Islamic Law, International Law, and Non-International Armed Conflict in Syria

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I. Introduction

Non-international armed conflicts (NIAC) occur more frequently in the world today and entail greater atrocities and human suffering than international armed conflicts.1 The increase in NIACs has seen a corresponding expansion in the body of law governing NIAC’s.2 Despite this expansion of law, gaps remain in the existing regulation of NIACs.3 The body of NIAC law is not equally binding upon states and non-state actors, non-state actors lack incentive to follow the law, and the law does not focus on reconciliation of the warring parties. This paper argues that, in the context of Muslim states involved in NIACs, the parties may turn to Islamic law as a source of common ground to fill gaps in international law.

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2 Id. at 220 (discussing how international criminal law, international human rights law, and the law of international armed conflict have all formed the corpus of law applying to NIACs).
3 Id. at 222.
Some commentators have criticized Islamic law for being incompatible with international law. In the context of NIAC, they are wrong. Islamic and international law have their differences, but they are compatible doctrines because both are aimed at protecting the victims of NIAC. Preventing fitnah is indeed the paramount interest of all jurists in applying Islamic law to NIAC. Fitnah means bloodshed, chaos, instability, and public disorder. Islamic law’s interest in preventing fitnah is why it shares common protections and criteria that trigger those protections with international law.

Applying Islamic and international law to the current NIAC in Syria demonstrates their compatibility. In 2010 and early 2011, Syria appeared to be a stable country when compared to the mass protests of the Arab Spring that toppled Tunisian dictator Zine El Abidine Ben Ali and Egyptian President Hosni Mubarak. Syrian President Bashar al-Assad seemed confident that the reforms he implemented over the years, his popular image among Syrians, and his defiance of the west would prevent the tidal wave of popular protests from spreading to Syria. Syria’s ostensible immunity from the Arab Spring did not last.

4 See generally Holly Taylor, The Constitutions of Afghanistan and Iraq: The Advancement of women’s Rights, 13 NEW ENG. J. INT’L & COMP. L. 137, 138 (2006) (arguing that including Islamic law in constitutions will allow human rights violations against women to continue); Hannibal Travis, Freedom or Theocracy?: Constitutionalism in Afghanistan and Iraq, 3 NW. U. J. INT’L HUM. RTS. 4 (2005) (arguing that Afghanistan’s constitutional requirement that government policy be compatible with Islamic law may allow grave breaches of human rights and frustrate respect for international human rights.); Mimi Wu, Clash of Civilizations: Shari’a in the International Legal Sphere, 1 YALE UNDERGRADUATE L.R. 50, 51 (2012) (discussing the theory that Shari’a is incompatible with international law because it has no mechanism for major changes and punishments under Shari’a violate fundamental human rights).

5 KHALED ABOU EL FADL, REBELLION & VIOLENCE IN ISLAMIC LAW 40 (Cambridge Univ. Press 2001).

6 In 2012, the International Committee of the Red Cross declared that the conflict in Syria amounts to a non-international armed conflict. Syria in Civil War, Red Cross Says, BBC (Jul 15, 2012), http://www.bbc.co.uk/news/world-middle-east-18849362. A NIAC may, however, become an international armed conflict if another state intervenes in the conflict through its troops or some of the parties to the NIAC act on behalf of that other state. Prosecutor v. Dusko Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 84 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995). Whether the internationalization of the Syrian conflict has subsequently rendered it an international armed conflict is beyond the scope of this paper.

7 DAVID W. LESCH, SYRIA THE FALL OF THE HOUSE OF ASSAD 38 (Yale Univ. Press 2012).

8 Id. at 41.
On March 15, 2011, angered by the arrest and torture of 15 children for writing “down with the regime” on a wall, the people of Daraa peacefully took to the streets demanding justice, democracy, and freedom.9 Fearing an insurrection, the Syrian security forces responded to the protesters by opening fire on the crowd and killing four people.10 Within days, the protests grew to thousands of people, spread to other cities, and demands grew for the removal of President Bashar al-Assad’s regime.11 The Syrian Government subsequently launched full-scale attacks on Daraa and other towns converting the once peaceful protest movement into an armed opposition and civil war.12

Syria is now the quintessential fitnah that Islamic jurists fear. Contrary to Islamic and international law, Syria has used weapons of mass destruction to fight rebels with no regard for the lives of innocent civilians.13 Government and anti-government forces have both resorted to siege warfare and committed murder, rape, and torture without fear of ever being held accountable.14 Some estimates suggest that more than 200,000 Syrians have been killed, more than four million refugees have fled Syria, and over ten million Syrians have been internally displaced.15

The scope and application of Islamic and international law to Syria somewhat differ, but application of both doctrines would go a long way towards addressing the ongoing atrocities.

The diverse application of—and gaps in—international law create a need to apply both doctrines.

10 Id.
11 Id.
12 Id.
14 Id.
Muslim countries have diverse acceptance of international treaties. Islamic law also has different levels of influence on the legal systems of Muslim countries. Unlike international law, Islamic law provides some unique protections such as combatant immunity to rebels and recognition of rebel authority to enter into peace agreements. Given that Islamic and international law are compatible, however, Islamic law can serve as common ground for countries in the region to help address the spillover from the Syrian conflict by filling gaps left by international law.

This article is structured in five parts. Part II examines a brief history of the development of international law’s treatment of NIAC and the different protections that it provides. Part III examines the sources of Islamic law and its treatment of NIAC. Part IV demonstrates how, despite their differences, Islamic and international law are compatible by applying both doctrines to the Syrian conflict. Part V explains how this compatibility can facilitate the development of regional polices to address NIACs.

II. International Law’s Development and Treatment of Non-International Armed Conflict

The extent to which modern international law applies to NIACs is determined by the type or nature of the conflict. Prior to adoption of Common Article 3 of the Geneva Conventions of 1949, a NIAC had to rise to the level of belligerency for international humanitarian law and the law of war to apply to the conflict. To constitute belligerency, a conflict had to satisfy four requirements. First, the conflict had to be a general conflict or civil war within a state that is beyond the scope of mere local unrest. Second, the non-state actors must occupy a substantial part of the territory of the state. Third, the non-state actors must have a measure of orderly

16 Anthony Cullen, Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law, 183 MIL. L. REV. 66, 74-5 (2005).
18 Id.
control or governance in the area that it controls.\textsuperscript{19} Fourth, they must observe the laws of war.\textsuperscript{20} Once recognized as a belligerency, international law treats the parties to the conflict as if they are states in an international armed conflict.\textsuperscript{21}

Non-international armed conflicts that did not amount to belligerency, such as rebellions and insurgencies, were beyond the scope of international law. A NIAC constitutes a rebellion if it is sporadic and susceptible to rapid suppression by a police force or normal procedures of internal security.\textsuperscript{22} An insurgency exists when a rebellion survives suppression, but does not yet meet the four factors of belligerency.\textsuperscript{23} Unlike the parties in belligerency, the actors in a rebellion or insurgency are subject to domestic law and the sovereign may punish the actors as any other criminal.\textsuperscript{24}

Since the 1930s, the distinction between belligerency, rebellion, and insurgency gradually blurred as international legal rules increasingly emerged to regulate NIACs.\textsuperscript{25} This change occurred because the focus of international law shifted from protecting state sovereignty to protecting human beings.\textsuperscript{26} The most significant outcome of this shift was the adoption of Common Article 3 of the 1949 Geneva Conventions.

Common Article 3 requires states to apply minimum protections “in cases of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties….“\textsuperscript{27} The phrase “armed conflict not of an international character” is not defined in

\begin{footnotes}
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Cullen, \textit{ supra} note 16, at 77.
\item \textsuperscript{22} Id. at 69-70.
\item \textsuperscript{23} Id. at 71.
\item \textsuperscript{24} Id. at 69-70.
\item \textsuperscript{25} Prosecutor \textit{v.} Dusko Tadic, Case No. IT-94-1-I, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995).
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].
\end{footnotes}
Common Article 3 because the drafters intended, “the scope of the application of the Article must be as wide as possible.”

In *Prosecutor v. Tadic*, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia held that an armed conflict exists whenever there is a protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.

To distinguish a NIAC from mere banditry, unorganized short-lived insurrections, or terrorism, international law focuses on both the intensity of the conflict and the organization of the parties to the conflict. The Commentary to Common Article 3 lists non-exclusive factors relevant to this determination. These factors include: the rebels possess an organized military force; the rebels have an authority responsible for their acts; the rebels act within a determinate territory; the rebels respect the rules of the Geneva Conventions; and the legal government responds to the rebels with regular armed forces.

Once triggered, Common Article 3 requires the humane treatment of noncombatants. Noncombatants include “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause…” Common Article 3 achieves humane treatment of noncombatants by prohibiting violence to life and person; murder; mutilation; cruel treatment and torture; taking of hostages; and outrages upon personal dignity. Finally, Common Article 3 protects prisoners by prohibiting “the passing of sentences and the carrying out of executions

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29 Tadic, *supra* note 25, at ¶ 70.
32 *Id.* at 35.
33 Fourth Geneva Convention, *supra* note 27, at Common Article 3(1).
34 *Id.*
without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”

These protections of Common Article 3 also reflect customary international law and represent a minimum standard from which the parties to any type of armed conflict must not depart.

In 1977, Additional Protocol II was adopted to further develop the law governing NIAC and to ensure greater protections for its victims. Additional Protocol II supplements Common Article 3 without modifying the conditions under which Article 3 applies. Common Article 3 is thus “the parent provision that enshrines fundamental humanitarian principles and Additional Protocol II is its extension.”

A higher threshold must be met to trigger Additional Protocol II protections than to trigger Common Article 3 protections. “In fact, the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as Common Article 3, which applies in all situations of NIAC.”

Article 1(1) states that the Protocol applies to “armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out substantial and concerted military operations and to implement this Protocol.”

This Protocol shall not apply to situations on internal disturbances and tensions, such as riots,
isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

The objective criteria triggering Additional Protocol II does not depend on the judgment of the parties to the conflict. Instead, the Protocol applies automatically as soon as the criteria of Article 1(1) are fulfilled. “The aim of this system is that the protection of the victims of armed conflict should not depend on the authorities concerned.”

Once triggered, Additional Protocol II provides greater protections than Common Article 3. Theses protections included humane treatment of people who do not take part in the hostilities, protection of wounded and sick, and protection of the civilian population. Article 4 establishes fundamental humane principles for people not participating in hostilities by prohibiting (a) violence to life, murder, torture, mutilation, or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity such as rape, enforced prostitution, and any form of indecent assault; (f) slavery and the slave trade in all their forms; and (g) pillage. Articles 5 and 6 provide protections for detainees and guarantee basic due process rights before a person can be convicted and punished for a crime. Articles 7, 8, and 9, impose a duty to search for, collect, protect, and treat the wounded and sick and medical and religious personnel.

Finally, Additional Protocol II provides specific protections for the civilian population. Article 13 prohibits making the civilian population or individual civilians the object of attack or

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42 Id. at art. 1(2).
43 ICRS Commentary on Additional Protocols, supra note 39, at 1351.
44 Id.
45 Id.
46 Additional Protocol II, supra note 37, at art. 4(2).
47 Id. at arts. 5 and 6.
48 Id. at arts. 7-9.
acts of violence.\textsuperscript{49} Article 14 forbids starvation as a method of combat.\textsuperscript{50} It also prohibits destruction or removal of objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.\textsuperscript{51} Article 17 forbids ordering displacement of the civilian population unless the security of the civilians involved or imperative military reasons so demand.\textsuperscript{52} “Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.”\textsuperscript{53} Many of Additional Protocol II’s protections are now considered to be part of customary international law.\textsuperscript{54}

In addition to Common Article 3 and Additional Protocol II, other treaties may apply to NIACs. For example, Protocol II to the Convention on Certain Conventional Weapons (the Mines Protocol) was revised to apply to NIAC’s because the majority of land mines are found in states involved in a NIAC.\textsuperscript{55} Article 8 of The Rome Statute of the International Criminal Court (Rome Statute) distinguishes between war crimes that apply in international armed conflicts and those that apply to NIACs.\textsuperscript{56} The 1954 Hague Convention contains rules relating to the protection of cultural property that extend to NIACs.\textsuperscript{57}

Customary international humanitarian law also regulates NIACs. As mentioned earlier, Common Article 3 and portions of Additional Protocol II are considered customary international law.

\textsuperscript{49} Id. at art. 13.
\textsuperscript{50} Id. at art. 14.
\textsuperscript{51} Additional Protocol II, supra note 37, at art. 14.
\textsuperscript{52} Id. at art. 17.
\textsuperscript{53} Id.
\textsuperscript{54} ICRC Respect for IHL, supra note 36, at 9. For more information of customary law that applies to non-international armed conflict see JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME 1: RULES (Cambridge University Press, 2005).
\textsuperscript{55} Sivkmara, supra note 1, at 225.
\textsuperscript{56} Id. at 226.
\textsuperscript{57} Id. at 227.
The International Criminal Tribunal for the former Yugoslavia (ICTY) has identified a body of customary international law that applies to NIACs. This includes the prohibition on attacks against civilians and civilian objects, the prohibition on the wanton destruction of property, the protection of cultural property and religious objects, the prohibitions on plunder and pillage, and the prohibition on the use of chemical weapons. Finding an expansive body of customary law, the ICRC study on customary international law posited that 149 out of 161 rules of customary international humanitarian law are or may be applied in a NIAC.

Finally, international human rights law and domestic law round out the corpus of law regulating NIACs. International human rights law—particularly non derogable human rights—protect vulnerable populations in NIACs. Domestic law in the state in which the conflict is taking place may also provide additional protections and limits on behavior.

III. Islamic Law’s Treatment of Non-International Armed Conflict

Unlike international law, Islamic law includes both law and tenants of Islamic faith. “It serves as a code for this life and the hereafter that fosters peace with oneself and with society.” Islamic law is adaptable to specific situations because Muslim scholars are expected to establish contemporary understandings of Islamic law to address human conduct in evolving social contexts. *Shari’a* and *fiqh* are the principle components of Islamic law.

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58 ICRC RESPECT IHL, supra note 36, at 9.
59 Sivakumaran, supra note 1, at 228.
60 Id.
61 Id.
62 ICRC RESPECT IHL, supra note 36, at 10.
63 Id.
64 NIAZ A. SHAH, ISLAMIC LAW AND THE LAW OF ARMED CONFLICT 12 (Routledge 2011).
65 WAEEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 19 (Cambridge 2009).
Shari’a literally means the path to be followed or clear way to be followed. The Qur’an and the Sunnah are the two principle sources of Shari’a. The Qur’an was revealed between 610 and 632 C.E to the Prophet Muhammad. As the word of God, Muslims believe that the Qur’an is infallible. The Sunnah is the life and practices of the Prophet Muhammad. The Sunnah is a primary source of Shari’a because the Qur’an dictates, “Ye have indeed in the messenger of Allah a beautiful pattern [of conduct] for any one whose hope is in Allah and the Final Day, and who engages much in the Praise of Allah.” The details of the Sunnah were captured in specific narratives that became known as the hadith. Although a principle source of law, the Qur’an and the Sunnah alone are not always sufficient to answer questions raised by ever changing human life and needs. To deal with these new issues, Shari’a allows jurists to turn to human reasoning.

Jurists use the process of ijtihad to derive the rules of Shari’a from the primary sources. Ijtihad is the process of applying the mind to the text. When the primary sources are silent on a specific subject, ijtihad uses a form a reasoning known as maslahah to apply Shari’a principles to contemporary social contexts. Professor Wael B. Hallaq notes that, “There a five universal principles that underlie Shari’a, namely, protection of life, mind, religion, property, and offspring.” Under maslahah, if a public interest can be tied to the five universal principles that

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68 Id. at 31-2.
69 Yousaf supra note 66, at 49.
70 Id.
71 Id.
72 Id.
73 HALLAQ, supra note 65, at 16.
74 SHAH, supra note 64, at 13.
75 Id.
76 Id. at 16.
77 HALLAQ, supra note 64, at 26.
underlie Shari’a, religious scholars will interpret the law in a manner that is suitable to serve that public interest.\textsuperscript{78}

The process of deducing and applying Shari’a principles to real or hypothetical situations is called fiqh or Islamic jurisprudence. Islamic jurists’ apply four methods for deducing fiqh-based law: (1) interpreting the Qur’an to extract principles; (2) the application of principles reflected through the Hadith; (3) imja which is the consensus of opinion from companions of the Prophet Muhammad or learned scholars; and (4) analogical deduction known as qiyas.\textsuperscript{79}

Islamic jurisprudence is not universal because jurists adopt different legal philosophies and methods of deduction based upon which legal school of thought they are loyal to. Nineteen different schools of fiqh or fiqh madhhabs developed during the first four centuries of Islam.\textsuperscript{80} The rudiments of these fiqh madhhabs developed between 700 and 740 AD where legal specialist would hold circles of learning.\textsuperscript{81} These learning circles subsequently formed into distinct legal schools of thought whose students adopted the doctrine of the school’s leading jurist.\textsuperscript{82} The fiqh madhahabs became known by the names of the legal jurists who gave the school its distinctive doctrinal characteristic.\textsuperscript{83} Today, the four major Sunni fiqh madhahabs are Hanafi, Maliki, Shafi’i, and Hanbali while the Jafari is the predominate Shiite fiqh madhab.\textsuperscript{84}

The law may differ or even conflict among the diverse fiqh madhhabs, but preventing fitnah is the public interest that permeates all jurists’ application of Islamic law to NIAC. Since the Qur’an and the Sunnah do not provide much guidance on how Shari’a governs NIAC, it is vital

\textsuperscript{78} Id. at 25.
\textsuperscript{79} Abdal-Haqq, supra note 67, at 36.
\textsuperscript{80} Id. at 37.
\textsuperscript{81} HALLAQ, supra note 65, at 63.
\textsuperscript{82} Id. at 156-7.
\textsuperscript{83} Id. at 152.
\textsuperscript{84} Abdal-Haqq, supra note 67, at 39.
for Islamic scholars to consider *fitnah* when determining when rebellion may be justified and what protections Islamic law provides.

The line between international and non-international armed conflict in Islamic law is religious. Islamic law considers NIAC an armed conflict between Muslims in the territory controlled by the caliph or an armed conflict between Muslims and the caliph.\(^{85}\) The word “Islam” means submission to god and a Muslim is a believer in the religion of Islam.\(^{86}\) In an armed conflict between Muslims, the entire body of the law of *quital* (combat) applies including the rules governing both international and non-international armed conflict.

Conversely, Islamic law considers international armed conflict as a conflict between Muslims and non-Muslims and only applies the rules of international armed conflict.\(^{87}\) The Qur’an refers to Muslim enemies as *mushrikun* (polytheists), *kuffar* (unbelievers), *munafiqun* (hypocrites), and *ahl al-kitab* (people of the book such as Jews and Christians).\(^{88}\) Religion, however, is not a justification for war—it merely identifies the parties to the conflict.\(^{89}\)

There are two somewhat conflicting verses in the Qur’an that impact NIACs. First, Verse 4:59 of the Qur’an provides, “O you who have believed, obey Allah and obey the Messenger and those in authority among you. And if you disagree over anything, refer it to Allah and the Messenger, if you should believe in Allah and the Last Day. That is the best and best in result.”\(^{90}\) Second, Verse 49:9 states, “If two groups of the believers fight each other, seek reconciliation between them. And if one of them commits aggression against the other, fight the one that commits aggression until it comes back to Allah’s command. So if it comes back, seek

\(^{85}\) Shah, *supra* note 64, at 61.


\(^{87}\) Shah, *supra* note 64, at 61 and 64.

\(^{88}\) Al-Dawoody, *supra* note 86, at 47.

\(^{89}\) Id. at 48.

\(^{90}\) Al-Dawoody, *supra* note 86, at 147.
reconciliation between them with fairness, and maintain justice. Surely Allah loves those who maintain justice."  

Thus, the Qur’an generally forbids rebellion by requiring Muslims to follow the head of state, but it also recognizes that non-international conflict among Muslims will occur. Significantly, Verse 49:9 dictates that a head of state may use force against a rebellion, but the object of the state is to bring the rebels back into obedience to the ruler rather than complete destruction of the rebels. It is no surprise that jurists are concerned with preventing fitnah when the Qur’an both favors stability by requiring obedience to the state while also requiring the state to fight rebels with an eye towards reconciliation.

Turning to the second primary source of Shari’a, the Sunnah casts minimal light on rebellion because there was no internal rebellion during the Prophet’s lifetime. The agreement that the Prophet Muhammad concluded with the Muslims of Medina, however, supports the Qur’an’s general prohibition against rebellion. In 622, the Prophet Mohammad and his followers left the city of Mecca to escape intolerance of the new religion and migrated to Medina. Upon arriving in Medina, the Prophet created the first Islamic state through The Charter of Islamic Alliance between the Muslims of Mecca and the Muslims of Medina, commonly known as the Constitution of Medina. A provision of the Constitution declares, “Whoever is rebellious or whoever seeks to spread enmity and sedition, the hand of every God-fearing Muslim shall be against him, even he be his son.”

Since the Qur’an and the Sunnah do not generally support rebellion, jurists relied upon the practices of the successors of the Prophet Muhammad to discern when rebellion may be

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91 SHAH, supra note 64, at 61.
92 Id. 62; FADL, supra note 5, at 62.
94 Id. at 39-40
95 SHAH, supra note 64, at 62.
permitted and what rules should apply to NIAC.\textsuperscript{96} Practices of the first four caliphs are not binding, but Muslim jurists hold them in high regard because it reflects a first-hand understanding of the Qur’an and Sunnah.\textsuperscript{97}

The rules regarding rebellion are mainly derived from the first and fourth caliphs. Abu Bakr, father-in-law of the Prophet, was chosen as the first successor to the Prophet.\textsuperscript{98} Abu Barker undertook a series of military campaigns known as the Ridda Wars (wars of apostasy) to restore tribes to the caliphate that refused to pay zakat (taxes) upon the death of the Prophet.\textsuperscript{99} The fourth caliph, Ali ibn Abi Talib, was the cousin and son-in-law of the Prophet.\textsuperscript{100} Like Abu Bakr, he also used military force against fellow Muslims who were not willing to accept his accession to the caliphate.\textsuperscript{101}

Relying upon the practices of the first and fourth caliphatates to support their reasoning, jurists have identified three situations where Islamic law permits rebellion.\textsuperscript{102} First, jurists generally agree that Muslims have a duty to rebel against a head of state if the ruler orders them to obey a command contrary to Shari’a because the hadith dictates that, “There is no obedience to a human being in disobedience to Almighty God.”\textsuperscript{103} Second, Islamic law permits rebellion if a head of state apostatizes from Islam, does not protect the religion, and does not protect interests of Muslims.\textsuperscript{104} Third, a ruler is supposed to protect the religion, maintain justice, and protect the

\begin{itemize}
  \item \textsuperscript{96} Id. at 61-2.
  \item \textsuperscript{97} Id. at 32-3.
  \item \textsuperscript{98} LEWIS, supra note 93, at 49.
  \item \textsuperscript{99} Id. at 50-1; see ABDUR RAHMAN I. DOL, SHARI’AH THE ISLAMIC LAW 265-66 (TaHa Publishers Ltd., 1984) (discussing how al-riddah means rejection of the religion of Islam in favor of any other religion. The act of apostasy ends one’s adherence to Islam and is punishable by death.)
  \item \textsuperscript{100} Id. at 61.
  \item \textsuperscript{101} Id. at 61-2.
  \item \textsuperscript{102} SHAH, supra note 64, at 67.
  \item \textsuperscript{103} AL-DAWOODY, supra note 85, at 155.
  \item \textsuperscript{104} Id.
\end{itemize}
rights of citizens. If he fails in these duties, a minority of jurists assert that he can be removed. Before a rebellion can resort to force against an unjust ruler, the ruler must first ignore calls to stop his injustice and tyranny. Always concerned with preventing fitnah, a rebellion against an unjust ruler is forbidden if the good of the rebellion does not outweigh the harm that the rebellion would cause to public order.

Like Common Article 3 and Additional Protocol II, Islamic law distinguishes between al-muharibunlqutta (bandits, highway robbers, and pirates) and al-bughah (rebellion and secession) to determine whether a group is afforded protections. If a group of people join together to use force to steal property, cut off highways, and kill people, they are merely al-muharibunlqutta. Islamic law’s rules regarding NIAC do not apply to the al-muharibunlqutta so the government may punish them as it would any other criminals.

Islamic law’s protections are only triggered if a group of people constitutes al-bughah. Jurists have identified three criteria to determine whether a group constitutes al-bughah. First, they must be a large body of people with some organization with the power to resist the caliph openly. The ability of a group to manage and control territory and organize under a leader is evidence that it has the requisite organization and the power to resist the caliph. Second, the group must have a ta’wil (just cause) to wage war against the Caliph. The rebels’ ta’wil does not have to be objectively true, but the rebels must have a subjective belief that their cause is

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105 Id.
106 Id. at 154.
107 Id. at 155.
108 Id. at 149; SHAH, supra note 64, at 63.
109 SHAH, supra note 64, at 63.
110 Id.
111 AL-DAWOODY, supra note 85, at 159.
112 Id.
113 Id. at 160.
valid. This stance indicates the jurists’ concern not to leave the judgment of whether a cause is just in the hands of the government. Third, the group must use force to overthrow the head of state. Accordingly, peaceful forms of resistance do not constitute a rebellion.

Muslim jurists may use the terms al-khawarij and al-bughah interchangeably. The khawarij were heterodox Muslims who appeared soon after the death of Muhammad and claimed that they alone were true believers and all other Muslims were apostates. The main difference between the two groups is that the bughah only fight against the ruler and his army whereas the khawarij indiscriminately attack both government forces and Muslim civilians. The majority of Muslim legal scholars treat the khawarij the same as the bughah, but Hanbali jurists treat them as apostates and apply laws of international armed conflict rather than the laws of NIAC. Despite the majority’s similar treatment of the two groups, Professor Habeck argues that using the term khawarij is still a valuable method of differentiating extremists from the rest of the Islamic world because it makes it plain to moderate Muslims how heterodox and violent the extremists are toward other Muslims.

Like international law’s treatment of a belligerency, if the level of NIAC rises to the level of al-bughah, Islamic law applies both the rules of non-international and international armed conflict. Given that Islamic law’s ultimate objective is to bring the rebels back under state rule and restore public order, the rules that govern the conflict focus on humane treatment of

114 Id.
115 Id.
116 AL-DAWOODY, supra note 85, at 159.
117 Id. at 161.
119 MARY HABECK, KNOWING THE ENEMY JIHADIST IDEOLOGY AND THE WAR ON TERROR 175 (Yale Univ. Press 2006).
120 AL-DAWOODY, supra note 85, at 151.
121 Id. at 150.
122 HABECK, supra note 119, at 175.
123 SHAH, supra note 64, at 64.
rebels. These rules include reconciliation, noncombatant immunity, humane treatment of prisoners, prohibition against indiscriminate weapons, and protection of property.

Verses 49:10 and 49:9 of the Qur’an require the state to attempt to reconcile with rebels because “[a]ll believers are but brothers; therefore seek reconciliation between your two brothers.” Caliph Ali followed the Qur’an’s mandate for reconciliation. In 657, the Governor of Syria, Mu’awiya, refused to step down for the new Governor appointed by Ali. Mu’awiya met the key elements of al-bughah because he ruled over a united province, he had a trained army capable of open armed resistance to the caliph, and his ta’wil was that he wanted justice for the murder of the third caliph in which he believed Ali was complacent. Ali attempted to negotiate a peaceful settlement with Mu’awiya before resorting to combat.

Following the Qur’an and Ali’s actions, a state must attempt to remove any founded injustice that the rebels complain of, attempt to resolve any misunderstanding that the rebels have regarding the ruler’s commands, and attempt to negotiate a peaceful settlement to the rebels’ demands. It is only upon the failure of negotiations that the state may resort to force to end a rebellion.

If a state must resort to combat, the practices of the first and fourth caliphs reveal the rules governing the use of force. Both of the caliphs demonstrated restraint in their use of force in order to achieve the ultimate goal of reconciliation with rebels. In fighting the Ridda Wars, Abu Bakr demonstrated restraint against the rebels by ordering his commanders not to engage in treachery or deception; not to indulge in mutilation; not to kill children, old men, and women;

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124 Id.
125 LEWIS, supra note 93, at 62-3.
126 Id.
127 Id.
128 AL-DAWOODY, supra note 85, at 162.
129 Id.
not to cut fruit bearing trees; and not to slaughter livestock except for food.\textsuperscript{130} Ali likewise demonstrated restraint by instructing his men not to fight the rebels until the rebels attack first; do not kill the wounded or mutilate the dead; do not enter homes without permission; and do not harm women.\textsuperscript{131}

It is therefore not surprising that Islamic law, like international law, embraces the principle of discrimination or distinction. This means that government forces cannot intentionally target women, children, the sick, and the wounded who may be accompanying the rebels, but are not taking part in the hostilities.\textsuperscript{132} Islamic law also protects civilians by forbidding the destruction of means necessary for sustainment of live such as sources of food and water.\textsuperscript{133}

Consistent with the principle of discrimination or distinction, the majority of jurists prohibit the use of indiscriminate weapons. Jurists were concerned that the use of weapons such as flooding, fire, or mangonels (a weapon that catapults large stones) risks the lives of noncombatants because such weapons do not discriminate between rebel and noncombatants.\textsuperscript{134} The Hanbali jurists, however, permit the use of indiscriminate weapons in response to the rebels’ use of such weapons against the state.\textsuperscript{135}

The Qur’an calls for humane treatment of prisoners in Verse 76:8-9 which provides, “And they feed for the love of Allah the indigent, the orphan, and the captive…. …” The Prophet likewise declared, “I command you to treat the captives well.”\textsuperscript{136} Nevertheless, Hanafi jurists assert that the state can execute prisoners to protect the state army from prisoners rejoining the

\textsuperscript{130} Yousaf, \textit{supra} note 66, at 457.
\textsuperscript{131} SHAH, \textit{supra} note 64, at 67-8.
\textsuperscript{132} AL-DAWOODY, \textit{supra} note 85, at 163.
\textsuperscript{133} \textit{Id}.
\textsuperscript{134} \textit{Id}, at 164.
\textsuperscript{135} SHAH, \textit{supra} note 64, at 65.
\textsuperscript{136} Yousaf, \textit{supra} note 66, at 464.
rebellion.137 These jurists stress, however, that is better to keep prisoners confined until the rebellion no longer poses a threat to the state.138 Notwithstanding the Hanafi position, the majority of jurists agree that the state cannot execute prisoners.139

Islamic law also forbids pillage and plunder of baghi property. After the battle of Nahranwan, Ali returned whatever property his army took from the opposing force.140 There is a story that some of Ali’s soldiers were using a pot that belonged to a defeated baghi to cook their meal.141 The baghi spilled the soldiers’ food on the ground and took his pot back from the soldiers without punishment.142 Jurists interpret this to mean Islamic law forbids even temporary confiscation of baghi property.143

Islamic law differs significantly from international law regarding punishment of rebels when the fighting is over. Islamic law does not impose any punishment for rebels because participation in a rebellion is not a criminal act.144 Unlike criminals, the baghi must have a sincere belief that they are fighting for a just cause. Their ta’wil exempts the baghi from subsequent punishment because they had a moral claim to legitimate power.145 Thus, the state cannot execute, imprison, or confiscate baghi property and must set baghi prisoners free upon the cessation of fighting.146 The state may, however, punish baghi for crimes committed that were not necessary to their rebellion.147

IV. Application of Islamic and International Law to the Syrian Conflict

137 AL-DAWOODY, supra note 85, at 165.
138 Id.
139 Id.
140 SHAH, supra note 64, at 65.
141 FADL, supra note 5, at 35.
142 Id. at 35.
143 Id. at 153.
144 Id. at 157.
145 Id. at 126.
146 Id. at 64-5.
147 SHAH, supra note 64, at 66.
Applying Islamic and international humanitarian law to the current armed conflict in Syria demonstrates that the two doctrines are compatible. Islamic and international law share common criteria that trigger their protections. Even where the triggering criteria differ, the rationale behind the criteria is the same. There are also two main differences in the doctrines. First, international law extends minimum protections to a larger number of people because Common Article 3 has a lower triggering threshold than Islamic law. Second, Islamic law provides greater protections to rebels than international law because only Islamic law is concerned with reconciliation of the warring parties. These differences do not render the doctrines incompatible because application of one doctrine does not prevent application of the other.

Opposition to the Syrian Government consists of a wide variety of political and militia groups that do not necessarily work together or agree on how to overthrow President Bashar al-Assad. Some observers estimate that there are over 1,000 diverse groups consisting of approximately 100,000 fighters. A number of these diverse groups are moving towards increased collaboration, but their divergent objectives prevent them from forming a coherent command structure. Despite this chaotic battlefield, some dominate groups within the anti-government forces can be identified.

In October 2011, the Syrian National Council (SNC) was formed as a political organization with the goal of overthrowing President Assad’s Government through non-violence. Syria’s majority Sunni population and the Muslim Brotherhood dominate the SNC. The SNC, however, was incapable of uniting anti-government forces. In November 2012, Secretary of

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150 HRC Report, supra note 13, at 6.
151 BBC NEWS MIDDLE EAST, supra note 148.
152 Id.
State Hillary Clinton called for the creation of an opposition leadership that could “speak for every segment and every geographic part of Syria.”

In response, Syrian dissident groups formed the National Coalition for Syrian Revolutionary and Opposition Forces (National Coalition). The National Coalition consists of approximately sixty members including representatives from each of Syria’s major cities and members of the SNC. According to its website, the National Coalition intends to organize and unify political factions to overthrow President Assad’s regime and establish a democratic government. France, the United Kingdom, the European Union, the United States, and six member states of the Gulf Cooperation Council have recognized the National Coalition as the legitimate representative of the Syrian people.

The National Coalition has tried to unite hundreds of diverse rebel battalions with different ideologies under the Supreme Military Council of the Free Syrian Army. The Military Council, led by defected General Salim Idriss, claims that it commands about 900 groups and has a total of at least 300,000 fighters. While united in the goal of removing President Assad from power, the armed groups disagree on how to depose him, who should replace him, and what the future of Syria should look like. The multiple groups have evolved into a more organized force under the Supreme Military Council, but they have failed to unify their structures under a

153 Id.
155 Id.
157 BBC NEWS MIDDLE EAST, supra note 148.
159 Id; General Idriss defected from the Syrian Army in 2012 after government forces killed dozens of his family members in Homs. SHARP AND BLANCHARD, supra note 15, at 8.
160 SHARP AND BLANCHARD, supra note 15, at 8.
coherent command.\textsuperscript{161} In August 2013, these armed groups controlled large swathes of northern and eastern Syria.\textsuperscript{162} As of July 2015, however, the territory under their control has been significantly reduced to an area around Aleppo and northeast of Hama.\textsuperscript{163}

There are also radical groups fighting in Syria that clash with the Supreme Military Council and the National Coalition.\textsuperscript{164} The most powerful radical groups are Jabhat al-Nusra and the Islamic State of Iraq (ISIS).\textsuperscript{165} Al-Qaeda in Iraq helped found ISIS while Qatar and Saudi Arabia provide ISIS financial backing.\textsuperscript{166} ISIS’s goal is to establish a strict Islamic state.\textsuperscript{167} ISIS controls territory in northern Syria and has garnered support from a portion of the population who see ISIS as an effective military force and a humanitarian group.\textsuperscript{168} Although ISIS has rejected the authority of the National Coalition and Supreme Military Council, it still fights at the local level with the Free Syrian Army.\textsuperscript{169}

In April 2013, ISIS split from al-Nusra and appropriated most of al-Nusra’s capabilities and manpower.\textsuperscript{170} ISIS has formed a hierarchical command and control system under the command of Abu Bakr Al-Baghdadi.\textsuperscript{171} In 2014, ISIS advanced along the Tigris and Euphrates Rivers

\textsuperscript{161} HRC Report, supra note 13, at 6.
\textsuperscript{162} Id.
\textsuperscript{164} HRC Report, supra note 13, at 6.
\textsuperscript{165} Id.
\textsuperscript{166} Tom A. Peter, After Assad, is Strict Islamic Rule Ahead for Syria, USA TODAY (Jan. 3, 3013), http://www.usatoday.com/story/news/world/2013/01/02/will-syria-become-islamic-state-after-assad/1784133/.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} Erika Solomon, Syrian Rebels Reject Opposition Coalition Call For Islamic Leadership, REUTERS (Sep. 25, 3013), www.reuters.com/assets/.
\textsuperscript{171} Id. at 3.
seizing population centers in Iraq, including the city of Mosul.\textsuperscript{172} It controls territory in both northwestern Iraq and northeastern Syria.\textsuperscript{173}

On June 29, 2014, ISIS proclaimed itself a Caliphate.\textsuperscript{174} The group has imposed a relentless assault on the basic freedoms of the civilians who live in the areas that it controls.\textsuperscript{175} ISIS identifies Shiites and Sunni’s who oppose them as non-Muslims and has engaged in a manifest pattern of violent acts against minority groups with the intent to control their presence within ISIS areas.\textsuperscript{176}

The Supreme Military Council and the National Coalition also have little or no influence over Syria’s Kurdish population. There are nearly three million Kurds in Syria who live mostly in the north-east along the borders of Turkey and Iraq.\textsuperscript{177} In July 2012, President Assad withdrew his military forces and government bureaucrats from the Kurdish territories to bolster support against the uprising.\textsuperscript{178} The most powerful Kurdish political party in Syria, the Democratic Union Party (PDY), assumed control of the area.\textsuperscript{179} The PDY has changed street names in its territory from Arabic to Kurdish, schools openly teach the Kurdish language, and the armed branch of the PDY flies a Kurdish flag from checkpoints on main roads.\textsuperscript{180}

The armed wing of the PDY is fighting ISIS and other al-Qaeda groups for control of two towns, Ras al-Ayn and Tel Abyad, which separate the Kurdish territories.\textsuperscript{181} ISIS sees the Kurds as an obstacle to their desire to create an Islamic state and accuse the Kurds of supporting

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{172} CHRISTOPHER M. BLANCHARD, ET AL., \textit{Summary to CONGRESSIONAL RESEARCH SERVICE, THE “ISLAMIC STATE” CRISIS AND U.S. POLICY} (Jun. 11, 2015).
\item \textsuperscript{173} \textit{Id.} at 1.
\item \textsuperscript{174} UN INDEPENDENT RPT., \textit{supra} note 170 at 2.
\item \textsuperscript{175} BLANCHARD, \textit{supra} note 172 at 4.
\item \textsuperscript{176} \textit{Id.} at 1 and 5.
\item \textsuperscript{177} ECE Goksedef, \textit{War in Syria Inspires Kurdish Unity}, \textsc{Aljazeera}, (Jul. 27, 2013), http://www.aljazeera.com/indepth/features/2013/07/2013727161533579785.html.
\item \textsuperscript{178} \textit{Id.}
\item \textsuperscript{179} \textit{Id.}
\item \textsuperscript{180} Ben Hubbard, \textit{Kurdish Struggle Blurs Syrian Battle Lines}, \textsc{New York Times}, (Aug. 1, 2013) http://www.nytimes.com/2013/08/02/world/middleeast/syria.html?_r=1&.
\item \textsuperscript{181} Goksedef, \textit{supra} note 177.
\end{itemize}
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President Assad.\textsuperscript{182} President Assad is willing to let these two groups fight each other while he focuses resources on the fight against the Free Syrian Army.\textsuperscript{183}

The fight for the towns of Ras al-Ayn and Tel Abyad has united fractured Kurdish political parties.\textsuperscript{184} In October 2011, the Kurdish National Council in Syria (KNC) was formed as an umbrella organization which included the PDY and thirteen other Kurdish parties.\textsuperscript{185} The KNC seeks political decentralization and political autonomy under a post al-Assad Syrian Government.\textsuperscript{186} The Kurdish parties intend to hold parliamentary elections in the area under their control and they are drafting an interim constitution.\textsuperscript{187} The National Coalition rejects the KNC’s demand for decentralization.\textsuperscript{188}

Both international and Islamic law apply to the Syrian conflict. Syria is a party to all four Geneva Conventions, but it is not a party to Additional Protocol II.\textsuperscript{189} Consequently, the requirement that the conflict take place in the territory of a high contracting party is met under Common Article 3, but it is not met under Additional Protocol II. Nevertheless, many provisions of Additional Protocol II still apply to the Syrian conflict because they are considered customary international law.\textsuperscript{190} As discussed in greater detail in section V, Islamic law likewise applies.

\begin{footnotes}
\footnote{182}{Ben Hubbard, \textit{supra} note 180.}
\footnote{183}{Goksedef, \textit{supra} note 177.}
\footnote{184}{HRC Report, \textit{supra} note 13, at 4.}
\footnote{185}{CARNEGIE MIDDLE EAST CENTER, \textit{The Kurdish National Council in Syria}, (Feb. 15, 2012), http://carnegie-mec.org/publications/?fa=48502.}
\footnote{186}{\textit{Id.}}
\footnote{187}{HRC Report, \textit{supra} note 13, at 4.}
\footnote{188}{CARNEGIE MIDDLE EAST CENTER, \textit{supra} note 185.}
\footnote{190}{Jean-Marie Henckaerts, \textit{Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict}, 87 \textsc{Int’l.R. of the Red Cross} 175, 188 (Mar. 2005).}
\end{footnotes}
indirectly to the Syrian conflict because Article 3 of Syria’s Constitution recognizes Islam as the state religion and requires that Islamic jurisprudence be a main source of legislation.191

Putting aside that Syria is not a party to Additional Protocol II, the protection of rebels under both Islamic law and Article 1(1) of Additional Protocol II only extends to rebels who are fighting the State’s armed forces.192 Conversely, Common Article 3 only considers whether the state is using its armed forces as one factor in determining whether there is a NIAC. Consequently, the fighting between Syria’s armed forces and the rebels meets the criteria triggering the protections of all three doctrines, but only Common Article 3 extends protections to the fighting between the Kurds and ISIS.

The size, strength, and organization of the National Coalition and Free Syrian Army are enough to meet the triggering criteria of all three doctrines. In determining whether there is an armed conflict, Common Article 3 merely considers whether a party in revolt has an organized military force.193 Additional Protocol II, however, requires some responsible command to constitute a NIAC.194 Responsible command means the ability of an organization to carry out sustained military operations regardless of whether it has some hierarchal structure.195 Islamic law requires the group to be large enough to openly resist the caliph to constitute a rebellion and considers responsible command as an element of determining the group’s strength.196

Although it does not have a structured chain of command, the Free Syrian Army represents a substantial organized military force that has been able to sustain military operations for the past

192 AL-DAWOODY, supra note 85, at 160; Additional Protocol II, supra note 37, at art. 1(1).
194 Additional Protocol II, supra note 37, at art. 1(1).
195 ICRC Commentary on Additional Protocols, supra note 39, at 1352.
196 AL-DAWOODY, supra note 85, at 158-9.
three years.\textsuperscript{197} The Syrian Government has responded to the rebellion with its regular armed forces.\textsuperscript{198} The Supreme Military Council cannot exercise direct control over all of the rebel forces fighting under the umbrella of the Free Syrian Army. Nonetheless, it indicates that it will respect the law of armed conflict by stating that it will, “[H]old accountable any of the members of the joint military forces of the revolution.”\textsuperscript{199}

Rebel control of territory in Syria helps trigger the protections of Islamic law and Common Article 3, but it does not trigger Additional Protocol II. The Free Syrian Army previously exercised control over swathes of northern Syria, and still controls the area around Aleppo and northeast of Hama.\textsuperscript{200} The PDY also controls territory in the north and ISIS controls the northern towns of Ras al-Ayn and Tel Abyad.\textsuperscript{201} Rebel control of territory is a consideration in triggering both Islamic law and Common Article 3 protections because it is evidence that the conflict has the strength to amount to a rebellion rather than a mere riot or sporadic act of violence.\textsuperscript{202} Additional Protocol II, however, considers control of territory as evidence that the rebels have the minimum infrastructure required to implement the Protocol.\textsuperscript{203} As discussed below, the FSA, ISIS, and the PDY are not implementing the protections of Additional Protocol II. Their mere physical control of territory without implementation of basic protections is not enough to trigger the protections of Additional Protocol II.

Finally, only Islamic law requires the rebels to have a \textit{ta’wil}. Each anti-government group has a \textit{ta’wil}. Islamic jurists recognize that rebellion is permitted against a ruler who has failed to maintain justice and protect the rights of citizens, but the ruler must first ignore calls to stop his

\textsuperscript{197} HRC Report, \textit{supra} note 13, at 5-6.
\textsuperscript{198} Id.
\textsuperscript{200} HRC Report, \textit{supra} note 13, at 6.
\textsuperscript{201} Peter, \textit{supra} note 166.
\textsuperscript{202} ICRC Commentary, \textit{supra} note 28, at 36.
\textsuperscript{203} ICRC Commentary on Additional Protocols, \textit{supra} note 39, at 1353.
tyranny before rebels can resort to the use of force.\textsuperscript{204} The conflict in Syria started over peaceful protests by the people in Daraa calling for freeing their children from prison and demanding greater liberties.\textsuperscript{205} The Syrian Government ignored these calls for greater freedom and responded to the protesters with deadly force.\textsuperscript{206} The National Coalition and Free Syrian Army have responded with force and claim that they are fighting to, “…establish [a] democratic, pluralistic Syria based on the rule of law and civil State, where all Syrians will be equal regardless of their ethnic, religious and sectarian background.”\textsuperscript{207}

Arguably, even ISIS and other Islamist groups have a \textit{ta’wil}. ISIS and Islamists are fighting to establish an Islamic caliphate.\textsuperscript{208} Jurists generally recognize that rebellion is permitted against a head of state that apostatizes from Islam and does not protect the religion.\textsuperscript{209} It does not matter that the Islamists’ distorted version of Islam is actually counter to Islamic law. A \textit{ta’wil} only requires that rebels subjectively believe that their claim of injustice is valid and not that their claim is objectively true.\textsuperscript{210}

Despite meeting the triggering mechanisms for Islamic law, it is unlikely that Hanbali jurists would apply Islamic law of NIAC to ISIS. Because ISIS intentionally attacks non-combatant Muslims instead of just fighting government forces, it is fair to categorize them as \textit{khawarij} rather than \textit{bughah}. As \textit{khawarij}, Hanbali jurists would consider ISIS apostates and only apply Islamic law of international armed conflict.

Once triggered, international and Islamic law provide different degrees of similar protections. Examining the similarities and differences in how the doctrines address peace negotiations,

\begin{thebibliography}{9}
\bibitem{204} AL-DAWOODY, \textit{supra} note 85, at 55.
\bibitem{205} Sterling, \textit{supra} note 9.
\bibitem{206} \textit{Id}.
\bibitem{207} NCS, \textit{supra} note 134, at Declaration.
\bibitem{208} Peter, \textit{supra} note 143.
\bibitem{209} AL-DAWOODY, \textit{supra} note 85, at 155.
\bibitem{210} \textit{Id}. at 159.
\end{thebibliography}
protecting civilians, siege warfare, and protecting prisoners shows that one doctrine may provide greater protections than the other. Despite different degrees of protection, their common aim to protect victims of NIAC makes them compatible doctrines.

Only Islamic law requires the government to attempt to reconcile with the rebels before resorting to force. In January 2013, long after the Syrian Government used military force against the rebels, President Assad offered a peace settlement with all parties. His plan offered a national reconciliation conference, elections, and a new constitution. It is doubtful that there will be any peace settlement. The National Coalition refuses to engage in any dialogue with President Assad’s regime. Both sides also believe that a military victory is possible.

Islamic and international law both prohibit intentionally targeting civilians, but the scope of protection is limited when government forces are not involved in the fighting. Sunni anti-government forces shelled Shiite villages west of Al-Qusayr and intentionally targeted civilians with sniper fire. In a separate incident, members of Jabhat al-Nusra entered homes in the town of Dayr Az-Zawr and executed approximately thirty civilians while chanting sectarian slogans. ISIS has publicly beheaded, shot, and stoned noncombatants in towns and villages across northern Syria.

Common Article 3 reaches this conduct, but Additional Protocol II and Islamic law do not because they only apply to an armed force fighting the state. Nevertheless, Islamic law arguably provides a greater deterrence to rebels harming civilians because they have no combatant immunity for such acts. Recall that only Islamic law grants rebels combatant immunity for such acts.

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212 NCS, supra note 156, at Coalition Principles.
213 9th HRC Report, supra note 13, at 5.
214 Id. at 38.
215 Id. at 32.
216 9th HRC REPORT, supra note 15, at 6.
217 Additional Protocol II, supra note 37, at art. 1(1).
immunity.

Since the rebels here are targeting civilians, rather than fighting government forces, they would not receive combatant immunity for these atrocities. The state can therefore treat them as it would any other murderers.

Additional Protocol II falls short of granting combatant immunity because it only “encourages the authorities in power to grant the broadest possible amnesty to persons who participate in the armed conflict.” Since international law does not mandate combatant immunity for rebels, the rebels, who are already criminals, have little incentive to stop murdering civilians.

Both Additional Protocol II and Islamic law prohibit starvation as a means of warfare. Common Article 3 does not expressly address starvation, but it mandates humane treatment for those not participating in the conflict. Ignoring Islamic and international law, the Syrian Government used siege warfare against the town of Al-Qusayr. Al-Qusayr is located in Homs province close to the Lebanese border. Since early 2012, approximately 2,500 anti-government forces controlled most of the town and the surrounding countryside. The Syrian Army and Hezbollah forces from Lebanon started the campaign to retake Al-Qusayr by burning crops and stopping the flow of food, water, and medicine into the town. The Human Rights Council reports that the Syrian Government intentionally used starvation to render life unbearable, weaken armed groups, and force civilians to flee the area. Such brutal action intentionally directed against the civilian population clearly violates Islamic law and Additional Protocol II’s prohibition against starvation as a means of warfare.

\[^{218}\text{FADL, supra note 5, at 64-5.}\]
\[^{219}\text{Yousaf, supra note 66, at 455 (arguing that Qur’an Verse 5:32 expressly forbids arbitrary killing).}\]
\[^{220}\text{Additional Protocol II, supra note 37, at art. 6(5).}\]
\[^{221}\text{Id. at art. 14; Yousaf, supra note 66, at 458 (arguing that Ali’s command not to cut down fruit trees has been interpreted to prohibit starvation as a means of warfare).}\]
\[^{222}\text{Common Article 3, supra note 27.}\]
\[^{223}\text{HRC Report, supra note 13, at 34.}\]
\[^{224}\text{Id. at 34-5.}\]
\[^{225}\text{Id. at 34.}\]
\[^{226}\text{Id. at 38.}\]
International and Islamic law mandate humane treatment of prisoners, but only international law requires that prisoners receive due process of law.\textsuperscript{227} The Syrian Government and anti-government forces have detained thousands of people.\textsuperscript{228} Both groups are torturing and killing prisoners.\textsuperscript{229} Most prisoners languish in a cell with no access to judicial oversight or legal counsel.\textsuperscript{230}

In addition to humane treatment of prisoners, Common Article 3 prohibits, “passing of sentence and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”\textsuperscript{231} Article 6 of Additional Protocol II provides greater due process protections including a presumption of innocence, prohibition against compelled self-incrimination, a minimum age for the death sentence, and a prohibition of application of ex post facto laws.\textsuperscript{232} Given that Islamic law has no similar due process requirement, international law provides a greater degree of protection to prisoners than Islamic law. Islamic law, however, is still compatible with international law because it does not prohibit prisoners from receiving due process of law.

V. The Reality of Islamic Law in Muslim States

Islamic law alone is not an adequate body of law to address modern NIACs. Moreover, Muslim states apply or are influenced by Islamic law by varying degrees. Islamic law can, however, serve as common ground for Muslim states to develop regional policies to address gaps in international law to more effectively address NIACs. Gaps in international exist because

\textsuperscript{227} Id.
\textsuperscript{228} Id. at 9.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Common Article 3, supra note 27, at (1)(d).
\textsuperscript{232} Additional Protocol II, supra note 37, at art. 6.
some Muslim states are not members of Additional Protocol II and some of the parties fighting in a NIAC do not recognize international law. Because Islamic and international law are compatible, however, Islamic law can fill gaps left by trying to form regional polices in which not all states follow the entire body of international law. Islamic law can also encourage non-state actors to follow rules governing NIAC and facilitate peace agreements between states and non-state actors. To demonstrate these possibilities, it is first important to understand how Muslim states actually apply Islamic law.

Most Muslim states want to apply Islamic law, but there are significant differences in the manner and extent of that application.233 At one end of the spectrum, states such as Lebanon and Turkey are secular and do not incorporate Islamic law into their legal systems.234 For example, the Turkish Constitution mandates that Turkey is a secular democratic state and Islamic law is not even mentioned in the constitution.235 At the other end of the spectrum, the Kingdom of Saudi Arabia considers the Qur’an and the Sunnah its constitution.236 Although Saudi Arabia is a monarchy, the purpose of the state is to protect Islam, implement Shari’a, order people to shun evil, and fulfill God’s call.237 As such, the King’s power is subordinate to Islamic law and the Kingdom’s system of governance is more than just based on Islamic principles—it is the embodiment of Islam.238

In the middle of the spectrum are states in which Islamic law is an important, but not exclusive source, of legislation.239 These states have clauses in their constitutions, commonly known as “repugnancy clauses,” which require legislation to either conform to Shari’a or

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233 Shah, supra note 64, at 1.
234 Nisrine Abiad, Shari’a, Muslim States and International Human Rights Treaty Obligations: A Comparative Study 36-7 (British Institute of Int’l and Comparative Law 2008).
235 Id. at 36.
237 Id. at art. 23.
238 Abiad, supra note 234, at 42-3.
239 Id. at 46.
establish Shari’a as a source of law. A review of the historical development of these clauses is critical to understanding their application.

Repugnancy clauses first appeared in the 1950s as part of an effort to constitutionalize a new understanding of Islamic law’s role in the state. The Egyptian comparative lawyer Abd al-Razzaq al-Sanhuri deeply influenced the adoption repugnancy clauses. Sanhuri argued that a state cannot derogate from a handful of general principles that are common to all competing interpretations of Islamic law. He further posited that these non-derogable general principles were consistent with most rules found in European codes that had been transplanted into the Arab world during the colonial error.

In 1949, Egypt commissioned Sanhuri to draft its new civil code. Predictably, Sanhuri’s code harmonized Islamic and European law which allowed the state to indigenize a national legal system consistent with preexisting European relationships. Many other Muslim states desiring to remove the yoke of colonialism while maintaining the ability to run a modern state adopted similar Sanhuri-codes.

Consistent with Sanhuri’s work, Muslim States in the middle of the spectrum adopted repugnancy clauses in their constitutions that balance Islamic and man-made law. In 1950, Syria’s new constitution required that “Islamic fiqh shall be the chief source of legislation.” While appearing to require all Syrian laws respect Islamic principles, Syrians understood this provision to merely recognize that fiqh is but one among several sources of law. In 1973,

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242 Id. at 740-41.
243 Id. at 741
244 Id.
245 Id.
246 Id. at 774.
247 Id.
Syria amended its constitution to reflect this understanding by providing that “Islamic jurisprudence shall be a major source of legislation.”

The Syrian Civil Code of 1949 recognizes that Islamic law is just one among several sources of law. Syria obtained independence from French colonialism in 1947 and began reforming its legal system with the Syria Civil Code of 1949. Sanhuri’s influence on Syria’s Civil Code is evident from the explanatory note that affirms that it was taken from the Egyptian Civil Code due to similarities in traditions, customs, and social situations between Syria and Egypt. The first article of the code explains that legislative provisions govern all matters to which they apply. When no such provision applies, judges are to be governed by the principles of Islamic law. When no provision of Islamic law is applicable, Syrian judges are to be guided by prevailing custom and, when no custom is applicable, by natural law and the laws of equity.

Libya was also a middle spectrum state in which Islamic law could serve as a source of law, but it appears that Islamic law may now play a greater role in the new government. After World War II, Britain, France, the United States, and Russia agreed that Italy must relinquish sovereignty over its North African colonies. On November 21, 1949, the U.N. General assembly adopted a resolution stating that Libya would become independent no later than January 1, 1952.

On October 7, 1951, prior to Libya’s declaration of independence, Libya enacted its constitution. Article 5 of the 1951 constitution provided that Islam is the religion of the state, but

248 SYRIAN CONSTITUTION, supra note 191, at art. 3.
251 Stigall, supra note 249, at 302.
252 Id. at 297.
253 Id.
did not indicate any legal consequences the flow from such declaration.\textsuperscript{254} In 1969, Libya ruler Muammar Gaddafi seized power over the country in a bloodless coup.\textsuperscript{255} Although Islam remained the official religion of the state, in practice secular policies and Gaddafi’s personal will overrode religion as a source of law.\textsuperscript{256} Nevertheless, Libya’s civil code continued to use Islamic law to govern select issues such as property rights and inheritance.\textsuperscript{257}

Following Gaddafi’s fall in 2011, Libya began its transition to democracy.\textsuperscript{258} In 2014, the temporary National Transitional Council elected a Constitutional Drafting Assembly to draft a new constitution.\textsuperscript{259} Article 8 of the CDA’s draft constitution provides some indication that Islamic laws may provide much greater influence in Libya than it has in the past. It states, “Islam shall be the religion of the State, and provisions of the Islamic Sharia shall be the source of all legislation. Any legislation in violation thereof may not be enacted. All legislation enacted in violation thereof shall be null and void.”\textsuperscript{260} This language thus appears to push Libya closer on the spectrum to states that strictly apply Islamic law. It remains unclear how Libya will balance this proposed provision with a desire of some of its citizens that the government protect democratic and secular liberal values.\textsuperscript{261}

Similar to Libya, in 1980 Egypt appeared to move from a middle spectrum state to the stricter application of Islamic law by amending its constitution from considering Islamic law as one of

\textsuperscript{254} ABIAD, supra note 234, at 48.
\textsuperscript{256} DIRK VANDEWALLE, \textit{A HISTORY OF MODERN LIBYA} 126 (Cambridge Press 2006).
\textsuperscript{257} Stigall, supra note 249, at 306.
\textsuperscript{258} Liolos, supra note 255, at 229.
\textsuperscript{259} Id.
\textsuperscript{260} International Institute for Democracy & Electoral Assistance, Libya – Initial Draft Constitution, \textit{Suggested Constitutional Articles From the First Thematic Committee for the Chapter of Form of State & Fundamental Cornerstones}, CONSTITUTIONNET \texttt{http://www.constitutionnet.org/vl/item/libya-initial-draft-constitution-2014-english}.
\textsuperscript{261} Liolos, \textit{supra} note 255, at 242.
several sources of legislation to the “principle source of legislation.” This amendment thus appeared to require all legislation to be consistent with Shari’a. Professor Hamoudi posits that it would be logistically complicated for a court to determine whether each provision of complex legislation is based principally on Shari’a rather than some other source of law. Egypt’s Supreme Constitutional Court significantly reduced this predicament by holding that the amendment only has prospective effect.

Regardless of where a Muslim state falls on the spectrum of application of Islamic law, Islamic law can serve as common ground to establish regional policies to contend with NIACs. The violence from the Syrian conflict is not contained within its borders. Turkey has absorbed more than 200,000 refugees fleeing the violence. Lebanon has absorbed almost one million refugees. The influx of refugees into Lebanon has tipped the sectarian balance between Sunni and Shiite and has culminated in violence along the Syrian border. ISIS has swept through northern Iraq and Iran has sent Shiite militias to take back the Iraqi city of Tikrit. Jordan is considered an entry point of support for rebels in Syria. More importantly, the over 2 Million refugees absorbed by Jordan has burdened that country’s scarce water supplies and infused Jordan with a large number of radicalized youth.

Dealing with these spillover effects of the Syrian conflict will require countries in the region to work with each other to stem the flow foreign fighters and aid, prevent the influx of refugees,
provide safe zones for refugees to return to, coordinate military and financial assistance to secure borders, negotiate settlements with rebel forces, and inoculate themselves from the spread of radical ideologies.\textsuperscript{271} International law alone may not fully provide the necessary legal structure to facilitate such coordination because there is disparity in Muslim state acceptance of international treaties. For example, all Muslim states are parties to the Geneva Conventions and will therefore apply minimum protections of Common Article 3 in cases of NIAC.\textsuperscript{272} Yet some of the states affected by the Syrian conflict, including Syria, Turkey, Iran, and Iraq, are not members of Additional Protocol II and are therefore not bound to apply its additional protections.\textsuperscript{273}

Islamic law can fill the gaps when not all states apply the full body of international law. For states in the middle of the spectrum that are also not members of Additional Protocol II, Islamic law can serve as an additional source of law to Common Article 3 in protecting life and property. As for secular Muslim states that do not apply Islamic law, it can still serve as common ground in the region because application of Islamic law to NIAC by middle spectrum states is compatible with international law.

Examining rebel authority to enter into agreements with states illustrates an example of how Islamic law can supplement Common Article 3 to provide greater protections. Common Article 3 allows the parties to a NIAC to enter into special agreements to commit to comply with humanitarian law.\textsuperscript{274} Islamic law goes even further by recognizing that rebels have authority to

\textsuperscript{271} Id. at vii-viii.
\textsuperscript{274} Common Article 3, supra note 27.
enter into binding treaties.\textsuperscript{275} This includes entering into treaties with non-Muslims if the non-Muslim party agrees not to support the rebels in their fight against the state.\textsuperscript{276} Rebels that enter treaties must follow the principle of \textit{pacta sunc servanda} (good faith in contractual obligations) because it is God who witnesses all contracts.\textsuperscript{277}

Common Article 3 is therefore narrower than Islamic law because it only authorizes agreements regarding application of humanitarian law whereas Islamic law authorizes full treaties. Pragmatically, rebels may also refuse to recognize that Common Article 3 applies to them because it is state-made law, but they cannot deny the binding nature of Islamic law because it is divine law.\textsuperscript{278} Parties to a NIAC may thus apply both doctrines to enter into agreements to establish safe zones for refugees, limit border crossings, facilitate movement of agencies and assistance, and settle other disputes.

For instance, Turkey and the United States announced that they intend to work with moderate Syrian rebel forces to establish a safe zone inside of Syria for Syrian refugees.\textsuperscript{279} The proposed safe zone will be located along the Turkish border between the outskirts of Aleppo and the Euphrates River.\textsuperscript{280} The United States claims that the zone is to protect refugees and not for use against President al-Assad’s regime.\textsuperscript{281} The initial plan calls for the United States providing aircraft, Turkey providing antiaircraft and artillery cover, and the rebels providing ground forces.\textsuperscript{282}

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\textsuperscript{276} \textit{Id}.\textsuperscript{276}
\textsuperscript{277} \textit{Id}.\textsuperscript{277}
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Islamic law’s recognition of rebel treaties as lawfully binding contracts witnessed by God can facilitate the creation of the proposed safe zone. Among many issues, Turkey, the United States, and rebel ground forces will have to coordinate air and artillery strikes, prisoner collections, safe passage for refugees, and treatment of the wounded and sick. A special agreement under Common Article 3 may facilitate this coordination to the extent that rebel forces are willing to accept its application. Nonetheless, Muslim Rebel forces cannot deny the binding nature of Shari’a because it is divine law.283 Since Islamic and international law are compatible, the parties can enter into a binding agreement establishing jus en bello principles that satisfy both doctrines.

The benefits of applying Islamic law to address NIAC appear to diminish, however, when non-Muslim states attack rebels. The United States, France, Canada, Denmark, Germany, and other Muslim and non-Muslim states have bombed targets in Iraq and Syria as part of a coalition to fight ISIS.284 Islamic law, however, requires Muslims to support rebels when non-Muslims attack Muslims.285 In other words, when Muslims have a conflict, they should not seek the support of non-Muslims against the other.

Recognizing that ISIS are khawarij rather than bugah somewhat resolves the dilemma of Islamic law forbidding Muslim states from seeking support from non-Muslim states in the fight against ISIS. Again, ISIS falls within the scope khawarij because they intentionally kill Muslim noncombatants. Hanbali jurists would therefore treat ISIS as apostates and apply Islamic law governing international, not non-international, armed conflict. As apostates, Hanbali jurists would not recognize ISIS as Muslims. A state or rebel group that follows or is influenced by

283 Tabassum, supra note 275, at 12.
284 Frantz, supra note 269.
285 Tabassum, supra note 275, at 17.
Hanbli *fiqh* may therefore seek non-Muslim foreign assistance to fight ISIS without violating Islamic law.

**VI. Conclusion**

Regarding NIAC, Islamic law may serve as common ground for parties to apply greater protections than those provided by international law alone. As this article has demonstrated, Islamic and international are compatible doctrines because both aim to protect life and property. Because they are compatible, application of one doctrine does not preclude application of the other. What's more, NIACs are likely to affect an entire region rather than remain neatly within the borders of one state. The need to supplement international law increases with the number of states dragged into the conflict because not all states apply the full body of international law. When it comes to most Muslim countries, the ability to supplement international law with Islamic law is indeed a viable option because their legal systems either directly implement or are influenced by Islamic law.

This article has posited that application of Islamic and international law to the Syrian conflict demonstrates their compatibility. The fighting between the Syrian Government, the Free Syrian Army, al-Nusra, and ISIS triggers both doctrines because the rebels have a large force, control territory, organize under a leader, and Syria is using its armed forces to fight the rebels. Islamic law’s additional requirement that the rebels have a subjective *ta’wil* does not conflict with international law because, like Additional Protocol II, it ensures that the state is not responsible for determining when legal protections are triggered. Hanbali jurists’ probable refusal to apply rules governing NIAC to ISIS because they are *khawarij* also does not conflict with international law, because, reminiscent of Common Article III, they would still apply minimal protections of Islamic law of international armed conflict.
Once triggered, international and Islamic law apply different degrees of similar protections. Both doctrines prohibit targeting non-combatants. Islamic law, however, provides a greater incentive for rebels to follow this rule by only granting them combatant immunity for attacking government forces. This greater incentive is consistent with Additional Protocol II’s encouragement to states to grant the broadest possible amnesty to persons who participate in the conflict. Likewise, both doctrines provide protections for prisoners, but only international law requires due process before sentencing a prisoner. Nonetheless, nothing in Islamic law forbids providing a prisoner with due process. Similarly, only Islamic law requires the state to attempt to negotiate a settlement with rebels before it can use force while recognizing the authority of rebels to enter into binding peace treaties. Nothing in international prohibits these practices.

It is a viable option for Islamic law to supplement international law because most Muslim states are either influenced or directly apply Islamic law. The Kingdom of Saudi Arabia, Pakistan, and the Islamic Republic of Iran all directly apply Islamic law as the primary source of law while Egypt and Syria merely consider Islamic law as one of several possible sources of law.\textsuperscript{286} Regardless of where Muslim states fall on this spectrum, their desire to either apply or accept Islamic law evidences probable concurrence to agreements that use Islamic law to supplement international law in order to deal with the spillover from a NIAC.

The need to supplement international law arises because Muslim countries accept international law to varying degrees. For instance, Syria, Turkey, Iran, and Iraq are not members of Additional Protocol II, but Saudi Arabia, Jordan, and Lebanon are members of the treaty. Thus, when trying to coordinate a regional response to the spillover from the Syrian conflict, Muslim states can look to Islamic law for common ground. By doing so, States can enter into agreements with rebel forces to establish refugee safe zones; secure borders; and encourage rebel

\textsuperscript{286} Id. at 47.
forces to adhere to *jus in bello* principles by granting them combatant immunity and denying their ability to refute rules based upon divine law. As for extremist organizations that are unlikely to come to the bargaining table, states can still afford them protections while isolating them from the rest of the Muslim community by labeling them as *khawarij*.

The bloody struggle over Syria involving disparate rebel groups, increasing sectarian divide, and violent spillover into neighboring countries will likely remain a complex and multifaceted conflict for a long time. The nature of the conflict demands a creative legal solution to protect its victims. Applying Islamic and international law is that creative solution.