess military power and organisation, *shawkah*, *man'ah*, *fay'ah*. It is quite remarkable to find striking similarities between classical Islamic law and modern international humanitarian law in defining the limits of force that should be possessed or used for acts of hostility to be treated as respectively under the Islamic law of rebellion or as non-international armed conflict under international humani-

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<sup>6</sup> All translations of the Qur'anic texts in this chapter are mine.

tarian law. While classical Muslim jurists used many parameters to measure the force of an armed group in deciding whether to treat them as rebels, such as different minimum numbers, or whether the armed rebels control a town or a stronghold, only some classical Muslim jurists stipulated that the armed group must have a leader. Even for those who do not refer to the existence of leadership, it is apparent in their writing that the use of force does not mean sporadic incidents by armed individuals but force by an armed group which constitutes an entity unified by a shared cause, as shown below. These parameters resemble the definition of non-international armed conflicts in Additional Protocol II, Article 1(1), describing as conflicts those conflicts, “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations”.<sup>7</sup> But the most practical determining factor according to both legal systems is that the government is obliged to call on the military forces against the armed groups and not the police forces only.<sup>8</sup> For modern international humanitarian law, these definitions aim at distinguishing non-international armed conflicts from less violent acts, such as riots or acts of banditry, while for classical Islamic law, these deliberations regarding the size or power of the armed group also distinguish between armed rebels and terrorists or other criminals on the one hand, and on the other indicate that the rebels may have a just cause because their power may be the result of popular support for their cause. Therefore, if an unidentified small number of armed individuals who have no popular support, and thus do not constitute a military challenge to the government, use force against state authorities, then they cannot enjoy the status of rebels and they will be punished under the Islamic law of *hirábah*, according to the *Hanafí* and *Hanbali* schools,<sup>9</sup> or punished for the specific crimes they commit during the

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<sup>7</sup> Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (‘Additional Protocol II’), 8 June 1977, in force 7 December 1978, Article 1(1) (<http://www.legal-tools.org/doc/fd14c4/>).

<sup>8</sup> See Al-Qaráfí, 1994, p. 6, see *supra* note 5; Al-Rahaybání, 1964, p. 161, see *supra* note 5.

<sup>9</sup> ‘Abd Allah Ibn Maḥmúd Ibn Mawdúd, *Al-Ikhtiyár li-Ta’líl al-Mukhtár*, Dár Al-Kutub Al-‘Ilmiyyah, Beirut, 2005, vol. 4, p. 160; ‘Abd Al-Qádir ‘Awdah, *At-Tashrî‘ al-Jiná’i al-Islamî: Muqáranan bi-al-Qánún al-Waḍ’i*, Dár Al-Kitáb Al-‘Arabí, Beirut, vol. 2, p. 681.

course of hostilities, according to Sháfi‘í.<sup>10</sup> This distinction between rebels and armed criminals is of paramount importance, because both armed rebels and governmental armed forces are immune from punishment for acts of hostility, provided that both follow the Islamic restraints on the use of force stipulated for this specific form of armed conflict and the purposes of their use of force, as discussed below.

Second, the armed group must have a *ta‘wíl*, a complaint about injustice inflicted upon them by the government, or a belief that the government violated the *Shari‘ah*, or a disagreement with the government policies. In a word, this condition resembles to a certain extent the just cause criterion in the Christian just war theory, although classical Muslim jurists were generous and neutral and did not stipulate that the armed group’s cause should necessarily be justified or legitimate. Interestingly, for the classical Muslim jurists, it is sufficient that the armed group believe in the justness of their cause. Although classical Muslim jurists indicate that the armed groups may likely be unjustified in their use of force, if such a group manages to collect and organise such a sizable military power, then they deserve to be treated under the law of rebellion. These two conditions indicate that such armed groups are not bandits and potentially, though not necessarily, may have a just cause, and therefore the state must treat them under the specific regulations of the Islamic law of rebellion.<sup>11</sup>

Third, they must use armed force, *khurúj*. This means that in modern terms any peaceful opposition to the state authorities, such as peaceful demonstrations or sit-ins, do not fall under the law of rebellion and hence cannot be classified as conflicts. Moreover, if armed rebellion is not criminalised under Islamic law, provided the above conditions are fulfilled, then *a fortiori* such peaceful opposition to the state cannot be criminalised either.

If these three instructions and precedents set by the Fourth *Caliph* are met, a process of resolving such a potential armed conflict peacefully

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<sup>10</sup> Al-Sháfi‘í, 1973, p. 218, see *supra* note 3; ‘Awdah, p. 681, see *supra* note 9.

<sup>11</sup> See, for example, Muḥammad Al-Khaṭīb Al-Shirbīnī, *Al-Iqná‘ fī Hall al-Fáz Abí Shujá‘*, Dār Al-Fikr, Beirut, 1994, vol. 2, p. 548; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law*, Cambridge University Press, Cambridge, 2006, p. 243; Ahmed Al-Dawoody, *The Islamic Law of War: Justifications and Regulations*, Palgrave Series in Islamic Theology, Law, and History, Palgrave Macmillan, New York, 2011, vol. 2, pp. 159 ff.



must be followed, and if the process fails, then the special regulations on the use of force in this form of armed conflict must be strictly followed by the conflicting parties. The jurists agree that the state must contact the armed rebels and engage in discussions and negotiations with them regarding their justifications for the use of force, and if it finds that they are indeed legitimate, then it has to make the necessary decisions to correct the wrong done by the state. If the state has done nothing wrong, it should clarify and explain its position to the rebels and correct any misunderstanding the rebels may have. This approach is stipulated in the Qur'anic text 49:9 and was followed by the Fourth *Caliph* in the battles of Al-Jamal (in 656) and Şifīn (in 657).<sup>12</sup> Some classical Muslim jurists add that if the discussion and negotiations fail between the state and the rebels who remain persistent in their plans to use force, then they should be called for a public *munázarah* (debate) so that the public can judge on the justness of their cause.<sup>13</sup>

If this process of reconciliation and attempts to prevent the conflict all fail, then, according to the majority of Muslim jurists, governmental forces are not allowed to initiate acts of hostilities against the armed rebels; while according to Abú Ḥanífah, the governmental forces are allowed to start to use force only after the armed group assemble to use force, because if the governmental forces waited until the armed group had already used force against them, they might be unable to mount a defence.<sup>14</sup> If fighting becomes inevitable, then the objective of fighting on

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<sup>12</sup> See, for example, Muwaffaq Al-Dīn 'Abd Allah Ibn Aḥmad Ibn Qudámah, *Al-Mughnī: fī Fiqh al-Imám Aḥmad Ibn Ḥanbal ash-Shaybání*, Dār Al-Fikr, Beirut, 1984, vol. 9, p. 5; 'Awdah, p. 689, see *supra* note 9.

<sup>13</sup> On this process of resolving the conflict peacefully, see, for example, 'Alá Al-Dīn Al-Kásání, *Badá'i' al-Şaná'i' fī Tartīb aṣḥ-Şhará'i'*, 2nd ed., Dār Al-Kitáb Al-'Arabí, Beirut, 1982, vol. 7, p. 140; Yúsus Al-Qaradáwí, *Fiqh al-Jihád: Dirásah Muqáranah li-Aḥkámih wa Falsafatih fī Daw' al-Qur'án wa as-Sunnah*, Maktabah Wahbah, Cairo, 2009, vol. 2, pp. 1002 ff.; 'Alí Ibn Muḥammad Ibn Ḥabíb Al-Máwardí, *Naṣiḥah al-Mulúk*, Maktabah Al-Faláh, Al-Safah, Kuwait, 1983, p. 255; Aḥmad Ibn 'Abd Al-Ḥalím Ibn Taymiyyah, *Al-Khiláfah wa al-Mulk, Min Rasá'il Shaykh al-Islam Ibn Taymiyyah*, 2nd ed., Maktabah Al-Manár, Az-Zarqá', Jordan, 1994, p. 65; Al-Sháfi'i, 1973, p. 218, see *supra* note 3; Al-Nawawí, 2000, p. 349, see *supra* note 4; Al-Qaráfí, 1994, p. 7, see *supra* note 5; Al-Mirdáwí, 1986, p. 312, see *supra* note 5; 'Awdah, p. 689, see *supra* note 9; Abou El Fadl, 2006, pp. 152–59, see *supra* note 11; Ibn Qudámah, 1984, p. 5, see *supra* note 12.

<sup>14</sup> See Khaled Abou El Fadl, "Political Crime in Islamic Jurisprudence and Western Legal History", in *U.C. Davis Journal of International Law & Policy*, 1998, vol. 4, no. 1, p. 20.

the part of the governmental forces should be that of merely putting down the rebellion by bringing them under the obedience of the ruler, that is, not to terminate the rebels. On the part of the rebels, their fighting should be restricted to achieving its objectives. For these reasons, in addition to restrictions on the use of force in international armed conflicts, the classical Muslim jurists stipulated the following strict rules of engagement, which distinguish this specific form of non-international armed conflict from any other form of conflicts:<sup>15</sup>

1. The governmental forces cannot target the armed rebels to kill during the fighting. Put in modern terms, both parties should not aim to shoot at the head or chest, let alone use any weapons of mass destruction;
2. The rebels can be fought only while they are *muqbilún* (attackers), which means that the governmental force's use of force must be restricted to self-defence; and, therefore
3. *Lá yutba ' mudbiruhum*, that is, the rebels cannot be followed if they are escaping the battlefield;
4. *Lá yujhaz 'alá jarihihum*, the injured rebels cannot be killed. Although all the jurists address the governmental forces here, the same rules should be followed by the rebels;
5. Rebels' women and children cannot be enslaved and their property cannot be taken as the spoils of war. Moreover, as an indication of the sanctity of the rebels' property, even weapons confiscated from the rebels during the combat cannot be used by the governmental forces except in case of military necessity and must be returned to the rebels after the cessation of violence;
6. The State cannot seek the military assistance of non-Muslim forces in fighting against the rebels; and
7. With the exception of Abú Ḥanífah, the jurists agree that captured armed rebels must be set free.

It is regrettable that when these humane rules of engagement with the armed rebels are compared with the brutal repression of the peaceful

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<sup>15</sup> See, for example, Al-Sháfi'í, 1973, p. 218, see *supra* note 3; Al-Nawawí, 2000, pp. 250–52, see *supra* note 4; Muwaffaq Al-Dín 'Abd Allah Ibn Aḥmad Ibn Qudámah, *'Umdah al-Fiqh*, Maktabah Aṭ-Ṭarafayn, Taif, p. 149; Abou El Fadl, 2006, pp. 152–60, see *supra* note 11; Al-Dawoody, 2011, pp. 163–67, see *supra* note 11.

demonstrators during the Arab Spring revolutions of 2011, one reaches the conclusion that Islamic law here is either unheard of or is being deliberately ignored, not only by state authorities but even by Islamic scholars. It seems that even peaceful demonstrators and peaceful political opponents of the state cannot enjoy such privileged status in many Muslim countries at present. The Amnesty International fact-finding team in Egypt indicated that, on 4 April 2011, the number of those killed in the Egyptian 25 January 2011 revolution was estimated at 856 by the Egyptian Ministry of Health. It also “found extensive evidence of excessive use of force by security forces across the country, including lethal force against protesters and others posing no threat to their or others’ lives”.<sup>16</sup> Moreover, some of the peaceful protestors were shot dead in the head and chest by snipers who, according to Amnesty International, were part of the police force,<sup>17</sup> in flagrant violation of the rules above, which affirm that even armed rebels cannot be fought unless they are *muqbilún* (attackers) and even then they cannot be a target for killing – the purpose of using force against them should be to quell their violence.

Therefore, if both the governmental forces and the rebels abide by these strict regulations, none of them will be liable for punishment for any destruction caused to the lives and property during the course of hostilities<sup>18</sup>. It should be reaffirmed here that any use of force by either party – the rebels or state authorities – before or after the initiation of hostilities or even during the hostilities if not linked to the objectives indicated above, will be liable to punishment. However, classical Islamic jurists did not mention what punishment the rebels or state authorities should receive in this case.<sup>19</sup> No less important, the fact that the rebels must be set free, at

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<sup>16</sup> Amnesty International, “Egypt Rises: Killings, Detentions and Torture in the ‘25 January Revolution’”, 19 May 2011 (<http://www.legal-tools.org/doc/7edd2c/>).

<sup>17</sup> *Ibid.*, pp. 18, 33, 35.

<sup>18</sup> Al-Kásání, 1982, p. 141, see *supra* note 13; Al-Qaráfí, 1994, p. 10, see *supra* note 5; Ibn Qudámah, 1984, pp. 8 ff., see *supra* note 12; Abou El Fadl, 2006, p. 238, see *supra* note 11; Al-Dawoody, 2011, pp. 166 ff., see *supra* note 11.

<sup>19</sup> See, for example, Muḥammad Al-Khaṭīb Al-Shīrbīnī, *Mughnī al-Muhtáj ilá Ma‘rifah Ma‘ání Alfáz al-Minháj*, Dár Al-Fikr, Beirut, vol. 4, p. 125; Muḥammad Ibn Abí Al-‘Abbás Aḥmad Ibn Ḥamzah Al-Ramlí, *Niháyah al-Muhtáj ilá Sharḥ al-Minháj*, Dár Al-Fikr, Beirut, 1998, vol. 7, p. 405; Muḥammad Al-Ghazálí, *Al-Wajíz fī Fiqh al-Imám ash-Sháfi‘i*, Dár Al-Arḡam Ibn Abí Al-Arḡam, Beirut, 1997, vol. 2, p. 164; Al-Shīrbīnī, 1994, p. 549, see *supra* note 11; Abou El Fadl, 1998, pp. 17 ff., see *supra* note 14; ‘Abd Allah Al-Ba‘lí,

least after the cessation of hostilities, and that they are not liable for punishment for any destruction caused to the lives and property, proves that armed rebellion is not criminalised under classical Islamic law, provided that the armed rebels meets the three conditions above, on the one hand, and abide by these strict regulations on the use of force, on the other.

Interestingly, these classical Islamic rules regulating the Islamic law of rebellion are in agreement with the modern definition of non-international armed conflicts under international humanitarian law. The concerns of humanising non-international armed conflicts are quite clear in both legal systems. For example, the Islamic law of armed rebellion and Common Article 3 of the Geneva Conventions of 1949 and Article 1 of Additional Protocol II ensure non-combatant immunity, humane treatment of captured adversaries, and prohibit torture and the taking of hostages. However, while captured rebels cannot be prosecuted for the mere fact of resorting to armed rebellion, as shown above, under international humanitarian law, adversaries captured in non-international armed conflicts do not enjoy the status of prisoners of war ('POWs') granted in international armed conflicts, and therefore can be prosecuted under national legislation for the mere fact of taking up arms. But, in an attempt to avoid the victimisation of the state's adversaries, Article 6(2) of Additional Protocol II stipulates that a fair trial is a must for the passing of sentences and execution of punishments.<sup>20</sup>

### 6.3. Fighting Against *Al-Khawárij*

The greatest challenge in examining the case of the *Khawárij* in the literature of the four *Sunní* schools of Islamic law is the lack of a systematic treatment that clearly sets the definition of the *Khawárij* and the conditions for identifying a group as such, as well as the punishment, if any, for such group. Unlike the cases of the other two forms of non-international armed conflicts studied here, the Islamic legal treatment of the *Khawárij* is not based on scriptural sources – the *Qur'án* and the *Sunnah* – since the *Khawárij* emerged after the death of the Prophet. Hence, the jurists refer to the *Khawárij* mainly during their discussion of the *bugháh* and, to a

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*Kashf al-Mukhaddarát wa ar-Riyád al-Muzhirát li-Sharh Akhṣar al-Mukhtaṣarát*, Dár Al-Bashá'ir Al-Islamiyyah, Beirut, 2002, vol. 2, p. 775.

<sup>20</sup> Additional Protocol II, Article 6(2), see *supra* note 7 (<http://www.legal-tools.org/doc/fd14c4/>).

great extent, their treatment reflects a historical description rather than a legal one. In other words, the legal sources mainly relate the origin and characteristics of this group in the absence of elaborate rules that regulate how they should be treated under Islamic law. In fact, they even disagree over the origin of the emergence of the *Khawárij*: some relate the origin of their emergence to a situation in which a certain ‘Abd Allah Ibn Dhí Al-Khuwaisírí Al-Tamímí objected against the Prophet’s distribution of some property. Strangely enough, this is considered by some scholars as the first case of *khurúj* (literally: exit, going out), although this situation does not include any use of violence by this single individual. Others opine that their origin is with the groups who resorted to violence against the Third *Caliph* ‘Uthmán Ibn ‘Affán, while the majority of the jurists relate their origin to the group of the supporters of the Fourth *Caliph* who rejected his acceptance of the offer of resorting to arbitration in order to end the conflict suggested by Mu‘áwiyah Ibn Abí Sufyán after the battle of Šiffín (in 657).<sup>21</sup>

The sources describe the *Khawárij* as pious and devout worshippers;<sup>22</sup> however, they had a very limited or narrow understanding, or were ignorant, of Islam and the *Qur’án*. Apart from the historical narration of the emergence of the *Khawárij* and for the purpose of this chapter, the main characteristics of the *Khawárij* which distinguish them from other groups are that, first, they target innocent civilian Muslims including women and children, while the *bugháh*’s use of force is directed at the state authorities and limited to achieving its objectives. Two, unlike the *bugháh* and similar to the *muháribún*, the *Khawárij* indiscriminately kill and commit terrorist acts against their Muslim victims. Third, they seize the property of their Muslim victims, which is also prohibited under the Islamic law of rebellion. Fourth, they believe that any Muslim who committed a major sin, including the Companions of the Prophet, is a *káfir* (unbeliever). Hence, *takfír* (excommunication) of Muslims who commit any sin has since then become one of their main characteristics and a rationale for dividing the Muslims into believers versus *kuffár*. In other

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<sup>21</sup> See Sulaymán Ibn Šálih Ibn ‘Abd Al-‘Azíz Al-Ghušn, “Al-Khawárij: Nah’atuhum, Musammáhum, Al-Qábuhum, Firaquhum”, in *Majallah Jámi‘ah al-Imám*, 2010, vol. 48, pp. 85–145; Usama Sulaymán, “Al-Khawárij bayn Al-Máđí wa Al-Ĥadír”, in *At-Tawhíd*, vol. 404, p. 57.

<sup>22</sup> Al-Ghušn, 2010, pp. 94, 99–102, see *supra* note 20.

words, as pointed out by Ibn Taymiyyah, the *Khawárij* see themselves as representing the *dár al-Islam* while the rest of the Muslims represent the *dár al-ḥarb*. Their reading of the Qur'anic text 64:2, "It is He Who created you, then some of you are unbelievers and some of you are believers", leads them mistakenly to this two-fold division, which results in excommunicating those who do not share their beliefs.<sup>23</sup>

If these four characteristics are met within a certain group, then what are the Islamic rules of engagement that must be followed in fighting against the *khawárij*? Classical Muslim jurists disagree on this question, giving three possible answers: the majority argue that they should be treated as rebels, while some jurists of the *Hanbalí* school argue that they are to be treated as apostates. Nonetheless, a group of jurists maintain that they are to be treated as *muḥáribún*.<sup>24</sup> These answers reflect the lack of developed rules regulating specifically the treatment of the *khawárij*, which again explains the confusion between them and other forms of non-international armed conflicts in early Islamic history. In fact, the majority opinion here is untenable, because giving the privileged status granted to rebels under Islamic law to the *khawárij*, who among their main characteristics include the indiscriminate slaughter of women and children and using "terror-oriented methods",<sup>25</sup> practically means, for example, that government forces are not allowed to initiate hostilities against them, aim to kill them during the combat, or follow them while they are escaping from the fighting. If this were the case, then governmental forces would not be allowed to stop the *khawárij*'s slaughter of

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<sup>23</sup> On the *Khawárij* see, for example, Zayd Al-Dín Ibn Najím, *Al-Baḥr ar-Rá'iq Sharḥ Kanz ad-Daqá'iq*, 2nd ed., Dár Al-Ma'rifah, Beirut, 1983, vol. 5, p. 151; Ibn Qudámah, 1984, pp. 3 ff., see *supra* note 12; Muḥammad Amin Ibn 'Umar Ibn 'Abidín, *Háshiyah Radd al-Muhtár 'alá ad-Durr al-Mukhtár: Sharḥ Tanwír al-Absár Fiqh Abú Ḥanifah*, Dár Al-Fikr, Beirut, 2000, vol. 4, p. 262.

<sup>24</sup> See Zakariyyá Ibn Muḥammad Ibn Aḥmad Ibn Zakariyyá Al-Anṣárí, *Manhaj al-Tulláb*, Dár Al-Kutub Al-'Ilmiyyah, Beirut, 1997, p. 123; Al-Mirdáwí, 1986, p. 310, see *supra* note 5; Ibn Qudámah, 1984, pp. 3 ff., see *supra* note 12; 'Alí Ibn Aḥmad Ibn Sa'id Ibn Hazm, *Al-Muḥallá*, Dár Al-Áfāq Al-Jadídah, Beirut, 1964, vol. 11, p. 97; Tamara Sonn, "Irregular Warfare and Terrorism in Islam: Asking the Right Questions", in James Turner Johnson and John Kelsay (eds.), *Cross, Crescent, and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, Greenwood, New York 1990, pp. 135 ff.; Abou El Fadl, 2006, p. 56, see *supra* note 11.

<sup>25</sup> Abou El Fadl, 2006, p. 56, see *supra* note 11.

innocent victims, a consequence the majority of the jurists certainly could not justify.

No less important, since the *Khawárij* were even, in the words of Abou El Fadl, “declared to be rebels, entitled to the treatment given to the *bugháh*, and not bandits”,<sup>26</sup> does this also mean that the *Khawárij* are to be set free after the cessation of hostilities and thus receive no punishment just like the rebels? Again, certainly, if the answer is yes, then this is another untenable position from the classical Muslim jurists, because letting the *Khawárij* who perpetrate such terrorist acts and who are likened in some legal sources to the *muháribún* because both of them cause *fasád fí al-’ard* (corruption in the land) go unpunished is in stark violation of the Qur’anic text 5:33–34, examined below. Although there is no specific *hadd* punishment prescribed for the *khawárij*, particularly if they are to be prosecuted according to a law of their own, simply because they emerged after the death of the Prophet, it is still unwarranted that, in the literature studied, classical Muslim jurists did not develop a set of punishments for the *khawárij*. Therefore, it is ironic that the *Málikí* and *Ḥanbalí* schools of law mistakenly listed and treated armed rebellion among the *hudúd* crimes, though they did not provide such a punishment, and they as well as the rest of the *Sunní* jurists fail to develop the punishment of the *khawárij*. That is because, as shown above, in light of the comparison between the *bugháh* and the *khawárij*, the former’s use of force potentially has a just cause, unlike the latter’s who even if they had a just cause, cannot go unpunished because of their indiscriminate killings and acts of terrorism.

#### 6.4. Fighting Against *Al-Muháribún*

The law of fighting against the *al-muháribún*, known as the law of *hírábah* or *quṭṭá ‘uṭ-ṭaríq* (highway robbery, brigandry, banditry), is the most developed and the least controversial among the four forms of the use of organised force treated under classical Islamic law, because of its basis in scripture, which includes specific punishments. Here, there is no disagreement among all Muslim jurists, classical and contemporary alike, that *hírábah* is a *hadd* crime. Although *hírábah* does not usually reach the level of an armed conflict in the modern sense of the word, classical Muslim jurists’ discussions reflect a situation in which organised force is used

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<sup>26</sup> *Ibid.*

and which endangers the security of society. The law of *ḥirābah* is based on the following Qur'ānic text:

Indeed, the retribution for those who *yuhāribūn* [make war upon] God and His Messenger and strive to make *fasād* [corruption] in the land is that they be killed or gibbeted or have their hands and feet amputated from opposite sides or they be banished from the land; this is a degradation for them in this world and in the Hereafter they will receive a grave chastisement. Excluded [from this retribution] are those who repent before you capture them; and be sure that God is All-Forgiving All-Merciful.

At the outset, it has to be affirmed here that, unlike the *bughāh* and the *khawārij*, the *muhāribūn* have no *ta'wīl*, justification, for their use of force because, as described in the classical sources, they do not provide justifications: their motives are usually the taking of money by force or spreading terror and intimidation among their victims. As for the elements of this crime: first, the use or threat of use of force, since the culprits of *ḥirābah* are described as an armed group who possess *shawkah* and *man'ah* (force, might, strength, power) – the terms which describe the *bughāh* above – and this is used *mughālabah* (overtly, forcefully), that is, in a manner that shows a challenge to state authorities. Although force can be used by a small group or even an individual in the context of *ḥirābah*, usually the context involves an organised and overt use of force. Second, victims are innocent victims who do not expect an armed confrontation and thus are unable to defend themselves. In the words of the classical Muslim jurists, the victims *lā yalḥaquhum al-ghawth* (are helpless and cannot be rescued). Therefore, unlike the *bughāh* and similar to the *khawārij*, the *muhāribūn* use “terror-oriented methods” against their victims who are mainly innocent civilians.<sup>27</sup>

So the situation here describes an armed confrontation between the *muhāribūn* and governmental forces (the police or military, depending on

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<sup>27</sup> On the definition, elements, and forms of the crime of *ḥirābah* see, for example, Al-Kásání, 1982, p. 90, see *supra* note 12; Al-Shāfi'í, 1973, vol. 6, p. 152, see *supra* note 3; Ibn Qudámah, p. 149, see *supra* note 15; Muḥammad Ibn Aḥmad Ibn Muḥammad Ibn Ruṣhd, *Bidāyah al-Mujtahid wa Nihāyah al-Muqtaṣid*, Dār Al-Fikr, Beirut, vol. 2, p. 340; Al-Qarāfí, 1994, p. 125, see *supra* note 5; Al-Dawoody, 2011, pp. 170–77, see *supra* note 11; Nik Rahim Nik Wajis, “The Crime of Ḥirāba in Islamic Law”, Ph.D. thesis, Glasgow Caledonian University, 1996.



the power of the former) and Islamic rules of engagement apply only to the governmental forces. In sharp contrast to the *bugháh*, the governmental forces can target to kill the *muḥáribún* during the fighting and if they escape the fighting, they are to be followed until they are captured or killed. If the *muḥáribún* collected taxes from a territory they controlled, these taxes have to be re-collected by the state, unlike the case of the *bugháh*. Furthermore, unlike the rules of engagement in international armed conflicts under Islamic law, the *muḥáribún* cannot be given *amán* (quarter).<sup>28</sup> Although this might appear in contradiction to the established framework of international law, since Article 8(2)(e)(x) of the Statute of the International Criminal Court includes among the list of war crimes “Declaring that no quarter will be given”,<sup>29</sup> the meaning of *amán* (quarter) as regulated in classical Islamic law, would in the case of *muḥáribún* indicate amnesty. In the conduct of hostilities, *amán* is a sort of contract whereby an enemy is granted protection for his life and property until he returns to his territory. It describes a situation in which an enemy indicates, either by a gesture or verbally, that he will no longer continue the fighting.<sup>30</sup> This proves that these are the harshest rules of engagement in Islam.

Although the punishments for the culprits convicted of *ḥirábah* are prescribed in the above Qur’anic text, jurists mainly disagree over the intended meaning of the Arabic proposition *aw* (or) separating each of the above punishments. In short, the majority of jurists maintain that this proposition indicates listing a specific order for each crime committed,<sup>31</sup>

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<sup>28</sup> See, for example, ‘Alí Ibn Muḥammad Ibn Ḥabíb Al-Máwardí, *Kitáb al-Aḥkám as-Sultániyyah wa al-Wiláyát ad-Díniyyah*, Maktabah Dár Ibn Qutaybah, Kuwait, 1989, p. 86.

<sup>29</sup> Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 (‘ICC Statute’), Article 8(2)(e)(x) (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>30</sup> For more information on the *amán* system see, Al-Dawoody, 2011, pp. 129–36, see *supra* note 11.

<sup>31</sup> See Muḥammad Ibn Aḥmad Ibn Abí Sahl Al-Sarakhsí, *Kitáb al-Mabṣút*, Dár Al-Ma’rifah, Beirut, vol. 9, p. 195; Ibn Mawdúid, 2005, p. 121, see *supra* note 9; Ibn Najím, 1983, p. 73, see *supra* note 23; Al-Sháfi‘í, 1973, vol. 6, p. 151, see *supra* note 3; Al-Ghazálí, 1997, p. 177, see *supra* note 19; Al-Shīríní, pp. 181–83, see *supra* note 19; Ibn Qudámah, 1984, pp. 125, see *supra* note 12; Ibn Qudámah, p. 149, see *supra* note 15; Al-Mirdáwí, 1986, pp. 296–98, see *supra* note 5; Al-Buhútí, 1970, pp. 330 ff., see *supra* note 5; Al-Rahaybání, 1961, p. 254, see *supra* note 5; Ibn Ruṣhd, p. 341, see *supra* note 27; Abou El Fadl, 2006, pp. 56 ff., see *supra* note 11; Frank E. Vogel, “The Trial of Terrorists under Classical Islamic Law”, in *Harvard International Law Journal*, 2002, vol. 43, no. 1, pp. 58–61.

while *Málikí* jurists advocate that this proposition indicates that the judge has the freedom to choose the punishment commensurate with each convicted criminal.<sup>32</sup> But, in any case, there is no disagreement over the criminalisation of *hirábah* and the fact that its culprits receive the severest punishments prescribed in Islamic law.<sup>33</sup>

## 6.5. The Case of ISIS

The emergence of most terrorist and radical Muslim groups throughout Islamic history is mainly linked with armed conflicts (mostly among Muslims), dictatorships, or the decline of the Muslims' power in the twentieth century. The emergence of ISIS is a case in point. In fact, ISIS is the result of two armed conflicts in Iraq and Syria that were caused by two dictatorships: the Saddam regime in Iraq and the Assad regime in Syria. The US-led invasion of Iraq led to the formation of Al-Qaeda in Iraq in 2003 at the hands of the Jordanian Abú Muş‘ab Al-Zarqáwí.<sup>34</sup> Some of the ISIS militants, particularly those from outside these two countries, joined this group in order to recover the glory and power of the Muslims by establishing the *Caliphate*. ISIS was formed by Abú Bakr Al-Baghdádí in April 2013 as a result of a merger between a number of militant forces in Iraq formed following the US-led invasion of Iraq with the militant groups in Syria following the outbreak of the civil war in Syria in 2011. The governmental armed forces of Iraq and Syria, in addition to the international community, had not yet managed to destroy ISIS at the time of writing, despite controlling most of the territories in both Iraq and Syria,<sup>35</sup> and

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<sup>32</sup> See Al-Qaráfí, 1994, p. 126, see *supra* note 5; Ibn Ruşhd, p. 341, see *supra* note 27; Muḥammad Ibn Muḥammad Ibn ‘Abd Al-Rahmán Al-Ḥattáb, *Mawáhib al-Jalíl li-Sharḥ Mukhtaşar Khalíl*, 2nd ed., Dár Al-Fikr, Beirut, 1977, vol. 6, p. 315; Aḥmad Al-Dardír, *Ash-Sharḥ al-Kabír*, Dár Al-Fikr, Beirut, vol. 4, pp. 349 ff.; Al-Disúqí, 2013, pp. 349 ff., see *supra* note 5; Al-Máwardí, 1999, p. 353, see *supra* note 4; Al-Máwardí, 1989, p. 84, see *supra* note 28; ‘Awdah, p. 647, see *supra* note 9; Sherman A. Jackson, “Domestic Terrorism in the Islamic Legal Tradition”, in *The Muslim World*, September 2001, vol. 91, no. 3–4, p. 300; Vogel, 2002, p. 59, see *supra* note 31.

<sup>33</sup> On the punishment of *hirábah* see also, Aḥmad Ibn ‘Abd Al-Ḥalím Ibn Taymiyyah, *As-Siyásah ash-Shar‘iyyah fi Işláh ar-Rá‘í wa ar-Ra‘iyyah*, Dár Al-‘Áfáq Al-Jadídah, Beirut, 1983, pp. 68–74; Al-Dawoody, 2011, pp. 177–83, see *supra* note 11.

<sup>34</sup> Ahmed Al-Dawoody, “ISIS and its Brutality Under Islamic Law”, in *Kansai University Review of Law and Politics*, 2015, vol. 36, p. 102.

<sup>35</sup> Dale Sprusansky, “Understanding ISIS: Frequently Asked Questions”, in *The Washington Report on Middle East Affairs*, October 2014, pp. 19–20.

ISIS' claimed responsibility for terrorist attacks committed in the Muslim world and in Europe. Although ISIS proclaimed itself a state, according to former US President Barack Obama, in his speech of 11 September 2014 on combating ISIS and terrorism, it "is certainly not a state [...] It is recognized by no government, nor the people it subjugates. ISI[S] is a terrorist organization, pure and simple".<sup>36</sup>

However, in light of the above discussion of the three forms of non-international armed conflicts treated by classical Muslim jurists, I will attempt to classify the use of armed force by ISIS into one of these categories, and identify the rules of engagement in fighting against it, as well as the punishment if any for its captured militants.

	Military power and organisation	<i>Ta'wíl</i>	Use of force	Rules of engagement	<i>Takfir</i>
<i>Bugháh</i>	√	√	√	√	×
<i>Khawárij</i>	√	√	√	×	√
<i>Muháribún</i>	√	×	√	×	×
ISIS	√	√	√	×	√

ISIS undoubtedly possesses *shawkah*, *man'ah*, *fay'ah*, military power and organisation, which is a common condition set by the classical Muslim jurists for all the above three forms of conflict. According to the parameters set by classical Muslim jurists, they already constitute a large number,<sup>37</sup> they managed to control more than a city or a stronghold, and the armed forces of more than one country are called on to fight against it. Also, ISIS has a command and a structure that has already allowed it to conduct hostilities and run its ahistorical, barbaric version of a so-called state. Furthermore, under the command of its leader Abú Bakr Al-

<sup>36</sup> *Ibid.*

<sup>37</sup> See Al-Sháfi'í, 1973, p. 218, *supra* note 3; Al-Shirbíní, p. 123, *supra* note 19; Abou El Fadl, 2006, p. 151, *supra* note 11.

Baghdádí, ISIS has managed to receive allegiance from groups in Egypt, Libya, Yemen, Saudi Arabia, Nigeria,<sup>38</sup> Algeria, the Arabian Peninsula,<sup>39</sup> Afghanistan, Pakistan, Dagestan, and Chechnya,<sup>40</sup> in addition to the tribal leaders of the areas under control in Iraq and Syria.<sup>41</sup> Although recent reports indicate that ISIS's force is declining, in the face of international society's failure to destroy ISIS, it has gained recruits both from the Muslim world and the West, including born Muslims and converts, as announced in its magazine *Dabiq*, the mouthpiece of ISIS. According to some recent studies, the estimated number of foreign fighters who have joined ISIS is up to 15,000 from 80 countries; a maximum of 25 percent of these fighters have come from the West.<sup>42</sup>

ISIS also has a *ta'wíl*, which is a common characteristic of the *bugháh* and the *khawárij*, but not of the *muháribún*. Its ultimate objective, or at least one of its justifications for the use of force, is the establishment of the Islamic *Caliphate*. Its leader, Al-Baghdádí, affirmed that the re-establishment of the *Caliphate* will put an end to the weakness and humiliation of the Muslims and bring about its lost glory. Therefore, in June 2014, he proclaimed himself as the *Caliph* of all the Muslims and asked them to give allegiance to him.<sup>43</sup> Hence, ISIS shares the above characteristics with the *bugháh* and the *khawárij*.

Regarding Islamic rules of engagement, ISIS has violated them: it has committed horrible atrocities against its victims, including women; children; and religious, ethnic, or sectarian minorities. ISIS militants have committed war crimes. They committed ethnic cleansing against the “non-Arab and non-*Sunní* Muslim communities, killing or abducting hundreds, possibly thousands, and forcing more than 830,000 others to flee the areas

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<sup>38</sup> See Clarion Project, “Special Report on the Islamic State”, 23 August 2016, p. 23.

<sup>39</sup> The Islamic State, “Remaining and Expanding”, in *Dabiq*, 2015, vol. 5, pp. 12, 22.

<sup>40</sup> The Islamic State, “From Hypocrisy to Apostasy”, in *Dabiq*, 2015, vol. 7, pp. 34 ff.

<sup>41</sup> The Islamic State, “The Return of Khilafa”, in *Dabiq*, 2014, vol. 1, pp. 12–15.

<sup>42</sup> See Daniel Byman and Jeremy Shapiro, “Be Afraid. Be A Little Afraid: The Threat of Terrorism from Western Foreign Fighters in Syria and Iraq”, 2014, Foreign Policy at Brookings, Policy Paper No. 34, p. 9. See also International Centre for the Study of Radicalisation Insight, “Up to 11,000 foreign fighters in Syria; steep rise among Western Europeans”, 17 December 2013.

<sup>43</sup> See BBC News, “ISIS rebels declare ‘Islamic State’ in Iraq and Syria”, 30 June 2014.

it [...] captured since 10 June 2014”.<sup>44</sup> In addition to the slaughter of innocent civilians, torture and mutilation of victims, they also committed massacres of hundreds of captured Iraqi soldiers and forced Yazidi and Christian persons into sexual slavery.<sup>45</sup>

*Takfír* has become a major justification for terrorist attacks and assassinations, particularly of government official or public figures, for the past half a century. But leaving aside *takfír*, because it will not have a legal effect in determining the rules of engagement and the punishment of ISIS captives, the fact that ISIS violates the rules of engagement and uses terrorist attacks against civilians among other crimes disqualifies its members from being treated under the privileged status of the *bugháh* and, as a consequence, they are to be treated either under the vague law of the *Khawárij* or the law of *hírábah*, which comprise the harshest rules of engagement and the severest punishments. Therefore, recalling that jurists disagreed over the treatment of the *Khawárij* as apostates, rebels, or *muháribún*, the more rational position here is that ISIS should be treated as *muháribún* as far as the rules of engagement and punishment are concerned, simply because the law of the *Khawárij* is not developed particularly regarding the punishment of war crimes and violations of the rules of engagement. In response to a question about the Islamic ruling regarding ISIS members, the Jordanian Dár Al-Iftá’ (*Fatwá Council*) issued *fatwá* number 3065 on April 13, 2015, stating that ISIS is a terrorist organisation because of its shedding of blood, *takfír* of the Muslims, causing *fasád fí al-’ard*, and violating the Islamic rules of engagement.<sup>46</sup> The *fatwá* does not refer to ISIS as either *Khawárij* or *muháribún*, although it uses the terminology employed by the classical Muslim jurists in the description of both; and does not refer to the punishment for ISIS militants either.

Therefore, since the rules of fighting against the *muháribún* should apply against ISIS, governmental forces can target ISIS militants to kill during fighting, and they are to be captured or killed. Following the classical Muslim jurists’ rulings, the taxes collected by ISIS from the territo-

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<sup>44</sup> Amnesty International, “Ethnic Cleansing on a Historic Scale: The Islamic State’s Systematic Targeting of Minorities in Northern Iraq”, MDE 14/011/2014, 2014, p. 4.

<sup>45</sup> United Nations News, “‘Barbaric’ sexual violence perpetrated by Islamic State militants in Iraq – UN”, 13 August 2014.

<sup>46</sup> Jordanian Dár Al-Iftá’ (*Fatwá Council*), “Fatwá number 3065” available on the web site of the Jordanian government.

ries under their control are to be re-collected by the Iraqi and Syrian governments after re-taking control of the territories controlled by ISIS. But this ruling of the classical Muslim jurists is unwarranted, because the same justifications for prohibiting re-collecting the taxes in the case of the *bugháh* exist here in the case of ISIS. This is because re-collecting taxes will result in undue financial hardships for the taxpayers, as the *Sháfi'í* jurists, Al-*Shirbíní* and Al-Ramlí argued;<sup>47</sup> but also, as the *Hanafí* jurist 'Alá Al-Dín Al-Kásání pointed out, because the government did not provide the protection in return for which it collects the taxes.<sup>48</sup>

Regarding the punishment for captured ISIS militants, bearing in mind that ISIS members are not entitled to combatant status because only the *bugháh* are entitled to combatant status according to the Islamic law of non-international armed conflicts, convicted ISIS militants will receive the prescribed *hirábah* punishment.<sup>49</sup> Therefore, whether in battlefield or non-battlefield crimes, ISIS members convicted of killing are to be sentenced to execution and gibbetting, although *Málikí* jurists maintain that gibbetting is optional to the judge.<sup>50</sup> It is worth adding here that in *hirábah* crimes, which do not include killing, the *Málikí* jurists give the judge the authority to choose any of the four prescribed punishments in the *Qur'án*, provided that it serves the interests of society. So, if ISIS members are prosecuted and convicted for only terrorising and intimidating their victims without being convicted of killing or causing bodily injury or any other crimes, they are to be exiled or imprisoned.<sup>51</sup> Rape, torture, mutilation, forced expulsion, and other crimes committed in the context of the crime of *hirábah* receive the same punishment, even though not listed by name in classical Islamic criminal law books, because they fall within the

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<sup>47</sup> Al-*Shirbíní*, pp. 125, see *supra* note 19; Al-Ramlí, 1998, p. 405, see *supra* note 19.

<sup>48</sup> Al-Kásání, 1982, p. 142, see *supra* note 13.

<sup>49</sup> See, for example, Al-Dawoody, 2011, pp. 170–93, see *supra* note 9; Ahmed Al-Dawoody, “International Terrorism and the Jurisdiction of Islamic Law”, in *International Criminal Law Review*, 2015, vol. 15, no. 3, pp. 565–86.

<sup>50</sup> See Al-Qaráfí, 1994, p. 126, see *supra* note 27; Ibn Rushd, p. 341, see *supra* note 27; Al-Hattáb, 1977, p. 315, see *supra* note 32; Al-Dardír, pp. 349 ff., see *supra* note 32; Al-Disúqí, pp. 349 ff., see *supra* note 5; Al-Máwardí, 1999, p. 353, see *supra* note 4; Al-Máwardí, 1989, p. 84, see *supra* note 4; 'Awdah, p. 647, see *supra* note 9; Jackson, 2001, p. 300, see *supra* note 32; Vogel, 2002, p. 59, see *supra* note 31.

<sup>51</sup> See Al-Sarakhsí, p. 195, see *supra* note 31; Al-*Sháfi'í*, 1973, vol. 6, pp. 151 ff., see *supra* note 3; Ibn Qudámah, 1984, p. 125, see *supra* note 12.

description of committing *fasád* in the land. Bearing in mind that *Málikí* jurists give the judge the authority to choose any of the four punishments prescribed in the *ḥirábah* Qur'ánic text, the judge can sentence ISIS members to execution if they have the intellectual ability to plan the attacks, while if they have only the physical ability to carry out the attacks, then the judge can sentence them to amputation of the right hand and left foot. But if ISIS members lack both intellectual and physical abilities, the judge can give them a discretionary punishment or send them to exile.<sup>52</sup>

As for accomplices, while the majority of jurists maintain that they should receive the same punishment as the actual perpetrators, Al-Sháfi'í argues that they should only receive a discretionary punishment left to the authority of the judge and imprisonment.<sup>53</sup> It should be pointed out here that it is only in the case of *ḥirábah* crimes that accomplices receive the same punishment as the actual perpetrators, because these crimes are considered as an aggression against the whole of society and not against the victims and their families only. For this reason, it is also only in *ḥirábah* crimes that the families of the murdered victims have no right to pardon the killers and waive their executions. But it should be added here that, concerning the question of the jurisdiction of Islamic courts, if such terrorist crimes are committed by ISIS members outside the Muslim world, then only a judge in an Islamic court that applies the *Hanafí* school of law will refuse to adjudicate such cases because, according to the *Hanafí* school of law, Islamic courts have no jurisdiction over crimes committed outside the Islamic world.<sup>54</sup>

## 6.6. Conclusion

The above discussion shows that the classical Muslim jurists developed detailed rules regulating the use of force in the cases of both armed rebellion and terrorism. Within the context of their primitive conflict situations, the classical Muslim jurists succeeded in terms of defining these two forms of conflict, setting the rules of engagement, and tackling the question of punishment. However, they failed to address the question of pun-

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<sup>52</sup> See Al-Qaráfí, 1994, p. 126, see *supra* note 5; Ibn Rušhd, p. 341, see *supra* note 27; 'Awdah, p. 647, see *supra* note 9.

<sup>53</sup> Al-Sarakhsí, p. 198, see *supra* note 31; Al-Sháfi'í, 1973, vol. 2, pp. 641 ff., 666–68, see *supra* note 3.

<sup>54</sup> See Al-Dawoody, 2015, pp. 565–86, see *supra* note 47.

ishments for the violations of the rules of engagement and developing punishments for the *khawárij*. Hence, the main challenge here for a classical Muslim judge who would attempt to enforce the Islamic rules in this area is the contradictory rulings developed by jurists of different, and even the same, schools of law. Additionally, the confusion between the laws of fighting against *al-bugháh* and *al-Khawárij* in Islamic legal and non-legal literature has led the *Málíkí* and *Hanbalí* schools to mistakenly list armed rebellion among the *hudúd* crimes and, disappointingly, in the present time, this confusion and the fact that the *Khawárij* used acts of terrorism in early Islamic history have been capitalised on by many contemporary scholars who generally denounce and criminalise opposition to the state, whether in the form of expression of opinion or peaceful demonstrations, let alone armed rebellion.

It goes without saying that the forms and nature of conflict do change and hence modern forms of non-international armed conflict cannot be identical to the four forms regulated by the classical Muslim jurists. The case of ISIS shows some similarities with the forms of conflict discussed above, but its violation of the rules of engagement and use of acts of terrorism subject its members to the Islamic law of terrorism, particularly in light of the undeveloped law of the *khawárij*. Without a doubt, ISIS has committed numerous war crimes and human rights abuses including ethnic cleansing, massive murder, torture, forced marriages, sexual abuses and sexual slavery, use of child soldiers, and executions without due process. Although all these crimes are outrageous violations of Islamic law, ISIS still finds its way to the classical texts and claims that its acts represent true interpretations of Islamic sources. Less than a decade ago, I called for a codification by Muslim scholars and jurists of an Islamic law of war that is applicable in our present warfare contexts, in order to curb such violations “when the warriors or perpetrators of acts of warfare or terrorism are not in regular state armies”.<sup>55</sup> This is intended to be no more than an authentic scholarly representation of the Islamic rules on the use of force in modern warfare situations, which can counteract the misunderstanding and misrepresentation of classical Islamic sources.

In fact, both classical Muslim jurists and modern international humanitarian law share the same concerns of humanising armed conflicts,

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<sup>55</sup> Al-Dawoody, 2011, p. 105, see *supra* note 11.



with striking similarities; yet the classical sources can be misused on the one hand by radical groups and terrorists to justify indiscriminate use of force and terrorist attacks, and on the other hand, the confusion between the laws of fighting against *al-bugháh* and *al-Khawárij* has been used and abused by state authorities to criminalise opponents of the state and even sentence them to death. The current situation of lip-service adherence to Islamic law by some countries and of its being considered merely archaic and too scholarly by some, as well as the literalist interpretations and applications of it by radical groups, leads to the conclusion that the renewal and codification of Islamic law in its surrounding contexts is a must. Otherwise, since it seems that many Muslim societies will continue to struggle between the Islamisation versus the de-Islamisation of their societies, at least for the foreseeable future, the Muslim world and the West will continue to bear the consequences.

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## Islam and International Criminal Law and Justice

Tallyn Gray (editor)

Mindful of alleged and proven core international crimes committed within the mainly-Muslim world, this book explores international criminal law and justice in Islamic legal, social, philosophical and political contexts. Discussing how law and justice can operate across cultural and legal plurality, leading Muslim jurists and scholars emphasize parallels between civilizations and legal traditions, demonstrating how the Islamic 'legal family' finds common ground with international criminal law. The book analyses questions such as: How do Islamic legal traditions impact on state practice? What constitutes authority and legitimacy? Is international criminal law truly universal, or too Western to render this claim sustainable? Which challenges does mass violence in the Islamic world present to the theory and practice of Islamic law and international criminal law? What can be done to encourage mainly-Muslim states to join the International Criminal Court? Offering a way to contemplate law and justice in context, this volume shows that scholarship across 'legal families' is a two-way street that can enrich both traditions. The book is a rare resource for practitioners dealing with accountability for atrocity crimes, and academics interested in opening debates in legal scholarship across the Muslim and non-Muslim worlds.

The book contains chapters by the editor, Onder Bakircioglu, Mashood A. Baderin, Asma Afsaruddin, Abdelrahman Afifi, Ahmed Al-Dawoody, Siraj Khan, Shaheen Sardar Ali and Satwant Kaur Heer, and Mohamed Elewa Badar, in that order.

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