
ISLAMIC LAW, INTERNATIONAL LAW, AND NON-INTERNATIONAL ARMED CONFLICT IN SYRIA

Patrick B. Grant*

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ABSTRACT

Non-international armed conflicts (“NIAC”) occur more frequently in the world today than international armed conflicts. Although the

* The author is a Lieutenant Colonel in the Army Judge Advocate General’s Corps and is currently serving as the Chief of Operational and International Law at Fort Hood, TX. In 2014, he earned his LL.M. from Fordham Law School, New York, NY; 2011 LL.M. from The Judge Advocate General’s School, U.S. Army, Charlottesville, VA; his J.D. in 2002 from the University of Oklahoma, College of Law, Norman, OK; and his B.A. in 1999 from the University of Oklahoma, Norman, OK. Previous assignments include Assistant Professor, United States Military Academy, West Point, NY 2014-2016; Brigade Judge Advocate, 2d Brigade, 10th Mountain Division, Fort Drum, NY, and Sharana, Afghanistan 2011-2013; Litigation Attorney, Litigation Division, United States Army Legal Services Agency (USALSA), Arlington, VA, 2007-2010; Appellate Attorney, Defense Appellate Division, USALSA, Arlington VA, 2006-2007; Trial Defense Counsel, Trial Defense Services, Fort Campbell, KY and Kirkuk, Iraq, 2004-2006; Administrative Law Attorney, 101st Airborne Division (Air Assault), Fort Campbell, KY and Mosul Iraq, 2003-2004. Any opinion expressed in this Article is solely that of the author and not necessarily that of the Department of Defense or the U.S. Military Academy.

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corpus of law governing NAICs has expanded, it may not always be enough to address the atrocities associated with such conflicts. Moreover, there is a need to supplement international law because not all states apply the full body of international law, non-state actors lack incentive to follow international law, and international law does not focus on reconciliation of the warring parties.

Islamic law may serve as common ground for parties to a NIAC to apply greater protections than those provided by international law alone. Applying Islamic and international law to the Syrian conflict demonstrates that the doctrines have different triggering thresholds and varying degrees of similar protections. The doctrines are compatible, however, because use of one doctrine does not preclude use of the other. Islamic law can therefore supplement international law among states that have diverse acceptance of international treaties. It is also a viable option for Islamic law to supplement international law because most Muslim states are either influenced by or directly apply Islamic law. For example, 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. 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 to provide greater protections in a NIAC.

I. INTRODUCTION

Non-international armed conflicts (“NIACs”) occur more frequently in the world today and entail greater atrocities and human suffering than international armed conflicts.¹ The increase in NIACs corresponds with an expansion of the body of law governing NIACs.² Despite the expansion of law, gaps remain in existing regulation of NIACs.³ The body of NIAC law does not equally bind 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.⁴ 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.

¹ Sandesh Sivakumaran, *Re-envisioning the International Law of Internal Armed Conflict*, 22 EUR. J. INT'L L. 219, 219 (2011).

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 221-22.

⁴ See Michelle L. Mack, *Compliance with International Law by Non-State Actors in Non-International Armed Conflicts* 2-3 (Harvard Int'l Humanitarian Law Res. Initiative, Working Paper, 2003).

Some commentators have criticized Islamic law as being incompatible with International Law.⁵ In the context of NIACs, they are wrong. Although Islamic and International Law have differences, they are compatible doctrines within the context of NIACs, because both aim to protect the victims of NIACs.⁶ Preventing *fitnah*—bloodshed, chaos, instability, and public disorder—is the paramount interest of all jurists in applying Islamic law to NIACs.⁷ Islamic law’s interest in preventing *fitnah* explains why it shares with International Law common protections and criteria triggering those protections.

Applying both Islamic and International Law to the current NIAC in Syria demonstrates their compatibility.⁸ In 2010 and early 2011, Syria appeared to be a stable country unaffected by mass protests of the Arab Spring that toppled Tunisian dictator Zine El Abidine Ben Ali and Egyptian President Hosni Mubarak.⁹ Syrian President Bashar al-Assad “seemed confident” that the reforms he had implemented during his rule, his popular image among Syrians, and his defiance of the West would

⁵ See generally Mimi Wu, *Clash of Civilizations: Shari’a in the International Legal Sphere*, 1 YALE UNDERGRADUATE L. REV. 50, 51 (2010) (discussing the theory that *Shari’a* is incompatible with international law because it has no “mechanism through which major change can be implemented” and because punishments under *Shari’a* violate fundamental human rights); 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. 1, 2 (2005) (arguing that Afghanistan’s constitutional requirement that government policy be compatible with Islamic law may allow breaches of and frustrate respect for international human rights).

⁶ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; KHALED ABOU EL FADL, REBELLION & VIOLENCE IN ISLAMIC LAW 40 (2001).

⁷ See FADL, *supra* note 6, at 40.

⁸ 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. See *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 83-84 (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.

⁹ DAVID W. LESCH, SYRIA THE FALL OF THE HOUSE OF ASSAD 38 (2012).

prevent the tidal wave of popular protests from spreading to Syria.¹⁰ Syria's ostensible immunity from the Arab Spring did not last.¹¹

On March 16, 2011, angered by the arrest and torture of fifteen children for writing "the people want to topple the regime" on a wall, the people of Daraa peacefully took to the streets demanding justice, democracy, and freedom.¹² Fearing an insurrection, the Syrian security forces responded to the protesters by opening fire on the crowd, thereby killing four people.¹³ Within days, thousands of people joined the protests, which had spread to other cities, and demands grew for the removal of President Bashar al-Assad's regime.¹⁴ The Syrian government subsequently launched full-scale attacks on Daraa and other towns, converting the initially peaceful protest movement into an armed opposition and civil war.¹⁵

Syria can now be characterized as the quintessential *fitnah* that Islamic jurists fear. Contrary to Islamic and International Law, the Syrian government is using weapons of mass destruction to fight rebels,¹⁶ without regard for the lives of innocent civilians.¹⁷ Both government and anti-government forces have resorted to siege warfare and committed murder, rape, and torture without fear of accountability.¹⁸ Some estimates suggest that more than 250 thousand Syrians have been killed, more than 4.8 million refugees have fled Syria, and over 7.6 million Syrians have been internally displaced.¹⁹

The scope and application of Islamic and International Law to Syria somewhat differ. However, because Muslim countries vary in their

¹⁰ *Id.* at 41.

¹¹ *Id.* at 39.

¹² Joe Sterling, *Daraa: The Spark That Lit the Syrian Flame*, CNN (Mar. 1, 2012), <http://www.cnn.com/2012/03/01/world/meast/syria-crisis-beginnings/index.html>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ The term "Rebel" is used throughout this paper to refer to organized non-state actors fighting the state or each other in a Common Article 3 conflict.

¹⁷ See generally U.N. Human Rights Council, Rep. on the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/24/46 (Aug. 16, 2013) [hereinafter 2013 UNHRC Syria Report].

¹⁸ See *id.* at 8.

¹⁹ U.N. Human Rights Council, Rep. on the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/28/69, at 13 (Feb. 5, 2015) [hereinafter 2015 UNHRC Syria Report]; see also JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV., RL33487, *summary of ARMED CONFLICT IN SYRIA: BACKGROUND AND U.S. RESPONSE* (2013); Adam Taylor, *The Syrian War's Death Toll is Absolutely Staggering. But No One Can Agree on the Number*, WASH. POST (Mar. 15, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/03/15/the-syrian-wars-death-toll-is-absolutely-staggering-but-no-one-can-agree-on-the-number/>.

acceptance of international treaties, and International Law contains gaps, the application of both doctrines would help address the ongoing atrocities in Syria.²⁰ Unlike International Law, Islamic law provides unique protections to rebels, such as combatant immunity and recognition of rebel authority to enter into peace agreements.²¹ Given the compatibility of Islamic and International Law, Islamic law can serve as common ground for countries in the Arab world to help address spillover from the Syrian conflict by filling in the gaps left by International Law.

This article is structured in six parts. Part II examines the historical development of International Law's treatment of NIACs and the different protections that it provides. Part III examines the sources of Islamic law and its treatment of NIACs. Part IV demonstrates how, despite their differences, Islamic and International Law are compatible by applying both doctrines to the Syrian conflict. Part V details how Muslim states actually apply Islamic law. Part VI explains how the compatibility of the two doctrines can facilitate the development of regional polices to address NIACs.

II. INTERNATIONAL LAW'S DEVELOPMENT AND TREATMENT OF NIACs

The extent to which modern International Law applies to NIACs is determined by the nature of the conflict. Prior to the 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 laws of war to apply to the conflict.²² To constitute a belligerency, a conflict must satisfy four requirements.²³ First, the conflict must be a general conflict or civil war within a state that exceeds "mere local unrest."²⁴ Second, non-state actors must occupy "a substantial part of the territory of the state" where the armed conflict is taking place.²⁵ Third, the non-state actors must maintain "a measure of orderly" control or governance

²⁰ It is important to note that Islamic law has different levels of influence on the legal systems of Muslim countries. Toni Johnson & Mohammed Sergie, *Islam: Governing Under Sharia*, COUNCIL ON FOREIGN REL. (Jul. 25, 2014), <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>.

²¹ AHMED AL-DAWOODY, *ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* 162 (2011); WILLIAM H. BOOTHBY, *CONFLICT LAW: THE INFLUENCE OF NEW WEAPONS TECHNOLOGY, HUMAN RIGHTS AND EMERGING ACTORS* 37 (2014).

²² Anthony Cullen, *Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*, 183 MIL. L. REV. 66, 74-75 (2005).

²³ Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 109 (2000).

²⁴ *Id.*

²⁵ *Id.*

in the area that they control.²⁶ Fourth, the non-state actors must observe the laws of war.²⁷ Once the conflict is recognized as a belligerency, International Law treats the parties to the conflict as if they are states in an international armed conflict.²⁸

NIACs that do not amount to belligerency, such as rebellions and insurgencies, are beyond the scope of traditional International Law.²⁹ A NIAC constitutes a rebellion if it is sporadic and “susceptible to rapid suppression” by a police force or “normal procedures of internal security.”³⁰ An insurgency exists when a rebellion survives suppression, but does not yet meet the four factors of belligerency.³¹ 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.³²

Since the 1930s, the distinction between belligerency, rebellion, and insurgency gradually blurred as an increasing number of international legal rules emerged to regulate NIACs.³³ This change occurred when the focus of International Law shifted from protecting state sovereignty to protecting human beings.³⁴ 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”³⁵ The phrase “armed conflict not of an international character” is not defined in Common Article 3 because the drafters intended “the scope of application of the [A]rticle [to] be as wide as possible.”³⁶ 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 pro-

²⁶ *Id.*

²⁷ *Id.*

²⁸ Cullen, *supra* note 22, at 77.

²⁹ *Id.* at 76.

³⁰ *Id.* at 69-70.

³¹ *Id.* at 71.

³² *Id.* at 69-70.

³³ *Prosecutor v. Tadic*, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter *Tadic*, ICTY Defence Motion Decision].

³⁴ *Id.*

³⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Geneva Convention (IV)*].

³⁶ OSCAR M. UHLER ET AL., INT’L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 35-36 (Jean S. Pictet ed., Ronald Griffin & C.W. Dumbleton trans., 1958) [hereinafter *UHLER, COMMENTARY ON GENEVA CONVENTION (IV)*].

tracted armed violence between governmental authorities and organized armed groups, or between organized armed groups within a state.³⁷

To distinguish NIACs from 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.”³⁸ The International Committee of the Red Cross (“ICRC”) Commentary to Common Article 3 lists non-exclusive factors relevant to this determination.³⁹ These factors include whether: 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.⁴⁰

Once triggered, Common Article 3 requires the humane treatment of noncombatants, defined as “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”⁴¹ In addition, 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.”⁴² It also protects prisoners by prohibiting “the passing of sentences 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.”⁴³ Lastly, Common Article 3 protections “reflect customary international law and represent a minimum standard from which the parties to any type of armed conflict must not depart.”⁴⁴

In 1977, Additional Protocol II was adopted to further develop the law governing NIACs and ensure greater protections for its victims.⁴⁵ Additional Protocol II supplements “Common Article 3 without modifying the conditions under which Article 3 applies.”⁴⁶ Accordingly, Common Arti-

³⁷ Tadic, ICTY Defence Motion Decision, *supra* note 33, at ¶ 70.

³⁸ Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) [hereinafter Tadic, ICTY Judgment], <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

³⁹ UHLER, COMMENTARY ON GENEVA CONVENTION (IV), *supra* note 36, at 35-36.

⁴⁰ *Id.* at 35.

⁴¹ Geneva Convention (IV), *supra* note 35, 6 U.S.T. at 3518.

⁴² *Id.*

⁴³ *Id.* at 3520.

⁴⁴ MICHELLE MACK, INT’L COMM. OF THE RED CROSS, INCREASING RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN NON-INTERNATIONAL ARMED CONFLICTS 7 (Feb. 2008) [hereinafter MACK, RESPECT FOR IHL].

⁴⁵ Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 611, pmb1.

⁴⁶ *Id.* 1125 U.N.T.S. at 611, art. 1.

cle 3 enshrines fundamental humanitarian principles, with Additional Protocol II as its extension.⁴⁷

Additional Protocol II protections have a higher triggering threshold than Common Article 3 protections.⁴⁸ “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 [NIACs].”⁴⁹ Article 1(1) states that the Protocol applies to:

all 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.⁵⁰

Article 1(2) further provides, that Additional Protocol II does “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”⁵¹

The objective criteria triggering Additional Protocol II do not depend on the judgment of the parties to the conflict.⁵² Instead, the Protocol applies automatically as soon as the criteria of Article 1(1) are fulfilled.⁵³ “The aim of this system is that the protection of the victims of armed conflict should not depend on the authorities concerned.”⁵⁴

Once triggered, Additional Protocol II provides greater protections than Common Article 3.⁵⁵ These protections include the humane treatment of people not participating in the hostilities, protection of the wounded and sick, and protection of the civilian population.⁵⁶

Article 4 establishes fundamental humane principles for people not participating in hostilities by prohibiting:

⁴⁷ SYLVIE-STOYANKA JUNOD, INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) 1339 (Yves Sandoz et al. eds., 1987) [hereinafter JUNOD, COMMENTARY ON ADDITIONAL PROTOCOL II].

⁴⁸ *Id.* at 1348.

⁴⁹ *Id.*

⁵⁰ Additional Protocol II, *supra* note 6, at 1125 U.N.T.S. at 611, art. 1(1).

⁵¹ *Id.* art. 1(2).

⁵² See JUNOD, COMMENTARY ON ADDITIONAL PROTOCOL II, *supra* note 47, at 1351 (“The aim of this system is that the protection of the victims of armed conflict should not depend on the authorities concerned.”).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1350.

⁵⁶ *Id.* at 1357.

- (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 . . . [including] rape, enforced prostitution[,] and any form of indecent assault;
- (f) Slavery and the slave trade in all their forms; [and]
- (g) Pillage.⁵⁷

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.⁵⁸ Articles 7, 8, and 9 impose a duty to search for, collect, protect, and treat wounded, sick, medical, or religious personnel.⁵⁹

Finally, Additional Protocol II provides specific protections for the civilian population. Article 13 prohibits making the civilian population or individual civilians the object of attacks or acts of violence.⁶⁰ Article 14 forbids starvation “as a method of combat.”⁶¹ 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.”⁶² Article 17 forbids ordering displacement of the civilian population “unless the security of the civilians involved or imperative military reasons so demand.”⁶³ In the event of such displacements, Article 17 further provides that, “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.”⁶⁴ Many of Additional Protocol II’s protections “are now considered to be part of customary international law.”⁶⁵

Other treaties, in addition to Common Article 3 and Additional Protocol II, may apply to NIACs.⁶⁶ For example, Protocol II to the Convention on Certain Conventional Weapons was revised to apply to NIACs because the majority of land mines are found in states involved in

⁵⁷ Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 612, art. 4(2).

⁵⁸ *Id.* at 612-13, arts. 5, 6.

⁵⁹ *Id.* 1125 U.N.T.S. at 614, arts. 7-9.

⁶⁰ *Id.* at 615, art. 13.

⁶¹ *Id.* art. 14.

⁶² *Id.*

⁶³ *Id.* at 616, art. 17.

⁶⁴ *Id.*

⁶⁵ MACK, RESPECT FOR IHL, *supra* note 44, at 9. For more information of customary law that applies to non-international armed conflict see generally 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

⁶⁶ See MACK, RESPECT FOR IHL, *supra* note 44, at 9.

NIACs.⁶⁷ Similarly, Article 8 of The Rome Statute of the International Criminal Court distinguishes between war crimes that apply in international armed conflicts and those that apply in NIACs.⁶⁸ Additionally, the 1954 Hague Convention “contains . . . rules relating to the protection of cultural property”⁶⁹ that extend to NIACs.

Customary international humanitarian law also regulates NIACs.⁷⁰ As mentioned earlier, Common Article 3 and portions of Additional Protocol II are considered customary international law.⁷¹ The International Criminal Tribunal for the former Yugoslavia (“ICTY”) “has identified a body of customary international law” that applies to NIACs.⁷² 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.”⁷³ Finding an expansive body of customary law, an ICRC study on customary international law posited that 149 out of 161 “rules of customary international humanitarian law are or may be applicable” in a NIAC.⁷⁴

Finally, international human rights law and domestic law round out the corpus of law regulating NIACs.⁷⁵ “International human rights law—particularly [that of] non-derogable human rights—protects vulnerable populations in NIACs.⁷⁶ Domestic law may also “provide additional protections and limits on behaviour” in the state in which the conflict is taking place.⁷⁷

III. ISLAMIC LAW’S TREATMENT OF NON-INTERNATIONAL ARMED CONFLICT

Unlike International Law, Islamic law fuses law and tenets of Islamic faith.⁷⁸ The “purpose of [Islamic] law is to foster living in peace, first with oneself, and second with and in society.”⁷⁹ Islamic law is adaptable to specific situations because Muslim scholars are expected to establish con-

⁶⁷ Sivakumaran, *supra* note 1, at 225-26.

⁶⁸ *Id.* at 226.

⁶⁹ *Id.* at 227.

⁷⁰ MACK, RESPECT FOR IHL, *supra* note 44, at 9.

⁷¹ *Id.* at 7, 9.

⁷² Sivakumaran, *supra* note 1, 228.

⁷³ *Id.*

⁷⁴ *Id.* at 229.

⁷⁵ See MACK, RESPECT FOR IHL, *supra* note 44, at 10.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See NIAZ A. SHAH, ISLAMIC LAW AND THE LAW OF ARMED CONFLICT: THE ARMED CONFLICT IN PAKISTAN 12 (2011).

⁷⁹ WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 19 (2009).

temporary understandings of Islamic law to address human conduct in “evolving social contexts.”⁸⁰ *Shari’a* and *fiqh* are the principal components of Islamic law.⁸¹

Shari’a “literally means the . . . path to be followed or clear way to be followed.”⁸² The Qur’an and the *Sunnah* are the two primary sources of *Shari’a*.⁸³ The Qur’an was revealed between 610 and 632 CE to the Prophet Muhammad.⁸⁴ “As the . . . word of God, Muslims believe that the Qur’an is infallible.”⁸⁵ The *Sunnah* refers to the life and practices of the Prophet Muhammad.⁸⁶ Accordingly, the *Sunnah* is a primary source of *Shari’a* because the Qur’an dictates, “[y]e 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.”⁸⁷ The details of the *Sunnah* were captured in “specific narratives” known as *hadith*.⁸⁸ Although a principal 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.⁸⁹

Jurists use the process of *ijtihad* “to derive [the] rules of [*Shari’a*] from the primary sources.”⁹⁰ *Ijtihad*, in effect, involves interpreting the primary sources.⁹¹ When the primary sources are silent on a specific subject, jurists applying *ijtihad* use a form of reasoning known as *maslahah* to apply *Shari’a* principles to contemporary social contexts.⁹² Professor Wael B. Hallaq notes that “there are five universal principles that underlie the *Shari’a*, namely, protection of life, mind, religion, property, and offspring.”⁹³ Under *maslahah*, if a public interest can be tied to the five universal principles that underlie *Shari’a*, religious scholars will interpret the law in a manner that is suitable to serve that public interest.⁹⁴

⁸⁰ Omar Yousaf, “IHL” as “Islamic Humanitarian Law”: A Comparative Analysis of International Humanitarian Law & Islamic Military Jurisprudence Amidst Changing Historical Contexts, 24 FLA. J. INT’L L. 439, 442-43 (2012).

⁸¹ See Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27, 32 (2002).

⁸² *Id.* at 33.

⁸³ *Id.*

⁸⁴ Yousaf, *supra* note 80, at 443.

⁸⁵ *Id.*

⁸⁶ *Id.* at 443-44.

⁸⁷ *Id.* at 444 (internal quotation marks and citation omitted).

⁸⁸ HALLAQ, *supra* note 79, at 16.

⁸⁹ *Id.* at 16, 19.

⁹⁰ SHAH, *supra* note 78, at 13.

⁹¹ *Id.*

⁹² See *id.* at 16.

⁹³ HALLAQ, *supra* note 79, at 26.

⁹⁴ *Id.* at 25.

“The process of deducing and applying *Shari’a* principles . . . to real or hypothetical . . . situations is called *fiqh* or Islamic jurisprudence.”⁹⁵ 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 the learned scholars”; and (4) analogical deduction known as *qiyas*.⁹⁶

Islamic jurisprudence is not universal because jurists adopt different legal philosophies and methods of deduction based on their loyalties to a particular legal school of thought.⁹⁷ Nineteen different schools of *fiqh* or *fiqh madhhabs* “developed during the first four centuries of Islam.”⁹⁸ The rudiments of these *fiqh madhhabs* developed between about 700 and 740 AD when legal specialists would hold circles of learning.⁹⁹ These circles of learning subsequently formed into distinct legal schools of thought whose students adopted the doctrine of the school’s leading jurist.¹⁰⁰ The *fiqh madhhabs* also became known by the names of the legal jurists who gave each school its distinctive doctrinal characteristic.¹⁰¹ Today, the four major Sunni *fiqh madhhabs* are *Hanafi*, *Maliki*, *Shafi’i*, and *Hanbali*; whereas, the predominant Shiite *fiqh madhhab* is *Jafari*.¹⁰²

The law may differ or even conflict among the diverse *fiqh madhhabs*, but preventing *fitnah* permeates all jurists’ application of Islamic law to NIACs.¹⁰³ Since the Qur’an and the *Sunnah* do not provide much guidance on how *Shari’a* governs NIACs, Islamic scholars must consider *fitnah* when determining whether a rebellion may be justified and what protections Islamic law provides.

The line between international armed conflict and NIAC in Islamic law is religious.¹⁰⁴ Islamic law considers NIACs armed conflicts between groups of Muslims in the territory controlled by the caliph or armed conflicts between Muslims and the caliph.¹⁰⁵ “The word ‘Islam’ means submission . . . to God,” and a Muslim is “a believer in the religion of Islam.”¹⁰⁶ In an armed conflict between groups of Muslims, the entire

⁹⁵ Abdal-Haqq, *supra* note 81, at 36.

⁹⁶ *Id.*

⁹⁷ *See id.* at 38.

⁹⁸ *Id.*

⁹⁹ HALLAQ, *supra* note 79, at 32.

¹⁰⁰ *Id.* at 33.

¹⁰¹ *Id.* at 33-34.

¹⁰² Abdal-Haqq, *supra* note 81, at 39.

¹⁰³ *Id.* at 38; *see* FADL, *supra* note 6, at 40.

¹⁰⁴ *See* SHAH, *supra* note 78, at 61.

¹⁰⁵ *Id.*

¹⁰⁶ AL-DAWOODY, *supra* note 21, at 47.

body of the law of *qital* (combat) applies, including the rules governing both international armed conflicts and NIACs.¹⁰⁷

Conversely, Islamic law considers international armed conflict to be a conflict between Muslims and non-Muslims and only applies the rules of international armed conflict.¹⁰⁸ 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).¹⁰⁹ Religion, however, is not a justification for war—it merely identifies the parties to the conflict.¹¹⁰

There are two somewhat conflicting verses in the Qur'an that impact how Islamic law treats NIACs. First, Verse 4:59 of the Qur'an provides, "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."¹¹¹ 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 reconciliation between them with fairness, and maintain justice. Surely Allah loves those who maintain justice.¹¹²

Thus, the Qur'an generally forbids rebellion by requiring Muslims to follow the head of state, but it also recognizes that a non-international conflict (and, by extension, a NIAC) among Muslims can occur.¹¹³ 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 obedi-

¹⁰⁷ See SHAH, *supra* note 78, at 64. Conversely, Islamic law considers international armed conflict as a conflict between Muslims and non-Muslims; Islamic law only applies the rules of international armed conflict to those conflicts. *Id.* at 61, 64. 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). AL-DAWOODY, *supra* note 21, at 47. Religion, however, is not a justification for war—it merely identifies the parties to the conflict and determines whether the conflict will be considered a NIAC. *See id.* ("[T]he Qur'anic justifications for fighting against the Muslims' enemies who were given . . . various religious descriptions can be mistakenly understood to be based on their religious identity alone, as in fact is assumed by many researchers.")

¹⁰⁸ SHAH, *supra* note 78, at 61, 64.

¹⁰⁹ AL-DAWOODY, *supra* note 21, at 47.

¹¹⁰ *See id.* ("[T]he Qur'anic justifications for fighting against the Muslims' enemies who were given . . . various religious descriptions can be mistakenly understood to be based on their religious identity alone, as in fact is assumed by many researchers.")

¹¹¹ THE NOBLE QUR'AN, <https://quran.com/4/59-69> (last visited Oct. 9, 2016).

¹¹² SHAH, *supra* note 78, at 61.

¹¹³ *Id.*

ence to the ruler rather than completely destroy them.¹¹⁴ It is no surprise that jurists are concerned with preventing *fitnah* since the Qur'an 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 no internal rebellion occurred during the Prophet's lifetime.¹¹⁵ However, the agreement that the Prophet Muhammad concluded with the Muslims of Medina supports the Qur'an's general prohibition against rebellion.¹¹⁶ In 622, the Prophet Muhammad and his followers left the city of Mecca to escape religious intolerance and migrated to Medina.¹¹⁷ 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.¹¹⁸ 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 [if] he be his son."¹¹⁹

Since the Qur'an and the *Sunnah* do not generally support rebellion, jurists have relied upon the practices of the Prophet's successors to discern when rebellion is permitted and what rules should apply to NIACs.¹²⁰ "Practices of the first four caliphs are not binding," but Muslim jurists hold them in high regard because the practices "reflect [a] first-hand understanding of the Qur'an and the *Sunnah*."¹²¹

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.¹²² Abu Bakr 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.¹²³ The fourth caliph, Ali ibn Abi Talib, was the cousin and son-in-law of the Prophet.¹²⁴ Like Abu Bakr, he also used military force

¹¹⁴ *Id.* at 61-62.

¹¹⁵ *Id.* 62; FADL, *supra* note 6, at 62.

¹¹⁶ SHAH, *supra* note 78, at 62.

¹¹⁷ BERNARD LEWIS, *THE ARABS IN HISTORY*, 36-38 (Oxford Univ. Press, 6th ed. 2002).

¹¹⁸ SHAH, *supra* note 78, at 62.

¹¹⁹ *Id.* (internal quotation marks and citation omitted).

¹²⁰ *Id.* at 61-62.

¹²¹ *Id.* at 32-33.

¹²² LEWIS, *supra* note 117, at 49.

¹²³ *Id.* at 50-51; see ABDUR RAHMAN I. DOI, *SHARIAH THE ISLAMIC LAW* 265-66 (1984) ("*Al-riddah* means rejection of the religion of Islam in favor of any other religion. The act of apostasy . . . end[s] . . . one's adherence to Islam" and is punishable by death).

¹²⁴ LEWIS, *supra* note 117, at 49, 61.

against fellow Muslims who were not willing to accept his accession to the caliphate.¹²⁵

Relying upon the practices of the first and fourth caliphates, jurists have identified three situations in which Islamic law permits rebellion.¹²⁶ 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, “[t]here is no obedience to a human being in disobedience to Almighty God.”¹²⁷ Second, Islamic law permits rebellion if a head of state apostatizes from Islam, does not protect the religion, or does not protect interests of Muslims.¹²⁸ Third, a ruler is supposed to protect the religion, maintain justice, and protect the rights of citizens; and, if he fails in these duties, a minority of jurists asserts that he can be removed.¹²⁹ Before a rebellion can resort to force against an unjust ruler, the ruler must first “ignore calls to stop his injustice and tyranny.”¹³⁰ Always concerned with preventing *fitnah*, Islamic law forbids a rebellion against an unjust ruler if the good of the rebellion does not outweigh the rebellion’s harm to public order.¹³¹

Like Common Article 3 and Additional Protocol II, Islamic law distinguishes between *al-muharibunlqutta* (banditry, highway robbery, and piracy) and *al-bughah* (rebellion and secession) to determine whether Islamic law provides a group any protections.¹³² If a group of “people join together to use arms, cut off highways, steal property, kill people[,] and prevent the free passage of persons,” they are merely *al-muharibunlqutta*.¹³³ Islamic law’s rules regarding NIACs do not apply to the *al-muharibunlqutta*, so the government may punish them as any other criminals.¹³⁴

Conversely, Islamic law’s protections are only triggered if a group of people’s actions constitute *al-bughah*.¹³⁵ Jurists have identified three criteria to determine whether a group’s actions constitute *al-bughah*.¹³⁶ First, the group must be a large body of people with some organization and with the power to resist the caliph openly.¹³⁷ The ability of a group to manage and control territory and organize under a leader evinces the

¹²⁵ *Id.* at 61-62.

¹²⁶ See AL-DAWOODY, *supra* note 21, at 153, 155-56.

¹²⁷ *Id.* at 148, 153.

¹²⁸ *Id.* at 154.

¹²⁹ *Id.* at 155-56.

¹³⁰ *Id.* at 154.

¹³¹ AL-DAWOODY, *supra* note 21, at 156.

¹³² *Id.* at 149; SHAH, *supra* note 78, at 63.

¹³³ SHAH, *supra* note 78, at 63.

¹³⁴ *Id.*

¹³⁵ AL-DAWOODY, *supra* note 21, at 150.

¹³⁶ *Id.* at 158-60.

¹³⁷ *Id.* at 158.

requisite organization and power to resist the caliph.¹³⁸ Second, the group must possess a *ta'wil* (just cause) to wage war against the caliph.¹³⁹ The group's *ta'wil* does not have to be objectively true, but the group must have a subjective belief that their cause is valid.¹⁴⁰ The absence of an objectively true requirement reflects the jurists' concern with giving the government the power to decide whether a cause is just.¹⁴¹ Third, the group must "use force to overthrow the head of state."¹⁴² Accordingly, peaceful forms of resistance do not constitute a rebellion.¹⁴³

Muslim jurists may use the terms *al-khawarij* and *al-bughah* interchangeably.¹⁴⁴ "The *khawarij* . . . appeared soon after the death of Muhammad claim[ing] that they alone were true believers [of Islam]," and that all other Muslims were apostates.¹⁴⁵ 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.¹⁴⁶ The majority of Muslim legal scholars treat the *khawarij* and the *bughah* the same, but *Hanbali* jurists distinguish the two by treating the *khawarij* as apostates and applying laws of international armed conflict rather than the laws of NIACs.¹⁴⁷ Despite the majority's similar treatment of the two groups, Professor Habeck argues that using the term *khawarij* is still a valuable method of "differentiat[ing] [extremists] from the rest of the Islamic world" because "it makes it plain to moderate Muslims just how heterodox and violent" the extremists are toward other Muslims.¹⁴⁸

Like International Law's treatment of a belligerency, if the level of a NIAC rises to the level of *al-bughah*, Islamic law applies both the rules of non-international and international armed conflict.¹⁴⁹ 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 rebels. These rules include reconciliation, noncombatant immunity, humane treatment of prisoners, prohibition against indiscriminate weapons, and protection of property.

¹³⁸ *Id.* at 159.

¹³⁹ *Id.*

¹⁴⁰ AL-DAWOODY, *supra* note 21, at 159-60.

¹⁴¹ *Id.*

¹⁴² *Id.* at 160-61.

¹⁴³ *Id.* at 161.

¹⁴⁴ See Sadia Tabassum, *Combatants, Not Bandits: The Status of Rebels in Islamic Law*, 93 INT'L REV. OF THE RED CROSS 121, 124 (2011); AL-DAWOODY, *supra* note 21, at 151.

¹⁴⁵ MARY HABECK, *KNOWING THE ENEMY: JIHADIST IDEOLOGY AND THE WAR ON TERROR* 175 (Yale Univ. Press, 2006).

¹⁴⁶ AL-DAWOODY, *supra* note 21, at 151.

¹⁴⁷ See *id.* at 150.

¹⁴⁸ HABECK, *supra* note 145, at 175.

¹⁴⁹ See SHAH, *supra* note 78, at 64.

Verses 49:9-10 of the Qur'an require the state to attempt to reconcile with rebels because "[a]ll believers are but brothers; therefore[, Muslims should] seek reconciliation between" among themselves.¹⁵⁰ 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.¹⁵¹ Mu'awiya met the key elements of *al-bughah* because he ruled over a united province, 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.¹⁵² Ali attempted to negotiate a peaceful settlement with Mu'awiya before resorting to combat.¹⁵³

In order to follow the Qur'an and emulate Ali's actions, a state must attempt to remove any founded injustice that the rebels complain of, resolve any misunderstanding that the rebels have regarding the ruler's commands, and negotiate a peaceful settlement to the rebels' demands.¹⁵⁴ It is only upon the failure of negotiations that the state may resort to force to end a rebellion.¹⁵⁵

If a state must resort to combat, the practices of the first and fourth caliphs elucidate the rules governing the use of force.¹⁵⁶ Both of the caliphs demonstrated restraint in their use of force to achieve their ultimate goal of reconciliation with rebels.¹⁵⁷ In fighting the Ridda Wars, Abu Bakr demonstrated restraint against the rebels by ordering his commanders not to engage in treachery or deception; not indulge in mutilation; not kill children, old men, or women; not "cut fruit bearing trees"; and not slaughter livestock except for food.¹⁵⁸ Ali likewise demonstrated restraint by instructing his men not to fight the rebels unless the rebels attacked first; not kill the wounded or mutilate the dead; not enter homes without permission; and not harm women.¹⁵⁹

It is therefore not surprising that Islamic law, like International Law, embraces the principle of discrimination, or distinction.¹⁶⁰ 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.¹⁶¹ Islamic law also protects civilians by for-

¹⁵⁰ SHAH, *supra* note 78, at 64.

¹⁵¹ LEWIS, *supra* note 117, at 62-63.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ AL-DAWOODY, *supra* note 21, at 162.

¹⁵⁵ *Id.*

¹⁵⁶ SHAH, *supra* note 78, at 66-68.

¹⁵⁷ See Yousaf, *supra* note 80, at 455-59.

¹⁵⁸ See *id.* at 457.

¹⁵⁹ SHAH, *supra* note 78, at 67-68.

¹⁶⁰ See Yousaf, *supra* note 80, at 455-59.

¹⁶¹ AL-DAWOODY, *supra* note 21, at 163.

bidding the destruction of means necessary for the sustainment of life, such as sources of food and water.¹⁶²

Consistent with the principle of discrimination or distinction, the majority of jurists prohibit the use of indiscriminate weapons.¹⁶³ This grew out of jurists' concerns that the use of weapons such as flooding, fire, or mangonels (a weapon that catapults large stones) risked the lives of noncombatants because such weapons do not discriminate between rebels and noncombatants.¹⁶⁴ *Hanbali* jurists, however, permit the use of indiscriminate weapons if rebels use such weapons against the state.¹⁶⁵

The Qur'an calls for humane treatment of prisoners in verse 76:8-9 which calls for "feed[ing] for the love of Allah the indigent, the orphan, and the captive . . ." ¹⁶⁶ The Prophet likewise declared, "I command you to treat the captives well."¹⁶⁷ Nevertheless, *Hanafi* jurists assert that the state can execute prisoners to protect the state army from those prisoners rejoining the rebellion.¹⁶⁸ These jurists stress, however, that is better to keep prisoners confined until the rebellion no longer poses a threat to the state.¹⁶⁹ Notwithstanding the *Hanafi* position, the majority of jurists agree that the state cannot execute prisoners.¹⁷⁰

Islamic law also forbids the pillage and plunder of *baghi* property.¹⁷¹ After the battle of Nahranwan, Ali returned whatever property his army took from the opposing force.¹⁷² In one story, some of Ali's soldiers were using a pot that belonged to a defeated *baghi* to cook their meal.¹⁷³ The *baghi* spilled the soldiers' food on the ground and took his pot back without punishment.¹⁷⁴ Jurists interpret this to mean that Islamic law forbids even temporary confiscation of *baghi* property.¹⁷⁵

Islamic law differs significantly from International Law regarding punishment of rebels when the fighting is over.¹⁷⁶ Islamic law does not

¹⁶² See Yousaf, *supra* note 80, at 457.

¹⁶³ LAURA MAY, WAR CRIMES AND JUST WAR 167 (Cambridge Univ. Press, 2007).

¹⁶⁴ AL-DAWOODY, *supra* note 21, at 164.

¹⁶⁵ See *id.*

¹⁶⁶ Yousaf, *supra* note 80, at 463.

¹⁶⁷ *Id.*

¹⁶⁸ AL-DAWOODY, *supra* note 21, at 165.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ SHAH, *supra* note 78, at 65.

¹⁷² *Id.*

¹⁷³ FADL, *supra* note 6, at 35.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 153.

¹⁷⁶ AL-DAWOODY, *supra* note 21, at 167 ("Th[e] generous treatment of rebels under classical Islamic law stands in stark contrast to the treatment of rebels in the Western tradition of war."); FADL, *supra* note 6, at 157 (noting that Islamic law seeks to treat rebels humanely).

impose any punishment for rebels because participation in a rebellion is not a criminal act.¹⁷⁷ Unlike criminals, the *baghi* must have a sincere belief that they are fighting for a just cause.¹⁷⁸ Their *ta'wil* exempts the *baghi* from subsequent punishment because they had a moral claim to legitimate power.¹⁷⁹ Thus, the state cannot execute, imprison, or confiscate *baghi* property, and it must set *baghi* prisoners free upon the cessation of fighting.¹⁸⁰ The state may, however, punish *baghi* for crimes committed that were not necessary to their rebellion.¹⁸¹

IV. APPLICATION OF ISLAMIC AND INTERNATIONAL LAW TO THE SYRIAN CONFLICT

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 certain protections for individuals involved in conflicts. Even where the triggering criteria differ, the rationale behind the criteria is the same. However, there are two main differences in the doctrines.¹⁸² First, International Law extends minimum protections to a larger number of people because Common Article 3 has a lower triggering threshold than Islamic law.¹⁸³ Second, Islamic law provides greater protection to rebels than does International Law because Islamic law is more concerned with reconciliation of the warring parties.¹⁸⁴ 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.¹⁸⁵ Some observers estimate that there are over a thousand diverse groups consisting of approximately 100 thousand fighters in total.¹⁸⁶ A number of these diverse groups are moving toward increased collaboration, but their “divergent objectives” prevent them from forming a “coherent command” struc-

¹⁷⁷ FADL, *supra* note 6, at 157.

¹⁷⁸ AL-DAWOODY, *supra* note 21, 159-60.

¹⁷⁹ *Id.* at 126.

¹⁸⁰ FADL, *supra* note 6, at 34, 64-65.

¹⁸¹ SHAH, *supra* note 78, at 66.

¹⁸² *See supra* text accompanying notes 38-44, 135-148.

¹⁸³ *See id.*

¹⁸⁴ SHAH, *supra* note 78, at 64.

¹⁸⁵ *Guide to the Syrian Opposition*, BBC (Oct. 17, 2013), <http://www.bbc.co.uk/news/world-middle-east-15798218>.

¹⁸⁶ William R. Polk, *Understanding Syria: From Pre-Civil War to Post-Assad*, THE ATLANTIC (Dec. 10, 2013), <http://www.theatlantic.com/international/archive/2013/12/understanding-syria-from-pre-civil-war-to-post-assad/281989/> (figures accurate as of 2013).

ture.¹⁸⁷ Despite this chaotic battlefield, some dominant 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 al-Assad’s government through non-violence.¹⁸⁸ Syria’s majority Sunni population and the Muslim Brotherhood dominate the SNC.¹⁸⁹ The SNC, however, was incapable of uniting anti-government forces.¹⁹⁰ In November 2012, former Secretary of State, Hillary Clinton, called for the creation of an opposition leadership “that could speak to every segment and every geographic part of Syria.”¹⁹¹

In response, Syrian dissident groups formed the Syrian National Coalition for Opposition and Revolutionary Forces (“National Coalition”).¹⁹² The National Coalition consists of approximately sixty members, including “representative[s] from each of Syria’s major cities” and members of the SNC.¹⁹³ According to its website, the National Coalition intends to organize and unify political factions to overthrow President al-Assad’s regime and establish a democratic government.¹⁹⁴ France, the United Kingdom, the European Union, the United States, and “the six member states of the Gulf Cooperation Council” have recognized the National Coalition as the “‘legitimate representative’ of the Syrian people.”¹⁹⁵

The National Coalition has tried to unite hundreds of diverse rebel battalions with different ideologies under the Syrian Supreme Military Council.¹⁹⁶ 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.”¹⁹⁷ While the armed groups are “united in the goal of removing al-Assad from power, [they] disagree on how to depose him, who should replace him[,] and what the future of Syria should look like.”¹⁹⁸ The multiple groups have evolved into a more organized force

¹⁸⁷ 2013 UNHRC Syria Report, *supra* note 17, at 6.

¹⁸⁸ BBC, *Guide to the Syrian Opposition*, *supra* note 185.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² Ruth Sherlock, *Syrian Opposition Finally Forms Unified Coalition*, THE TELEGRAPH (Nov. 11, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9670398/Syrian-opposition-finally-forms-unified-coalition.html>.

¹⁹³ *Id.*

¹⁹⁴ *Mission Statement and Goals*, NAT’L COAL. OF SYRIAN REVOLUTIONARY AND OPPOSITION FORCES, <http://en.etilaf.org/about-us/goals.html> (last visited on Sept. 21, 2016).

¹⁹⁵ BBC, *Guide to the Syrian Opposition*, *supra* note 185.

¹⁹⁶ Basma Atassi & Mohammed Haddad, *Interactive: Mapping Syria’s Rebellion*, AL JAZEERA (Jul. 19, 2013), <http://www.aljazeera.com/indepth/interactive/2013/07/20137188552345899.html>.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

under the Supreme Military Council, but they have failed “to unify their structures under a coherent command.”¹⁹⁹ In August 2013, these armed groups controlled large swathes of northern and eastern Syria.²⁰⁰ However, as of July 2015, the territory under their control had been significantly reduced to an area around Aleppo and northeast of Hama.²⁰¹

There are also radical groups fighting in Syria that clash with the Supreme Military Council and the National Coalition.²⁰² The most powerful of these radical groups are the Islamic State in Iraq and Syria (“ISIS”) and Jabhat al-Nusra.²⁰³ ISIS originated in Iraq as Al-Qaeda in Iraq (“AQI”) led by Abu Musab al-Zarqawi.²⁰⁴ After peaking in 2006, Zarqawi’s death and a growing Sunni opposition to AQI’s brutal tactics caused a sharp decline in AQI’s power and membership.²⁰⁵ With the withdrawal of American forces in 2011, however, AQI reemerged under the new name the Islamic State in Iraq, established new leadership under Abu Bakr al-Baghdadi, and began to regain Sunni support against Maliki’s government.²⁰⁶

In late 2011, AQI helped found Jabhat al-Nusra when Abu Bakr al-Baghdadi sent an AQI operative to Syria to organize a regional jihadist cell.²⁰⁷ Since 2012, al-Nusra has conducted military operations with other Sunni opposition groups and expanded operations to eleven of Syria’s thirteen governorates.²⁰⁸ The goal of these radical groups is to establish a “strict Islamic state.”²⁰⁹ ISIS and Jabhat al-Nusra control territory in

¹⁹⁹ 2013 UNHRC Syria Report, *supra* note 17, at 6.

²⁰⁰ *Id.*

²⁰¹ See *Syria: Mapping the Conflict*, BBC (Jul. 10, 2015), <http://www.bbc.com/news/world-middle-east-22798391> (mapping out areas of Syria where territorial control has recently changed hands).

²⁰² See 2013 UNHRC Syria Report, *supra* note 17, at 6.

²⁰³ *Id.*; see also Alice Guthrie, *Decoding Daesh: Why is the new name for ISIS so hard to understand?*, FREE WORD CENTRE (Feb. 19, 2015), <https://www.freewordcentre.com/blog/2015/02/daesh-isis-media-alice-guthrie/> (explaining that ISIS is also known as the “Islamic State of Iraq and the Levant” and “*Daesh*,” an acronym derived from the Arabic name *الدولة الإسلامية في العراق والشام*, phonetically translated to *ad-Dawlah al-Islamiyah fi l-Iraq wa-sh-Sham*).

²⁰⁴ *Mapping Militant Organizations: The Islamic State*, Stanford University, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/1?highlightIS>

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Mapping Militant Organizations: Jabhat Fatah al-Sham (Formerly Jabhat al-Nusra)*, Stanford University, <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/493>.

²⁰⁸ *Id.*

²⁰⁹ Tom A. Peter, *After Assad, Is Strict Islamic Rule Ahead for Syria?*, USA TODAY (Jan. 3, 2013), <http://www.usatoday.com/story/news/world/2013/01/02/will-syria-become-islamic-state-after-assad/1784133/>. Professor Stephen M. Walt of the Harvard Kennedy School of Government states, “I think that there is no question that the way to look at it as a revolutionary state-building organization.” Tim Arango, *ISIS*

northern Syria and have garnered support from a portion of the population who sees them as effective military forces and humanitarian groups.²¹⁰ ISIS has rejected the authority of the National Coalition and Supreme Military Council; the al-Nusra front fights at the local level with the Free Syrian Army.²¹¹

In April 2013, ISIS split from al-Nusra and “appropriated most of al-Nusra’s capabilities and manpower.”²¹² Since then, ISIS has formed a hierarchical “command and control system under [the command] of Abu Bakr al-Baghdadi.”²¹³ In 2014, ISIS “advanced along the Tigris and Euphrates rivers in Iraq, seizing population centers, including [the city of] Mosul.”²¹⁴ It now controls territory in “northwestern Iraq and northeastern Syria.”²¹⁵

“On June 29, 2014, ISIS proclaimed itself a ‘Caliphate.’”²¹⁶ The group has relentlessly assaulted the basic freedoms of the civilians who live in the areas that it controls.²¹⁷ ISIS identifies Shiites and Sunnis 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.”²¹⁸

The Supreme Military Council and the National Coalition also have little to no influence over Syria’s Kurdish population.²¹⁹ There are nearly three million Kurds in Syria, who live mostly in the northeast along the

Transforming Into Functioning State That Uses Terror as a Tool, N.Y. TIMES (July 21, 2015), <http://www.nytimes.com/2015/07/22/world/middleeast/isis-transforming-into-functioning-state-that-uses-terror-as-tool.html>.

²¹⁰ Tom A. Peter, *After Assad, Is Strict Islamic Rule Ahead for Syria?*, USA TODAY (Jan. 3, 2013), <http://www.usatoday.com/story/news/world/2013/01/02/will-syria-become-islamic-state-after-assad/1784133/>; 2013 UNHRC Syria Report, *supra* note 17, at 6.

²¹¹ See Erika Solomon, *Syria Rebels Reject Opposition Coalition, Call for Islamic Leadership*, REUTERS (Sep. 25, 2013), www.reuters.com/article/us-syria-crisis-opposition-idUSBRE9800LA20130925.

²¹² Rep. of the Indep. Int’l Comm’n of Inquiry on the Syrian Arab Republic: Rule of Terror: Living Under ISIS in Syria, U.N. Doc. A/HRC/27/CRP.3, at 2 (Nov. 14, 2014) [hereinafter UN Indep. Rep.].

²¹³ *Id.* at 3.

²¹⁴ CHRISTOPHER M. BLANCHARD ET AL., *summary to CONG. RESEARCH SERV.*, R43612, THE “ISLAMIC STATE” CRISIS AND U.S. POLICY (Jun. 11, 2015).

²¹⁵ *Id.* at 1.

²¹⁶ UN Indep. Rep., *supra* note 212, at 3.

²¹⁷ *Id.* at 4.

²¹⁸ UN Indep. Rep., *supra* note 212, at 5; see also BLANCHARD, *supra* note 214, at 1.

²¹⁹ Mohammed Abbas, *Syria Kurdish Leader Rejects New Opposition Coalition*, REUTERS (Nov. 20, 2012), <http://www.reuters.com/article/us-syria-kurds-opposition-idUSBRE8AJ1FV20121120>.

borders of Turkey and Iraq.²²⁰ In July 2012, President al-Assad withdrew his military forces and government “bureaucrats from [the] Kurdish territories . . . to bolster support against . . . the uprising.”²²¹ “[T]he most powerful Kurdish political party in Syria,” the Democratic Union Party (“PYD”), assumed control of the area.²²² The PYD has changed street names in its territory “from Arabic to Kurdish, schools openly teach the Kurdish language,” and the armed branch of the PYD flies a Kurdish “flag from checkpoints on main roads.”²²³

The armed wing of the PYD fought ISIS and other al-Qaeda groups for control of two towns, Ras al-Ayn and Tel Abyad, which separate the Kurdish territories.²²⁴ ISIS sees the Kurds as an obstacle to its desire to create an Islamic state and accuses the Kurds of supporting President al-Assad.²²⁵ President al-Assad is willing to let these two groups fight each other while he focuses resources on the fight against the Free Syrian Army.²²⁶

The fight for the towns of Ras al-Ayn and Tel Abyad united fractured Kurdish political parties.²²⁷ In October 2011, the Kurdish National Council in Syria (“KNC”) was formed as an umbrella organization that includes the PYD and fifteen other Kurdish parties.²²⁸ “The KNC seeks political decentralization” and political autonomy under a post al-Assad Syrian government.²²⁹ The Kurdish parties intend to hold parliamentary elections in the area under their control and are drafting an interim constitution.²³⁰ The SNC rejects the KNC’s demand for political decentralization.²³¹

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.²³² Consequently, the requirement that the conflict take place

²²⁰ Ece Goksedef, *War in Syria Inspires Kurdish Unity*, AL JAZEERA (Jul. 27, 2013), <http://www.aljazeera.com/indepth/features/2013/07/2013727161533579785.html>.

²²¹ *Id.*

²²² *Id.*

²²³ Ben Hubbard, *Kurdish Struggle Blurs Syria’s Battle Lines*, N.Y. TIMES (Aug. 1, 2013), <http://nyti.ms/11y33B4>.

²²⁴ Goksedef, *supra* note 220.

²²⁵ Hubbard, *supra* note 223.

²²⁶ Goksedef, *supra* note 220.

²²⁷ *Id.*

²²⁸ *The Kurdish National Council in Syria*, CARNEGIE MIDDLE E. CTR. (Feb. 15, 2012), <http://carnegie-mec.org/publications/?fa=48502>.

²²⁹ *Id.*

²³⁰ 2013 UNHRC Syria Report, *supra* note 17, at 4.

²³¹ CARNEGIE MIDDLE E. CTR., *supra* note 228.

²³² *State Parties to the Main Treaties as of 13 September 2016*, INT’L COMM. OF THE RED CROSS, http://ihl-databases.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmmodres/domino/OpenAttachment/applic/ihl/ihl.nsf/5FE9C868227EDD1CC1257F330052D22D/%24File/IHL_and_other_related_Treaties.pdf?Open

in the territory of a high contracting party is met under Common Article 3, but it is not met under Additional Protocol II.²³³ Nevertheless, many provisions of Additional Protocol II still apply to the Syrian conflict because they are considered customary international law.²³⁴ As discussed in greater detail in section V, Islamic law likewise applies 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.²³⁵

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.²³⁶ Conversely, Common Article 3 only considers whether the state is using its armed forces as one factor in determining whether there is a NIAC.²³⁷ 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."²³⁸ Additional Protocol II, however, requires that rebels involved in a NIAC possess some "responsible command."²³⁹ Responsible command means the ability of an organization to carry out sustained military operations, regardless of whether it has some hierarchal structure.²⁴⁰ To constitute a rebellion under Islamic law, a group must be large enough to openly resist the caliph; responsible command is an element in determining the group's strength.²⁴¹

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 several years.²⁴² The Syrian government has responded to the rebellion with its regular armed

²³³ See *supra* text accompanying notes 35, 50.

²³⁴ Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 188 (2005).

²³⁵ CONSTITUTION OF THE SYRIAN ARAB REPUBLIC Feb. 26, 2012, ch. 1, art. 3.

²³⁶ AL-DAWOODY, *supra* note 21, at 159; Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 611, art. 1(1).

²³⁷ UHLER, COMMENTARY ON GENEVA CONVENTION (IV), *supra* note 36, at 35-36.

²³⁸ *Id.* at 35.

²³⁹ Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 611, art. 1(1).

²⁴⁰ JUNOD, COMMENTARY ON ADDITIONAL PROTOCOL II, *supra* note 47, at 1352.

²⁴¹ AL-DAWOODY, *supra* note 21, at 158-59.

²⁴² See 2013 UNHRC Syria Report, *supra* note 17, at 5-6.

forces.²⁴³ Although the Supreme Military Council cannot exercise direct control over all of the rebel forces fighting under the umbrella of the Free Syrian Army, it indicates that it respects the law of armed conflict by stating that it will “bring all those responsible for war crimes to account in accordance with International Law.”²⁴⁴

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.²⁴⁵ The Free Syrian Army previously exercised control over swathes of northern Syria and still controls the area around Aleppo and areas northeast of Hama.²⁴⁶ The PYD also controls territory in the north and Kurdish groups have battled ISIS for control of the northern towns of Ras al-Ayn and Tel Abyad.²⁴⁷ 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 a collection of sporadic acts of violence.²⁴⁸ Additional Protocol II, however, considers control of territory as evidence that rebels have the minimum infrastructure required to implement the Protocol.²⁴⁹ As discussed below, the Free Syrian Army, ISIS, and the PYD are not implementing the protections of Additional Protocol II.²⁵⁰ Their mere physical control of territory without implementation of basic protections is not enough to trigger the protections of Additional Protocol II.²⁵¹

Finally, only Islamic law requires the rebels to have a *ta’wil*.²⁵² 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 . . . tyranny” before rebels can resort to the

²⁴³ *Id.* at 6.

²⁴⁴ *Fact Sheet*, SUPREME MIL. COUNCIL OF THE FREE SYRIAN ARMY, <http://www.etilaf.org/en/about-us/fact-sheet.html> (last visited Oct. 20, 2013).

²⁴⁵ JUNOD, COMMENTARY ON ADDITIONAL PROTOCOL II, *supra* note 47, at 1353 (“[I]t is likely that only common Article 3 will apply to the first stage of hostilities.”).

²⁴⁶ BBC, *See Syria: Mapping the Conflict*, *supra* note 201.

²⁴⁷ Goksedef, *supra* note 220; Laura Mofta, *ISIS Syria Offensive in Ras Al-Ain: Islamic State Launches Major Assault on Key Syrian Border Town*, INT’L BUS. TIMES (Mar. 11, 2015), <http://www.ibtimes.com/isis-syria-offensive-ras-al-ain-islamic-state-launches-major-assault-key-syrian-1843320>; Tom Perry, *Syrian Kurds Say Thwart Big Islamic Attack on Border Town*, REUTERS (Jul. 1, 2015), <http://www.reuters.com/article/us-mideast-crisis-syria-idUSKCN0PB3YI20150701?feedType=RSS&feedName=worldNews>.

²⁴⁸ *See* UHLER, COMMENTARY ON GENEVA CONVENTION (IV), *supra* note 36, at 35-36; AL-DAWOODY, *supra* note 21, at 158-59.

²⁴⁹ *See* JUNOD, COMMENTARY ON ADDITIONAL PROTOCOL II, *supra* note 47, at 1352-53.

²⁵⁰ *See infra* text accompanying notes 270-274.

²⁵¹ JUNOD, COMMENTARY ON ADDITIONAL PROTOCOL II, *supra* note 47, at 1353.

²⁵² AL-DAWOODY, *supra* note 21, at 157.

use of force.²⁵³ The conflict in Syria started over peaceful protests by the people in Daraa calling for their children to be freed from prison and demanding greater liberties.²⁵⁴ The Syrian government ignored these calls for greater freedom and responded to the protesters with deadly force.²⁵⁵ The National Coalition and the Free Syrian Army responded with force and claim that they want to establish “a civil democratic Syria” and that they are fighting for Syrian “national sovereignty and independence . . . unity of the Syrian people, . . . the country, and its cities.”²⁵⁶

Arguably, even ISIS and other Islamist groups have a *ta’wil*. ISIS and Islamists are fighting to establish an Islamic caliphate.²⁵⁷ Jurists generally recognize that rebellion is permitted against a head of state that “apostatizes from Islam” and does not protect the religion.²⁵⁸ It does not matter that the Islamists’ distorted version of Islam is actually counter to Islamic law. A *ta’wil* only requires that rebels subjectively believe that their claim of injustice is valid and not that their claim is objectively true.²⁵⁹ Thus, each of the anti-government groups has a *ta’wil*.

Despite meeting the triggering mechanisms for Islamic law, it is unlikely that *Hanbali* jurists would apply Islamic law of NIACs to ISIS. Because ISIS intentionally attacks non-combatant Muslims instead of only fighting government forces, it is fair to categorize them as *khawarij* rather than *bughah*.²⁶⁰ As *khawarij*, *Hanbali* jurists would consider ISIS apostates and only apply Islamic law of international armed conflict.²⁶¹

Once triggered, International and Islamic law provide different degrees of similar protections. Examining the similarities and differences in how the doctrines address peace negotiations, protecting civilians, siege warfare, and protecting prisoners shows that one doctrine may provide greater protections than the other. Despite these different degrees of protection, their common aim to protect victims of NIACs makes them compatible doctrines.

Only Islamic law requires the government to attempt to reconcile with the rebels before resorting to force.²⁶² In January 2013, long after the Syrian government used military force against the rebels, President al-Assad offered a peace settlement to all “officially tolerated opposition

²⁵³ *Id.* at 154.

²⁵⁴ Sterling, *supra* note 12.

²⁵⁵ *Id.*

²⁵⁶ *Coalition Principles*, NAT’L COAL. OF SYRIAN REVOLUTIONARY AND OPPOSITION FORCES, <http://en.etilaf.org/about-us/goals.html> (last visited on Sept. 21, 2016).

²⁵⁷ UN Indep. Rep., *supra* note 212, at 3-4.

²⁵⁸ AL-DAWOODY, *supra* note 21, at 153, 157-58.

²⁵⁹ *Id.* at 159.

²⁶⁰ See *supra* text accompanying notes 149, 220.

²⁶¹ See *supra* text accompanying note 150.

²⁶² See SHAH, *supra* note 78, at 64.

groups,” excluding the armed Syrian opposition.²⁶³ His plan offered a “national reconciliation conference, elections, and a new constitution.”²⁶⁴ Despite al-Assad’s actions, it is doubtful that there will be any peace settlement. The National Coalition refuses to engage in any dialogue with President al-Assad’s regime.²⁶⁵ Both sides also believe that a military victory is possible.²⁶⁶

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.²⁶⁷ Sunni anti-government forces have “shelled Shiite villages west of Al-Qusayr” and intentionally targeted civilians with sniper fire.²⁶⁸ In one incident, members of Jabhat al-Nusra entered homes in the town of Dayr Az-Zawr and executed approximately thirty civilians while chanting sectarian slogans.²⁶⁹ ISIS has publicly beheaded, shot, and stoned noncombatants in towns and villages across northern Syria.²⁷⁰

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.²⁷¹ 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.²⁷² Since the rebels here are targeting civilians rather than fighting government forces, they would not receive combatant immunity for these atrocities under Islamic law.²⁷³ The state can therefore treat them as it would any other murderer.²⁷⁴ 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

²⁶³ Anne Barnard, *Defiant Speech by Assad Is New Block to Peace in Syria*, N.Y. TIMES (Jan. 7, 2013), http://www.nytimes.com/2013/01/07/world/middleeast/syria-war-developments.html?_r=1.

²⁶⁴ *In Speech, Defiant Assad Pledges to Continue Fighting*, N.Y. DAILY NEWS (Jan. 6, 2013), <http://www.nydailynews.com/news/world/speech-defiant-assad-pledges-continue-fighting-article-1.1234488>.

²⁶⁵ *Coalition Principles*, *supra* note 256.

²⁶⁶ 2015 UNHRC Syria Report, *supra* note 19, at 4-5.

²⁶⁷ See Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 615; AL-DAWOODY, *supra* note 21, at 167.

²⁶⁸ 2013 UNHRC Syria Report, *supra* note 17, at 38.

²⁶⁹ *Id.* at 32.

²⁷⁰ 2015 UNHRC Syria Report, *supra* note 19, at 35-36.

²⁷¹ See *supra* text accompanying notes 38-41, 50, 140-146; Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 611.

²⁷² AL-DAWOODY, *supra* note 21, at 167-68.

²⁷³ *Id.* at 168.

²⁷⁴ Cf. Yousaf, *supra* note 80, at 455 (arguing that Qur’an Verse 5:32 “expressly forbids arbitrary killing”).

in the armed conflict.”²⁷⁵ Since International Law does not mandate combatant immunity for rebels, the rebels, who are already criminals, have little incentive to stop murdering civilians under International Law.

Both Additional Protocol II and Islamic law prohibit starvation as a means of warfare.²⁷⁶ Common Article 3 does not expressly address starvation, but it mandates humane treatment for those not participating in the conflict.²⁷⁷ Ignoring Islamic and International Law, the Syrian government used siege warfare against the town of Al-Qusayr.²⁷⁸ “Al-Qusayr is located in Homs province . . . close to the Lebanese border.”²⁷⁹ In early 2012, approximately 2,500 anti-government forces controlled most of the town and the surrounding countryside.²⁸⁰ The Syrian Army and Hezbollah forces from Lebanon started the campaign to retake Al-Qusayr by stopping the flow of food, water, and medicine into the town.²⁸¹ 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.²⁸² 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.

Both International and Islamic law mandate humane treatment of prisoners, but only International Law requires that prisoners receive due process of law.²⁸³ The Syrian government and anti-government forces have detained thousands of people.²⁸⁴ Both groups are torturing and killing prisoners.²⁸⁵ Most prisoners “languish in . . . cells with no access to judicial oversight [or] legal counsel.”²⁸⁶

In addition to requiring the humane treatment of prisoners, Common Article 3 prohibits the “passing of sentences 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.”²⁸⁷ Article 6 of Additional Protocol II provides greater due process protections including a presumption of inno-

²⁷⁵ Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 614, art. 6(5).

²⁷⁶ *Id.* at 615; Yousaf, *supra* note 80, at 457 (arguing that Ali’s command not to cut down fruit trees has been interpreted to prohibit starvation as a means of warfare).

²⁷⁷ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention (III)].

²⁷⁸ 2013 UNHRC Syria Report, *supra* note 17, at 37-38.

²⁷⁹ *Id.* at 34.

²⁸⁰ *Id.* at 34-35.

²⁸¹ *Id.* at 35.

²⁸² *Id.* at 38.

²⁸³ Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 613, art. 6(2).

²⁸⁴ 2013 UNHRC Syria Report, *supra* note 17, at 9-10.

²⁸⁵ *Id.* at 8-13.

²⁸⁶ *Id.* at 8-9.

²⁸⁷ Geneva Convention (III), *supra* note 277, 75 U.N.T.S. at 136, art. (1)(d).

cence, prohibition against compelled self-incrimination, a minimum age for the death sentence, and a prohibition of application of *ex post facto* laws.²⁸⁸ Given that Islamic law has no similar due process requirement, International Law provides a greater degree of protection to prisoners than Islamic law.²⁸⁹ Nevertheless, Islamic law is still compatible with International Law because it does not prohibit prisoners from receiving due process of law.²⁹⁰

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 in varying degrees.²⁹¹ Islamic law can, however, serve as common ground for Muslim states to develop regional policies that fill gaps in International Law in order to more effectively address NIACs. Gaps in International Law exist because some Muslim states are not members of Additional Protocol II and some parties fighting in NIACs do not recognize International Law. Islamic law can also encourage non-state actors to follow rules governing NIACs 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 apply Islamic law, but there are significant differences in the manner and extent of that application.²⁹² At one end of the spectrum, states such as Lebanon and Turkey are secular and do not incorporate Islamic law into their legal systems.²⁹³ For example, the Turkish Constitution defines Turkey as a secular democratic state and does not even mention Islamic law.²⁹⁴ At the other end of the spectrum, the Kingdom of Saudi Arabia considers the Qur'an and the *Sunnah* to be its Constitution.²⁹⁵ Although Saudi Arabia is a monarchy, the monarchy's, and thus the state's, purpose is to protect Islam, implement *Shari'a*, order people to shun evil, and fulfill Allah's call.²⁹⁶ 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."²⁹⁷

²⁸⁸ Additional Protocol II, *supra* note 6, 1125 U.N.T.S. at 613-14, art. 6.

²⁸⁹ See AL-DAWOODY, *supra* note 21, at 137-38.

²⁹⁰ See *id.*

²⁹¹ SHAH, *supra* note 78, at 7-8.

²⁹² *Id.* at 1.

²⁹³ NISRINE ABIAD, SHARIA, MUSLIM STATES AND INTERNATIONAL HUMAN RIGHTS TREATY OBLIGATIONS: A COMPARATIVE STUDY 35-36 (2008).

²⁹⁴ *Id.* at 36.

²⁹⁵ See BASIC LAW OF GOVERNANCE [CONSTITUTION], Mar. 1, 1992, art. 1 (Saudi Arabia).

²⁹⁶ *Id.* at arts. 5, 23.

²⁹⁷ ABIAD, *supra* note 293, at 42-43.

In the middle of the spectrum are states in which Islamic law serves as an important, but not exclusive, source of legislation.²⁹⁸ These states have clauses in their constitutions, commonly known as “repugnancy clauses,” which “require legislation to either conform” to *Shari’a* or establish *Shari’a* as a source of law.²⁹⁹ A review of the historical development of these clauses is critical to understanding their application.

Repugnancy clauses appeared in the 1950s as part of an effort to constitutionalize a new understanding of Islamic law’s role in the state.³⁰⁰ The Egyptian comparative lawyer Abd al-Razzaq al-Sanhuri deeply influenced the adoption of repugnancy clauses.³⁰¹ Sanhuri argued that a state cannot derogate from a handful of general principles that are common to all competing interpretations of Islamic law.³⁰² He further posited that these non-derogable general principles are consistent with most rules found in European codes, which were “transplanted into the Arab world during the colonial era.”³⁰³

In 1949, Egypt commissioned Sanhuri to draft its new civil code.³⁰⁴ Predictably, Sanhuri’s code “harmonize[d] Islamic and European law” and allowed the state to indigenize a national legal system consistent with preexisting European relationships.³⁰⁵ Many other Muslim states desiring to remove the yoke of colonialism while maintaining the ability to run a modern state adopted similar codes.³⁰⁶

Consistent with Sanhuri’s work, middle spectrum Muslim states adopted repugnancy clauses in their constitutions that balance Islamic with man-made law.³⁰⁷ Syria’s 1950 constitution mandated that “Islamic *fiqh* shall be *the* chief source of legislation.”³⁰⁸ While appearing to require that all Syrian laws respect Islamic principles, Syrians understood this provision to recognize that *fiqh* would be but one among several sources of law.³⁰⁹ In 1973, Syria amended its constitution to reflect this

²⁹⁸ See *id.* at 46.

²⁹⁹ See Haider Ala Hamoudi, *Repugnancy in the Arab World*, 48 Willamette L. Rev. 427, 427 (2012) (“‘Repugnancy clauses’ – those constitutional provisions that, in language that varies from nation to nation, require legislation to conform to some core conception of Islam – are all the rage these days.”).

³⁰⁰ Clark B. Lombardi, *Constitutional Provisions Making Sharia “A” or “The” Chief Source of Legislation: Where Did They Come from? What Do They Mean? Do They Matter?*, 28 AM. U. INT’L L. REV. 733, 737 (2013).

³⁰¹ *Id.* at 741.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.* at 742.

³⁰⁶ *Id.*

³⁰⁷ See *id.* at 739-40.

³⁰⁸ *Id.* at 744 (emphasis added).

³⁰⁹ *Id.* at 744-45.

understanding by providing that “Islamic jurisprudence shall be a major source of legislation.”³¹⁰

The Syrian Civil Code of 1949 recognizes that Islamic law is just one among several sources of law.³¹¹ Syria gained independence from French colonialism in 1946 and began reforming its legal system with the adoption of the Syrian Civil Code of 1949.³¹² Sanhuri’s influence on the Syrian 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.”³¹³ “The first article of the Syrian Civil Code explains” that legislative provisions govern all matters to which they apply.³¹⁴ When no such provision applies, judges are to be governed by the principles of Islamic law.³¹⁵ Specifically, the Syrian Civil Code provides that “[w]hen 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 law of equity.”³¹⁶

Historically, Libya was also a middle spectrum state in which Islamic law could serve as a source of law; however, it appears that Islamic law will play a greater role in a post-Gaddafi government.³¹⁷ After World War II, “Britain, France, the United States, and [Russia] agreed that Italy [must] relinquish sovereignty over its North African colonies.”³¹⁸ On November 21, 1949, the U.N. General Assembly adopted a resolution “stating that Libya would become independent no later than January 1, 1952.”³¹⁹ On October 7, 1951, prior to Libya’s declaration of independence, Libya enacted its constitution.³²⁰ Article 5 of the 1951 Constitution declared that “Islam [was] the religion of the state,” but defined no legal consequences flowing from that declaration.³²¹ In 1969, Muammar

³¹⁰ *Id.* at 745; CONSTITUTION OF THE SYRIAN ARAB REPUBLIC, *supra* note 235, art. 3 (emphasis added).

³¹¹ See Dan E. Stigall, *The Civil Codes of Libya and Syria: Hybridity, Durability, and Post-Revolution Viability in the Aftermath of the Arab Spring*, 28 EMORY INT’L L. REV. 283, 302 (2014).

³¹² *Id.* at 301.

³¹³ Razi A. Diab, *Religion and the Law in Syria*, ARAB CTR. FOR INT’L HUMANITARIAN LAW & HUMAN RIGHTS EDUC., http://www.acihl.org/article.htm?article_id=26 (last visited Sept. 25, 2016).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ Stigall, *supra* note 311, at 303.

³¹⁷ *Id.* at 303; *Libya Assembly Votes for Sharia Law*, AL JAZEERA (Dec. 4, 2013), <http://www.aljazeera.com/news/africa/2013/12/libya-assembly-votes-sharia-law-2013124153217603439.html>.

³¹⁸ Stigall, *supra* note 311, at 297.

³¹⁹ *Id.*

³²⁰ DIRK VANDEWALLE, A HISTORY OF MODERN LIBYA xxi (2006).

³²¹ ABIAD, *supra* note 293, at 48 (internal quotation marks and citations omitted).

Gaddafi seized power in a bloodless coup.³²² 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.³²³ Nevertheless, Libya's civil code continued to use Islamic law to govern select issues such as property rights and inheritance.³²⁴

Following Gaddafi's fall in 2011, Libya began its transition to democracy.³²⁵ In 2014 the temporary National Transitional Council elected a Constitutional Drafting Assembly ("CDA") to draft a new constitution.³²⁶ Article 8 of the CDA's draft constitution provides some indication that Islamic law may have much greater influence in Libya than it has in the past.³²⁷ It states:

Islam shall be the religion of the State, and Islamic Sharia shall be the source of legislation in accordance with the recognized sects and interpretations without being bound to any of its particular jurisprudential opinions in matters of interpretation. The provisions of the Constitution shall be interpreted in accordance with this.³²⁸

This language appears to push Libya away from being a middle spectrum country and closer to states that strictly apply Islamic law. It remains unclear how Libya will balance this proposed provision with the desire of some of its citizens for the government to protect democratic and secular liberal values.³²⁹

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, which formerly considered Islamic law to be only one of several sources of legislation, to reflect that Islamic law is the "main source of law."³³⁰ This amendment appeared to require all legislation to be consistent with *Shari'a*.³³¹ Haider Ala Hamoudi, renowned scholar of Islamic law, posits that it would be logistically complicated for a court to deter-

³²² John Liolos, *Erecting New Constitutional Cultures: The Problems and Promise of Constitutionalism Post-Arab Spring*, 36 B.C. INT'L & COMP. L. REV. 219, 228 (2013).

³²³ *Id.* at 228.

³²⁴ Stigall, *supra* note 311, at 306.

³²⁵ Liolos, *supra* note 322, at 228-29.

³²⁶ *Id.* at 229.

³²⁷ See Ronald Bruce St John, *Libya's Draft Constitution: Compromise or Compromised?*, THE ATLANTIC COUNCIL (Mar. 3, 2016), <http://www.atlanticcouncil.org/blogs/menasource/libya-s-draft-constitution-compromise-or-compromised>; VAN-DEWALLE, *supra* note 320, at 126.

³²⁸ *Draft Libyan Constitution of April 2016, Non-official English Translation by UNSMIL*, CONSTITUTION.NET, http://www.constitutionnet.org/files/draft_constitution_of_libya_april_2016_unofficial_english_traslation.pdf (last visited Oct. 9, 2016).

³²⁹ See Liolos, *supra* note 322, at 242.

³³⁰ ABIAD, *supra* note 293, at 47.

³³¹ *Id.*

mine whether each provision of complex legislation is based principally on *Shari'a* rather than some other source of law.³³² Egypt's Supreme Constitutional Court significantly reduced this predicament by holding that the amendment only has prospective effect.³³³

Regardless of where a Muslim state falls on the spectrum of application of Islamic law, such a law can serve as a common ground to establish regional policies to contend with NIACs. The violence from the Syrian conflict is not contained within its borders.³³⁴ Turkey has absorbed more than 2.5 million refugees fleeing from the violence.³³⁵ Lebanon has absorbed over 1 million refugees.³³⁶ The influx of refugees into Lebanon has tipped the sectarian balance between Sunni and Shiite and has culminated in violence along the Syrian border.³³⁷ ISIS has swept through northern Iraq and Iran has sent Shiite militias to take back the Iraqi city of Tikrit.³³⁸ Jordan is considered to be an entry point of support for rebels in Syria.³³⁹ More importantly, the over 635,000 2 million refugees absorbed by Jordan have brought in a large number of radicalized youth and burdened the country's scarce water supply.³⁴⁰

Dealing with these spillover effects of the Syrian conflict will require countries in the region to work with each other to stem the flow of aid and foreign fighters, prevent the influx of refugees, provide safe zones to which refugees can return, coordinate military and financial assistance to secure borders, negotiate settlements with rebel forces, and inoculate themselves against the spread of radical ideologies.³⁴¹ 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 the minimum protections of Common Article 3 in cases of NIACs.³⁴² Yet some of the states affected by the Syrian conflict, including Syria, Turkey, Iran, and Iraq, are

³³² Hamoudi, *supra* note 299, at 430.

³³³ *Id.* at 429, 444.

³³⁴ WILLIAM YOUNG ET AL., RAND NAT'L DEF. RESEARCH INST., SPILLOVER FROM THE CONFLICT IN SYRIA 16-17 (2014).

³³⁵ *Id.*

³³⁶ *Id.* at 27; AMNESTY INT'L, *Syria's Refugee Crisis in Numbers* (Feb. 3, 2016), <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/>.

³³⁷ YOUNG ET AL., *supra* note 334, at 28.

³³⁸ Ashley Fantz & Greg Botelho, *Iran, Shia Militias Involvement in ISIS Fight a Mixed Blessing for U.S. Iraq*, CNN (Mar. 13, 2015), <http://www.cnn.com/2015/03/13/middleeast/iraq-iran-shia-militias/>; Kenneth M. Pollack, *Iraq: Understanding the ISIS Offensive Against the Kurds*, BROOKINGS INST. (Aug. 11, 2014), <https://www.brookings.edu/blog/markaz/2014/08/11/iraq-understanding-the-isis-offensive-against-the-kurds/>.

³³⁹ YOUNG ET AL., *supra* note 334, at 48.

³⁴⁰ *Id.* at 47-50; AMNESTY INT'L, *supra* note 336.

³⁴¹ YOUNG ET AL., *supra* note 334, at vii-viii.

³⁴² *State Parties to the Main Treaties as of 13 September 2016*, *supra* note 232.

not members of Additional Protocol II and therefore are not bound to apply its additional protections.³⁴³

Islamic law can fill the gaps created by the disparate application of the full body of International Law in the region. For states in the middle of the spectrum that have not adopted Additional Protocol II, Islamic law can serve as an additional source of law to Common Article 3 and protect life and property. As for secular Muslim states that do not apply Islamic law, Islamic law can still serve as common ground in the region because application of Islamic law to NIACs by middle spectrum states is compatible with International Law.

To understand how Islamic law can supplement Common Article 3 to provide greater protections for those involved in and affected by NIACs, it is useful to examine rebel authority to enter into agreements with states under both Common Article 3 and Islamic law. Common Article 3 allows the parties to a NIAC to enter into special agreements to commit to comply with humanitarian law.³⁴⁴ Islamic law goes even further by recognizing that rebels have the authority to enter into binding treaties.³⁴⁵ 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.³⁴⁶ Rebels that enter treaties must follow “the principle of *pacta sunt servanda* (i.e. good faith in contractual obligations) because it is God who” witnesses all contracts.³⁴⁷

Common Article 3 is therefore narrower than Islamic law because it only authorizes agreements regarding the 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.³⁴⁸ Parties to a NIAC may thus apply both doctrines to enter into agreements establishing safe zones for refugees, limiting border crossings, facilitating movement of agencies and assistance, and settling other disputes.

For instance, Turkey and the United States agreed on a plan to collaborate and announced that they intend to work with moderate Syrian rebel forces to establish a safe zone inside of Syria for Syrian refugees.³⁴⁹ The proposed safe zone is to be located along the Turkish border between the

³⁴³ *Id.*

³⁴⁴ Geneva Convention (III), *supra* note 277, 75 U.N.T.S. at 138.

³⁴⁵ Tabassum, *supra* note 144, at 136.

³⁴⁶ *Id.*

³⁴⁷ ABIAD, *supra* note 293, at 102-03 (internal quotation marks omitted).

³⁴⁸ Tabassum, *supra* note 144, at 132.

³⁴⁹ Anne Barnard et al., *Turkey and U.S. Plan to Create ‘Safe Zone’ Free of ISIS*, N.Y. TIMES (Jul. 27, 2015), www.nytimes.com/2015/07/28/world/middleeast/turkey-and-us-agree-on-plan-to-clear-isis-from-strip-of-northern-syria.html?_r=0.

outskirts of Aleppo and the Euphrates River.³⁵⁰ The United States claimed that the zone is for the protection of refugees and is not intended for use against President al-Assad's regime.³⁵¹ The initial plan called for the United States to provide aircraft, Turkey to provide anti-aircraft and artillery cover, and the rebels to provide ground forces.³⁵²

Islamic law's recognition of rebel treaties as legally binding contracts witnessed by Allah 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.³⁵³ Because Islamic and International Law are compatible doctrines, 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 NIACs appear to taper, 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 established to fight ISIS.³⁵⁴ Islamic law requires Muslims to support fellow Muslims when non-Muslims attack.³⁵⁵ In other words, when Muslim groups have a conflict, they should not seek the support of non-Muslims to fight each other.

Recognizing that ISIS is *khawarij* rather than *bughah* 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.³⁵⁶ *Hanbali* jurists would not recognize ISIS as Muslim. Accordingly, *Hanbali* jurists would treat ISIS as an apostate group and apply Islamic law governing international armed conflicts.³⁵⁷ Therefore, a state or rebel group that follows or is influenced by *Hanbali fiqh* may seek non-Muslim foreign assistance to fight ISIS without violating Islamic law.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ Tabassum, *supra* note 144, at 132.

³⁵⁴ Ashley Fantz, *Who's Doing What in the Coalition Battle Against ISIS*, CNN (Oct. 9, 2014), <http://www.cnn.com/2014/10/09/world/meast/isis-coalition-nations/>.

³⁵⁵ Tabassum, *supra* note 144, at 137.

³⁵⁶ *See supra* notes 149, 220

³⁵⁷ *See supra* text accompanying note 150.

VI. CONCLUSION

Regarding NIACs, Islamic law may serve as a 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. Moreover, 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. However, the ability to supplement International Law with Islamic law is indeed a viable option for countries that subscribe to the tenets of Islamic law because their legal systems either directly implement or are influenced by Islamic law.

This article has posited that the application of Islamic and International Law to the Syrian conflict demonstrates their compatibility. The fighting among the Syrian government, the Free Syrian Army, al-Nusra, Kurdish groups, 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 the minimal protections of the Islamic law of international armed conflict.

Doctrinally, International and Islamic law apply analogous protections. Both doctrines prohibit targeting non-combatants. Islamic law, however, provides a greater incentive for rebels to follow this rule because it only grants them combatant immunity when they attack government forces. This greater incentive is consistent with Additional Protocol II's encouragement of states to grant the broadest possible amnesty to persons who participate in the conflict. Likewise, both doctrines provide protections for prisoners. Although nothing in Islamic law forbids providing a prisoner with due process, only International Law requires it. 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 Law prohibits these practices.

It is a viable option for Islamic law to supplement International Law because most Muslim states are either influenced by or directly apply Islamic law. The Kingdom of Saudi Arabia, Pakistan, and the Islamic Republic of Iran all apply Islamic law directly as the primary source of law, while Egypt and Syria merely consider Islamic law to be one of sev-

eral possible sources of law.³⁵⁸ Regardless of where Muslim states fall on this spectrum, their desire to either apply or accept Islamic law evidences probable concurrence on 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 in 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 non-combatant safe zones, secure borders, and encourage rebel forces to adhere to *jus in bello* principles by granting them combatant immunity and denying their ability to refute rules based on divine law. As for extremist organizations that are unlikely to come to the bargaining table, states can still afford such organizations 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 years to come. The nature of the conflict demands a creative legal solution to protect its victims. Applying both Islamic and International Law is that creative solution.

³⁵⁸ SHAH, *supra* note 78, at 7-8.

