

From Words to Deeds: A Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms

Al-Qaeda

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LIST OF ACRONYMS AND ABBREVIATIONS

ANSA	Armed non-state actor
AP	Anti-personnel
AQAP	Al-Qaeda in the Arabian Peninsula
AQI	Al-Qaeda in Iraq (Al-Qaeda in Mesopotamia)
AQIM	Al-Qaeda in the Islamic Maghrib
AQIS	Al-Qaeda in the Indian Subcontinent
AV	Anti-vehicle
AWSD	Aid Worker Security Database
HTS	Hay'at Tahrir al-Sham (Organization for the Liberation of the Levant)
HRW	Human Rights Watch
ICRC	International Committee of the Red Cross
IHL	International humanitarian law
IHRL	International human rights law
ISg	Islamic State group
ISIS	Islamic State in Iraq and Sham
NIAC	Non-international Armed Conflict
OIC	Organisation of Islamic Cooperation

GLOSSARY OF TERMS

Aman: A safety pledge made by Muslims to non-Muslims ensuring safe temporary residence in the Muslim world. Also, a safety pledge made by non-Muslims to Muslims in non-Muslim territory.

Baghy: Rebellion against a Muslim ruler.

Dhimma: Contract under which non-Muslims resided in Muslim territory in early Muslim societies.

Dhimmi: A non-Muslim person who possesses a dhimma contract.

Hakimiyya: Divine sovereignty – adherence to Islamic law as the primary tenet of governance.

Hiraba: The crime of highway robbery in the classical jurisprudential tradition, extended by modern Muslim scholars to include conflicts with terrorists.

Jahiliyya: the age of ignorance, referring to the period before Prophet Muhammad's message in the Arabian Peninsula. Often used in modern contexts to describe societies perceived as straying from the message of Islam.

Jihad: Literally, the exertion of one's best effort (in the path of God), but legally, conflicts with non-Muslims.

Jizya: A tribute/tax paid by non-Muslims who permanently resided in early Muslim societies under a dhimma contract.

Ridda: Renunciation of the Muslim faith. Conflicts with those who commit ridda are treated by some scholars as coming under a separate legal regime.

Takfir: A declaration that someone has committed ridda

Tatarus: Often referred to situations where the Muslim army was besieging a non-Muslim city and the non-Muslim army used untargetable categories such as women, children and Muslims as shields.

EXECUTIVE SUMMARY

This case study has been conducted as part of the research project as part of the research project 'From Words to Deeds: A research Study of Armed Non-State Actors' Practice and Interpretation of International Humanitarian and Human Rights Norms', which aims at providing tools for an effective engagement of armed non-State actors to improve humanitarian protection.

From a legal perspective, while ANSAs are bound by IHL, how they actually perceive, understand and act upon their obligations has remained insufficiently explored. Through a comparative analysis of selected norms, the research project aims to advance understanding of ANSAs' perspectives and behaviour, enhance strategies to promote their compliance with IHL as well as inform future international law-making processes.

Due to the rejectionist position taken by al-Qaeda towards the international global order and its claim to exclusive reliance on Islamic law, the research team has decided to focus its legal analysis on Islamic laws of war. Considering the fluidity and diversity of views in Islamic law, examined in Section 4 on applicable law, the case study offers an overview of some of the key al-Qaeda documents, highlighting the group's ideological positions on the norms examined and contrasting them with the classical jurisprudential tradition and some mainstream Muslim institutions and scholars such al-Azhar, Wahbah al-Zuhayli and Yusuf al-Qaradawi. Reference is also sometimes made to the Cairo Declaration on Human Rights in Islam, an international legal document arrived at under the auspices of the Organisation of Islamic Cooperation (OIC).

Key findings include:

- Al-Qaeda does not consider itself bound by IHL. Modern Muslim scholars and institutions argue that when Muslim states become parties to an international treaty, the treaty enters the corpus of Islamic legal obligations on the basis of Muslim polities' duty to uphold pacts. Contrary to this view, al-Qaeda claims that Muslim states' acceptance of international legal obligations is evidence of infidelity to Islam and the group instead asserts its exclusive adherence to Islamic law. Treatises published by key group ideologues reference early Muslim juristic views to assert their compliance with Islamic laws regulating armed conflict.
- The group claims that most modern Muslim governments must be considered infidels, thereby denying the applicability of Islamic law's regulation of inter-Muslim political conflicts (baghy). At the same time, claims of the infidelity of Muslim governments help the group deny the applicability of the regime of aman, which provides temporary safety and protection to non-Muslims in Muslim territory. It should be noted that later works by al-Qaeda ideologues seem to restrict the infliction of damage in Muslim countries, but the group's rationale of apostasy, invalidating visas granted to non-Muslims, is most evident in Ayman al-Zawahiri's early works.
- The group offers an expansive interpretation of participation in combat on the basis of offering support to the war efforts of the state. Support is not interpreted as direct support or participation, but is stretched to include taxpayers and voters, thereby creating space

to expand the category of targetable individuals and eroding traditional Islamic legal protections of certain groups such as women. In addition to an expansive definition of participation in conflict, the group stretches the Islamic notion of *tatarus*, traditionally applicable to situations of collateral damage of human shields, to justify the use of indiscriminate war tactics, such as the use of explosive devices. As noted later in the study, more caution is exercised by al-Qaeda when Muslims and non-Muslim residents of Muslim territories would be the probable victims of indiscriminate attacks.

- Some of the examined norms, such as humanitarian access and the protection of cultural property, receive little attention in the group's ideological works. However, its criticism of the Islamic State group's (ISg's) targeting of relief workers and the AQIS (al-Qaeda in the Indian Subcontinent) Code of Conduct's focus on limiting destruction to avoid the infliction of damage on the wider public can be treated as a starting point for a commitment to refrain from violations of those norms.
- Al-Qaeda's affiliates have deviated to varying degrees from the 'mother' organization's commitments regarding the examined norms. For example, there are several reports that the affiliates examined in this case study have often targeted non-Sunni Muslims and other religious minorities.
- In our analysis, while the rise of the rival ISg may have further radicalized al-Qaeda's affiliate (Jabhat al-Nusra), it has led al-Qaeda to attempt to contrast itself to the ISg as a more moderate and restrained group in its discourses about their limitations under Islamic law. This is best exemplified by the AQIS Code of Conduct. While there are issues with the Code's interpretation of who may be targetable, both on the grounds of Islamic law and international law, it asserts the need for restraint in targeting and in the infliction of damages on adversaries even when the method or target is, from the group's point of view, legitimate under Islamic law. This is to avoid the alienation and antagonization of the Muslim masses. Moreover, al-Qaeda and its affiliates have never endorsed practices adopted by the ISg that have shocked Muslims and non-Muslims, such as sexual violence and slavery, which further distinguishes the two groups.
- Al-Qaeda's ideologues rely extensively on claims of excessive force and oppression by adversaries to justify the group's tactics as fending off oppression and reciprocity. They argue that dissent in oppressive regimes in the Muslim world is not possible and thus the only way to alleviate oppression is to resort to the tactics the group endorses. At the same time, they argue that warring parties have engaged in several violations, repeatedly citing the deaths of women and children, in order to justify their indiscriminate tactics. Addressing these two main claims/grievances would disarm al-Qaeda of the justifications for its methods of combat.

INTRODUCTION

This case study has been conducted as part of the research project ‘From Words to Deeds: A research Study of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms’,¹ which aims at providing tools for an effective engagement of armed non-State actors to improve humanitarian protection. During the life of the project, funds were received from UK Research and Innovation, the UK Foreign, Commonwealth and Development Office, the Swiss Department of Foreign Affairs and the Humanitarian Aid Department of the European Commission.²

The research builds on three interrelated trends. First, as most armed conflicts today are non-international,³ ANSAs tend to play prominent roles, exerting a growing influence over the lives of individuals worldwide. Because of the humanitarian consequences their actions entail, especially for the civilian population, the international community has called for a more sustained engagement with ANSAs toward IHL compliance.⁴ Second, from a legal perspective, though it is undisputed that ANSAs are bound by IHL, how they view, interpret or implement

1 The issue of human rights obligations of armed non-state actors (ANSAs) under international law remains controversial both at the theoretical and policy levels. Therefore, the present research project focuses on collecting and analysing ANSAs’ practice and interpretation of international humanitarian law (IHL) rules. Nevertheless, norms related to human rights, such as gender equality or the 18-year age limit for recruitment and participation of children in hostilities have been included in the interviews. Indeed, even if the issue of human rights obligations of ANSAs is controversial, ANSAs themselves often refer to human rights in their policies and regulations. This is a good indication of what some ANSAs feel bound by and thus deserves to be considered in the analysis, notably because it can be indicative of what could be included in future law-making processes.

2 For further information on the project, see A. Bellal, P. Bongard and E. Heffes, *From Words to Deeds: A Research of Armed Non-State Actors’ Practice and Interpretation of International Humanitarian and Human Rights Norms*, Research Brief, Geneva Academy of International Humanitarian Law and Human Rights (Geneva Academy), December 2019, <https://www.geneva-academy.ch/joomlatools-files/docman-files/From%20Words%20to%20Deeds%20A%20Research%20of%20Armed%20Non-State%20Actors%E2%80%99%20Practice%20and%20Inter.pdf> (last accessed 9 August 2022).

3 Despite widespread recognition that the majority of armed conflicts today are non-international in nature, there are divergent views on the precise number. See A. Bellal (ed), *The War Report: Armed Conflicts in 2018*, Geneva Academy, 2019, p 19, <https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf> (last accessed 9 August 2022), p 19; International Committee of the Red Cross (ICRC), *The Roots of Restraint in War*, 2018, pp 13–14.

4 United Nations Security Council, *Protection of Civilians in Armed Conflict: Report of the Secretary General*, UN doc S/2019/373, 7 May 2019, §66 (affirming that ‘enhancing respect for the law requires changing the behaviour and improving the practices of non-State armed groups. Key to this is principled and sustained engagement by humanitarian and other relevant actors that is, moreover, strategic and based on a thorough analysis of the group(s) concerned’).

their international obligations has remained insufficiently explored.⁵ While a number of studies have analysed states' practice, notably the 2005 study by the International Committee of the Red Cross (ICRC) on customary IHL,⁶ A comprehensive analysis of existing humanitarian norms from the perspective of ANSAs has yet to be made. Only then will one 'know how the existing rules and possible future development of IHL ... would change if they were taking the perspective of non-State armed groups into account'.⁷ Finally, the state-centric approach to ANSAs' international obligations may explain to some extent the lack of ownership of, and compliance with, international law by these actors. Indeed, there is an increasing sense that ANSAs' compliance with international law is likely to improve if they are consulted about the development and implementation of the rules that are binding upon them.⁸

This research project aims to increase our knowledge of ANSAs' practice and interpretation of selected international norms, notably in IHL.⁹

5 Several authors have referred to this knowledge gap. See, among others, M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, 2019; H. Jo, *Compliant Rebels: Rebel Groups and International Law in World Politics*, Cambridge University Press, 2015; D. Petrasek, *Ends & Means: Human Rights Approaches to Armed Groups*, International Council on Human Rights Policy, 2000, <https://reliefweb.int/attachments/2d260b8d-64fa-32ce-97ad-3d639c95f777/3DCC2D9C95FC0BCFC1256C14004E55A1-EndsandMeans.pdf> (last accessed 9 August 2022).

6 J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge University Press, 2005. See also the ICRC Customary IHL Database (ICRC CIHL Database), <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home> (last accessed 9 August 2022). It should be noted that the 2005 ICRC study on customary IHL does not focus entirely on issues of compliance with IHL, but on the identification of customary norms within this realm. Of course, an argument can be made that the practice and *opinio juris* needed for the latter serves as an indicator to measure the level of acceptance of, and respect for, the applicable legal framework. A study on the correlation between both is beyond the scope of this case study.

7 M. Sassòli, 'Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law', 1 *Journal of International Humanitarian Legal Studies* 1 (2010) 19.

8 *Ibid*; S. Sivakumaran, 'Implementing Humanitarian Norms Through Non-State Armed Groups', in H. Krieger (ed), *Inducing Compliance with International Humanitarian Law: Lessons From the African Great Lakes Region*, Cambridge University Press, 2015; S. Sivakumaran, *The Law of Non International Armed Conflict*, Oxford University Press, 2012.

9 The research examines ANSAs' perspectives on the following core norms: i) protection of civilians from attacks; ii) the prohibition of sexual violence and gender discrimination; iii) the prohibition of using and recruiting children in hostilities; iv) the protection of education; v) humanitarian access; vi) protection of health care; vii) the prohibition of forced displacement; viii) use of landmines and other explosive devices; ix) detention, fair trial and administration of justice; x) the special protection of certain objects, such as cultural property and the environment. The choice of these norms has been dictated by three factors: First, the violation of these norms represents a current challenge identified by various humanitarian actors when dealing with ANSAs. The second factor is related to ANSAs' perceptions of these norms, as some of them

It focuses on the following main questions:

- Are ANSAs familiar with these norms and how do they understand them?
- Do they agree with their content?
- What factors influence their policy and practice?
- Are there new issues that ANSAs would be willing to regulate in the future?

By compiling and analysing ANSAs' views and interpretation on a comparative basis (the sources include unilateral declarations, public statements, codes of conduct, command orders, penal codes, 'legislations', decrees, memoranda of understanding, special agreements, as well as peace and ceasefire agreements), the research provides a better sense of how ANSAs perceive IHL, which norms are more accepted or disputed and why. It also sheds light on the causes of violations or, *a contrario*, the actors that are conducive to compliance or restraint. Altogether, the results of the research advance our understanding of ANSAs' behaviours during armed conflicts and inform strategies to promote their compliance with IHL as well as future international law-making processes.

METHODOLOGY

Because the research project aims to offer an analysis of ANSAs' claims about law and the legitimacy of their actions, and due to the rejectionist position taken by al-Qaeda towards the international global order, including international law, the research team has decided to focus its legal analysis on Islamic laws of war. Considering the fluidity and diversity of views in Islamic law, examined in Section 4 on applicable law, the case study offers an overview of al-Qaeda's ideological positions on the norms examined and contrasts them with the classical jurisprudential tradition and mainstream Muslim institutions and scholars.

Both the classical and modern interpretations of Islamic law reflect great diversity, deeming it impossible to offer an exhaustive overview of these traditions within the confines of this case study. Thus, in reference to the classical tradition, the study mostly relies on classical works that offer an overview of different juristic positions, such as Al-Tabari's *Kitab al-Jihad*, Ibn Qudama's *Al-Mughni* and Ibn Rushd's *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*.

To give the reader a sense of some of the modern views of Islamic laws of war that contradict the group's position, the study refers to certain statements made by al-Azhar or key Islamic scholars or research conducted by prominent modern Muslim scholars such as Muhammad Abu Zahra, Wahbah al-Zuhayli and Yusuf al-Qaradawi. It should be noted that the mainstream literature examined in the case study is not meant to provide an exhaustive overview of the modern Islamic

represent the most contentious and challenging humanitarian provisions from their perspective. Finally, some of the selected norms may be part of future legal developments.

interpretation of the laws of war, but rather to offer the reader a glimpse of how the modern mainstream tradition contradicts the group's views of Islamic law.

Reference is also sometimes made to the Cairo Declaration on Human Rights in Islam, an international legal document arrived at under the auspices of the OIC. This source is relevant to the debate on human rights norms in Islam for two reasons. First, as clarified later in this study, Muslim states' positions on the role of human rights may be utilized to determine a modern position on the Islamic interpretation of human rights issues. Second, the Cairo Declaration, in addition to having been arrived at under the auspices of the OIC, asserts that 'The Islamic Shari'a is the only source of reference for the explanation or clarification of any of the articles of this Declaration.'¹⁰

The following key intellectual mainstream figures/works have been relied on in the study:

1. Works published under the auspices of al-Azhar, one of the most renowned Sunni institutions in the Muslim world.
2. A collective letter from Muslim scholars to Abu Bakr al-Baghdadi.¹¹ While the letter is directed at the Islamic State in Iraq and Sham (ISIS), it is key to highlighting the general agreement of prominent Muslim scholars on issues of Islamic law pertaining to armed conflict.
3. Muhammad Abu Zahra (1898–1974): an Egyptian scholar who worked extensively on Islamic laws of war.
4. Wahbah al-Zuhayli (1932–2015): a prominent Syrian jurist and professor of jurisprudence at Damascus University, who wrote extensively on Islamic laws of war.
5. Yusuf al-Qaradawi: a prominent Muslim jurist who has written on Islamic laws of war. Al-Qaradawi, who is Chair of the International Union of Muslim Scholars, maintains a strong relationship with the Muslim Brotherhood.

With regard to al-Qaeda's interpretation of Islamic laws of war, the following key militant figures have been relied on in the study:

1. Abu Abdullah al-Muhajir (Abdul Rahman al-Ali) (d. 2016): an Egyptian militant ideologue who was initially critical of al-Qaeda, but later joined the organization and 'by 1998 ... had become dean of al-Qa`ida's Shariah College'.¹²

¹⁰ Art 25, Cairo Declaration on Human Rights in Islam, 5 August 1990, <https://www.refworld.org/docid/3ae6b3822c.html> (last accessed 25 August 2022).

¹¹ 'Open Letter To Dr. Ibrahim Awwad al-Badri, Alias "Abu Bakr al-Baghdadi"' and 'To the Fighters and Followers of the Self-Declared "Islamic State"' (Letter to Baghdadi), 19 September 2014, <http://www.lettertobaghdadi.com/14/english-v14.pdf> (last accessed 25 August 2022).

¹² T. Hamming, 'The Hardline Stream of Global Jihad: Revisiting the Ideological Origin of the Islamic State', 12 CTC Sentinel 1 (January 2019), <https://ctc.usma.edu/hardline-stream-global-jihad-revisiting-ideological-origin-islamic-state/> (last accessed 25 August 2022).

2. Abu Muhammad al-Julani (Ahmad Hussein al-Shar’): the leader of Jabhat al-Nusra and later Hay’at Tahrir al-Sham (Organization for the Liberation of the Levant – HTS)
3. Abu Muhammad al-Maqdisi (Issam al-Barqawi): a Jordanian militant ideologue. While he is not officially associated with al-Qaeda, his works have influenced its theoretical approaches to jihad, and particularly the Jordanian jihadi Abu Mus’ab al-Zaqawi. Referred to by the Combating Terrorism Center at West Point as ‘the key contemporary ideologue in the Jihadi intellectual universe’.¹³
4. Abu Musab al-Zarqawi (Ahmad Fadil al-Nazal al-Khalayleh) (d. 2006): a Jordanian militant who headed al-Qaeda in Iraq.
5. Ayman al-Zawahiri (d. 2022): co-founder of al-Qaida with Osama bin Laden and the leader of the organization from 2011– 2022.

Al-Qaeda is a prolific, decades-old organization that builds on previous militant approaches to Islamic laws regulating armed conflict, and continues to develop numerous writings on the subject. The group is also widely argued to have been influenced by key militant literature from within and outside the organization’s ranks. Due to this prolific output, it is impossible to offer a full overview of militant works addressing questions relating to Islamic laws of war. It should also be noted that, considering the expansion of the group and the rise of several affiliates, the views examined here do not necessarily reflect the views and positions of all affiliate groups. Thus, the case study focuses primarily on the works of Abu Muhammad al-Maqdisi and the co-founder and leader, until his death in July 2022, of al-Qaeda, Ayman al-Zawahiri. While al-Maqdisi, a Jordanian militant ideologue, is not officially associated with al-Qaeda, his works have influenced its theoretical approaches to jihad, and particularly the Jordanian jihadist Abu Mus’ab al-Zaqawi before the latter’s further radicalization. His influence and the continued reverence towards him, are the primary reasons for his inclusion in the examination of the group’s approach to Islamic laws of war. Caution must be employed, however, in assuming that al-Maqdisi’s views are necessarily al-Qaeda’s. As highlighted below, it is evident that al-Maqdisi’s positions are often more moderate – if this term can be used – than al-Zawahiri’s. The study also, when necessary, relies on the views of Abu Abdullah al-Muhajir, as a representation of more radical views within al-Qaeda. Whenever necessary, reference is also made to fatwas issued by other key militant figures within the organization and two of its affiliates:

- 1) Al-Qaeda in the Arabian Peninsula (AQAP) and its affiliate Ansar al-Sharia. The case study focuses on the conduct of AQAP, considering its establishment and endorsement by al-Zawahiri, which indicates a general proximity of AQAP to al-Qaeda al-Umm – the mother organization (see the al-Qaeda profile in Section 3).
- 2) Jabhat al-Nusra (rebranded in July 2016 as Jabhat Fatah al-Sham and later in 2017 as HTS): The case study focuses on Jabhat al-Nusra because it provides a good contrast to the ISIS case study in this project. It examines Jabhat al-Nusra’s practice until 2016, because the rift

13 J. Wagemakers, ‘Abu Muhammad al-Maqdisi’, 1 CTC Sentinel 6 (May 2008), November 16, 2020, <https://ctc.usma.edu/abu-muhammad-al-maqdisi-a-counter-terrorism-asset/> (last accessed 25 August 2022).

between al-Qaeda al-Umm and the rebranded organization indicates a significant divergence thereafter (see the al-Qaeda profile in Section 3).

In the early twenty-first century, al-Qaeda expanded through the creation of affiliates who enjoy varying degrees of proximity with the mother organization, such as al-Qaeda in Europe, al-Qaeda in Egypt, al-Qaeda in Mesopotamia (al-Qaeda in Iraq – AQI), al-Qaeda in the Islamic Maghrib (AQIM),¹⁴ al-Qaeda in the Arabian Peninsula (AQAP) and Jabhat al-Nusra. It is impossible to sum up the practice of these affiliates within the scope of this research, thus the paper focuses on the AQIS Code of Conduct, in addition to the practice of Jabhat al-Nusra and AQAP. AQIS' proximity to al-Qaeda al-Umm has led some commentators to argue that it is the most reflective of the organization among its peripheries, deeming its Code of Conduct a good example of the organization's practice.¹⁵ AQAP serves as a good example of a group affiliated with al-Qaeda, given its close ties with the mother organization and al-Zawahiri's direct involvement in its setup. Meanwhile, Jabhat al-Nusra's activities in Syria make it a fitting example for the purposes of the case study because its practice can be contrasted with that of the ISG. The case study also relies on United Nations and human rights organizations' reports on violations committed by AQAP, which later became Ansar al-Sharia and Jabhat al-Nusra, until its metamorphosis in July 2016 into Jabhat Fatah al-Sham and then HTS in 2017.¹⁶ In addition to UN reports on the conduct of the two affiliates, the case study also relies on their propaganda newsletters.

Finally it is important to note that, in contrast to the other case studies within the framework of this research, for security, as well as legal, reasons no field research was conducted to interview members of either of the groups examined here.

AL-QAEDA PROFILE

Al-Qaeda originated as a political movement that uses militant insurgency as a means of struggle against, what it sees as, illegitimate authoritarian regimes in the Muslim world and a 'colonial' anti-Muslim international system. Emerging in the context of post-colonial struggles in the Islamic world, al-Qaeda represents a variation of political Islamic movements and their agenda of instituting a mode of governance that closely adheres to Islam and Sharia law. On the one hand, al-Qaeda builds on the ideological corpus of these movements, namely the ideas of Sayyid Qutb

¹⁴ The French acronym, AQMI, is also commonly used.

¹⁵ The Soufan Center, Al-Qaeda in the Indian Subcontinent: The Nucleus of Jihad in South Asia, January 2019, p 7, <https://thesoufancenter.org/wp-content/uploads/2019/01/Al-Qaeda-in-the-Indian-Subcontinent-AQIS.pdf> (last accessed 25 August 2022). Whereas al-Qaeda's practice is not seen as a source in the interpretation of applicable law, the term practice is used here to clarify how the group interprets Islamic laws of war and to assess the extent to which its interpretations vary from other Islamic interpretations and to which its conduct complies with its own interpretations.

¹⁶ Center for Strategic and International Studies, 'Hay'at Tahrir al-Sham (HTS)', <https://www.csis.org/programs/transnational-threats-project/past-projects/terrorism-backgrounders/hayat-tahrir-al-sham> (last accessed 25 August 2022).

(1906–1966)¹⁷ and Abu al-A‘la al-Mawdudi (1903–1979),¹⁸ among others. Al-Mawdudi’s concept of hakimiyya (divine sovereignty) along with Qutb’s notion of jahiliyya (the age of ignorance, referring to the period before Prophet Muhammad’s message in the Arabian Peninsula) laid out the basis of the permissibility, that is, responsibility, of Muslims to carry out jihad against the regimes adopting and perpetuating modern law, instead of the rule of Sharia (God’s law).¹⁹ On the other hand, al-Qaeda signifies a practical mutation of the political Islamic movements’ focus on internal issues of legitimacy and social welfare in opposition to the authoritarian regimes of their countries (the near enemy) into an outward focus on the colonial powers, referred to as the ‘far enemy’.²⁰ According to al-Qaeda’s logic, colonial powers primarily caused and continue to perpetuate the situation in the Islamic world and must thus be defeated in order to defeat the near enemy – authoritarian apostate regimes in the Muslim world.

Al-Qaeda’s trajectory can be seen in four distinct phases: first, the formative period bearing the group’s origins during the Afghan War and throughout the 1980s; second, the 1990s, witnessing the United States’ intervention in the Gulf War and in Somalia as well as the increase in its military bases in the Arabian Peninsula, leading to al-Qaeda’s declarations of war against the US and Israel, which culminated in the 9/11 attacks; third, the post-2001 period which saw a set of key transformations: al-Qaeda going underground in the face of an international counterterrorism campaign (the Afghanistan War in 2001 followed by Iraq war in 2003), and its decision to franchise its jihadist agenda, with al-Qaeda affiliates emerging all over the world (from Iraq and the Arabian Peninsula to the Maghrib and Europe). A crucial repercussion of al-Qaeda’s franchising has been the relationship of al-Qaeda al-Umm with its different affiliates. In their pursuit of local agendas and their loose connection to the core, these affiliates have proved to have rationales of their own, sometimes contradictory to that of al-Qaeda al-Umm. In this fourth phase of al-Qaeda’s history (2001–2011), the organization has witnessed rifts in its own ideology due to this franchising. Al-Qaeda in Iraq is a case in point, where the affiliate has eventually metamorphosed into the Islamic State (see Islamic State Group case study).

A. PHASE ONE: ORIGINS

Against the backdrop of the Cold War, al-Qaeda’s nucleus originated as a response to the Soviet Union’s military intervention in Afghanistan in support of the communist Afghan Government

17 S. Khatab, *The Political Thought of Sayyid Qutb: The Theory of Jahiliyyah*, Routledge, 2006; for more on al-Qaeda’s Qutbi origins, see: F. A. Gerges, *The Rise and Fall of Al-Qaeda*, Oxford University Press, 2011, pp 30–34.

18 V. Pugachev, ‘Abul A‘la Mawdudi’s Concept of Hakimiyya and its Critical Assessment in Islamic Legal-Political Thought’, 9 *Vestnik of Saint Petersburg University. Law* 2 (2018), <https://core.ac.uk/download/pdf/217187421.pdf> (last accessed 25 August 2022).

19 W. E. Shepard, ‘Sayyid Qutb’s Doctrine of Jahiliyya’, 35 *International Journal of Middle East Studies* 4 (2003).

20 D. L. Byman and J. R. Williams, ‘ISIS vs. al-Qaeda: Jihadism’s Global Civil War’, Brookings, 24 February 2015, <https://www.brookings.edu/articles/isis-vs-al-qaeda-jihadisms-global-civil-war/> (last accessed 4 March 2022).

in 1979. Fighters from all over the Muslim world rallied to Afghanistan in answer to calls for jihad against the Soviet infidels.²¹ Osama bin Laden – the leader and financier of al-Qaeda who came to be an inspiration for much wider circles of jihadis and Muslims in general – himself joined the war in Afghanistan back in 1979.²² This network can be seen as the nucleus of what came to be al-Qaeda, operating as a microcosm of its religious orientation, recruitment and aspired-for reach. Bin Laden then met Ayman al-Zawahiri, an Egyptian jihadist who led the Islamic Jihad group in Egypt and became the second-in-command of al-Qaeda since its inception until the death of bin Laden in 2011, after which he assumed the leadership of the organization until his death in 2022. From as early as 1989, the group came to be known as al-Qaeda (Arabic for The Base), whose aim was the military recruitment and training of fighters from all over the world in Afghanistan.²³

B. PHASE TWO: DECLARING WAR

The second turning point in al-Qaeda's history is the Iraqi invasion of Kuwait in 1990. Osama bin Laden offered to mobilize his network of Arab Afghans to protect the Saudi regime. The Saudis, however, declined his offer and proceeded in their request for military assistance from the US, bringing American troops to the Arabian Peninsula. From 1991 to 1996, al-Qaeda operated from Sudan. Throughout this period, it opposed the increasing US intervention in the Arabian Peninsula. When the US launched Operation Restore Hope in Somalia in 1992–1993, bin Laden sent al-Qaeda members to help the Somali fighters against the American intervention.²⁴ The years in Sudan and Somalia were an active search for an alternative to Afghanistan, which became less hospitable after the Soviet withdrawal in 1989. The situation changed with the Taliban's ascent to power and the eventual expulsion of the group from Sudan, providing an opportunity for al-Qaeda to move back to Afghanistan in 1996.

By 1996, al-Qaeda's identification of the US as the target of its jihad – the grand evil that all jihad should start with – crystalized. In this year, bin Laden issued the Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Sites.²⁵ In 1998, al-Qaeda issued a second declaration of war. In this document, bin Laden takes things a step further by issuing a fatwa saying, '[t]he ruling to kill the Americans and their allies – civilians and military – is an

21 R. K. Cragin, 'Early History of al-Qa'ida', 51 *The Historical Journal* 4 (2008).

22 B. O. Riedel, *The Search for Al Qaeda: Its Leadership, Ideology, and Future*, Brookings Institution Press, 2008, pp 43–44.

23 M. Ould Mohamedou, *Understanding Al Qaeda: The Transformation of War*, Pluto Press, 2007, p 46.

24 Al-Qaeda members submitted reports to Osama bin Laden on the situation in Somalia. See S. al-'Adl, 'A Short Report on the Trip from Nairobi', *Combating Terrorism Center at West Point*, n.d., translated on 20 March 2002. <https://ctc.usma.edu/harmony-program/a-short-report-on-the-trip-from-nairobi-original-language-2/> (last accessed 25 August 2022).

25 O. bin Laden, 'Declaration of Jihad Against the Americans Occupying the Land of the Two Holiest Sites', *Combating Terrorism Center at West Point*, n.d., <https://ctc.usma.edu/harmony-program/declaration-of-jihad-against-the-americans-occupying-the-land-of-the-two-holiest-sites-original-language-2/> (last accessed 2022).

individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa Mosque and the holy mosque [Mecca]'.²⁶ For al-Qaeda, the role of the US in the Middle East – be it its intervention in the Gulf War or Somalia, its military bases in the Arabian Peninsula or its direct support to the authoritarian regimes in the region and to Israel– identified it as the neo-colonial power behind the dysfunctional economic and political situation of the Middle East (and the Muslim world).²⁷

During the last half of the 1990s, al-Qaeda also emerged with a well-structured hierarchy of its own. With bin Laden as the leader of the organization, and al-Zawahiri as his deputy, al-Qaeda had a majlis shura (consultation council) that included 31 members working in units for military operations, finances, religious affairs, media and logistics.²⁸ Thus, for al-Qaeda, this period was not only time for a clear ideological configuration/orientation, it was also a phase of operationalization. On one hand, it focused on structuring its bureaucracy, its military training/operations and its media and recruitment outreach. On the other, it undertook a mission of exporting its ideology (transnational jihad), garnering support from all over the Muslim world, all while sending its message to the enemy loud and clear. During this phase, al-Qaeda was most successful in launching large attacks on US targets, culminating in its infamous 9/11 attacks.

C. PHASE THREE: REORGANIZATION

The aftermath of the 9/11 attacks marks what is arguably the most contentious phase of the US's relationship with the Middle East region, with the US war in Afghanistan in late 2001 followed by the invasion of Iraq in 2003. In the face of an open war against the US, al-Qaeda underwent a set of changes to adapt to the situation, thus changing the organization's structure and mode of operation completely, with the main network going underground and relying on loosely connected affiliates in different localities – a balance that proved to be difficult to maintain over the following years.²⁹

Between 2005 and 2010, several affiliates of al-Qaeda emerged: al-Qaeda in Europe, al-Qaeda in the Sinai Peninsula, AQI, AQIM and AQAP.³⁰ While some of these affiliates proved to be less sustainable than others and some were merely loose networks such as al-Qaeda in Europe, they all represent the logic of geographical expansion that al-Qaeda deployed. Throughout this phase, a differentiation between al-Qaeda al-Umm's attacks and those of the franchises crystalized,

26 'Jihad Against Jews and Crusaders', World Islamic Front Statement, 23 February 1998, <https://fas.org/irp/world/para/docs/980223-fatwa.htm> (last accessed 25 August 2022).

27 Ibid.

28 Gerges, *The Rise and Fall of Al-Qaeda*, supra fn 17, p 47.

29 M. Ould Mohamedou, *The Rise and Fall of Al Qaeda: Lessons in Post-September 11 Transnational Terrorism*, Geneva Centre for Security Policy, 2011, https://ciaotest.cc.columbia.edu/wps/gcsp/0022687/f_0022687_18672.pdf (last accessed 25 August 2022); Ould Mohamedou, *Understanding Al Qaeda*, supra fn 23, pp 53–57.

30 Ould Mohamedou, *The Rise and Fall of Al Qaeda*, supra fn 29, pp 23–24.

with those of al-Qaeda al-Umm spreading across European metropolises (for example, the Madrid and London attacks in 2004 and 2005, respectively), and the affiliates carrying out smaller-scale attacks on western targets/subjects (tourists, western countries' embassies and consulates and US headquarters) as well as the governments of their localities.³¹

One should avoid drawing a picture of this phase as one of smooth adaptation on the part of al-Qaeda. The decade also witnessed a prolonged draining of the organization's cadres; senior members were targeted, ending with the death of bin Laden himself in May 2011.³² The question of the strength of al-Qaeda is difficult to answer. The wars in Afghanistan and Iraq proved to be a serious depletion of resources that al-Qaeda smartly decided not to engage in. The US war in Iraq, in particular, garnered for al-Qaeda some unprecedented support from in the Arab and the Muslim worlds (at least before AQI's attacks in Iraq).³³ Moreover, in post-Saddam Hussein Iraq, al-Qaeda found a perfect alternative to their physical base in Afghanistan, which remained essential until the Yemeni and Syrian civil wars in 2011, opening new fields for the organization.

D. PHASE FOUR: LOCALIZATION

In the post-2011 phase of al-Qaeda's history, the organization metamorphosed in a practical as well as ideological sense. The decade started with the Arab Spring uprisings in 2010/2011, which posited a radically distinct alternative to al-Qaeda's path of change, through the non-violent uprisings of the masses and the rise of Islamist movements like the Muslim Brotherhood – the fundamental competitor among religiously inspired militant groups.³⁴ Nevertheless, the instability and chaos that ensued, breaking into full-fledged civil wars in Syria, Libya and Yemen, and the considerable setback to the police state in Egypt, opened unprecedented opportunities for al-Qaeda and other militant groups, notably ISIS, to base themselves in these local contexts.³⁵

Under al-Zawahiri's leadership – announced in June 2011, six weeks after bin Laden's death in May 2011 – al-Qaeda al-Umm's strategy shifted to further delegation to the local affiliates. Thus, the foundational premise of al-Qaeda, i.e. targeting the far enemy, metamorphosed into

31 Ibid, pp 61–62.

32 The US killed the military chief Mohammed Atef, also known as Abu Hafs al-Masri, in 2001, and successfully detained Ramzi Ben al-Shaiba and Khaled Sheikh Mohammad, top military operatives responsible for the September 2001 attacks, and Zein al-Abidin Mohammed Hussein (Abu Zubayda), the senior chief of operations during the period 2001–2003. As suggested by Fawaz Gerges, only the Pakistani authorities offered information to the US, enabling the targeting of more than 400 of bin Laden's lieutenants in the aftermath of the 9/11 attacks, including some from the highest ranks of al-Qaeda. Gerges, *The Rise and Fall of Al-Qaeda*, supra fn 17, p 105.

33 See Gerges' analysis of the US war in Iraq's impact on al-Qaeda's mass support. Ibid, pp 106–107.

34 C. Lister, *Al-Qaeda Versus ISIS: Competing Jihadist Brands in the Middle East*, Middle East Institute: Counter Terrorism Series, no 3, November 2017, p 1.

35 Ibid.

prioritizing the local, acknowledging the importance of engaging in a long game of change – realpolitik.

In September 2013 al-Zawahiri issued his General Guidelines for Jihad, which presented itself as a manifesto ushering in the organization's strategy and code of conduct in the post-2011 phase. The Guidelines prioritized attending to the local contexts of al-Qaeda's affiliates, advising them to engage with opposition groups to create and guarantee long-lasting local bases for al-Qaeda as well as wide popular support.³⁶ Al-Zawahiri ordered al-Qaeda's affiliates to refrain from operations against local governments, sectarian targeting (against Shiites, Ismailis and Ahmadis) and the killing of non-combatant civilians.³⁷ These messages from al-Qaeda al-Umm were a culmination of tendencies that had already been reverberating in different affiliates of al-Qaeda, whether in North and Western Africa under AQIM or the Arabian Peninsula under AQAP, the Guidelines being a formal pronouncement of this strategy.³⁸ The timing of the Guidelines' publication in 2013 was indicative of al-Qaeda's painstaking efforts to distance itself from the savagery and sectarian targeting associated with ISIS, which fueled the rifts between the two organizations, leading to their formal split in 2014 and the jihadist rivalry that ensued.

Beside this rejuvenation of al-Qaeda's strategy and code of conduct, this phase was characterized by an expansion – a multiplication – of local Qaeda affiliates, seizing the opening spaces in the post-Arab Spring period. For instance, AQIM expanded its presence to Tunisia and Libya following their uprisings, and to Mali, taking advantage of the civil war there.³⁹ AQAP strengthened its ties with the tribes of Southern Yemen, successfully seizing territories along the south coast.⁴⁰ Jabhat al-Nusra emerged as al-Qaeda's affiliate in Syria, playing a key role in the civil war. In 2012 al-Qaeda formalized al-Shabaab in Somalia as an affiliate.⁴¹ Ansar Bait al-

36 A. al-Zawahiri, General Guidelines for Jihad, as cited in Lister, *Al-Qaeda Versus ISIS*, supra fn 34, pp 5–6.

37 Ibid, pp 5–6; C. Thomas, *Al Qaeda and U.S. Policy: Middle East and Africa*, Congressional Research Service, 5 February 2018, p 12, <https://sgp.fas.org/crs/mideast/R43756.pdf> (last accessed 25 August 2022).

38 In 2012, the leader of al-Qaeda in the Islamic Maghrib sent a message to his forces in Mali asking them to slow down their application of Sharia and to treat people like 'babies': 'The current baby is in its first days, crawling on its knees, and has not yet stood on its two legs ...If we really want it to stand on its own two feet in this world full of enemies waiting to pounce, we must ease its burden, take it by the hand, help it and support it until its stands', R. Callimachi, 'In Timbuktu, Al-Qaida Left Behind a Manifesto', Associated Press, 14 February 2013, p2, <https://www.pulitzer.org/files/2014/international-reporting/callimachi/04callimachi2014.pdf>.

39 Lister, *Al-Qaeda Versus ISIS*, supra fn 34, pp 20–21.

40 M. Horton, 'Fighting the Long War: The Evolution of Al-Qa'ida in the Arabian Peninsula', 10 *CTC Sentinel* 1 (2017) 17, <https://ctc.westpoint.edu/fighting-the-long-war-the-evolution-of-al-qaida-in-the-arabian-peninsula/> (last accessed 25 August 2022).

41 Al-Shabaab (Arabic for Youth) has operated in Somalia since 2006. It pledged allegiance to al-Qaeda al-Umm in 2009, but it was not until 2012 that the later formalized its link to al-Qaeda. See Wilson Center, 'The

Maqdis operated in Egypt's Sinai as an affiliate of ISIS (which was under al-Qaeda al-Umm then) and later on, several allied groups emerged there including Ajnad Misr, Harakat Sawa'id Misr and Ansar al-Islam.⁴² In 2014, al-Zawahiri also announced the formation of AQIS under his leadership.

Al-Qaeda's expansion in the Middle East and North Africa region post-Arab Spring had its own challenges that continue to raise questions concerning the potency of the group and its future. On one hand, al-Qaeda's locally focused long-term approach gave rise to a rebranding wave undertaken by its affiliates. In 2011, AQAP in Yemen established Ansar al-Sharia in an attempt to distance itself from al-Qaeda's notorious name and frame itself within a more local agenda – a move that was encouraged by al-Zawahiri himself in an endorsement of local affiliates pursuing their own agendas in order to further enmesh themselves in the local contexts.⁴³ Jabhat al-Nusra (an al-Qaeda affiliate until 2016) in Syria also followed years later with an attempt to distance itself from al-Qaeda. In 2016, it changed its name into Jabhat Fath al-Sham, and later to Hay'at Tahrir al-Sham (HTS) following an alliance with several other Islamist opposition groups and militias in 2017. Jabhat al-Nusra's announcement of cutting ties with external entities was first seen as a tactical move to secure its position within the Syrian opposition forces. Although, in 2016, al-Zawahiri publicly gave Jabhat al-Nusra and other affiliates the green light to break off from al-Qaeda as long as they aspired to establish their own Islamic governance,⁴⁴ a series of assassinations and detentions of al-Qaeda's non-Syrian senior members by Jabhat al-Nusra severed the relationship between the two organizations.⁴⁵ In 2017, al-Zawahiri ferociously criticized al-Nusra: '[N]obody should be told to leave the Levant ...What is this heretical innovation that we should not have foreign links?'⁴⁶ Ever since its defection, HTS has been

Jihadi Threat 3: Whither Al-Qaeda?', 8 December 2016, <https://www.wilsoncenter.org/article/the-jihadi-threat-3-whither-al-qaeda> (last accessed 25 August 2022). Since then, al-Shabaab has been deemed al-Qaeda's most active branch after Jabhat al-Nusra in Syria during this decade (2011–2020). See Wilson Center, 'U.S. Report: Isis and Al Qaeda Threats in 2019', 30 June 2020, <https://www.wilsoncenter.org/article/us-report-isis-and-al-qaeda-threats-2019> (last accessed 25 August 2022).

42 Ansar Bayt al-Maqdis pledged allegiance to ISIS in November 2014; See The Tahrir Institute for Middle East Policy, Egypt's Rising Security Threat, 2015, https://timep.org/wp-content/uploads/2015/11/Tahrir_Report_FINAL_WEB.pdf (last accessed 25 August 2022). On Ansar al-Islam, see Wilson Center, 'U.S. Report', supra fn 41.9

43 Horton, 'Fighting the Long War', supra fn 40, pp 17–22.

44 'Zawahiri: Syria's Nusra Free to Break al-Qaeda Links', Al Jazeera, 2016, <https://www.dailymotion.com/video/x49800z> (last accessed 25 August 2022).

45 'Syria Group Hayat Tahrir al-Sham and al-Qaeda Legacy', BBC News, 22 May 2019, <https://www.bbc.com/news/world-middle-east-48353751>; O. Ajjoub, 'HTS and al-Qaeda in Syria: Reconciling the Irreconcilable', Middle East Institute, 20 December 2021, <https://www.mei.edu/publications/hts-and-al-qaeda-syria-reconciling-irreconcilable> (last accessed 25 August 2022).

46 Al-Zawahiri, as cited in Thomas, Al Qaeda and U.S. Policy, supra fn 37, p 10.

accused of abandoning the jihadi global agenda and challenged by other jihadist groups on this basis. Most important among these is Hurras al-Din, born out of a further defection of al-Qaeda loyalists from HTS in February 2018.

On the other hand, al-Qaeda continues to lose its cadres. In, Nasir al-Wuhayshi, leader of AQAP and al-Qaeda's presumed second in command was killed.⁴⁷ In 2019, Hamza bin Laden, the son and heir of Osama bin Laden who had been groomed to take over the leadership of the organization after al-Zawahiri, was reported dead⁴⁸ and in July 2022 al-Zawahiri was killed in a US drone attack with speculations over his successor.⁴⁹

BOX 1: IHL APPLICABLE TO AL-QAEDA

The determination of the applicability of IHL to al-Qaeda depends on the country in which the specific group operates. Indeed, similarly to the ICRC, this research considers that 'from a legal perspective, there is no such thing as a "war against terrorism"', and adopts a case-by-case approach in order to analyse and legally classify the various situations of violence.⁵⁰ Thus, in the context of the present case study, IHL has applied, or still applies, to several armed conflicts to which al-Qaeda al-Umm, AQAP as well as Jabhat al-Nusra, have been, or are still, parties to, notably in Afghanistan, Yemen and Syria. More specifically, and as confirmed by the US Supreme Court in *Salim Ahmed Hamdan v Donald H. Rumsfeld et al.*, Common Article 3 of the Geneva Conventions applied to the conflict between the US and al-Qaeda in Afghanistan.⁵¹ Common Article 3 also applies in the non-international armed conflict (NIAC) in which AQAP is involved in Yemen and to al-Nusra in Syria.⁵² While Afghanistan ratified the 1977 Additional Protocol to the Geneva Conventions (AP II) in 2009, Syria and Yemen are not parties to it and it was therefore

47 K. Fahim "Al Qaeda Confirms U.S. Strike Killed Nasser al-Wuhayshi, Its Leader in Yemen", The New York Times, June 16, 2015, <https://www.nytimes.com/2015/06/17/world/middleeast/al-qaeda-arabian-peninsula-yemen-nasser-al-wuhayshi-killed.html>, accessed 05 September 2022

48 C. Kube, 'Osama Bin Laden's Son and Heir, Hamza, Is Dead, U.S. Officials Say', NBC News, 31 July 2019, <https://www.nbcnews.com/politics/national-security/u-s-has-intel-osama-bin-laden-s-son-heir-n1037236>.

49 Jerome Drevon, "The al-Qaeda's Chief's Death and its Implications", International Crisis Group, <https://www.crisisgroup.org/asia/south-asia/afghanistan/al-qaeda-chiefs-death-and-its-implications>, accessed 05 September 2022.

50 ICRC, 'The Applicability of IHL to Terrorism and Counterterrorism', 1 October 2015, <https://www.icrc.org/fr/node/14180> (last accessed 25 August 2022).

51 US Supreme Court, *Salim Ahmed Hamdan v Donald H. Rumsfeld et al.*, 548 US 557 (2006).

52 See 'Non-International Armed Conflicts in Yemen', RULAC, last updated 8 May 2022, <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-yemen#collapse4accord> (last accessed 25 August 2022); 'Non-International Armed Conflicts in Syria', RULAC, last updated 24 May 2022, <https://www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-syria#collapse4accord> (last accessed 25 August 2022).

not considered in relation to the groups operating in these contexts. Customary IHL applies, however, to all NIACs examined here, whether or not the different states have ratified APII.

THE APPLICABLE REGIME UNDER ISLAMIC LAW

As explained above, considering al-Qaeda's claim of adherence to Islamic law and rejection of the applicability of international law and international norms to its practices, this case study focuses on analysing AQAP's and Jabhat al-Nusra's practice from an Islamic legal perspective. As frequently asserted by scholars of Islamic law, the Islamic legal tradition has evolved as a legal system that prescribes the behaviour of the political authority rather than reflecting its sovereign will, thereby producing a jurist-centric field, with a decentralized structure of authority.⁵³ Difference and diversity of interpretation are key features of Islamic law to the present day, even with the emergence of the modern nation state and its more centralized, hierarchical approach to legal norms. There is no doubt that within this structure, formative and classic jurisprudential texts have over the years maintained more authority than modern interpretations due to factors that extend beyond the scope of this study.⁵⁴ However, even within revered and authoritative sources, juristic views often offer diverse interpretations of the law, including in this study's subject matter – the regulation of armed conflict.

Determining the applicable regime is also a complicated task because Islamic jurisprudence articulates the legal system along thematic lines, dividing it to different branches of law that are closely connected and difficult to separate. The isolated study of the branches of law regulating armed conflict disregards this connectedness and the fact that the legal system was practised within a different political reality that predates the modern nation state and its state-centric understanding of sovereignty and legal authority.⁵⁵ In other words, to examine applicable rules in Islamic law, two primary questions need to be asked: Who has the authority to articulate the law? And, what type of conflict is at hand?

A. LEGAL AUTHORITY IN ISLAMIC LAW: ANSWERING THE 'WHO?' QUESTION

The pluralism of the Islamic legal tradition makes it difficult for us to pinpoint a singular ruling on a particular issue from classical jurisprudence. For example, jurists offer a wide variety of positions on questions relating to targeting, with some advocating targeting all adult men, others

53 W. B. Hallaq, *The Origins and Evolution of Islamic Law*, Cambridge University Press, 2004, p 193.

54 See A. Shalakany, 'Islamic Legal Histories', 1 *Berkeley Journal of Middle Eastern Islamic Law* 1 (April 2008).

55 See N. Badawi, 'Regulation of Armed Conflict: Critical Comparativism', 37 *Third World Quarterly* 11 (2016).

adult able men and others limiting targeting to those who participate in fighting.⁵⁶ Such contestation may be seen as enabling militant groups to adopt and select views that allow them to manoeuvre the tradition to adopt permissive tactics, but at the same time, it also enables critics to pinpoint their deviation from authoritative rulings by prominent classical jurists.

The modern era is equally complicated when it comes to the question of authority in interpreting Islamic law. Scholars may disagree over the timeframe and the factors that have contributed to the rise of codification in the modern Muslim world,⁵⁷ but it is widely established that sovereignty is manifested in the state's assumption of control over law. Hence, we witness a shift in many states to codification of a singular interpretation of Sharia, selected differently in each polity. In parallel, we also witness state control over religious institutions. This phenomenon of cooptation of religious institutions by the state, often by autocratic regimes, particularly in the Middle East, has eroded those institutions' legitimacy.⁵⁸ Meanwhile, independent scholars with varying degrees of distance from the political authority have gained momentum to fill the legitimacy gap created by this modern relationship between the state and state-coopted religious scholars. At the other end of the spectrum, militant groups and their religious experts assert the illegitimacy of their detractors and offer a different interpretation of Islamic law.

The situation is particularly complex when examining Islamic laws of war because many Muslim states claim adherence to the principles of conflict in Islamic law, yet the Islamic legal regime is not directly incorporated in their legal systems. Unlike, for example, personal status law, where the modern state incorporates this branch of Islamic law into the state legal system, Islamic laws of war veer towards moral rather than legal obligations.

B. REGIMES GOVERNING ARMED CONFLICT: ANSWERING THE 'WHAT?' QUESTION

1. DETERMINING THE RELEVANT LEGAL REGIME

One of the key challenges in assessing actions of militant groups is the determination of applicable legal regimes. Under classical Islamic law, one can discern four primary types of armed conflict with governing legal regimes: wars with non-Muslims (jihad), inter-Muslim war (baghy), apostasy (ridda) and battles with highway robbers/bandits (hiraba):

56 Ali ibn Hazm, *Kitab al-Muhalla bi-l-Athar*, vol 7, ed by A. M. Shakir, Al-Maktab al-Tijari li-l-~~xi~~ba'a wa-l-Nashr, 1969, p 296; Muhammad ibn Jarir al-Tabari, *Kitab al-Jihad wa Kitab al-Jizya wa Ahkam al-Muharibin min Kitab Ikhtilaf al-Fuqaha*, ed by J. Schacht, Brill, 1933, pp 8–12.

57 K. Fahmy, 'Justice, Law and Pain', in B. Dupret (ed), *Standing Trial: Law and the Person in the Modern Middle East*, I. B. Tauris, 2005; W. B. Hallaq, 'What is Shari'a?', 12 *Yearbook of Islamic and Middle Eastern Law* (2007); Shalakany, 'Islamic Legal Histories', supra fn 54.

58 Abu Muhammad al-Maqdisi, 'Millat Ibrahim', *Minbar al-Tawhid w al-Jihad*, 2010, p 66,

http://www.ilmway.com/site/maqdis/MS_20383.html, accessed January 20, 2021 (site inactive).

1. Wars with non-Muslims (jihad): This is the primary branch of armed conflict examined by classical jurists and addresses conflict with non-Muslims. The regulations governing armed conflict with non-Muslims include targeting, permissible war tactics, treatment of captives and acquisition of enemy property.
2. Wars with Muslims (baghy): The legal regime governing baghy examines the possibility and legitimacy of rebellion against the Muslim political authority. In some classical works, baghy regulations are deemed more restrictive in regard to permitted war tactics than those concerning jihad, particularly in terms of the treatment of the wounded and those fleeing the battlefield, and acquisition of rebel property. Many scholars prohibit killing wounded and fleeing Muslim rebels, with some exceptions, and deem Muslim rebel property inviolable, i.e. not to be confiscated by the political authority.⁵⁹
3. Apostasy wars (ridda): The regulations concerning ridda are closer to those for jihad, but the most significant distinction for the purpose of this study is that apostasy terminates the inviolability of Muslim life and property, thereby legitimizing the resort to violence against such groups. It is noteworthy, however, that unlike militant interpretations, classical approaches to ridda mostly refrain from deeming a self-declared Muslim an apostate.
4. Wars with highway robbers and bandits (hiraba): While the Quranic source on hiraba does not limit itself to criminal activity, classical jurists mostly restrict the regime to battles with highway robbers and bandits. The regime is more permissible than that of baghy in terms of tactics employed in battles with those who fall under this category, particularly in terms of punishment and acquisition of property.

Despite the recurrence of inter-Muslim violence in the confrontations between Muslim regimes and militant groups, most mainstream scholars and militant groups do not rely on the regulations concerning baghy as the applicable legal regime. Arguably, mainstream scholars minimize its application because of its restriction of permissible tactics for the political authority, while militant groups reject its recognition of the political authority's legitimacy. Thus, many modern scholars prefer to place militant groups under the banner of hiraba due to the groups' resorts to terrorizing tactics that disrupt public peace.⁶⁰ On the other hand, al-Qaeda, ISIS and other groups engaged in violent activities with the state who claim an Islamic reference rely, with varying degrees, on the notions of jahiliyya and hakimiyya,⁶¹ to argue the apostasy of the targeted group.

59 Ibn Qudama, *Al-Mughni*, ed by A. ibn Abdul Muhsin al-Turki and A. F. Muhammad al-Hulw, Dar 'Alam al-Kutub, 1997, 12:252.

60 I. Ahmad Khan, 'Mawqif al-Adiyan Tijah al-Irhab wa-l-Ta'aruf', in *al-Majlis al-'Ala li-l-Shu'un al-Islamiyya Eighth Conference: al-Islam wa Mustaqbal al-Hiwar al-Hadari*, Cairo, July 1996, pp 24–26. http://elazhar.com/conf_au/8/23.asp, accessed 6 June 2011 (site inactive).

61 See glossary.

2. THE PLACE OF INTERNATIONAL AGREEMENTS WITHIN THIS SYSTEM

One other issue in identifying the applicable legal regime is determining where international legal obligations fit into the Islamic conception of law. On the one hand, jurists have often asserted the need for respect for pacts and treaties, with many modern jurists arguing that international humanitarian law is binding due to its acceptance by modern Muslim states as a binding legal regime.⁶² This assertion has been plausibly relied upon by modern mainstream jurists to maintain its binding nature. Yet, militant groups, to varying degrees, have asserted the illegitimacy of the modern state and rejected its reliance on codified law rather than Sharia law, arguing that international treaties contravene Sharia and were entered into by illegitimate authorities. Al-Zawahiri, for example, in addition to his critique of double standards in international agreements relating to prisoners of war, prohibition of torture and human rights,⁶³ argues that Muslims must reject subordination brought about by international law and uphold Islamic law.⁶⁴ Even al-Maqdisi maintains the same logic and states that it is not surprising that apostate regimes governing the Muslim world adopt and accept international law considering their deviation from Islam.⁶⁵

BOX 2: KEY AL-QAEDA DOCUMENTS RELATED TO THE RULES APPLICABLE IN CONFLICT

Ayman al-Zawahiri, *Al-Tabri'a, Minbar al-Tawhid w al-Jihad*, As-Sahab Media, 2008.

Ayman Al-Zawahiri, *Risalat Tawjihāt Amma l-i-l Amal Jihadi (General Guidelines for Jihadist Work)*, 2013.

AQIS Code of Conduct, 2017.

Abu Abdullah al-Muhajir, *Masa'il fi Fiqh al-Jihad*.

62 W. al-Zuhayli, *Athar al-Harb Fi l-Fiqh al-Islami*, 3rd edn, Dar al-Fikr, 1998, pp 354–355.

63A. al-Zawahiri, 'Al-Waqi' bayn al-Alam wa al-Amal', *Minbar al-Tawhid w al-Jihad*, 2013, p 43. http://www.ilmway.com/site/maqdis/MS_874.html ; accessed July 22, 2020 (site inactive).

64 A. al-Zawahiri, 'Al-Waqi' bayn al-Alam wa l-Amal', transcribed video interview, As-Sahab Media, June 2014, p 43, http://www.ilmway.com/site/maqdis/MS_874.html.

65 Abu Muhammad al-Maqdisi, 'Al-Shar'iyā al-Dawliya wa Munaqdatuha li-l-Shar'ia al-Islamiya', *Minbar al-Tawhid w al-Jihad*, 2002, p 2, http://www.ilmway.com/site/maqdis/MS_65.html , accessed 9 May 2021 (site inactive).

AL-QAEDA VIEWS AND PRACTICES WITH REGARD TO SELECTED IHL NORMS

1. PROTECTION OF CIVILIANS FROM ATTACK

A. PRINCIPLE OF DISTINCTION

Under customary IHL, the parties to a conflict must at all times distinguish between civilians and combatants.⁶⁶ Attacks may only be directed against combatants; they must not be directed against civilians. Civilian objects are also protected against attacks.⁶⁷ Indiscriminate attacks are prohibited.⁶⁸

While IHL prohibits targeting civilians and defines a civilian as a person not participating in hostilities, the classical Islamic legal tradition predates the modern distinction between the military and the population under its protection/control, leading to varied and diverse interpretations of who may be targeted.⁶⁹ Some classical jurists have prohibited targeting those who cannot participate in fighting, others have singled out vulnerable groups such as monks, the blind and the elderly as impermissible targets, whereas a few have asserted that all adult men may be targeted.⁷⁰ Four categories, however, are consistently treated as impermissible targets by

66 See Rule 1, ICRC CIHL Database, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul (last accessed 25 August 2022).

67 Rule 7, *ibid.*

68 Rule 11, *ibid.*

69 Al-Maqdisi, for example, criticizes attacks on the Red Cross and humanitarian aid workers. See Abu Muhammad Maqdisi, ‘Munasaha lil-Uqala’ min Ansar al-Dawla al-Islamiya fi al-Iraq w al-Sham wa Munasara Laha Did al-Salibiyin wa-l-Murtadin’, *Minbar al-Tawhid w al-Jihad*, 6 September 2014,

http://www.ilmway.com/site/maqdis/MS_65.html, accessed 09 June/21 (site inactive); Abu Muhammad al-Maqdisi, *Waqafat Ma’ Thimar al-Jihad, Ghorfat al-Fajr al-Islamiya*, 2007, pp 24–25, http://www.ilmway.com/site/maqdis/MS_65.html, accessed 09/05/21 (site inactive); al-Zawahiri, ‘Haqaiq al-Sira’.

70 Abu al-Walid Muhammad ibn Ahmad ibn Muhammad ibn Ahmad Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, Dar al-Hadith, 2004, 2:147–148; Ibn Qudama, *Al-Mughni*, *supra* fn 59, 13:177–179; Ibn Hazm, *Kitab Al-Muhalla bi-l-Athar*, *supra* fn 56, 7:296; Al-Tabari, *Kitab al-Jihad*, *supra* fn 56, pp 8–12.

early jurisprudence: women, children,⁷¹ Muslims in non-Muslim territories and non-Muslims in Muslim territories, the latter two under the regimes of *dhimma*⁷² and *aman*.⁷³

Dhimma refers to a regime prevalent in early Muslim communities, where non-Muslims residing in the territory were guaranteed protection of life and property and were expected to pay a tax in return for protection. Jurists disagreed over those entitled to such protections. Some argued that only Christians, Jews and 'Magians'⁷⁴ were entitled to this status,⁷⁵ some that all non-Muslim, non-Arab and Arab monotheists may fall under the regime of *dhimma*,⁷⁶ and others that any non-Muslim may fall under the regime.⁷⁷

Aman refers to safety pledges to non-Muslims who are temporarily in Muslim lands and to Muslims in non-Muslim territories. In Muslim lands, individual members of the Muslim community may make a safety pledge and it is to be respected by the community.⁷⁸ Generally speaking, if the caliph wished to revoke *aman* granted to a non-Muslim, he was expected to escort the non-Muslim safely outside Muslim territories.⁷⁹ If a Muslim entered non-Muslim lands under a safety pledge, they were expected to adhere to this pledge and refrain from inflicting harm on the non-Muslim communities.⁸⁰ As noted, by al-Shaybani, even if this Muslim found abducted Muslim women and children in the hands of the non-Muslim community, they would be expected to not attempt to rescue the captives before notifying the *aman* grantor that they no longer wished to enjoy it,⁸¹ indicating a general inclination to reject treachery.

In conclusion, the classical tradition varies in its determination of impermissible targets. Scholars who argue that disbelief is a basis for the permissibility of killing, exclude only women and children, whereas those who argue that the basis is the ability to fight, exclude those who cannot fight such as the elderly and the mentally and physically disabled, or those who are not

71 Ibid.

72 Shams al-Din ibn Qayyim, *Ahkam Ahl al-Dhimma*, Turath For Solutions, 2013, 1:109.

73 Al-Tabari, *Kitab al-Jihad*, supra fn 56, p 34.

74 The term used for Zoroastrians in classical jurisprudence.

75 Ibn Hazm, *Kitab al-Muhalla bi-l-Athar*, supra fn 56, 7:345-346; M. al-Shafi'i, *Al-Umm*, Dar al-Wafaa, 2001, 4:246.

76 Ibn Qayyim, *Ahkam Ahl al-Dhimma*, supra fn 72 1:87.

77 Ibid, 1:89.

78 Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, supra fn 70, 2:145-146; Muhammad ibn al-Hasan al-Shaybani, *Sharh al-Siyar*, Dar Ehya' al-Turath al-'Araby 158-1, 2004, p 61; Al-Shafi'i, *Al-Umm*, supra fn 75, 7:405; Ibn Qudama, *Al-Mughni*, supra fn 59, 13:80.

79 Al-Tabari, *Kitab al-Jihad*, supra fn 56, p 34.

80 Al-Shafi'i, *Al-Umm*, supra fn 75, 7:405; Ibn Qudama, *Al-Mughni*, supra fn 59, 13:152-153.

81 Al-Shaybani, *Sharh al-Siyar*, supra fn 78, 2:66-67. See also, al-Shafi'i, *Al-Umm*, supra fn 75, 7:405.

ready to participate in combat such as farmers and hired labourers.⁸² It should be noted that the wounded are mostly only referred to as impermissible targets in combat with Muslims.⁸³

Modern mainstream scholars of Islamic law interpret the sources of Islamic law to assert that those who do not participate in fighting may not be targeted⁸⁴ and that Muslims who enter non-Muslim territory are obligated by virtue of the visa they are granted to uphold the restrictions of aman and refrain from harming the territory they visit and its inhabitants.⁸⁵

As a result, the majority of mainstream Muslim scholars and institutions, including the grand muftis of Egypt and Saudi Arabia and the imam of the Grand Mosque in Mecca, have explicitly denounced the 9/11 attacks.⁸⁶ For example, Abdul Aziz al-Shaykh, the Grand Mufti of Saudi Arabia at the time, issued a statement asserting that ‘the recent developments in the United States including hijacking planes, terrorizing innocent people and shedding blood, constitute a form of injustice that cannot be tolerated by Islam, which views them as gross crimes and sinful acts’.⁸⁷

Al-Qaeda’s Position on Targeting in Non-Muslim Territories

Within this diverse context, al-Qaeda’s ideological inspirations appear, at first glance, to concur with modern mainstream interpretations, taking the position that those who do not participate in armed conflict may not be targeted. However, an expansive interpretation of participation is offered by the group to legitimize the resort to attacks against civilians. This approach argues that citizenship of an enemy non-Muslim state constitutes participation. Indeed, for al-Qaeda, the payment of taxes is considered a form of support for the government and participation in the political process through voting is seen as participation in its decision to launch attacks against Muslims. For example, in his influential treatise, *Al-Tabri’a*, al-Zawahiri quotes another militant ideologue – Nasir al-Fahd – to justify the 9/11 attacks: ‘We must know that any decision, especially detrimental war decisions, by the infidel US state is not made without polling or voting

82 Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, supra fn 70, 2:148.

83 Ibn Qudama, *Al-Mughni*, supra fn 59, 12:252.

84 Al-Zu‘ayli, *Athar al-Harb Fi l-Fiqh al-Islami*, supra fn 62, p 500; Abu Zahra, *Al-Ilaqat al-Dawliya fi l-Islam*, p 109; Letter to Baghdadi, supra fn 11, p 6; Yusuf al-Qara‘awi, *Fiqh al-Jihad: Dirasah Muqaranah li-A‘kamil wa-Falsafatih fi l-Daw‘ al-Qur‘an wa-al-Sunnah*, Maktabat Wahbah, 2009, 1:395.

85 Y. al-Qaradawi, *Al-Jihad*, 2:1320–1321; al-Qaradawi, *Fiqh al-Jihad*, supra fn 84, pp 1320–1321; Al-Zuhayli, *Athar al-Harb Fi l-Fiqh al-Islami*, supra fn 62, p 508; Abu Zahra, *Al-Ilaqat al-Dawliya fi l-Islam*, supra fn 84, p 72. Abu Zahra and al-Zuhayli assert the principle of aman without specific reference to the visa system.

86 J. L. Esposito, *The Future of Islam*, Oxford University Press, 2013, pp 103–104.

87 Quoted in *ibid*, p 103.

by representatives in their infidel legislative bodies, and those bodies primarily represent the opinions of the voters'.⁸⁸

Al-Qaeda's Position on Targeting in Muslim Territories

Al-Qaeda and militant ideologues who have influenced it take a different position on targeting those who reside in Muslim lands, even if they declare the ruling government an infidel government. For example, al-Maqdisi, a key militant ideologue who has been influential in terms of al-Qaeda's and other militant groups' views on war, offered a scathing critique of his disciple, Abu Musab al-Zarqawi's, targeting tactics in Iraq. In reference to suicide attacks, he advised al-Zarqawi to 'beware of being lenient in what we have been accustomed to being strict on; the sanctity of Muslim blood [lives], property and belongings even if they [those Muslims] are deemed sinners'.⁸⁹ Moreover, al-Zawahiri asserts that Christians residing in Egypt are partners to a nation that al-Qaeda holds no animosity towards,⁹⁰ indicating acceptance of the impermissibility of targeting non-Muslims residing in Muslim communities. In a similar vein, al-Maqdisi argues that non-Muslims in Muslim territories enjoy what he calls a semblance of a safety pact or a dhimma pact and, accordingly, should not be targeted.⁹¹

This position, however, excludes agents of the state from untargetable categories. Unlike IHL, which deems civil servants or members of the administration to be untargetable provided they do not participate in hostilities, al-Qaeda's militant ideologues consider modern Muslim governments to have renounced Islam and hence deem the agents of these governments targetable.⁹² Al-Maqdisi cautions, however, that not every Muslim who works for an 'infidel' government may be deemed an apostate and restricts this classification to those who participate in the codification of un-Islamic laws or participate in autocratic rule.⁹³ This position, while restrictive within the militant spectrum, is rejected by most Muslim scholars who assert that Muslims do not enjoy the authority to denounce other self-declared Muslims' faith and reject the

88 A. al-Zawahiri, *Al-Tabri'a*, *Minbar al-Tawhid w al-Jihad*, As-Sahab Media, 2008, p 28, http://www.ilmway.com/site/maqdis/MS_874.html, accessed 22/07/20 (site inactive).

89 Abu Muhammad al-Maqdisi, 'Munasaha lil-Uqala', supra fn 69, pp 9–10.

90 Abu Zahra, *Al-Ilaqat al-Dawliya fi l-Islam*, supra fn 84, pp 102–103.

91 According to this logic, the infidel status of the regimes governing the Muslim world does not derogate from the status of Muslims and non-Muslims residing in those territories, in other words, even if the safety pact might be suspect, there is a reasonable assumption (semblance) of aman or dhimma.

92 Al-Maqdisi, *Waqafat Ma' Thimar al-Jihad*, supra fn 69, pp 24–25; Al-Zawahiri, *Al-Tabri'a*, supra fn 88, p 174. It is worth noting that al-Zawahiri, unlike the Islamic State, restricts takfir to the state and its agents and refrains from deeming the general public, including Muslim scholars, apostates even if they deviate in their interpretation of religion. See A. al-Zawahiri, 'Dr. Ayman al-Zawahiri's Message to Sheikh Abi Misa'ab al-Zarqawi', *Minbar al-Tawhid wa-l-Jihad*, 2005, pp 10–11. http://www.ilmway.com/site/maqdis/MS_874.html; accessed July 22, 2020 (site inactive)

93 Abu Muhammad al-Maqdisi, 'Hadhihi Aqidatuna', *Minbar al-Tawhid w al-Jihad*, 2003, p 28, http://www.ilmway.com/site/maqdis/MS_65.html; accessed May 9, 2021 (site inactive).

inclination of militant groups towards takfir – calling another Muslim an infidel – as evidenced by those scholars’ reluctance to designate even militant groups apostates, regardless of how astray in their interpretation of religion they may be.⁹⁴



THE PRACTICE OF AFFILIATED GROUPS

The 2017 AQIS Code of Conduct adheres to the Guidelines issued by al-Zawahiri, recommending prudence in the conduct of jihad. The Code, accordingly, ‘forbids hitting or killing targets permissible in Shari’ah when hitting or killing such targets does more harm than good to the jihadi movement’.⁹⁵ It also forbids carrying out permissible operations that are ‘beyond the understanding of Muslim masses and repulses them from the jihad’.⁹⁶ Accordingly, the Code of

94 A. Abdel-Hamid, ‘Shaykh al-Azhar Mujadadan: La Astati’ Takfir Da’ish’, Al Arabiya, 20 May 2020. <https://www.alarabiya.net/ar/arab-and-world/egypt/2015/12/02/شيخ-الأزهر-داعش-ليسوا-كفاراً-لكنهم-مفسدين-في-الأرض>.

95 ‘Al-Qaeda in the Indian Sub-Continent Code of Conduct’ (AQIS Code of Conduct), As-Sahab Media Subcontinent, 2017, p. 3 https://jihadology.net/wp-content/uploads/_pda/2017/06/al-qacc84_idah-in-the-indian-subcontinent-22code-of-conduct22-en.pdf, accessed 05 September 2022.

96 Ibid.

Conduct only lists the following as permissible targets in Pakistan after approval of the individual attack by the imam:

1. State armed forces ‘obstructing the path to the implementation of the sharia including ... maintaining American dominance’.⁹⁷ These include, in the order of priorities, the officers and personnel of secret security agencies, senior officers of the military and senior officers of ‘law enforcement agencies (Rangers, Counter-Terrorism Department, police)’.⁹⁸
2. Ministers and senior bureaucrats ‘directly engaged’ in the ‘American war’ against Islam.
3. Retired military officers and politicians who engaged in the war against Islam.⁹⁹
4. Blasphemers against the Prophet.
5. Attacks on prisons and abductions of inspectors general to secure the release of jihadists from prisons.
6. Apostates promoting secularism in the region.
7. ‘Enemies and killers’ of religious scholars.¹⁰⁰

Three other general remarks are made regarding these targets. First, as with IHL rules on conduct of hostilities, military personnel are targetable in all situations, including when they are on holiday. Second, ‘officers are a greater priority than soldiers’. Finally, in deviation from IHL rules on this matter, politicians and officers ‘who carried out oppression’ are also a priority.¹⁰¹

The Code also lists operations that must be avoided in Muslim countries. In addition to operations that repulse average Muslims, it asserts that those who do not fight or aid fighters against the group should not be targeted. Additionally, it asserts that it is ‘absolutely wrong’ to carry out blasts at ‘public gatherings, mosques, funerals and courtrooms’ because these are likely to harm ordinary Muslims. It also prohibits targeting wives and children of military personnel. While schools are ‘carved by’ unbelievers, it is considered extremely wrong and un-Islamic to target schools. Similarly, while tombs and shrines are considered un-Islamic, it is prohibited to target them. Finally, the Code also asserts that dwellings of non-Muslims, including Hindus and Christians, if ‘they don’t gather forces’ against Muslims should not be targeted. Similarly, Shiites who do not wage war against Sunnis are not to be fought.¹⁰²

AQAP and Jabhat al-Nusra have targeted civilian security agents and collaborators with governments. UN and NGO reports point to numerous attacks by AQAP and Jabhat al-Nusra against law enforcement personnel and/or individuals assumed to be cooperating with the government. Human Rights Watch (HRW) repeatedly reports that AQAP launches ‘dozens of

97 Ibid, p 8.

98 Ibid, p 8.

99 Defined as a war against the implementation of Sharia.

100 Ibid, p 8.

101 Ibid, p 9.

102 Ibid, pp 9-12.

deadly bombings and other attacks on Yemeni security targets'.¹⁰³ For example, the 2014 HRW World Report states that 'suicide bombing attacks both claimed and denied by AQAP against Yemen's Defense Ministry compound killed at least 52 people and injured another 161. The dead included at least seven foreign doctors and nurses working at the military hospital in the compound'. Also, 'AQAP carried out dozens of deadly bombings and other attacks on Yemeni Security forces'.¹⁰⁴ It should be noted, however, that AQAP apologized for its hospital attack indicating a rejection of targeting hospitals.¹⁰⁵ The UN High Commissioner for Human Rights' reports on the situation in Yemen also list several incidents of loss of civilian lives, destruction of civilian buildings in attacks¹⁰⁶ and political assassinations of religious leaders.¹⁰⁷ The same strategy is pursued by Jabhat al-Nusra in its war against the Syrian regime. For example, the 'group and its affiliates executed more than 70 government soldiers who had been detained and rendered hors de combat'¹⁰⁸ after it overtook the Abu Duhur airbase in Idlib in 2015. This policy was also pursued with groups affiliated, or presumed to be affiliated, with the regime. Amnesty International has reported summary killings of 'civilians, captured members of the Syrian government armed forces and security forces, and of pro-government shabiha militias, as well as persons alleged to be "infiltrators"'.¹⁰⁹ Sometimes, certain groups' ethnicity or religious identity has led to the presumption of their cooperation with the regime. In April 2015, in cooperation with other groups, Jabhat al-Nusra attacked and killed fleeing civilians in a predominantly Alawite village, arguably 'because of the Alawite community's perceived support of the Government. Civilians were shot and killed while fleeing'.¹¹⁰

103 Human Rights Watch (HRW), 'Yemen', World Report 2013; <https://www.hrw.org/world-report/2013/country-chapters/yemen> (last accessed 25 August 2022); HRW, 'Yemen', World Report 2014; <https://www.hrw.org/world-report/2014/country-chapters/yemen> (last accessed 25 August 2022); HRW, 'Yemen', World Report 2011, <https://www.hrw.org/world-report/2011/country-chapters/yemen> (last accessed 25 August 2022).

104 HRW, 'Yemen', World Report 2014, *supra* fn 103.

105 'Al-Qaeda Apologises for Yemen Hospital Attack', BBC News, 23 December 2013, <https://www.bbc.com/news/world-middle-east-25491407>.

106 Situation of Human Rights in Yemen: Report of the United Nations High Commissioner for Human Rights, UN doc A/HRC/30/31, 7 September 2015, §§28–29.

107 Situation of Human Rights in Yemen: Report of the United Nations High Commissioner for Human Rights, UN doc A/HRC/33/38, 4 August 2016, §37.

108 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/31/68, 11 February 2016, §107.

109 Amnesty International, "'Torture Was My Punishment': Abductions, Torture and Summary Killings Under Armed Group Rule in Aleppo and Idleb, Syria', 2015, p 5, <https://www.amnesty.org/en/documents/mde24/4227/2016/en/> (last accessed 25 August 2022).

110 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/30/48, 13 August 2015, §129.

Despite the declared ideological commitment to the safety of religious minorities and the group's assertion that non-Muslims in Muslim territories are not permissible targets, there are also several reports of attacks against religious minorities. In August 2014, Bedouin militants associated with Jabhat al-Nusra fired at Druze civilian buses during the hostilities in the village of As-Suwayda and attacked a Druze family, killing three men with mortar fire. 'Survivors of the attack stated that the fighters shouted, "You are kufar, you are pigs. We are coming to kill you".'¹¹¹ Similar incidents have also been reported against Alawites¹¹² and Shia¹¹³ groups.

In addition to an expansive definition of legitimate targets and erosion of the category of civilian, AQAP and Jabhat al-Nusra have resorted to indiscriminate attacks which are prohibited by IHL.¹¹⁴ Indiscriminate attacks are defined as those 'which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, in each such case, are of a nature to strike military and civilian objectives or civilian objects without distinction.'¹¹⁵

Relying on the expanded definition of tatarus employed by al-Qaeda, affiliate groups have resorted to bombings and shelling that cause loss of civilian life.¹¹⁶ Additionally, in Syria, reported attacks by al-Qaeda affiliate groups and ISIS resulted in the grave loss of civilian lives.¹¹⁷ There are also reports of Jabhat al-Nusra besieging villages and cutting off electricity and water supplies to civilian areas or destroying infrastructure necessary to civilian life.¹¹⁸ In some instances, the resort to such tactics is hard to justify as collateral damage considering that there are numerous reports of bombings in civilian areas where there is no clear government target. For example, Jabhat al-Nusra claimed responsibility for the April 2014 bombing in the Karm al-Louz neighborhood populated by Alawites where '[t]here were no soldiers based in the area nor were there any other military objectives ... As paramedics, firefighters and civilians rushed to the

111 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/28/69, 5 February 2015, §231.

112 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra fn 110, §§129, 138.

113 Ibid, §§ 127, 131, 137-138.

114 Rule 11, ICRC CIHL Database, supra fn 66.

115 Rule 12, CIHL Database, Rule 12. *ibid*.

116 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/22/59, 5 February 2013, §119. HRW, 'Syria', World Report 2015, <https://www.hrw.org/world-report/2015/country-chapters/syria> (last accessed 25 August 2022).

117 HRW, 'Syria', World Report 2017, <https://www.hrw.org/world-report/2017/country-chapters/syria> (last accessed 25 August 2022).

118 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/27/60, 13 August 2014, §§126-127.

scene of the bombing to assist the injured and douse the flames, a second car bomb exploded.’¹¹⁹ The UN Independent International Commission of Inquiry on the Syrian Arab Republic has reason to believe that the second bomb which exploded after the arrival of first responders deliberately targeted those first responders.¹²⁰ There are numerous other incidents where there is no clear military or even security target in the bombing of civilian areas.¹²¹

B. PRINCIPLES OF PROPORTIONALITY AND PRECAUTIONS

Under customary IHL, it is prohibited to carry out an attack that may be expected to cause excessive harm to civilians and civilian property compared to the anticipated military advantage (principle of proportionality).¹²² In addition, in the planning and conduct of military operations, the parties to the conflict must do everything feasible to avoid or minimize collateral damage (principle of precautions). Constant care must be taken to spare civilians and civilian objects.¹²³

Classical Muslim jurisprudence often addresses the question of proportionality in the context of legal questions relating to *tatarus*. *Tatarus*, or shielding, often refers to situations where the Muslim army was besieging a non-Muslim city and the non-Muslim army used untargetable categories such as women, children and Muslims as shields. With varying degrees of the assumption of necessity and acceptable collateral damage, many classical jurists allowed attacking the non-Muslim army with the knowledge that such attacks may inflict damage on the individuals used as shields.¹²⁴

Mainstream scholars again reject the expansive interpretation of *tatarus* and rely on the classical jurists’ requirements that the Muslim army resort to those tactics only in situations when harm is necessary, unavoidable and unintentional.¹²⁵ Arguably, the shielding situations examined in the jurisprudence and the inclination to avoid harm is an indication that the weapons and tools referred to in situations of *tatarus* are envisioned to be somehow discriminate (like hurling machines and lances) and are thus incomparable to suicide bombing and the use of explosives in civilian areas. As noted by prominent contemporary Muslim jurists, *tatarus* ‘refers to the killing

119 Ibid, §§43–44.

120 Ibid.

121 Ibid, §37–38.

122 Rule 14, ICRC CIHL Database, supra fn 66.

123 Rule 15, *ibid*.

124 Al-Tabari, *Kitab al-Jihad*, supra fn 56, p 6; Ibn Hazm, *Kitab al-Muhalla bi-l-Athar*, supra fn 56, 7:296; al-Shaybani, *Sharh al-Siyar*, supra fn 78, p 102; al-Shafi’i, *Al-Umm*, supra fn 75, 4:348.

125 Al-Zu‘aylī, *Athar al-Harb Fi l-Fiqh al-Islami*, supra fn 62, p 506; Letter to Baghdadi, supra fn 11, p 9; Al-Qaradawi, *Al-Jihad*, supra fn 85, p 619; Abu Zahra, *Al-Ilaqat al-Dawliya fi l-Islam*, supra fn 84, p 108.

of innocents by accident and in no way indicates that the intentional killing of innocents – such as in bombings – is permitted'.¹²⁶

Al-Zawahiri, on the other hand, utilizes this rule and a reported prophetic allowance of night raids, despite the presence of women and children in the raided village and the difficulty of distinguishing them at night, to legitimize the resort to indiscriminate tactics in jihadist operations.¹²⁷ He also challenges the notion that those operations lead to loss of innocent lives and states that those who are deemed innocent belong to one of three categories. The first category includes 'those who neither participate in combat with their states, nor assist them [their states] financially or with opinion/advice and this category may not be killed as long as it is distinguishable from others'.¹²⁸ Once they are no longer distinguishable from others who may be targeted, they may be killed.¹²⁹ The second category is those who do not participate in hostilities alongside their states but assist it with their opinions and financial resources; they cannot be seen as innocent but rather as combatants who may be killed.¹³⁰ It is noteworthy that al-Zawahiri's understanding of support for the hostile state/government is expansive. For example, commenting on the 7/7 bombing in London, he asserted that 'they claim that they are democrats with an elected government. This elected government is killing our children and women ... If they oppose it, then they should depose it. If they are satisfied with it [the government], then they must pay the price of this satisfaction'.¹³¹ Finally, Muslims are the third category of potentially innocent people who may not be targeted. While al-Zawahiri acknowledges they may not be targeted, he argues that 'if they are indistinguishable from others, and there is no alternative but to kill them', killing them would be permissible.¹³² Unlike the ISG, al-Qaeda is of the view that non-Muslims residing in Muslim territories should not be targeted. For example, al-Zawahiri states that Muslims should refrain from harming the 'Nasara',¹³³ the Sikhs and the Hindus in Muslim states. 'If they transgress, it suffices to respond proportionately to the aggression, with a clarification that we do not seek initiation of combat with them, because we are preoccupied with fighting the head of Global kufr [disbelief] and we are keen to live with them in peace and harmony once the Muslim State is erected'.¹³⁴ Moreover, again unlike the

126 Letter to Baghdadi, *supra* fn 11, p 9.

127 Al-Zawahiri, Al-Tabri'a, *supra* fn 88, p 29; Rih al-Janna, p 97, http://www.ilmway.com/site/maqdis/MS_874.htm accessed 04/05/21 (site inactive).

128 Al-Zawahiri, Al-Tabri'a, *supra* fn 88, pp 29–30.

129 *Ibid.*

130 *Ibid.*

131 Al-Zawahiri, 'Bi Monsabat Murur Arba' Sanawat 'ala Ghazawat New York wa Washington', As-Sahab Media, 2005, p 9, http://www.ilmway.com/site/maqdis/MS_22096.html, accessed 04 March 2021 (site inactive).

132 Al-Zawahiri, al-Tabri'a, *supra* fn 88, pp 29–30.

133 Outdated term used by Islamists to refer to Christians.

134 Al-Zawahiri, *Risalat Tawjihāt Amma l-i-l Amal Jihadi*, 2013, pp 3–4.

Islamic State, there is an assertion that perceived deviant Muslim sects like the Shia should not be fought unless they initiate aggression, and in that case, the group is to restrict itself to fighting the aggressive parties only and refrain from targeting those who do not participate in fighting, their houses, their places of worship and religious congregations.¹³⁵ This position is also asserted by al-Maqdisi in the letter he penned in 2005 to al-Zarqawi, in which he denounces the ‘the excessive chaos in Iraq today, which is aimed at tarnishing the jihad and its beaming image through exploding cars and placing explosives in public roads’,¹³⁶ and urges al-Zarqawi to refrain from targeting non-Muslims residing in Muslim territory, and the Shia, even if they have shown historical animosity towards the people of the Sunna.¹³⁷

It should be noted, however, that with al-Qaeda’s expansion and its cognizance of the need to win the sympathies of Muslim communities, bin Laden asserted the need for a strategic assessment of potential damage to individuals in Muslim countries and affirmed the need for caution and limitation of operations that might inflict damages that alienate Muslims.¹³⁸

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AQIS’ Code of Conduct leans towards a closer adherence to the principle of tatarus in case there is potential harm to Muslim lives. As previously stated, it condemns attacks on public areas and schools out of fear of harming Muslims. However, in the case of AQAP and al-Nusra, it is difficult to discern a policy of proportionality or indications of precautions in attacks, unlike the classical jurisprudence’s demand that the army avoid aiming at untargetable categories even in situations of tatarus. Unfortunately, the compilation of practice analysed by the research team does not provide any justification for why this is so.

It is also clear that there are incidents where no precautions were taken to protect the civilian population from retaliation by the state forces. For example, AQAP’s successor, Ansar al-Sharia’s, fighters are reported to have shot with rifles at an aircraft flying over a busy market leading to the eventual bombing of the market by the aircraft.¹³⁹ Amnesty International has also reported another incident of an explosion in a Yemeni school. The circumstances of the incident and lack of evidence of outside shelling led Amnesty International to the conclusion that ‘it is

135 Ibid, p 4.

136 al-Maqdisi, Al-Zarqawi: Munasaha wa Munasara, Minbar al-Tawhid wa al-Jihad, 2005, pp 9–10, http://www.ilmway.com/site/maqdis/MS_65.html, accessed 09 June 202 (site inactive)..

137 Ibid, pp 11–12.

138 Letter from Osama bin Laden to Sheikh Mahmud, estimated date May 2010, <https://www.hsdl.org/?view&did=708039> (last accessed 25 August 2022).

139 Amnesty International, Conflict in Yemen: Abyan’s Darkest Hour, December 2012, p 27, <https://www.amnesty.org/en/wp-content/uploads/2021/06/mde310102012en.pdf> (last accessed 25 August 2022).

highly likely that Ansar al-Sharia was preparing bombs in buildings they occupied in residential areas'.¹⁴⁰ According to a statement by the Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic, Jabhat al-Nusra, among other warring parties, shelled civilian population areas, but mostly 'relied on suicide bombings and Vehicle Borne Improvised Explosive Devices during their assaults on military targets located within localities, usually causing extensive damage and large number of casualties among civilians'.¹⁴¹

2. THE PROHIBITION OF SEXUAL VIOLENCE AND GENDER DISCRIMINATION¹⁴²

Under customary IHL,¹⁴³ rape and other forms of sexual violence are prohibited. While common Article 3 of the 1949 Geneva Conventions does not explicitly refer to this terminology, it prohibits 'outrages upon personal dignity, in particular humiliating and degrading treatment'.

From an Islamic perspective, militant groups are faced with the particular challenge of the early Islamic legal system's consensus on designating women a special protected category. Women, along with children, may not be targeted unless they participate in combat.¹⁴⁴ However, many scholars assert they may be killed during combat if they are indistinguishable from the enemy on the basis of the abovementioned prophetic tradition stipulating that night raids are permissible

¹⁴⁰ Ibid, p 28.

¹⁴¹ P. S. Pinheiro (Chair of the Independent International Commission of Inquiry on the Syrian Arab Republic), 'The Use of Barrel Bombs and Indiscriminate Bombardment in Syria:

The Need to Strengthen Compliance with International Humanitarian Law', side event hosted by the Permanent Mission of Austria and Article 36, Geneva, 12 March 2015, p 3, <https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/CoISyria/CoISyriaIndiscriminateBombardment12032015.pdf> (last accessed 25 August 2022).

¹⁴² In its General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations, of 18 October 2013, the Committee on the Elimination of all Forms of Discrimination against Women (CEDAW) states: 'Under international human rights law, although non-State actors cannot become parties to the Convention, the Committee notes that under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are obliged to respect international human rights'. The Committee goes on to urge 'non-State actors such as armed groups: (a) to respect women's rights in conflict and post-conflict situations, in line with the Convention; (b) to commit themselves to abide by codes of conduct on human rights and the prohibition of all forms of gender-based violence'. UN doc CEDAW/C/GC/30, 18 October 2013, §§16 and 18.

¹⁴³ Rule 93, ICRC CIHL Database, supra fn 66.

¹⁴⁴ Al-Tabari, Kitab al-Jihad, supra fn 56, p 9; Ibn Rushd, Bidayat al-Mujtahid wa Nihayat al-Muqtasid, supra fn 70, 2:148; Ibn Qudama, Al-Mughni, supra fn 59, 13:177-179; Malik, Al-Mudawanna, 1:92; Al-Shaybani, Sharh al-Siyar, supra fn 78, p 101; Al-Shafi'i, Al-Umm, supra fn 75, 4:247-248; Ibn Hazm, Kitab al-Muhalla bi-l-Athar, supra fn 56, 7:296.

despite the difficulty of distinguishing women and children.¹⁴⁵ Modern scholars have, on the other hand, asserted that this prophetic tradition ‘refers to the killing of innocents by accident and in no way indicates that the intentional killing of innocents – such as in bombings – is permitted’.¹⁴⁶

In militant literature, one finds variations of the acceptance of the prohibition of killing women. Al-Maqdisi’s approach to the treatment of women is focused on Muslim women affiliated with militant groups. In a letter to al-Julani, leader of Jabhat al-Nusra, he urges him to refrain from moving women close to the battlefield to prevent them from being held captive by enemy troops and denounces some militant groups for deviating from such protection, leading to transgressions by the enemy including rape.¹⁴⁷ In another letter, he argues that the resort to including women in combat must be avoided if men can play the role assigned to women, and denounces hiding weaponry with women because such involvement may subject them to brutality, exposure or imprisonment with ‘prostitutes’.¹⁴⁸ He also advises restraint with women who are not affiliated with the militant groups and denounces attacks on women who fail to wear the veil or confiscation of their property for what may be perceived as lascivious behaviour.¹⁴⁹ On the other hand, al-Zawahiri utilizes the permissibility of targeting women if they participate in combat, relying on his previously examined expansive interpretation of participation to erode traditional protections of women: ‘now, their women are conscripted, fighting side by side with men, and those who are not imitate men. They shoot Muslims with no deterrence. Hence, unless a woman is weak and incapable, their killing is halal (permissible), even obligatory to protect religion, oneself and the nation.’¹⁵⁰

None of the examined militant texts address the question of sexual slavery or indicate acceptance of the practice. Moreover, none of these texts address policies for protection of victims of sexual violence, indicating that the topic is not treated as a matter of priority.

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The AQIS Code of Conduct does not address the question of sexual violence. In reference to the treatment of captives, it makes no reference to women in captivity, and in reference to the treatment of male captives, it does not list enslavement as an alternative, which indicates a

145 Ibn Hazm, *Kitab al-Muhalla bi-l-Athar*, 7:296, supra fn 56; Al-Shaybani, *Sharh al-Siyar*, supra fn 78, pp 101-102; Al-Shafi’i, *Al-Umm*, supra fn 75, 4:337-338, 347, 409; Ibn Qudama, *Al-Mughni*, supra fn 59, 13:138-140.

146 Letter to Baghdadi, supra fn 11, p 9.

147 Abu Muhammad al-Maqdisi, ‘Risala min al-Maqdisi ila al-Julani li-l-Hath ‘ala Man’ Naql al-Nisa’ fi-l-Qati’ al-Janubi; ‘Abr al-Hudud al-Urduniya al-Suriya’, *Minbar al-Tawhid w al-Jihad*, 2014, <http://www.ilmway.com/site/maqdis/index.htm>, accessed 20/01/21 (site inactive).

148 Al-Maqdisi, *Waqafat Ma’ Thimar al-Jihad*, supra fn 69, pp 29-31.

149 *Ibid*, p 107.

150 Al-Zawahiri, *Al-Tabri’a*, supra fn 88, p 22.

deliberate non-reliance on the slavery regime in Islamic law. Considering that slavery was the only route in the classical Islamic tradition, other than marriage, to permissible sexual activity, its absence may indicate a rejection of any form of sexual violence against women.

Yet, there are a number of reported incidents of sexual violence by Jabhat al-Nusra. In 2015, when the group seized control of Busra al-Sham, ‘Shia women married to Sunni men were threatened with sexual violence’.¹⁵¹ There are also reports of Druze women being forced to marry members of the group¹⁵² and strict discriminatory rules and regulations imposed on women leading to a widespread culture of fear.¹⁵³ Men have also been victims of sexual violence, with some incidents of male rape, including of young boys, by the group.¹⁵⁴ There are reports of similar violations committed by AQAP/Ansar al-Sharia in Yemen. For example, the 2013 UN Secretary-General’s report on children and armed conflict documents three cases of boys subjected to sexual violence by the group and verifies seven cases of forced marriages in the Abyan governorate.¹⁵⁵ The present research has not found any justification for these violations in the texts or policy documents presented by the groups.

3. THE PROHIBITION OF USING AND RECRUITING CHILDREN IN HOSTILITIES

IHL and IHRL prohibit the recruitment of children into armed forces or armed groups and their participation in hostilities.¹⁵⁶ ‘Although there is not, as yet, a uniform practice with respect to

151 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* fn 110, §131.

152 Human Rights Council (HRC), ‘I Lost My Dignity’: Sexual and Gender-Based Violence in the Syrian Arab Republic, Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN doc A/HRC/37/CRP.3, 8 March 2018, §60.

153 HRW, ‘Syria’, World Report 2016, <https://www.hrw.org/world-report/2016/country-chapters/Syria> (last accessed 25 August 2022).

154 HRC, ‘I Lost My Dignity’, *supra* fn 152, §62; All Survivors Project, ‘Destroyed From Within’: Sexual Violence Against Men and Boys in Syria and Turkey, 2018, p 17, <https://allurvivorsproject.org/wp-content/uploads/2022/03/Destroyed-from-Within-Sexual-Violence-against-Men-and-Boys-in-Syria-and-Turkey.pdf> (last accessed 25 August 2022); Children and Armed Conflict: Report of the Secretary-General, UN doc A/68/878- S/2014/339, 15 May 2014, §149.

155 Children and Armed Conflict: Report of the Secretary-General, UN doc S/2013/245, 15 May 2013, §167.

156 Rules 136 and 137, ICRC CIHL Database, *supra* fn 66. Art 4(1) of Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (OPAC). In the Commentary on Rule 137, the ICRC notes:

In the framework of the war crime of ‘using children to participate actively in hostilities’ contained in the Statute of the International Criminal Court, the words ‘using’ and ‘participate’ have been adopted in order

the minimum age for recruitment, there is agreement that it should not be below 15 years of age.¹⁵⁷ Additionally, Article 4(1) of the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict requires that '[a]rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.'¹⁵⁸

The definition of a child has often reflected varying societal norms, including varying assumptions of agency, marriage and legal competency. However, it is clear from the classical Islamic legal tradition's prohibition of the targeting of children that the legal system is designed around the non-participation of children in armed conflict. While the age of majority is often established at puberty in Islamic law, there is a wide prophetic narration that indicates that the Prophet refused to allow one of the companions to participate in battle at the age of 14 and only allowed him to participate the following year at the age of 15.¹⁵⁹ It should be noted, however, that some juristic views allow the participation of children in armed conflict in situations of defensive jihad, if there is an imperative and they are capable of fighting.¹⁶⁰

There is little research on the question of recruitment of children in armed conflict in modern Muslim scholarship, but within this literature, there is a rejection of the practice. For example, in the Muslim scholars' letter to al-Baghdadi, it is asserted that throwing children 'into the fray of combat' to either kill or get killed constitutes 'crimes against innocents'.¹⁶¹ Moreover, al-Azhar's Observatory for Combating Extremism condemns the recruitment of children by ISIS and asserts

to: cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology. (ICRC CIHL Database, *supra* fn 66).

157 Rules 136 and 137, ICRC CIHL Database, *supra* fn 66.

158 Art 8(b)(xxvi) of the Rome Statute lists as a war crime 'conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities'. Although there is a growing trend towards a prohibition of any form of military recruitment or use in hostilities of persons under the age of 18 years, for the purpose of this research, we consider ANSAs to be bound by the 15-years standard and that any commitment to the 18-years limit for recruitment of children in their armed forces goes beyond their strict obligations under international law.

159 A. al-Dawoody and V. Murphy, 'International Humanitarian Law, Islamic Law and the Protection of Children in Armed Conflict', 101 *International Review of the Red Cross* 911 (2019).

160 Muhammad Amin ibn Abidin, *Kitab al-Dur al-Mukhtar wa Hashiyat Ibn Abidin*, vol 4, Dar al-Fikr, 1992, p 127.

161 Letter to Baghdadi, *supra* fn 11, p 13.

that there is ‘no Islamic jurisprudential basis for the recruitment of children and training them to shoot innocent people’.¹⁶²

Whereas al-Zawahiri briefly quotes the classical view supporting the use of children in armed conflict in defensive warfare when necessary, he does not dedicate any attention to such permissibility.¹⁶³ Moreover, he evidences the brutality of ‘crusaders’ during armed conflict with accounts of their killing children, and contrasts this practice to Salah al-Din, whom he claims refrained from reciprocity against crusaders.¹⁶⁴ Similar views are also voiced by al-Maqdisi in his critique of the practice of the political authorities in Muslim countries with Islamists.¹⁶⁵

It should be noted that the above sources do not address the age of recruitment and make a general reference to ‘children’ when addressing the question of recruitment. They also do not make a distinction between permissible and non-permissible roles for children in combat if recruited.

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The AQIS Code of Conduct does not address the question of recruitment of children. Yet, Inspire, AQAP’s newsletter, has lauded children for answering the call to jihad¹⁶⁶ and has provided evidence of the ideological commitment to the recruitment and use of children in military activities, a practice reportedly often resorted to by all parties to the conflict in Yemen and Syria, including AQAP/Ansar al-Sharia¹⁶⁷ as well as Jabhat al-Nusra, respectively.¹⁶⁸ It should be noted, however, that the UN Secretary-General’s annual reports on children and armed conflict point to a heavier reliance on children by other parties to the conflict. Though the reports do not detail the

162 Al-Azhar Observatory for Combating Terrorism, ‘Istratijiyat Da’ish fi-Istiqtab wa Tajnid al-Shabab’, 2017, <https://www.azhar.eg/DesktopModules/EasyDNNNews/DocumentDownload.ashx?portalid=4&moduleid=7554&articleid=20139&documentid=3657>, accessed 29/01/22.

163 Al-Zawahiri, al-Tabri’a, supra fn 88, p 76.

164 Ibid, p 149.

165 Abu Muhammad al-Maqdisi, *Hiwar bayn Asakir al-Tawhid wa Asakir al-Shirk*, Minbar al-Tawhid w al-Jihad, 1996, pp 17–18, 26–27.

166 ‘O My Ummah, Be Happy’, Inspire, Ramadan 1436–Fall 2010, p 67.

167 Situation of Human Rights in Yemen, supra fn 107; HRW, ‘Yemen’, World Report 2014, supra fn 103; Children and Armed Conflict, supra fn 155, §155. Children and Armed Conflict: Report of the Secretary-General, UN doc S/2016/360, 20 April 2016, §165; Children and Armed Conflict: Report of the Secretary-General, UN doc A/72/361–S/2017/821, 24 August 2017, §188; Children and Armed Conflict: Report of the Secretary-General, A/72/865–S/2018/465, 16 May 2018, §201.

168 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra fn 111, §§ 72, 203–204; Children and Armed Conflict, supra fn 155, §145; Children and Armed Conflict: Report of the Secretary-General, UN doc A/69/926*–S/2015/409*, 5 June 2015, §191; Children and Armed Conflict, 2016, supra fn 168, §14; HRW, ‘Syria’, World Report 2016, supra fn 154.

ages and roles of children recruited in the conflicts, except for a reference to a 16-year-old recruited by Jabhat al-Nusra.¹⁶⁹

4. PROTECTION OF EDUCATION

Under customary IHL,¹⁷⁰ children affected by armed conflict are entitled to respect and protection. This includes notably access to education, food and health care. In addition, schools are considered to be civilian objects and are thus protected against attacks, unless they are used for military purposes and become lawful military objectives.

Under the principle of precaution, parties to armed conflict, including ANSAs must take constant care, in the conduct of military operations, to spare civilian objects, including schools. In addition, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to schools. In light of this principle, the use of functioning schools for military purposes must be avoided unless it is done for imperative military reasons.¹⁷¹

As clarified earlier, classical and modern Islamic scholars assert the impermissibility of targeting children, deeming the targeting of schools prohibited. Moreover, pursuit of knowledge is treated as an obligation in Quranic and Sunna traditions.¹⁷² As argued by Mohammad Hashim Kamali, the obligation to pursue education establishes it as an individual right and places a collective responsibility on the community to fulfil this right for both genders.¹⁷³

Key militant ideologues make no reference within the examined texts to the right to education or its disruption, to curricula or discrimination on the basis of gender. It is noteworthy that al-Zawahiri, in his commentary on the attack launched by the Egyptian Islamic Jihad, a militant organization he co- led in the 90s, against the Egyptian prime minister, which led to the death of a school-aged girl, justifies the attack on the basis of tatarus. However, he also claims that in preparing the operation, militants believed that the school was under construction and only learnt after the attack that the school was operational.¹⁷⁴ He further laments the loss of the child's life and offers financial compensation to her family under the Islamic legal regime of payment of blood money, yet asserts that the jihad cannot be suspended.¹⁷⁵

169 Children and Armed Conflict, *supra* fn 155, §145.

170 Rule 135, ICRC CIHL Database, *supra* fn 66.

171 Rules 7 and 15, *ibid*.

172 M. H. Kamali, 'Classical and Contemporary Approaches to Education: An Islamic Perspective', 2 *Islam and Civilisational Renewal* 3 (2011) 448-449.

173 *Ibid*, 450-451.

174 Al-Zawahiri, al-Tabri'a, *supra* fn 88, pp 177-178.

175 *Ibid*.

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As stated earlier, the AQIS Code of Conduct considers attacks on schools in Muslim countries to be un-Islamic due to the potential harm to Muslim children and teachers.¹⁷⁶ Yet, the conduct of al-Qaeda's affiliated groups has contributed, even if relatively minimally, to the erosion of the enjoyment of the right to education. Children's access to education in both Syria and Yemen has been severely impacted by both conflicts. Parties to these conflicts have been involved in the displacement of large numbers of the civilian population, partially as a result of attacks on schools and the use of schools for military activities, making it difficult to discern the particular impact of a party's involvement in the conflict. Nevertheless, the UN Secretary-General's annual reports on children and armed conflict point to both Jabhat al-Nusra and AQAP/Ansar al-Sharia being less active in the destruction of schools and their use for military activities than other parties. The 2016 report, however, points to the destruction of one school by Jabhat al-Nusra.¹⁷⁷ News reports also list Jabhat al-Nusra's active pursuit of education as a tool for offering religious education, maths and Arabic to boys and girls in territories outside the regime's control.¹⁷⁸ Such education was offered in parallel to the schooling system managed by the National Coalition of Syrian Revolutionary and Opposition Forces.¹⁷⁹ In Yemen, Amnesty International has reported schools in Ja'ar being disrupted 'after Ansar al-Sharia occupied the town'.¹⁸⁰ It has also reported Ansar al-Sharia denying residents the right to re-open schools because of its objection to the secular nature of the national curriculum and its insistence on the sex segregation of students and teachers from the age of six.¹⁸¹

5. HUMANITARIAN ACCESS

Common Article 3, Paragraph 2 of the 1949 Geneva Conventions provides that 'an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict'. This provision has been considered to be one of the legal bases on which humanitarian organizations, other than the ICRC, may provide humanitarian relief and

¹⁷⁶ AQIS Code of Conduct, *supra* fn 95, p 11.

¹⁷⁷ Children and Armed Conflict, 2016, *supra* fn 168, §157.

¹⁷⁸ Institute for War and Peace Reporting (IWPR), 'Syria: Confusion Reigns in Kfar Nabel's School System', 19 June 2015, <https://iwpr.net/global-voices/syria-confusion-reigns-kfar-nabels-school-system> (last accessed 25 August 2022); 'Baldah fi Sharq Suria ta'ish fi zil ahkam tanzim al-Qaeda', Reuters, 31 January 2013, <https://www.reuters.com/article/oegtp-syriaqaeda-sg5-idARACAE9B2BWC20130131>.

¹⁷⁹ IWPR, 'Syria: Confusion Reigns', *supra* fn 179.

¹⁸⁰ Amnesty International, Conflict in Yemen, *supra* fn 140, p 23.

¹⁸¹ *Ibid*, pp 23–24.

protection to people in need. Under customary IHL, the parties to an armed conflict ‘must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.¹⁸² Humanitarian relief personnel and objects must be respected and protected.¹⁸³

As stated previously, one of the most clearly articulated principles of Islamic law asserted in the classical tradition is the principle of aman, which stipulates that a non-Muslim granted aman in Muslim territory must be guaranteed protection of life and property for the duration of their stay, if they have been promised aman.¹⁸⁴ More significantly, aman may be granted by any Muslim residing in the territory and is not exclusive to the political authority.¹⁸⁵ If the Muslim political authority wishes to revoke the aman granted to a non-Muslim, then the person must be escorted safely outside the Muslim territory.¹⁸⁶ Mainstream modern scholars have also asserted the principle and its continued applicability in the modern Muslim world.¹⁸⁷

Al-Zawahiri, on the other hand, argues in earlier documents, that since non-Muslims enter Muslim territory on the basis of a visa granted by modern-day rulers of the Muslim world (considered infidels by al-Qaeda), they are not seen to have been granted aman.¹⁸⁸ However, this reasoning disregards the non-centralized nature of the aman regime, which acknowledges the guarantee of safety by any Muslim in the territory. Al-Zawahiri’s position loses further credibility in light of the group’s recognition of the general populace’s adherence to the Islamic faith, lending weight to the argument that Muslims’ interactions with non-Muslim groups are arguably classified as a valid aman. In response to this challenge, al-Zawahiri argues that no Muslims grant an explicit aman to non-Muslims and, even if they did, it is recognized that the ‘infidel’ government enjoys full discretion over the person’s entry into the territory.¹⁸⁹ On the other hand, al-Maqdisi condemns the targeting of humanitarian workers and asserts that these workers, such as ICRC staff, enjoy the protection of aman. He also condemns their abduction and murder. For example, he calls upon those engaged in militant activities ‘to provide aman to the delegates of the International Committee [of the Red Cross] and similar relief organizations and

182 Rule 55, ICRC CIHL Database, supra fn 66.

183 Rules 31 and 32, *ibid*.

184 Al-Tabari, *Kitab al-Jihad*, supra fn 56, p 34; Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, supra fn 70, 2:145–146; al-Shaybani, *Sharh al-Siyar*, supra fn 78, pp 158–161; al-Shafi’i, *Al-Umm*, supra fn 75, 7:405; Ibn Qudama, *Al-Mughni*, supra fn 59, 13:80.

185 Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, supra fn 70, 2:145–146; Al-Shaybani, *Sharh al-Siyar*, supra fn 78, pp 158–161; Al-Shafi’i, *Al-Umm*, supra fn 75, 7:405; Ibn Qudama, *Al-Mughni*, supra fn 59, 13:80. Note that there is a juristic debate over aman granted by dhimmis, minors and slaves.

186 Al-Tabari, *Kitab al-Jihad*, supra fn 56, 34.

187 Al-Qaradawi, *Fiqh al-Jihad*, supra fn 84, pp 1320–1321; Al-Zuhayli, *Athar al-Harb Fi l-Fiqh al-Islami*, supra fn 62, p 508; Abu Zahra, *Al-Ilaqat al-Dawliya fi l-Islam*, supra fn 84, p 72.

188 Al-Zawahiri, *Al-Tabri’a*, supra fn 88, p 136.

189 *Ibid*, p 135.

to refrain from targeting their members and delegates as long as they maintain their impartiality'.¹⁹⁰

The examined texts make no reference to discrimination on the basis of religion or gender in the provision of humanitarian relief.

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The AQIS Code of Conduct makes no reference to humanitarian workers but its strategic decision to refrain from fighting those who do not fight would plausibly include them. This appears to be the position adopted by Jabhat al-Nusra, at least theoretically, as is evident from its criticism of ISIS for killing humanitarian aid workers. In reference to the murder of Alan Henning by ISIS, the group's newsletter, al-Risalah, states that while 'he was a disbeliever, we mention his case here because he was under the protection of the Muslims'.¹⁹¹

Additionally, there seems to be an inclination to accept the responsibility to provide for the basic needs of the civilian population, as is evident in AQAP's celebration of al-Shabaab's provision of humanitarian supplies in Somalia.¹⁹² Statements made by Jabhat al-Nusra also point to a sense of obligation towards the Muslim community in the territories it controls. The group established the division of Public Administration for Services, modelled on a government administrative authority, assuming responsibilities for the supply of electricity, water and food.¹⁹³ For example, a June 2015 statement in Khan Shaykhun, the group comforts the population that the provision of water and bread will continue for the Muslim community.

In a study published by the Washington Institute for Near East Policy, an interview with a local council member in Shabwa asserted in 2013 that AQAP 'provided medical assistance, cleaned towns too, created jobs through better security, price controls'.¹⁹⁴ After its seizure of Mukalla, the group is reported to have 'provided a \$4 million budget for the council in order to furnish services to the population'.¹⁹⁵

This attention to the provision of services is reflective of AQAP's interest in winning the sympathies of the Yemeni population, as is evident in its letter to an AQIM leader asserting the

190 Al-Maqdisi, *Waqafat Ma' Thimar al-Jihad*, supra fn 69, pp 145–146.

191 'Khilafa One Year On', Al-Risalah, Ramadan 1436/ July 2015, p 24.

192 'On Water and Provision of Bread, Khan Sheikhoun', Archive of Jabhat al-Nusra/Hay' at Tahrir al-Sham Service Documents, Aymenn Jawad al-Tamimi's Blog, <https://www.aymennjawad.org/2015/08/archive-of-jabhat-al-nusra-service-documents> (last accessed 25 August 2022).

193 Ibid.

194 D. R. Green, *Defeating Al-Qaeda's Shadow Government in Yemen: The Need for Local Governance Reform*, Washington Institute for Near East Policy, 2019, p 19, <https://www.washingtoninstitute.org/media/950> (last accessed 25 August 2022).

195 Ibid, p 37.

need for ‘taking care of their daily needs like food, electricity, and water. Providing these necessities will have a great effect on people, and will make them sympathize with us and feel that their fate is tied to ours’.¹⁹⁶

While there are reports of the abduction and sometimes torture of humanitarian relief workers by AQAP¹⁹⁷ and Jabhat al-Nusra,¹⁹⁸ as well as instances of denying the civilian population access to humanitarian relief,¹⁹⁹ it can be stated that both groups have generally refrained from targeting or attacking humanitarian aid workers. In its recordings of attacks on humanitarian workers, the Aid Worker Security Database (AWSD), has only recorded 2 violations by Jabhat al-Nusra, when it ambushed and detained 3 UN-contracted drivers in 2013.²⁰⁰ As for AQAP/Ansar al-Sharia, AWSD reports one incident, where ‘armed men kidnapped a French international staffer as he was travelling from north Yemen to the Red Sea port city of Hudaida. After being held for three months, the victim was released; handed over by a group called Ansar al-Sharia in Shabwa’.²⁰¹

For the purpose of this case study and in the absence of fieldwork due to security restrictions, we were unable to address policies and restrictions relating to granting access to humanitarian workers or policies relating to the distribution of humanitarian relief or provision of services to non-Muslims, aside from the general references above to obligations towards the Muslim community.

6. PROTECTION OF HEALTH CARE

Under Common Article 3(2) of the 1949 Geneva Conventions, the ‘wounded and sick’ shall be collected and cared for and they must receive ‘to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. No distinction may be made among them founded on any grounds other than medical ones’.²⁰²

Medical personnel, facilities and transports that are exclusively assigned to medical purposes must be respected and protected in all circumstances, although they lose such protection if they

196 Quoted in *ibid*, pp 33–34.

197 ‘Hostages Freed by al-Qaeda Arrive Home in France’, France 24, 14 November 2011. www.france24.com/en/20111114-french-hostages-yemen-freed-al-qaeda-ngo-triangle-generation-humanitaire.

198 Amnesty International, “‘Torture was My Punishment’”, *supra* fn 109, p 24.

199 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* fn 118, §20.

200 For incidents of violations against aid workers in Syria, see Aid Worker Security Database, <https://aidworkersecurity.org/incidents/search?start=2011&detail=1&country=AR%20CSY> (last accessed 25 August 2022).

201 *ibid*.

202 Rule 110, ICRC CIHL Database, *supra* fn 66.

carry out or are used to commit acts harmful to the enemy.²⁰³ Attacks directed against medical and religious personnel and objects displaying the distinctive emblems of the Geneva Conventions in conformity with international law are prohibited.²⁰⁴

While numerous Islamic legal sources instruct Muslims to pursue a healthy life, it is difficult to discern from such instructions an obligation that is comparable to a modern understanding of the right to health, but Muslim states consider themselves bound by Islamic law to provide medical care as is evident from Article 17 of the Cairo Declaration on Human Rights in Islam, which stipulates: ‘b) Everyone shall have the right to medical and social care, and to all public amenities provided by society and the State within the limits of their available resource.’²⁰⁵ It should be noted, however, that most classic interpretations of Islamic law make no reference to the impermissibility of killing the wounded among non-Muslims but explicitly state that wounded Muslims in a war of rebellion may not be killed.²⁰⁶ Modern mainstream interpretations, on the other hand, have shifted towards prohibiting the killing of anyone who is not actually participating in combat,²⁰⁷ thereby deeming those incapable of fighting, including the wounded, impermissible targets.

The militant texts consulted make no reference to a right to health. The wounded are not listed among the categories that may not be fought and al-Muhajir explicitly relies on the classical jurist Ibn Qudama’s view²⁰⁸ that a Muslim who apprehends a captive may kill him if the captive cannot be transported due to being wounded or sick.²⁰⁹

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The AQIS Code of Conduct also makes no reference to a right to health. Yet, both AQAP/Ansar al-Sharia and Jabhat al-Nusra have targeted hospitals²¹⁰ and there are reports that AQAP used them

²⁰³ Rules 25, 28 and 29, *ibid*.

²⁰⁴ Rule 129, *ibid*.

²⁰⁵ Art 17, Cairo Declaration, *supra* fn 10.

²⁰⁶ Ibn Qudama, Al-Mughni, *supra* fn 59, 12:252. See discussion in Section 5A on targeting in Islamic law.

²⁰⁷ Abu Zahra, Al-Ilaqat al-Dawliya fi l-Islam, *supra* fn 84, p 103.

²⁰⁸ Ibn Qudama, Al-Mughni, *supra* fn 59, 13:51.

²⁰⁹ Abu Abdullah al-Muhajir, Masa’il fi Fiqh al-Jihad, p 449, <https://ia800503.us.archive.org/28/items/kotobjehad/masael.pdf> (last accessed 25 August 2022).

²¹⁰ On AQAP/Ansar al-Sharia, see Children and Armed Conflict: Report of the Secretary-General, UN doc A/73/907–S/2019/509, 20 June 2019, §193; On Jabhat al-Nusra, see Abu Sultan al-Jizrawi, ‘The Battle of Victory Jisr al-Shughour’, Al-Risalah, Ramadan 1436/ July 2015, p 10; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, August 2015, *supra* fn 110, §144.

for military purposes.²¹¹ Again, it should be noted that records of both violations in the UN Secretary-General’s reports on children and armed conflict indicate that such violations committed by both groups are less frequent than those committed by other parties to the conflict. Additionally, there are reports of denial of medical care to detainees by Jabhat al-Nusra.²¹² But in a 2015 edition of Al-Risalah, Jabhat al-Nusra justified an attack on a hospital on the basis of its use for military purposes indicating a general rejection of targeting hospitals in other cases.²¹³ In 2013, AQAP also apologized for an attack on a hospital, indicating a similar rejection of targeting hospitals.²¹⁴ Moreover, both groups have provided medical services to the communities under their control.²¹⁵ It seems that Jabhat al-Nusra also participated in the vaccination of children in territories controlled by anti-regime forces. This is evident in its investigation and trial of individuals accused of distributing corrupted vaccines sourced from the World Health Organization, which were said to have caused the death of around 30 children in Idlib.²¹⁶ We were unable, however, to find information on the treatment of women’s health issues and the provision of maternal and family planning services by the two groups.

7. THE PROHIBITION OF FORCED DISPLACEMENT

IHL prohibits the forced displacement of civilians ‘unless the security of the civilians is involved or imperative military reasons so demand’.²¹⁷ It also provides that in case of displacement, all possible measures shall be taken to ensure that the displaced persons are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the

211 On AQAP/Ansar al-Sharia, see Children and Armed Conflict, supra fn 155, §160; Children and Armed Conflict 2016, supra fn 168, §172; Children and Armed Conflict, 2017, supra fn 168, §196; HRW, ‘Yemen’, World Report 2015, <https://www.hrw.org/world-report/2015/country-chapters/yemen> (last accessed 25 August 2022).

212 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, August 2015, supra fn 110, §57.

213 Abu Sultan al-Jizrawi, ‘The Battle of Victory Jisr al-Shughour’, supra fn 211, p10.

214 ‘Al-Qaeda Apologises for Yemen Hospital Attack’, supra fn 105.

215 G. Abdul-Ahad, ‘Syria’s al-Nusra Front – Ruthless, Organised and Taking Control’, The Guardian, 10 July 2013, <https://www.theguardian.com/world/2013/jul/10/syria-al-nusra-front-jihadi>; Green, Defeating Al-Qaeda’s Shadow Government in Yemen, supra fn 195, p 19.

216 ‘Al-tahkik fi wafat ‘ashra atfal fi Idib b-likahat fasida’, Al Jazeera, 17 September, 2014, <https://www.aljazeera.net/news/arabic/2014/9/17/%D8%A7%D9%84%D8%AA%D8%AD%D9%82%D9%8A%D9%82-%D8%A8%D9%88%D9%81%D8%A7%D8%A9-%D8%B9%D8%B4%D8%B1%D8%A7%D8%AA-%D8%A7%D9%84%D8%A3%D8%B7%D9%81%D8%A7%D9%84-%D9%81%D9%8A-%D8%A5%D8%AF%D9%84%D8%A8>.

217 Rule 129, ICRC CIHL Database, supra fn 66.

same family are not separated.²¹⁸ Displaced persons have a right to return to their homes as soon as the reason for their displacement ceases to exist and security allows.²¹⁹

In classical Islamic law, which predates the modern nation-state apparatus, Muslims enjoyed mobility within Muslim territories and non-Muslims were guaranteed protection under aman. Aman was devised to provide safe refuge for non-Muslims in Muslim territories, regardless of whether or not they were forcibly displaced. It offered significant guarantees to life and property for those temporarily seeking refuge in or visiting Muslim lands.²²⁰ As stated earlier, the right to grant aman was accorded to members of the Muslim community and not just the state. However, with the move towards the modern nation-state system and its exclusive control over territorial borders, individual rights to grant aman are difficult to maintain, leading to a shift closer to modern international law's assertion of freedom of movement and protection of refugees. For example, Article 12 of the Cairo Declaration on Human Rights in Islam stipulates that '[e]very man shall have the right, within the framework of Shari'ah, to free movement and to select his place of residence whether inside or outside his country and if persecuted, is entitled to seek asylum in another country. The country of refuge shall be obliged to provide protection to the asylum-seeker until his safety has been attained, unless asylum is motivated by committing an act regarded by the Shari'ah as a crime.'²²¹ Modern Muslim scholars have also asserted the rejection of forced displacement on numerous occasions. For example, more than 1,000 Muslim scholars rejected compulsory forced sectarian displacement in the concluding remarks of the International Conference for Islamic Unity held in Saudi Arabia in 2018.²²²

None of the examined literature from al-Qaeda, Jabhat al-Nusra or AQAP/Ansar al-Sharia deals with the question of displacement, perhaps indicating a lack of interest in intellectual engagement with the issue

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218 Rule 131, *ibid*.

219 Rule 132, *ibid*.

220 Al-Tabari, *Kitab al-Jihad*, *supra* fn 56, p 34. See discussion of aman in Section 5A1.

221 Art 12, Cairo Declaration, *supra* fn 10. It is noteworthy that the Declaration was revised by the OIC for approval by states in 2020 but the review process was halted due to the Covid-19 pandemic.

222 A. S. Ahmed, 'Al-Tataruf w al-Iksa' w-al-Irhab: Muthalth al-Khatar Amam al-Alam al-Islamy, Wathikat Makah al-Mukaramah, Mithak Islamy Shamil Yahkom Qawaid al-Khilaf Bayn al-Muslimin', *Al Ahram*, 17 December 2018, <https://gate.ahram.org.eg/daily/News/202864/115/686091/%D8%AA%D8%AD%D9%82%D9%8A%D9%82%D8%A7%D8%AA-%D9%88-%D8%AA%D9%82%D8%A7%D8%B1%D9%8A%D8%B1-%D8%AE%D8%A7%D8%B1%D8%A7%D9%84%D8%AA%D8%B7%D8%B1%D9%81-%D9%88%D8%A7%D9%84%D8%A5%D9%82%D8%B5%D8%A7%D8%A1-%D9%88%D8%A7%D9%84%D8%A5%D8%B1%D9%87%D8%A7%D8%A8-%D9%85%D8%AB%D9%84%D8%AB-%D8%A7%D9%84%D8%AE%D8%B7%D8%B1-%D8%A3%D9%85%D8%A7%D9%85-%D8%A7%D9%84%D8%B9%D8%A7%D9%84%D9%85-%D8%A7%D9%84.aspx>.

Practice shows significant violations of the international prohibition of forced displacement and the Islamic position detailed above. In Yemen, for example, Ansar al-Sharia ‘occupied empty houses and turned them into military bases. When Ansar al-Shari’a retreated in June 2012, the towns and cities under their control were contaminated with unexploded ordnance, booby traps and mines, posing a major obstacle for internally displaced people wanting to return to their homes.’²²³ In Syria, Jabhat al-Nusra and other Islamist groups’ indiscriminate attacks, sectarian policies and the forced implementation of their brand of Islamic law led to extensive displacement, as evident in the displacement of Syrian Kurds.²²⁴ For example, in July 2013, after clashes with the People’s Defense Units, Jabhat al-Nusra and other affiliated groups instructed ‘Kurdish civilians to leave the town or face immediate attack. Thousands of Kurdish civilians subsequently fled. Many were abducted at checkpoints encircling the area. The property of those who fled was looted and burned.’²²⁵

8. USE OF LANDMINES AND OTHER EXPLOSIVE DEVICES

In addition to IHL’s regulations on indiscriminate attacks, discussed in Section 5A, the use of landmines – both anti-personnel (AP) and anti-vehicle (AV) – is not prohibited per se under customary IHL. However, when landmines are used, particular care must be taken to minimize their indiscriminate effects.²²⁶ In addition, parties to the conflict using landmines must record their placement, as far as possible.²²⁷ At the end of active hostilities, they must also remove or otherwise render them harmless to civilians or facilitate their removal.²²⁸ In addition, customary international law requires parties to international and non-international armed conflicts to ‘take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects’.²²⁹ The use of weapons which are by nature indiscriminate is also prohibited.²³⁰

Naturally, classical jurisprudence does not address the use of landmines and other explosive devices due to the modernity of such weapons. However, as explained earlier, Muslim jurists have

223 Amnesty International, Conflict in Yemen, supra fn 140, p 28.

224 E. Ferris, K. Kirişçi and S. Shaikh, Syrian Crisis: Massive Displacement, Dire Needs and a Shortage of Solutions, Foreign Policy at Brookings, 18 September 2013, pp 7–18, <https://www.brookings.edu/wp-content/uploads/2016/06/Syrian-CrisisMassive-Displacement-Dire-Needs-and-Shortage-of-Solutions-September-18-2013.pdf> (last accessed 25 August 2022).

225 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, February 2014, §147.

226 Rule 81, ICRC CIHL Database, supra fn 66.

227 Rule 82, *ibid.*

228 Rule 83, *ibid.*

229 Rule 17, *ibid.*

230 Rule 71, *ibid.*

accepted with varying limitations collateral damage under the regime of tatarus. In discussing permissible attacks against besieged cities, jurists acknowledge the use of potentially indiscriminate weapons such as rock-hurling machines, lances and fire. While they assert that untargetable groups should be avoided, they accept the permissibility of killing those groups if their death is unavoidable.²³¹ Modern mainstream scholars also assert the duty to refrain from killing non-combatants unless it is necessary and unavoidable.²³² This interpretation is in line with the customary rules of IHL: ‘When landmines are used, particular care must be taken to minimize their indiscriminate effects’,²³³ and booby traps must not be attached to objects enjoying special protection or objects likely to attract civilians.²³⁴

Al-Qaeda ideologues employ the classical regime of tatarus to argue for the permissibility of the use of explosive devices and even weapons of mass destruction. Al-Zawahiri argues for the permissibility of using indiscriminate weapons as an extension of the tatarus regime;²³⁵ Abu Abdullah al-Muhajir, the former Dean of al-Qaeda’s Sharia College who adopts more radical positions within the group, also uses the regime of tatarus to argue that jurists legitimize the use of weapons that inflict wide damage, which would justify the use of nuclear, chemical and biological weapons, even if this leads to the death of prohibited targets such as ‘the infidels’ women and children’.²³⁶ Moreover, al-Zawahiri claims an alternative basis for the resort to explosive weapons: reciprocity. He quotes Nasir al-Fahd’s fatwa, according to which, states like the US that inflict significant damage on Muslims may be treated reciprocally. The fatwa goes on to affirm, ‘some of our brothers had compiled the number of Muslims killed by their direct and indirect weapons and the number approached 10 million. As for the number of lands scorched by their bombs, explosives and rockets, it cannot be compiled by anyone other than God ...If you were to drop a bomb that kills 10 million of them and scorches as much land as they have scorched from Muslim lands, this would be permissible with no need for any further evidence.’²³⁷ In addition to reciprocity and general permissibility, al-Muhajir also argues that specific situations of vulnerability vis-à-vis the enemy create an obligation for Muslims to acquire weapons of mass destruction as a strategy of deterrence.²³⁸

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231 Al-Tabari, *Kitab al-Jihad*, supra fn 56, p 348.

232 Al-Zuhayli, *Athar al-Harb Fi l-Fiqh al-Islami*, supra fn 62, p 506.

233 Rule 81, ICRC CIHL Database, supra fn 66.

234 Rule 80, *ibid*.

235 Al-Zawahiri, *Al-Tabri’a*, supra fn 88, p 120.

236 Abu Abdullah al-Muhajir, *Masa’il fi Fiqh al-Jihad*, supra fn 209, pp 183–184.

237 Al-Zawahiri, *al-Tabri'a*, supra fn 88, p 118.

238 Al-Muhajir, *Masa’il fi Fiqh al-Jihad*, supra fn 209, p 188.

The AQIS Code of Conduct considers it impermissible to cause blasts in public areas or places where average Muslims may be hurt. The list of places provided includes courtrooms, mosques, markets, funerals and other public gatherings.²³⁹ Yet, both AQAP and Jabhat al-Nusra have extensively resorted to the use of explosives and suicide bombing (officially aimed at military targets).²⁴⁰ AQAP's English publication, *Inspire*, instructs Muslims on how to make homemade bombs, with detailed manuals on how to construct IEDs using everyday items, and boasts about al-Qaeda's successful placement of bombs on US planes.²⁴¹ Jabhat al-Nusra's English publication, *Al-Risalah*, contains numerous references to the celebration of suicide bombings.²⁴² Suicide bombing aimed at government targets has often led to indiscriminate killing by the two groups.²⁴³ Action on Armed Violence, in its report on IED usage, notes that Jabhat al-Nusra 'shift[ed] from using covert (S)VBIEDs en masse at the beginning of the war, to mainly employing up-armored SVBIEDs in and around their strongholds once the fighting had entered a semi-conventional stage of combat'.²⁴⁴

9. DETENTION, FAIR TRIAL AND ADMINISTRATION OF JUSTICE

A. TREATMENT OF PERSONS IN DETENTION

Common Article 3 of the 1949 Geneva Conventions, as well as customary IHL provide numerous rules concerning the treatment of persons in detention, notably the prohibition of ill-treatment, the provision of food and water and safeguards with regards to health and hygiene. ICRC access to persons deprived of their liberty is mandatory only in the context of international armed conflicts and, as such, is not an obligation for ANSAs. In the context of a NIAC, and according to Common Article 3, the ICRC 'may offer its services to the parties to the conflict with a view to visiting all persons deprived of their liberty for reasons related to the conflict in order to verify the conditions of their detention and to restore contacts between those persons and their

²³⁹ AQIS Code of Conduct, *supra* fn 95, 11.

²⁴⁰ Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, *supra* fn 119, §113; HRW 'Yemen', World Report 2014, *supra* fn 103; HRW, 'Yemen', World Report 2015, *supra* fn 212.

²⁴¹ See, e.g., *Inspire*, Summer 2010 (1431), p 33; *Inspire*, Summer 2010 (1431), p 5; *Inspire*, Special Issue, November 2010 (1431), p 4.

²⁴² *Al-Risalah*, Summer 2020, pp 5, 7, 14, 33, 61.

²⁴³ Children and Armed Conflict, *supra* fn 156, §166; Children and Armed Conflict, *supra* fn 155, §148; Children and Armed Conflict, *supra* fn 168, §154.

²⁴⁴ I. Overton, J. Dathan, C. Winter, J. Whittaker, R. Davies MBE QGM and H. Kaaman, *Improvised Explosive Device (IED) Monitor*, Action on Armed Violence, October 2017, p 26. <https://aoav.org.uk/wp-content/uploads/2017/10/IED-Monitor-Report-for-web-final.pdf> (last accessed 25 August 2022).

families'.²⁴⁵ According to the ICRC study on customary IHL, persons deprived of their liberty in relation to a NIAC must be released as soon as the reasons for their detention cease to exist.²⁴⁶

But aside from guarantees of fair trial within the court system, a significant issue arises regarding the legitimacy and enforceability of decisions issued by rebel courts. Most classical jurists acknowledge the decisions issued by rebel courts according to the concept of *baghy*. However, the question is rather moot in the modern context, considering the modern mainstream institutions' perceptions of terrorist militant groups as more suited to *hiraba*. Arguably, even the consideration of whether decisions issued by a group that falls under the concept of *hiraba* is enforceable is of rather limited import given the groups' perception of modern Muslim governments as infidels, hence deeming their own governance the legitimate (*hakim 'adl*) rather than a rebellious or seditious, regime.

With regards to war captives, the Quran gives wide discretion to the political authority, as is evident in the Quranic verse: 'When you meet the disbelievers in battle, strike them in the neck, and once they are defeated, bind any captives firmly – later you can release them by grace or by ransom – until the toils of war have ended.'²⁴⁷ Aside from the question of the legitimation of slavery in this verse, which is not addressed in this case study because of al-Qaeda's not practising it, the issue of killing captives also arises. Whereas the verse may be interpreted to permit killing a person only before they are taken into captivity, classical jurists have disagreed on the matter, with some accepting the possibility of killing captives as an alternative to releasing or ransoming them, and others rejecting the permissibility of killing captives.²⁴⁸ Modern views have either rejected the permissibility on the basis of its absence in Quranic instructions,²⁴⁹ or 'argued that international treaties that bind Muslim states and prohibit killing captives should be upheld by the political authority as a reciprocal obligation vis-à-vis other members of the international community'.²⁵⁰

On the question of torture during detention, Islamic scholars initially perceived evidence procured by torture as inadmissible, with some later classical scholars arguing for admissibility (including Ibn Taymiyya, a key influence on militant groups).²⁵¹ Later modern scholars, such as

245 Rule 124, ICRC CIHL Database, supra fn 66.

246 Rule 128, *ibid*.

247 The Qur'an, trans. M. A. S. Abdel Haleem, Oxford University Press, 2005, Surah 47, Verse 4.

248 Ibn Rushd, *Bidayat al-Mujtahid wa Nihayat al-Muqtasid*, supra fn 70, 2:144–145; Malik, *Al-Mudawanna*, supra fn 145, 1:501; al-Shaybani, *Sharh al-Siyar*, supra fn 78, pp 98–101; al-Shafi'i, *Al-Umm*, supra fn 75, 7:335; Ibn Qudama, *Al-Mughni*, supra fn 59, 13:44–46.

249 Al-Zuhayli, *Athar al-Harb Fi l-Fiqh al-Islami*, supra fn 62, p 435.

250 Al-Qaradawi, *Al-Jihad*, supra fn 85, 2:978–979.

251 B. Johansen, 'Signs as Evidence: The Doctrine of Ibn Taymiyya (1263–1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof', 9 *Islamic Law and Society* 2 (2002).

the Grand Imam of al-Azhar, renounce torture as an interrogation tactic.²⁵² Moreover, Article 20 of the Cairo Declaration on Human Rights in Islam prohibits subjecting individuals ‘to physical or psychological torture or to any form of maltreatment, cruelty or indignity’.

Militant ideologues like al-Zawahiri or al-Maqdisi assert the applicability of Islamic law as a necessary prerequisite of Islamic governance.²⁵³ With regards to killing captives, al-Muhajir relies on juristic views that permit this in order to establish its permissibility.²⁵⁴ While militant ideologues make no reference to the permissibility of transgressions such as torture, they criticize the Egyptian regime and the US for their resort to torture, implying a rejection of the practice²⁵⁵

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There is evidence that Jabhat al-Nusra was engaged in a systematic policy of taking hostages, including women and children, who were targeted for exchange in prisoner swaps with the government.²⁵⁶ In addition to summary executions²⁵⁷ and the disappearance of hostages,²⁵⁸ reports also indicate that Jabhat al-Nusra executed prisoners when there was a belief that the government had no intention of swapping them for prisoners detained by the government.²⁵⁹ Numerous reports also indicate the resort to torture, corporal punishment²⁶⁰ and degrading treatment including denial of food and basic medical care.²⁶¹

252 Ahmad al-Tayyib, ‘Khuturat al-Takfir’, in Al-Azhar fi Muwajaht al-Fikr al-Irhabi Conference, 3–4 December 2014, Dar al-Quds al-Arabi, 2016, p 73.

253 A. al-Zawahiri, Al-Hasad al-Mur, Al-Fajr, October 2008, pp 35–36; Al-Zawahiri, ‘Al-Waqi’ bayn al-Alam wa-l-Amal’, supra fn 64, p 20; Al-Maqdisi, ‘al-Shar’iya al-Dawliya’, pp 1–2; Al-Muhajir, Masa’il fi Fiqh al-Jihad, supra fn 210, pp 423–430.

254 Al-Muhajir, Masa’il fi Fiqh al-Jihad, supra fn 209, pp. 430–434

255 Al-Zawahiri, ‘Al-Waqi’ bayn al-Alam wa al-Amal’, supra fn 64, p 43.

256 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, February 2015, supra fn 111, §§63, 95, 204; Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra fn 119, §41.

257 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra fn 108, §106.

258 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra fn 119, §41.

259 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra fn 108, §100.

260 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, February 2016, supra fn 108, §108..

261 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, August 2015, supra fn 110, §56.

AQAP/Ansar al-Sharia also took ‘people, including civilians not directly participating in hostilities, in areas under its control without access to their families, a lawyer or the outside world’,²⁶² some of whom disappeared.²⁶³ Some hostages were taken to negotiate an exchange with the government, or in the hope of receiving ransom, particularly in the case of foreign hostages.²⁶⁴

B. FAIR TRIAL AND THE ADMINISTRATION OF JUSTICE

Under customary IHL, ‘[n]o one may be convicted or sentenced, except pursuant to a fair trial affording all essential judicial guarantees.’²⁶⁵

It is often argued that the Islamic legal culture exhibits revolutionary understandings of the rule of law through its assertion of the primacy of Sharia.²⁶⁶ The centrality of law and order is perhaps most evident in classical scholars’ assertion that the application of Islamic law is the primary determinant of the territory being deemed Islamic land (*dar al-Islam*).²⁶⁷ Modern interpretations, however, have reformulated this notion of *hakimiyya* to assert the compatibility between modern law and Islamic law if there is no clear and evident violation of Islamic tenets. When it comes to the question of guarantees of fair trial, there are numerous classical examinations of judicial qualifications, manifestations of justice and guarantees of what might be referred to as rule of law, including veneration of the notion of the independence of jurisprudential sciences and the judiciary from political control.²⁶⁸ It would, nevertheless, be anachronistic to assess the legal system’s adherence to modern notions of rule of law and fair-trial guarantees according to a millennium-old legal system.

THE PRACTICE OF AFFILIATED GROUPS

The AQIS Code of Conduct briefly asserts that jihadists who transgress and cause harm must be punished and those harmed must be compensated.²⁶⁹ Yet, there is no clarity in the document on the mechanisms for doing so. On the other hand, Jabhat al-Nusra and AQAP/Ansar al-Sharia have created Sharia courts with Sharia-trained judges. Jabhat al-Nusra backtracked on its initial cooperation with other opposition factions in a unified judicial mechanism due to its

262 Amnesty International, *Conflict in Yemen*, supra fn 140, p 29.

263 Ibid.

264 HRW, ‘Yemen’, *World Report 2013*, supra fn 103.

265 Rule 100, ICRC CIHL Database, supra fn 66.

266 W. Hallaq, *The Impossible State: Islam, Politics and Modernity’s Moral Predicament*, Kindle edn, Cambridge University Press, 2013, p 71.

267 Ibid, p 49.

268 Ibid, p 60.

269 AQIS Code of Conduct, supra fn 95, pp 11–12.

dissatisfaction with its inability to control it, and launched its own judicial system, Dar al-Qadaa (House of Judgment) in 2014. Dar al-Qadaa typically included six divisions, the diwan office which was responsible for procedural issues, a reconciliation division, a financial disputes division, the hudud division, the prison division and an enforcement division.²⁷⁰ The system dealt with civil and criminal issues as well as the trial of opposing groups' members. While swiftness may have been a feature appreciated by the public in this judicial model, there were serious concerns over the lack of judicial training,²⁷¹ summary trials, lack of respect for due process,²⁷² limited separation between the judiciary and the militant group²⁷³ and the restriction of personal freedoms, particularly for women.²⁷⁴ These concerns are heavily asserted in an account given by a member of the militant group in Al-Risalah of a trial conducted by the group. The account of the trial, which ended with a summary execution, makes no reference to legal representation.²⁷⁵

AQAP/Ansar al-Sharia also instituted Sharia courts in the territories it controlled. After an internal debate over the extent of Sharia implementation, views in favour of the group's maximalist interpretation prevailed, leading to some brutal practices: 'One example included public amputations of the hands of two individuals charged with theft, including a fifteen-year-old boy whose limbs were gruesomely paraded around the city as a warning to others against theft.'²⁷⁶ The popular approval of the AQAP courts in Yemen has similarities with the Syrian case, where people appreciated the acceleration of justice. However, the harsh interpretation and implementation of Sharia led to the alienation of AQAP and its eventual loss of control over the Yemeni territory it controlled such as Jaar and Zinjibar.²⁷⁷ These losses led the group to reconsider its strategy and favour a more gradual approach to implementation of the Sharia by its courts.²⁷⁸ A letter penned by an AQAP leader points to a reconciliatory attitude where educating people in religion before the implementation of punishment, regulating markets and protecting small

270 J. Cook, H. Haid and I. Trauthig, 'Jurisprudence Beyond the State: An Analysis of Jihadist "Justice" in Yemen, Syria and Libya', *Studies in Conflict & Terrorism*, 10 June 2020, <https://doi.org/10.1080/1057610X.2020.1776958> (last accessed 25 August 2022).

271 R. Schwab, 'Insurgent Courts in Civil Wars: The Three Pathways of (Trans)formation in Today's Syria (2012–2017)', *29 Small Wars & Insurgencies* 4 (August 2018) 811.

272 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, August 2015, *supra* fn 110, §97.

273 J. Landis, 'Al-Qaeda's Syrian Judiciary – Is It Really What Al-Jolani Makes It out to Be?', *Syria Comment*, 10 November 2014, <https://www.joshualandis.com/blog/al-qaedas-syrian-judiciary-really-al-jolani-makes/> (last accessed 25 August 2022).

274 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, August 2015, *supra* fn 110, §97.

275 'All Cases Are Judged According to Qur'an and Sunnah', *Al-Risalah*, October 2015, p 79.

276 Cook et al, 'Jurisprudence Beyond the State', *supra* fn 272, 5.

277 *Ibid.*

278 *Ibid.*

shops from abuse are key cursors of the group's strategy.²⁷⁹ More significantly, the letter asserts the importance of respect for justice and impartiality as is evident in its elaboration of 'how in these sharia cases, the police or court would write a requisition to a person, either a mujahid or "son from the region"'.²⁸⁰ In a letter from an AQAP leader to an AQIM leader, this reorientation is made even more evident:

You have to take a gradual approach with them when it comes to their religious practices. You can't beat people for drinking alcohol when they don't even know the basics of how to pray. We have to first stop the great sins, and then move gradually to the lesser and lesser ones ...

Enforcing Islamic punishments in war time is something that was done by our forbearers and it needs to be applied through good judgment and following a verdict.

Our opinion in the beginning was to postpone the issue. Only after monotheism took hold of people's hearts did we begin enforcing these punishments.

Sharia rule doesn't mean enforcing punishments, as some people believe, or have been made to believe. We have to correct this misconception for the sake of the people. Try to avoid enforcing Islamic punishments as much as possible, unless you are forced to do so.²⁸¹

Nevertheless, there are numerous accounts of brutal punishments, such as the crucifixion of the body of an executed man, the execution of a man 10 days after an alleged altercation with another man in a market leading to the death of the latter and several accounts of the execution of individuals accused of spying activities.²⁸²

J. THE SPECIAL PROTECTION OF CERTAIN OBJECTS SUCH AS CULTURAL PROPERTY

Under customary IHL, each party to the conflict must respect cultural property. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. Property of great importance to the cultural heritage of every people must not be the object of

²⁷⁹ Ibid, 6.

²⁸⁰ Ibid, 5.

²⁸¹ Al-Qaida Papers: How to Run a State, *Associated Press*, 2014, available at: <https://www.longwarjournal.org/images/al-qaida-papers-how-to-run-a-state.pdf> (accessed 25/08/2022).

²⁸² Amnesty International, *Conflict in Yemen*, supra fn 140, pp 16–17.

attack unless imperatively required by military necessity.²⁸³ In addition, the use of property of great importance to the cultural heritage of every people for purposes which are likely to expose it to destruction or damage is prohibited, unless imperatively required by military necessity.²⁸⁴ All seizure or destruction of or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science is prohibited. Any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, property of great importance to the cultural heritage of every people is prohibited.²⁸⁵ The international legal framework also protects intangible cultural heritage. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage defines ‘intangible cultural heritage’ as ‘[t]he practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage’. Although the obligations enshrined in this Convention are binding upon states, they can serve as guidelines for ANSAs willing to take safeguarding measures.

It is understandable that classical Islamic scholars have not dedicated significant attention to the treatment of cultural heritage sites, considering the relative novelty of the concept. Yet, some modern writings rely on the prohibition of wanton destruction and the prophetic instruction to preserve a Christian church as a basis for the preservation of cultural heritage sites.²⁸⁶ Moreover, the survival of many pre-Islamic cultural heritage sites provides ample evidence of early Islamic tolerance towards them. While Muslim scholars do not normally address the issue as one of the main topics of the conduct of war, there are numerous assertions by modern scholars that the destruction of religious mausoleums and cultural heritage sites is prohibited.²⁸⁷

Despite al-Qaeda’s alliance with the Taliban regime, which destroyed the Buddhas of Bamiyan in 2001, the documents examined in this case study make no reference to its position on the destruction of cultural heritage sites, except for the AQIS Code of Conduct’s assertion that tombs,

²⁸³ Rule 38, ICRC CIHL Database, supra fn 66.

²⁸⁴ Rule 39, *ibid.*

²⁸⁵ Rule 40, *ibid.*

²⁸⁶ V. Arnal, ‘Destructive Trends in Contemporary Armed Conflicts and the Overlooked Aspect of Intangible Cultural Heritage: A Critical Comparison of the Protection of Cultural Heritage Under IHL and the Islamic Law of Armed Conflict’, 102 *International Review of the Red Cross* 914 (2020) 550–551.

²⁸⁷ Marwa al-Bashir, ‘Ba’d Tafjir Qabr al-Naby Yunis w Adrhat al-Sufiya w al-Kana’is b-il-Iraq .. Ulama al-Azhar: Hadimu Qubuwwr al-Anbiya’ w al-Awlia’ .. Khawarij al-‘Asr,’ Al-Ahram, 24 July 2014, <https://gate.ahram.org.eg/daily/News/31259/41/309267/%D9%81%D9%83%D8%B1-%D8%AF%D9%8A%D9%86%D9%89/%D8%A8%D8%B9%D8%AF-%D8%AA%D9%81%D8%AC%D9%8A%D8%B1-%D9%82%D8%A8%D8%B1-%D8%A7%D9%84%D9%86%D8%A8%D9%8A-%D9%8A%D9%88%D9%86%D8%B3-%D9%88%D8%A3%D8%B6%D8%B1%D8%AD%D8%A9-%D8%A7%D9%84%D8%B5%D9%88%D9%81%D9%8A%D8%A9-%D9%88%D8%A7%D9%84%D9%83%D9%86%D8%A7%D8%A6%D8%B3-%D8%A8.aspx>.

shrines and mosques may not be targeted.²⁸⁸ Yet, reports from Yemen and Syria provide evidence of the affiliates, Ansar al-Sharia and Jabhat al-Nusra, destroying cultural heritage and religious sites. For example, Amnesty International's 2012 report on the conflict in the Abyan governorate in Yemen lists several incidents of destruction of religious shrines by Ansar al-Sharia. In one of these incidents, '[a] man wearing a headdress that covered his nose and mouth and referred to as Hatem al-Moqbel says: "We are going to destroy the shrine [qibba] that glorifies the righteous [people] ... a glorification that raises them from the level of humanity to the level of lordships."' ²⁸⁹ Moreover, the UN High Commissioner for Human Rights' 2015 report on the situation in Yemen states that al-Qaeda's affiliated groups destroyed 'the ancient tombs of Hadramaut on 1 July 2015'.²⁹⁰ In Syria, numerous reports refer to the excessive destruction²⁹¹ and looting²⁹² of religious and cultural sites by the different warring parties including Jabhat al-Nusra. Perhaps one of the most prominent incidents of destruction of a cultural heritage site by the group was the destruction of the ancient citadel of Aleppo in a battle with government forces who were using the citadel as a military position.²⁹³ In Jabal al-Summaq Jabhat al-Nusra forced the local Druze inhabitants to convert to Sunni Islam under the threat of death.²⁹⁴ Following the Druze's forced conversion, a document was redacted according to which the representatives of the Druze agreed to – among other things – destroy tombs and shrines.²⁹⁵

288 AQIS Code of Conduct, supra fn 95, p 11.

289 Amnesty International, Conflict in Yemen, supra fn 140, p 21.

290 Situation of Human Rights in Yemen, supra fn 107, §48.

291 M. D. Danti, 'Ground-Based Observations of Cultural Heritage Incidents in Syria and Iraq', 78 *Near Eastern Archaeology* 3 (2015) 133, <https://www.journals.uchicago.edu/doi/epdf/10.5615/neareastarch.78.3.0132> (last accessed 25 August 2022).

292 Ibid, 138.

293 Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, supra fn 119, §113.

294 United Nations Refugee Agency (2015), "Syria: Situation of the Druze, including whether they are perceived to be loyal to President Assad by the insurgent groups; treatment by the authorities and the insurgent groups (January 2015–November 2015)", 26 November, <https://www.refworld.org/docid/568e2c944.html>; al-Tamimi, A.J. (2015), "Jabhat al-Nusra and the Druze of Idlib Province", Syria Comment, 24 January, <https://www.joshualandis.com/blog/jabhat-al-nusra-druze-idlib-province/>

295 al-Tamimi, A.J., "Jabhat al-Nusra and the Druze of Idlib Province"; al-Tamimi, A.J. (2015e), "Additional Notes on the Druze of Jabal al-Summaq", Aymennjawad, 6 October, <http://www.aymennjawad.org/2015/10/additional-notes-on-the-druze-of-jabal-al-summaq>

CONCLUSIONS

- Al-Qaeda does not consider itself bound by IHL. Modern Muslim scholars and institutions argue that when Muslim states become parties to an international treaty, the treaty enters the corpus of Islamic legal obligations on the basis of Muslim polities' duty to uphold pacts. Contrary to this view, al-Qaeda claims that Muslim states' acceptance of international legal obligations is evidence of infidelity to Islam and the group instead asserts its exclusive adherence to Islamic law. Treatises published by key group ideologues reference early Muslim juristic views to assert their compliance with Islamic laws regulating armed conflict.
- The group claims that most modern Muslim governments must be considered infidels, thereby denying the applicability of Islamic law's regulation of inter-Muslim political conflicts (baghy). At the same time, claims of the infidelity of Muslim governments help the group deny the applicability of the concept of aman, which provides temporary safety and protection to non-Muslims in Muslim territory. It should be noted that later works by al-Qaeda ideologues seem to restrict the infliction of damage in Muslim countries, but the rationale of the apostasy of the regime, which invalidates visas granted to non-Muslims, is most evident in al-Zawahiri's early works.
- The group offers an expansive interpretation of participation in combat on the basis of offering support to the warring efforts of the state. Support is not interpreted as direct support or participation, but is stretched to include paying taxes and voting, thereby creating space for the expansion of the category of targetable individuals and eroding traditional Islamic legal protections for certain groups such as women. In addition to an expansive definition of participation in conflict, the group stretches the Islamic notion of tatarus, traditionally applicable to situations of collateral damage of human shields, to justify the use of indiscriminate war tactics, such as the use of explosive devices. As noted in the study, more caution is exercised by al-Qaeda when Muslims and non-Muslim residents in Muslim territories are the probable victims of indiscriminate attacks.
- Some of the examined norms, such as humanitarian access and the protection of cultural property, receive little attention in the group's ideological works. However, its critique of the ISg's targeting of relief workers and the AQIS Code of Conduct's focus on limiting destruction to avoid the infliction of damage on the wider public can be treated as a starting point for a commitment to refrain from violations of those norms.
- Al-Qaeda's affiliates have deviated to varying degrees from the 'mother' organization's commitments regarding the examined norms. For example, there are several reports that affiliates examined in this case study have often targeted non-Sunni Muslims and other religious minorities.
- In our analysis, while the rise of the rival ISg may have further radicalized al-Qaeda's affiliate (Jabhat al-Nusra), it has led al-Qaeda to attempt to contrast itself to the ISg as a more moderate and restrained group in its discourses about their limitations under Islamic law. This is best exemplified by the AQIS Code of Conduct. While there are issues with the Code's interpretation of who may be targetable, both on the grounds of Islamic law and international law, it asserts the need for restraint in targeting and in the infliction of damages on adversaries even when the method or target is, from the group's point of view,

legitimate under Islamic law. This is to avoid the alienation and antagonization of the Muslim masses. Moreover, al-Qaeda and its affiliates have never endorsed practices adopted by the ISg that have shocked Muslims and non-Muslims, such as sexual violence and slavery, which further distinguishes the two groups.

- Al-Qaeda's ideologues rely extensively on claims of excessive force and oppression by their adversaries to justify the tactics they resort to on the basis of fending off oppression and reciprocity. They argue that oppressive regimes in the Muslim world cannot be dissented against and that the only way to alleviate oppression is to resort to the tactics the group endorses. At the same time, they argue that warring parties have engaged in several violations, repeatedly citing the deaths of women and children, in order to justify their indiscriminate tactics. Addressing these two main claims/grievances would disarm al-Qaeda of the justifications for its methods of combat.

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