Islamic Jurisprudence on the Regulation of Armed Conflict

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Islamic Jurisprudence on the Regulation of Armed Conflict

Text and Context

By

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Introduction

Sexual slavery, videotaped burnings, and mutilations are images that are becoming closely connected with the notion of *jihād* following the ascendancy of the Islamic State (ISIS). At the same time, calls for limitations on Muslim immigration to the West, accusations of Islam as a barbaric religion promoting violence, and the conflation of Islam with the practices of militants are gaining popularity. Within this atmosphere, it is becoming increasingly difficult to talk about the Islamic regulation of armed conflict without falling into the trap of either essentialism or apologetics. Nevertheless, the importance of engaging with this branch of law can hardly be overemphasized. This book attempts to make an intervention that avoids those traps by addressing a primary question: how does one understand Islamic jurisprudence on the regulation of armed conflict in its past and present formulations? In order to do so, the book does not offer another summary of the legal tradition as understood by the author. Rather, it argues against the existence of a "true" interpretation of the rules of armed conflict in Islam. It offers a detailed examination of the internal deductive structures of different juristic works on the rules of *jihād* and elaborates on different methodological inconsistencies in those works to shed light on the role played by non-textual factors in the development of Islamic jurisprudence and to show that Islamic jurisprudence on armed conflict, like any other legal system, is guided by different sociopolitical considerations. The book deliberately avoids providing a summary of Islamic jurisprudence on the regulation of armed conflict because summaries often conflate contexts; they overwrite a narrative of continuity between jurisprudence and its context and assume connections across different juristic works, thereby creating a more definitive and depoliticized account of the tradition.

The idea for this book arose more than a decade ago out of a sense that modern scholarship on the regulation of armed conflict in Islamic law is seriously disconnected from the jurisprudence upon which it claims to base itself. The more I delved into classical jurisprudence, the more it became clear to me that classical and modern works are not only making distinct claims; they are, in fact, speaking different languages. Modern works used a language we have grown accustomed to, the language of military necessity and distinction between combatants and non-combatants, or in other words, the language of international humanitarian law (IHL), albeit in its most idealized and sanitized iteration, the language of the world we live in today and based on the paradigms created by the interaction between law and the modern nation-state. The other language, that of the early jurists, equally reflected the different eras

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it was formulated within, a world where some categories, such as women and children, were seen as impermissible targets across different cultures and where the separation between the civilian community and the state did not exist, partly due to the lack of a full-fledged army and the general mobilization of the warring parties' peoples during combat. Yet, to a great extent, most modern literature on the regulation of armed conflict in Islamic law often privileges a "modern" and "fantastical" understanding of the laws of war. Such an understanding is largely shaped by a very functionalist understanding of international law and its history,[1] whereby we ascribe normative supremacy for its assumed distinctions between combatants and civilians, and its prohibition of *certain* war tactics. To promote this modern narrative of Islamic law, the legal regime is reduced to a singular voice stripped of its diversity and the fluidity of its authority and advances an understanding of Islamic law as a set of positivist rules that are decontextualized and detached from their historical development,[2] with the objective of advancing an understanding of the Islamic regulation of armed conflict as a legal system producing the same effect of legal restraint on political entities in their conduct of wars as modern international law. Naturally, this is a highly selective understanding of the discipline, and plagued by an emphasis on certain textual sources at the expense of others. It ascribes prominence to certain jurists and suppresses opinions that contradict this modern project – even when such opinions are expressed by those jurists granted prominence. It also imposes a particularly anachronistic understanding of the functions of the law on armed conflict in Islamic jurisprudence, and is mirrored by a project that is methodologically identical but that has a very alternative understanding of the functions of the Islamic regulation of armed conflict – that of "modern" militant Islam. It is perhaps this methodological similarity, a similarity premised on the authoritativeness of early jurisprudence, that creates confusion and debate over the relationship between Islamic law and violence in armed conflict, leading to extensive essentialization of this diverse tradition.[3]

In a way, this book is an attempt to carve a space for an open debate over authority in Islamic law and the place of the classical tradition in the contemporary discourse over violence. In order to do so, it rejects the treatment of law

1 On functionalist legal histories, see Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36 (1984), 57–125.

2 Nesrine Badawi, "Regulation of Armed Conflict: Critical Comparativism," *Third World Quarterly* 37, no. 11 (2016), 1990–2009.

3 Graeme Wood, "What ISIS Really Wants," *The Atlantic* (March 2015), online: <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>, accessed 8 April 2017.

as a set of legal rules, applied rationally and deductively to a particular situation, thereby deriving a "scientific" and "formalist" understanding of the law. This view of the law not only confounds human agency in the process; it also ascribes a rather sacred understanding of the text, whereby the text rises above language, above biases, and above our understandings of social relations to consistently and coherently yield the same result in analogically similar situations. But, as critics note, this understanding of law fails to understand the politics of language and the role played by power dynamics in a society, having a direct impact not only on how we design and articulate legal relations but also on how we implement and understand those legal relations once pronounced.[4]

Perhaps the most relevant example of this critique is how we understand the relationship between law and violence. The prevalent narrative on this relationship is that law regulates and limits our tendency to resort to unmitigated violence. This understanding is further amplified by an understanding of legal history as a history of the progress of civilizations, which is most accentuated in the history of international law, seen as "a progressive history that in the end would lead to a world governed by the ideals of the Enlightenment, and the American and French Revolutions."[5] Of course, such an understanding of the legal regulation of violence during war is rightly critiqued for its Eurocentric outlook, an outlook that limits meaningful contributions to international humanitarian law to Western civilization.[6] More important, it actually fails to account for the complexity of the relationship between law and the regulation of armed political violence. Perhaps the most illustrative text on illusions about the regulation of armed conflict in international law is Berman's examination of rules on combatants, where he traces the colonial history of the legal order, its distinction between internal and international armed conflict, and its modern designation of terrorism as a special grey area in the regulation of armed conflict to prove that international law has never attempted to

4 James Herget, "Unearthing the Origins of a Radical Idea: The Case of Legal Indeterminacy," *American Journal of Legal History* 39 (1995), 60. See also Allan C. Hutchinson and Patrick J. Monahan, "Law, Politics and the Critical Legal Studies Scholars: The Unfolding Drama of American Legal Thought," *Stanford Law Review* 36 (1984): 202, and G. Edward White, "From Realism to Critical Legal Studies: A Truncated Intellectual History," *Southwestern Law Journal* 40 (1986–87), 825.

5 Bardo Fassbender and Anne Peters, "Introduction: Towards a Global History of International Law," in *Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2016), 1.

6 Nahed Samour, "Is There a Role for Islamic International Law in the History of International Law?" *European Journal of International Law* 25, no. 1 (2014), 313–19.

abolish violence, nor has it ever levelled the playing field between political players. On the contrary, it was designed and formulated to privilege a particular form of violence, violence committed by the state and its actors, and to restrict and delegitimize other forms of violence committed by political actors, from liberation movements to modern-day terrorists.[7]

1 How Do We Study Islamic Legal History?

The traditional understanding of Islamic legal history, with its emphasis on jurisprudence, has come under extensive criticism. There have recently been interesting attempts to reread the history of law by expanding the scope of law beyond its iteration in jurisprudence books.[8] There have also been attempts to reorient our understanding of the history of law beyond textual sources by including oral narrations, hence challenging our understanding of the text as an embodiment of an objective, immutable reality. Those efforts are to be lauded and would indeed constitute the basis for a distinctive examination of the regulation of armed conflict beyond the works of jurisprudence. An excellent example of this approach is Lena Salaymeh's examination of the treatment of prisoners of war in Islamic law, where the author looks beyond the works of jurisprudence to narrations of *siyar* (narratives of early Islamic conduct during armed conflict) and *maghāzī* (early raids) to trace the developments, formulations, and reformulations of Muslim approaches to the history of the treatment of prisoners of war in Islamic law.[9] While the focus of the present book is on jurisprudence, an approach such as Salaymeh's would prove incredibly useful to a tradition in which there is often an imagined reality of conduct of armed conflict by early Muslim rulers. Perhaps the two most interesting modern manifestations of this imagined past are ISIS's treatment of the Yazīdīs and

7 Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," *Columbia Journal of Transnational Law* 43 (2004–5), 5–17. See also David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), 36–37; Antony Anghie and B. S. Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts," *Chinese Journal of International Law* 2 (2003), 80; and Fredric Megret, "From Savages to Unlawful Combatants: A Post-colonial Look at International Humanitarian Law's Other," in *International Law and Its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2006), 265–317.

8 Amr Shalakany, "Islamic Legal Histories," *Berkeley Journal of Middle Eastern and Islamic Law* 1 (2008), 1–82, online: <http://scholarshilaw.berkeley.edu/jmeil/vol1/iss1/1>, accessed 28 April 2017.

9 Lena Salaymeh, *The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions* (Cambridge: Cambridge University Press, 2016), 43–84.

of pre-Islamic artefacts and antiquities. ISIS relies on Islamic traditions and jurisprudential opinions to legitimate the annihilation of Yazīdīs and destruction of artefacts, on account of polytheism.[10] Examining textual sources to address the practice of ISIS is significant, and it is an approach resorted to in this book. But an equally valid question – a question that is proposed frequently, but not as a direct manifestation of Islamic law – is why Muslim rulers have not acted in accordance with ISIS's imaginary model of Islamic law. A more important question, one that is less frequently asked, is that if there is a presumed contradiction between jurisprudence and both early and modern Muslim practice, why is practice automatically assumed to be outside the purview of Islamic law?

But it is the contention of this book that expanding the scope of Islamic law goes hand in hand with a detailed examination of the presumed authority, objectivity, and sanctity of early traditional sources of Islamic law, whether by reinterpreting textual sources – as attempted by Firestone in his examination of the history of *jihād* in the Qur'ān[11] – or by contextualizing works of jurisprudence. This project is hardly novel, and it has provided illuminating outcomes in several branches of the law, most prominently in feminist analysis of Islamic jurisprudence and human rights.[12] Even in the field of the regulation of armed conflict, numerous studies have asserted the contextual nature of jurisprudential responses to matters relating to how we resort to violence.[13] However, most

10 Understood here as *shirk bī-allah* (belief in another God other than Allah) rather than as an antonym to monotheism.

11 Reuven Firestone, *Jihād: The Origin of Holy War in Islam* (New York: Oxford University Press, 1999).

12 See Anvor Emon, Mark Ellis, and Benjamin Glahn, eds., *Islamic Law and International Human Rights Law* (Oxford: Oxford University Press, 2012); Kecia Ali, *Sexual Ethics in Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence* (Oxford: One World Publications, 2006). For an examination of a modern Islamic approach to gender violence see Lynn Welchman, "Honour and Violence Against Women in a Modern *Shar'ī* Discourse," *Hawwa* 5, nos. 2–3 (2007), 139–65. See also Ziba Mir-Hosseini, "The Construction of Gender in Islamic Legal Thought and Strategies for Reform," *Hawwa* 1, no. 1 (2003), 1–28.

13 Abdulaziz Aziz Sachedina, "The Development of Jihad in Islamic Revelation and History," in *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, ed. James Turner Johnson and John Kelsay (New York: Greenwood Press, 1990), 35–50; Majid Khadduri, *War and Peace in the Law of Islam* (Baltimore, MD: Johns Hopkins University Press, 1955); Ahmed al-Dawoody, *The Islamic Law of War: Justifications and Regulations* (New York: Palgrave Macmillan, 2011); Khaled Abou El Fadl, "Between Functionalism and Morality: The Juristic Debates on the Conduct of War," in *Islamic Ethics of Life: Abortion, War and Euthanasia*, ed. Jonathon E. Brockopp (Columbia: University of South Carolina Press, 2003), 103–28; Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2002); Abdullahi Ahmed

of this literature is interested in offering a grand narrative, a narrative according to which we are given a definitive, well-contoured understanding of the Islamic regulation of armed conflict. But as mentioned earlier, such an understanding tends to gloss over differences and to overemphasize similarities within the tradition. For example, al-Dawoody, as well as many others, claims that the majority of jurists held that according to the Islamic laws of war, non-combatants may not be targeted.[14] This claim, in and of itself, is based on another generalized and often repeated claim – that most jurists, with the exception of minority jurists like al-Shāfiʿī, have espoused the view that war must be defensive.[15] However, upon close examination of many juristic works, especially of the works examined in this book, it becomes clear that many jurists have acknowledged that war can be waged to propagate religion, and not simply to defend the right of non-Muslims to convert to Islam. More important, the claim that non-combatants may not be targeted is indicative of the shortcomings of the state of research in the field. As I have noted elsewhere,[16] in order to make such generalized claims, primary sources that might lead to an alternative understanding of the issue and complicate the narrative are often disregarded. The narration that the Prophet held that all Banū Qurayẓa[17] men who had reached puberty may be killed, for example, is rarely examined in the literature that advances the non-combatancy argument.[18] It is indeed

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al-Naim, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* (Cairo: American University in Cairo Press, 1992); Fred Donner, "The Sources of Islamic Conceptions of War," in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, ed. John Kelsay and James Turner Johnson (New York: Greenwood Press, 1991), 31–69; Wael Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009); James Turner Johnson and John Kelsay, eds., *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition* (New York: Greenwood Press, 1990); Ann Elizabeth Mayer, "War and Peace in the Islamic Tradition," in *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, ed. John Kelsay and James Turner Johnson (New York: Greenwood Press, 1991), 195–226; Rudolph Peters, *Jihad in Classical and Modern Islam: A Reader* (Princeton, NJ: Marcus Wiener, 1996); Sohail Hashmi, "Saving and Taking Lives in War: Three Modern Muslim Views," in *Islamic Ethics of Life: Abortion, War and Euthanasia*, ed. Jonathon E. Brockopp (Columbia: University of South Carolina Press, 2003), 129–54.

14 Al-Dawoody, *Islamic Law of War*, 111.

15 Muḥammad Abū Zahra, *al-ʿIlaqāt al-dawliyya fī l-islām* (Cairo: al-Dār al-Qawmiyya lī-l-Ṭibāʿa wa-l-Nashr, 1996), 54.

16 Badawi, "Critical Comparativism."

17 A Jewish tribe in Medina.

18 ʿAlī Aḥmad b. Ḥazm, *al-Muḥalla bi-l-athār* (Beirut: al-Maktab al-Tijārī li-l-Ṭibaʿa wa-l-Nashr, 1969), 7:299.

true that many jurists have prohibited targeting of some categories such as hired men, the blind, the crippled and monks, yet, most classical works have rarely prohibited targeting on the basis of participation of the conflict. It is indeed possible to deduce from the different juristic positions on the lists of prohibited categories, in light of pre-modern conflicts and the absence of long-standing armies, that the modern parallel may be the prohibition of targeting non-combatants. However, the dismissiveness with which contemporary literature treats diversity in the classical tradition leaves that literature susceptible to accusations that it misrepresents the tradition and deprives us of the opportunity to reorient the field.

More importantly, contemporary literature does not engage with this significant and necessary question: if Islamic law is contextual, how did the context reflect itself? Perhaps, the most significant exception to this summary-based narrative is Khaled Abou El Fadl's seminal book, *Rebellion and Violence in Islamic Law.* In this book, Abou El Fadl takes us through a thorough and detailed journey of the evolution and articulation of the jurisprudential regulation of rebellion across different schools and among the scholars within those schools. Abou El Fadl, in his historical analysis of Sunnī juridical works addressing rebellion in Islam, criticizes this overgeneralization of the tradition and shows how the juristic approaches to rebellion were more nuanced than a simple attempt to legitimate authority:

> It is exactly because of the failure to examine the details of the linguistic practices of Muslim legal discourses that most contemporary commentators have adopted an erroneous view of the role of Muslim jurists. The traditional or accepted scholarly view tends to see Muslim jurists as conservative legitimists who simply rationalized the existing political order.... However, the accepted scholarly view achieves a very partial understanding of juristic discourse because it fails to focus on the details of the legal discourse – the linguistic practice – and analyze it in terms of the dynamics of power, legal culture and legitimation. It fails to examine the microdiscourses of the law, to look beyond its stated instrumental goals, and instead to search for the creative process and its symbolic content. Consequently, the accepted view results in a starkly monochromatic or bipolar understanding of the juristic discourses.[19]

19 Abou El Fadl, *Rebellion,* 324.

2 Indeterminacy in Islamic Jurisprudence on the Regulation of Armed Conflict

This book attempts to provide a similarly detailed reading of Islamic jurisprudence on the conduct of war, with the objective of proving the indeterminacy of the juridical texts. This is achieved by exploring the inconsistency within the different juristic applications of *uṣūl al-fiqh* (the science of legal theory explaining "the authority and the relationship"[20] of the sources of Islamic law) to the *farʿ* (pl. *furūʿ*, the legal subject matter). Jurists have been selected from across the dominant *madhāhib* (schools of Islamic jurisprudence; sing. *madhhab*) to ensure that different patterns of Muslim legal thought are considered. The book is organized according to three main time frames: early/classical, medieval, and modern. Chapter 1 covers the period of early ʿAbbāsid rule (second Hijrī century) and the written jurisprudential tradition of this established Islamic empire. Chapter 2 covers the medieval period, when Muslim power declined and Muslim-controlled territories were lost to adversaries. Medieval scholarship written between the sixth/twelfth and eighth/fourteenth centuries is also significant because this was when the institution of the *madhhab* became entrenched, as did the expectation of clear allegiance to a particular, well-established jurisprudential doctrine. Chapters 3 and 4 move to a more contemporary analysis, examining scholarship written in the twentieth and twenty-first centuries, in order to shed light on modern Muslim views on armed conflict.

The choice of scholars from those periods is aimed at testing the hypothesis that sociopolitical scenes and identities influence juridical work. Accordingly, the book examines, on the one hand, different scenarios of interplay between the scholars' modes of juridical reasoning and, on the other hand, their geographical locations, political contexts, identities, and ideologies. In terms of jurisprudential schools, the book reviews five prominent jurists from the four prominent Sunnī schools (Mālikī, Ḥanafī, Shāfiʿī, Ḥanbalī) in addition to Ẓāhirism. Al-Shaybānī (d. 189–804), a founding figure of the Ḥanafī school and one of the two primary disciples of Abū Ḥanīfa (d. 150/767) (as well as the most prolific early scholar writing on the regulation of *jihād* and interaction with non-Muslims) is the representative of the Ḥanafī tradition. Al-Shāfiʿī (d. 204/820), often treated as the most seminal figure in early Islamic jurisprudence, and claimed by many as the founder of the doctrine of *uṣūl al-fiqh*

20 Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 26.

and the Shāfiʿī school, is an obvious choice to represent this *madhhab.*[21] Ibn Rushd al-Jadd (d. 520/1126), a prominent judge in al-Andalus during the reign of the Murabīṭūn, represents the Mālikī school. Ibn Taymīyya (d. 728/1328), often claimed as the primary inspiration for militant thought, represents the Ḥanbalī school. Finally, Ibn Ḥazm (d. 456/1064), who represents the extinct Ẓāhirī school, is chosen for two reasons. First, the Ẓāhirī claim to adhere completely to textual sources and to deny techniques perceived to expand juristic interpretive tools – such as *qiyās* (analogical deduction) and *istiḥsān* (juristic preference) – makes it an excellent case study for this book, given my hypothesis that all works studied deviate from their theories of legal reasoning and produce a legal regime that is responsive to the sociopolitical context. Second, Ibn Ḥazm is often relied on in contemporary works, both militant and mainstream, which makes him a highly relevant figure in modern juristic debates.

Since the aim is to demonstrate that jurists' schools of thought and legal analyses were not the sole factors to influence their rulings, the chosen jurists, in addition to representing distinctive schools of jurisprudence, also represent varying relationships with political authority. Al-Shaybānī and Ibn Rushd, for example, represent "semi-official" jurisprudence, in that both were prominent judges who enjoyed proximity to decision-making circles, while al-Shāfiʿī, Ibn Ḥazm, and Ibn Taymīyya were jurists who were relatively distant from the prevailing power and who, in some instances, endured rifts with it. The chosen jurists also reflect unique moments in the history of the Islamic empire. By choosing al-Shaybānī and al-Shāfiʿī, for example, we can gain insights into the early formulation of the legal tradition on armed conflict from the heart of the empire at the height of its power. Ibn Ḥazm and Ibn Rushd, in contrast, take the reader to the Muslim world's frontiers with the Christian powers, with anxiety over land loss and waning power looming over both jurists' works. And Ibn Taymīyya's jurisprudence allows us to examine the impact on his works of the collapse of the ʿAbbāsid empire at the hands of the Mongols. One further consideration that led to choosing the above scholars is their significant influence on modern works. Their works are often treated as seminal and are often relied upon equally by mainstream and militant works examining the regulation of armed conflict, thereby creating the space to examine further the coherence of modern works.

I contrast two camps in the modern era, the mainstream and the militant. The mainstream camp is represented by al-Azhar and traditional academic Muslim intellectuals. Militant works are represented through an analysis of a

21 A claim that has been challenged by key contemporary scholarship. It is discussed in more detail in Chapter 1.

debate between Ayman al-Ẓawāhirī, often referred to as al-Qāʿida's ideologue, and his former ally and comrade, Sayyid Imām ʿAbdul Azīz (b. 1369/1950), who issued two works renouncing the tactics of al-Qāʿida, as well as by the works of Turkī b. Mubārak al-Binʿalī (d. 1438/2017), an ISIS ideologue, and by ISIS's English publication, *Dabiq*.

But to what extent are the selected texts representative? Although the book attempts to dispel the notion of representation within the Islamic legal tradition (on the basis of its established diversity), the scholars, institutions, and groups chosen for examination in this book are ones whose authority has been asserted or who are at least accepted as having influenced the field. True, this book does not show sensitivity to the politics of construction of authority in Muslim jurisprudence, a process that may have sidelined significant and innovative jurists. However, the book is an internal critique of constructed authority, aiming to demonstrate that even established juridical figures responded to factors beyond legal reasoning. So, rather than attempting to expand the scope of Islamic jurisprudence and Islamic law, as laudable as that may be, this book hopes to provide evidence for the widely held claim and belief that Islamic jurisprudence is responsive to context, as well as to challenge formalist understandings that authoritative Islamic jurisprudence works merely reflect the implementation of jurists' theories of *uṣūl al-fiqh* across the different branches of Islamic law. Additionally, in order to do so, and despite its critique of legal positivism and formalist understandings of the law, the book follows the different jurists' claimed methodology, which leads it to appear formalist, thereby asserting what it aims to challenge. However, this choice is a deliberate one. Because the modern works examined continue to adhere to and promote a largely formalist understanding of the law, I felt that the most appropriate approach to challenge this understanding would be to offer an internal critique of those works by highlighting their limitations and shortcomings within such a positivist analysis.

This book does not claim to offer a full historical survey of Islamic jurisprudence on armed conflict. Many significant eras, polities, dynasties, and scholars are left aside despite their significance. An examination of jurisprudence under the Ottoman Empire, for example, would offer an excellent opportunity to examine Islamic law's interaction with Europe's *jus gentium*, and an exploration of jurisprudence such as Muḥammad ʿAbdū's (d. 1323/1905) or Abū Aʿlā Maudūdī's (d. 1399/1977) would shed light on Islamic law's development in the colonial and post-colonial contexts. However, space limitations have led me to focus on classical jurisprudence because modern jurisprudence relies primarily on what is often seen as the golden phase of Islamic law, with the founders continuing to be revered as unparalleled authorities.

One of the limitations of the choice of scholars is that the book focuses on Sunnī juristic works and so ignores other sects, notably Shīʿī jurists. This choice is based not on a denial of the importance of the role played by these jurists in the development of the field, but rather on the limitations of time and space. As clarified earlier, this book offers a detailed analysis of the legal arguments and tools used by the jurists whose works are explored. In a historical analysis of juristic works from the formative to the contemporary period, it would be difficult to include also an analysis of non-Sunnī works. It also addresses the general internal consistency of the works of the jurists, as well as their adherence to the positions developed by the *madhhab* and the juristic tradition as a whole. As argued by Hallaq, Muslim jurists gradually limited the interpretive options available and created a "more determinate body of positive law."[22] The book hopes to internally challenge this perception by proving that this process masked political and ideological agendas and was accordingly far from determinate.

The book does not challenge the theories of *uṣūl al-fiqh* adopted by the jurists either. While it is, of course, true that the theorization of the sources of Islamic law was, in itself, influenced by scholars' political interests and identities, the book avoids addressing the jurists' views on the sources, and approaches them as a given benchmark against which application to armed conflict is assessed.[23] This approach gives stronger weight to the indeterminacy argument because accepting the jurists' theoretical premises provides a better chance to illustrate the inconsistencies in the implementation of their theories to issues relating to the conduct of hostilities. Rather than offering speculative assumptions on the interests promoted by jurists, the book shows how each of them deviated from the theory of sources he claimed to adhere to.

Inconsistencies found in juristic works are used as tools to interpret the relationship between the legal system and society through the eyes of the different jurists, scholars, and groups, providing a narrative of how early jurists shaped Islamic laws of war and how much they established a notion of the "other" and created a framework through which the Muslim community perceived its relationship with non-Muslim communities. It also attempts to explore how the assumed needs and interests of some or all segments of Muslim society influenced classical and modern jurists in their writings. Finally, whenever relevant, it portrays the influence of the other on the theories developed.

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22 Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 236.

23 For an example of critiques of the theories of jurisprudence, see Naṣr Ḥāmid Abū Zayd, *al-Shāfiʿī wa taʾsīs al-idīyulūjiyya al-wasaṭiya* (Cairo: Sīnā li-l-Nashr, 1992).

In other words, it shows how, in some instances, positions about the law were responses to the perceived practice of the "other." In doing so, the book hopes to show sensitivity to the complexity of the nature of the relationship between law and politics and the intricate process of interaction between the two by resorting to an analytical framework that remains loyal to the Islamic tradition. After all, this critique was often employed by jurists in their criticism of each other's *furūʿ*. It is not uncommon to find classical scholars appropriating the theoretical framework of their imaginary interlocutors to prove the inadequacy of the interlocutors' conclusions.

The book is well aware of the constraints the legal tradition imposed, as it emerged and developed, on the jurist's freedom to articulate a legal system favourable to his views of the most appropriate conduct in warfare. After all, jurists have shown an interest in preserving the legalistic approach to Islamic jurisprudence in order to preserve their special corporate identity.[24] This interest is continuously traced in the jurisprudence of the scholars examined in the book. As will be noted in Chapter 1, for example, al-Shaybānī defied the caliph Hārūn al-Rashīd (reign: 148–193/786–809) by only reluctantly legitimizing the caliph's discourse with rebels, and al-Shāfiʿī refused to prohibit the enslavement of Arabs despite his personal inclination towards such a position. In Chapter 2, I portray how Ibn Taymīyya followed the juristic tradition on rebellion despite existing evidence to his discomfort with it. Finally, Ibn Rushd went to great efforts to assert the consistency of the Mālikī school, even when the scholars he examined clearly differed in their views. Nevertheless, the book argues that restrictions established by the Islamic tradition did not prevent jurists from deviating from their theoretical frameworks. Jurisprudence was often articulated syllogistically. However, in the cases examined, such syllogism does not stand scrutiny, because the foundational framework on which the legal reasoning is premised is inconsistent with the conclusions reached by the jurists. What the book hopes to achieve is to contribute to the literature on the dynamics of interplay between text and context, a debate in which I acknowledge that hypotheses and arguments presented in this book are subject to the same critique provided here, whereby the reading of the relationship between law and the historical context reflect the author's own biases and understanding of the law.

This approach takes into consideration the critiques by Abou El Fadl mentioned earlier regarding the interpretation of juristic positions and the need to pay attention to the "microdiscourses'" of the legal tradition. Rather than offering a snapshot of the Islamic laws of war and providing generalizations

24 Abou El Fadl, *Rebellion*, 324.

developed from the works of some scholars, the book examines, in detail, representative samples of juristic works from the formative, medieval, and modern eras, paying attention to the linguistic mechanisms and details of the arguments of the various jurists.

Although the book is reluctant to offer summaries of the Islamic legal tradition, I am aware that a reader unfamiliar with the legal subject matter may be overwhelmed with the microanalysis provided in the following chapters. Thus, in the paragraphs below, I offer a quick, admittedly reductive, summary of the discipline and of the primary issues relating to the regulation of conflict covered in this book. This summary should be used merely as a guide to the common issues examined in the jurisprudence. Many readers will notice that the book tends to focus on certain themes, a focus shaped as equally by the jurists' anxieties and interests as by the reader's own anxieties and interests, which are largely influenced by contemporary understandings of the legal regulation of violence. For example, despite a significant focus on the division of the booty/spoils of war among members of the Muslim army, the book dedicates little attention to this matter and focuses more extensively on matters relating to targeting and violence during armed conflict.

3 Primary Concerns of Classical Jurisprudence

3.1 *Types of Conflict*

The starting point for understanding the Islamic regulation of armed conflict is the juristic classification of armed conflict. Classical jurists often divided armed conflict into four primary categories, *jihād* (fighting unbelievers), *baghy* (fighting rebellious Muslim groups), *ḥirāba* (fighting highway robbers and bandits), and *ridda* (apostasy).

3.1.1 *Jihād* (Fighting Unbelievers)

Unlike modern scholarship's fixation on the justification for war with non-Muslims, classical scholarship is brief on the issue.[25] Contrary to a widely repeated claim that, with the exception of minority jurists like al-Shāfiʿī and Ibn Ḥazm, jurists prohibited offensive warfare,[26] most early classical jurisprudence is silent on the question of which non-Muslims may be fought and why. Rather, it focuses primarily on the "when" of the issue, or in other words whether an invitation to Islam is a necessary precursor for war against unbelievers. For

25 Hashmi, "Saving and Taking Lives in War," 129.

26 See e.g. al-Dawoody, *Islamic Law of War*, 111.

example, al-Ṭabarī notes in his work on *ikhtilāf*[27] that there is a general consensus that "the Prophet (pbuh) did not fight his enemies from the people of disbelief except after the propagation of his da'wa (message/invitation) and that he (pbuh) used to order the heads of his military missions to invite [to Islam], those who had not received the message."[28] Scholars, he further notes, disagreed over whether those who had received the message but were not specifically invited to join the religion of Islam needed to be invited before combat.[29] Ibn Rushd, in his *ikhtilāf* work *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*, signalled that jurists agreed that the People of the Book, except Christian Arabs and the ones from Quraysh, should be fought to force them either to convert to Islam or to pay the *jizya* (poll tax).[30] He relied on the Qur'anic verse, "Fight those of the People of the Book who do not [truly] believe in God and the Last Day, who do not forbid what God and His Messenger have forbidden, who do not obey the rule of justice, until they pay the tax and agree to submit."[31]

The bulk of jurisprudence on fighting unbelievers is instead focused on permissible harm to be inflicted on the enemy, acceptable military tactics, who may be deliberately killed, who may be inadvertently killed in the course of the battle, who may be taken as captive, and how property of the enemy is to be dealt with in terms of destruction, acquisition and distribution amongst booty recipients.

3.1.2 *Baghy* (Fighting Rebellious Muslim Groups)

Unlike conflict with non-Muslims, jurists offered more attention to the governing rules when the *baghy* regime is invoked. As the tradition consolidated, there was a general inclination, albeit with exceptions,[32] to restrict the applicability of the regime to groups satisfying two primary conditions. First, the group must be rebelling on the basis of possessing a *ta'wīl*, defined as a plausible, even if erroneous, religious justification. As noted by Abou El Fadl, jurists were often expansive in what they considered permissible *ta'wīl*, often

27 *Ikhtilāf* literally means difference. *Ikhtilāf* works survey different jurisprudential positions across the prominent schools.

28 al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizya wa aḥkām al-muḥāribīn min Kitāb Ikhtilāf al-fuqahā'*, ed. Joseph Schacht (Leiden: Brill, 1933), 2.

29 al-Ṭabarī, *Ikhtilāf*, 3.

30 Ibn Rushd (al-Ḥafīd), *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid* (Cairo: Dār al-Ḥadīth, 2004), 2:151.

31 Q 9:29. All references to the Qur'ān are to *The Qur'an*, trans. M. A. S. Abdel Haleem (Oxford: Oxford University Press, 2005).

32 See Chapter 2 for an examination of Ibn Ḥazm and Ibn Taymiyya's views.

including most grievances against the ruler's governance.[33] Second, the group must be sufficiently numerous to be fought.[34] The most significant outcome, in addition to the conduct-related outcomes discussed in the book, is that rebels in this case are not held responsible for damage to life and property.

3.1.3 *Ḥirāba* (Fighting Highway Robbers and Bandits)

Whereas the *ḥirāba* regime is invoked in contemporary works in the war against terrorists, it has traditionally been reserved by jurists to non-political conflicts with highway robbers and bandits. The primary verse relied upon for this crime is:

> Those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land: a disgrace for them in this world, and then a terrible punishment in the Hereafter, unless they repent before you overpower them – in that case bear in mind that God is forgiving and merciful.[35]

Whereas the Quranic verse relied upon in *ḥirāba* conflicts is expansive and potentially applies to rebellion, jurists have navigated sources to limit it to regular criminal activities that resort to terrorizing tactics, such as highway attacks in the desert. Again, jurists disagree over the definition depending on the location of the crime and tactics resorted to.[36] In the book, I discuss jurists who deviated from this tradition, as well as those who offer a modern reformulation of the regime of *ḥirāba.*

3.1.4 *Ridda* (Apostasy)

There is much debate on the *ridda* regime and its applicability to modern conflict. Militant regimes claim that contemporary Muslim states are apostate states, so must be fought. In the discussion of Ibn Taymiyya's work and militant ideology, I analyse these arguments and their limitations, considering their deviation from the classical tradition. However, although classical jurists have not generally devised a specific regime for the conduct of armed conflict with

33 Abou El Fadl, *Rebellion*, 242.
34 Abou El Fadl, *Rebellion*, 284.
35 Q 5:33–34.
36 al-Ṭabarī, *Ikhtilāf*, 242–47.

apostates, many of them have agreed that an apostate must be asked to repent and, if reluctant to do so, killed.[37]

3.2 *Who May Be Killed During Combat?*

Surveying modern scholarship on who may be killed during conflict is bound to leave the reader confused. While many works have been heavily influenced by the distinction between combatants and non-combatants in international humanitarian law, thereby claiming that only those participating in fighting may be specifically targeted and killed,[38] other works have asserted that anyone capable of fighting may be targeted.[39] However, an examination of early Islamic jurisprudence shows little reference to general rules derived on the basis of participation. Jurists generally distinguished between those who may be deliberately targeted and those who may be inadvertently killed during combat. They considered religion, gender, age, place of residence, and physical ability as possible factors influencing whether or not a person may be targeted. In the next chapters, I take the reader through the different juristic positions on targeting to portray how varied and complex the juristic literature is on this matter and how modern scholarship is often reductive and dismissive of this diverse tradition.

At the same time, those who may not be killed are often envisioned as legitimate collateral damage in a conflict if their death is inevitable. The situation most often envisioned by jurists is Muslims, women, and children shielding a fortress (*tatarus*). The question often asked is whether the fortress may be attacked by partially indiscriminate weapons such as lances and catapults, considering that such weapons may cause the death of individuals belonging those groups. Again, with varying degrees of acceptance, jurists agree that those weapons may be resorted to in such situations, relying primarily on a later discussed prophetic tradition, whereby the Prophet is said to have been asked about the death of women and children during night raids, to which he responded that they were from them (the infidels).[40]

37 ʿAbdul Raḥman al-Jazīrī, *Kitāb al-fiqh ʿalā l-madhāhib al-arbaʿa*, 2nd ed. (Beirut: Dār al-Kutub al-ʿIlmiyya, 2002), 5:372–74.

38 Abū Zahra, *al-ʿIlaqāt al-dawliyya*, 103. See also al-Dawoody, *Islamic Law of War*, 14.

39 Muhammad Hamidullah, *Muslim Conduct of State* (Lahore: Kashmiri Bazar, 1945), 195.

40 Muḥammad b. Idrīs al-Shāfiʾī, *al-Umm*, ed. Maḥmūd Mutrajī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 4:337.

3.3 *Captives*

A closely connected issue is the treatment of captives. Many modern works emphasize the possibility for ransom and graceful release for captives to assert congruency with the modern regulation of combat.[41] However, a practice generally dismissed until its recent revival by the ISIS is the enslavement of captives. Although it is true that the early Islamic tradition allowed for significantly limited avenues for slavery and encouraged manumission, war with non-Muslims continued to form a legitimate channel for slavery. Again, despite modern negligence of the issue, classical jurists agreed that captives may be enslaved and generally disagreed over the *imām*'s discretion over manumission of women and children on the one hand and of adult men on the other.[42]

3.4 *Property*

Discussion of property in modern literature is again reductive and selective, not just in the sources covered but also in the issues examined. Due to international humanitarian law's focus on the destruction of property and the rules governing it, modern scholarship shows a similar focus, with some scholars claiming that the destruction of property is prohibited since it amounts to *fasād fī l-arḍ* (destruction on earth, generally seen as prohibited by the Qur'ān),[43] despite the widely cited tradition that the Prophet burnt the trees of the Banū l-Naḍīr;[44] other scholars willingly acknowledge that property can be destroyed for military advantage.[45] Yet, most contemporary scholarship has disregarded the primary concern with regards to property in classical jurisprudence, the acquisition of property. Generally, most jurists acknowledged that property could be acquired during conflict with non-Muslims.[46] However, once non-Muslims were granted *dhimmī* (non-Muslim resident of Muslim territories) status, their lives and property became inviolable since they became subjects of the Muslim polity. In the following chapters, I offer a detailed discussion of the varied positions on when and to whom *dhimmī* status is granted by the *imām.*

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41 Troy Thomas, "Jihad's Captives: Prisoners of War in Islam," *USAF Air University Maxwell-Gunter AFB website* (2005), online: <https://apps.dtic.mil/dtic/tr/fulltext/u2/a435829.pdf>, 7, accessed 4 January 2007.

42 Ibn Rushd (al-Ḥafīd), *Bidāyat*, 2:145.

43 Muhammad Munir, "Suicide Attacks and Islamic Law," *International Review of the Red Cross* 90, no. 869 (2008), 88. Wahbeh al-Zuhili, "Islam and International Law," *International Review of the Red Cross* 87, no. 858 (2005), 282.

44 al-Shāfi'ī, *al-Umm*, 4:368.

45 al-Dawoody, *Islamic Law of War*, 128.

46 Ibn Rushd (al-Ḥafīd), *Bidayāt*, 2:152.

3.5 *Amān*

One other avenue for protecting non-Muslim lives and properties is the regime of *amān* (safety pact). As will be seen in the discussion of militant literature, *amān* is a key issue in a modern understanding of conflict with non-Muslims since it can seriously limit the conduct of covert or surprise military operations in both non-Muslim and Muslim societies. According to this regime, a Muslim entering non-Muslim lands under a pact of *amān* may not harm non-Muslims.[47] At the same time, non-Muslims entering Muslim lands may not be harmed, and their properties may not be taken for the duration of their stay if they have been granted a safety pledge from a person eligible to grant *amān.*[48] Who may grant an *amān* and what constitutes a breach of *amān* has varied from place to place. The modern debate has focused on whether the modern visa regime constitutes a safety pledge, both for a Muslim entering a non-Muslim state and for a non-Muslim entering a Muslim state.

47 al-Ṭabarī, *Ikhtilāf*, 35–54.

48 al-Ṭabarī, *Ikhtilāf*, 35–54.

CHAPTER 1

Islamic Jurisprudence in the Expansive Empire

The early ʿAbbāsid era, precisely until the death of Harūn al-Rashīd in 193–809, is often referred to as one of the most glorious periods in Islamic history. As Kennedy points out, al-Rashīd's time is portrayed as "the Golden Prime," partly because it is compared with the civil war that ensued between his two sons, but also partly because his reign "appeared a time of magnificence, power and prosperity."[1] With established suzerainty and strong government over an impressive, expansive empire, there is no wonder that the relationship between jurists and the political authority in the early ʿAbbāsid period has been subject to much debate in modern scholarship.[2] This established caliphate was paralleled by a rising technical juristic culture, whose relationship with the caliph as a religio-political figure must have been an intricate and complex one. The Grand Shaykh of al-Azhar, Aḥmad al-Ṭayyib (b. 1365/1946), argues that many of the jurisprudential works from this period were developing what he refers to as contextual jurisprudence (*fiqh wāqiʿ*), rather than textual jurisprudence (*fiqh nuṣūṣ*), and that their works partly reflected an interest in supporting the Islamic state in spreading and consolidating its power.[3] This response can hardly be separated from al-Rashīd's positioning himself as the champion of *jihād*, whereby he enacted administrative reforms to "provide more resources for jihad and participated in military expeditions bi-annually."[4] In this chapter, I trace how two key jurists of the time, al-Shaybānī and al-Shāfiʿī, reacted to this jihadist project, with the former representing jurists closely affiliated with the circles of governance, and the latter representing independent scholarship.

Despite internal strife and recurrent coups within the ʿAbbāsid dynasty, the ʿAbbāsid era was one of established Islamic suzerainty vis-à-vis non-Muslim neighbours. Domestically, power transfer was always a dilemma, particularly after the death of Hārūn al-Rashīd and the civil war that erupted between his

1 Hugh Kennedy, *When Baghdad Ruled the Muslim World: The Rise and Fall of Islam's Greatest Dynasty* (Cambridge, MA: De Capo Press, 2004), 51–52.

2 For analysis of modern scholarship on the relationship between the caliphs and the *ʿulamāʾ*, see Muhammad Qasim Zaman, "The Caliphs, the ʿUlamaʾ and the Law: Defining the Role and Function of the Caliph in the Early Abbasid Period," *Islamic Law and Society* 4, no. 1 (1997), 1–36.

3 Aḥmad al-Ṭayyib, interview by Muna al-Shāzlī, *al-ʿĀshira Māsaʾ*, Dream 2 TV, 4 January 2011.

4 Shawqī Abū Khalīl, *Hārūn al-Rashīd: Amīr al-khulafāʾ wa ajal mulūk al-dunyā* (Damascus: Dār al-Fikr, 1997), 82.

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two sons, al-Amīn and al-Maʾmūn. However, the reign of Hārūn al-Rashīd, who ruled for most of al-Shaybānī and al-Shāfiʿī's adult lives, was impressive in its ability to maintain control domestically and abroad. Internationally, al-Rashīd showed strong interest in securing the Islamic empire's borders. As earlier mentioned, classical and modern historians recount al-Rashīd's time as one of increased and heightened interest in *jihād*.[5] A recurrent enemy of the ʿAbbāsid dynasty, then, was the neighbouring Byzantine Empire, but one of the main characteristics of the conflict was its limitation to low-scale attacks, with little impact on the borders between the two empires.[6] However, Arab historians claim al-Rashīd had the upper hand in this ongoing military battle. An example of his power is established by the widely cited, but perhaps apocryphal, communication between himself and Nikephoros (d. 195/811), the Byzantine emperor. Nikephoros reportedly sent a letter to al-Rashīd informing him that he would not abide by the truce agreement between al-Rashīd and the former Byzantine queen, and demanding that al-Rashīd return all tribute money paid by the Byzantine predecessor or else face war. Al-Rashīd is claimed to have replied with an aggressive, confrontational letter: "From Hārūn, the prince of believers, to Nikephoros, the dog of the Romans. I have read your book, you son of an infidel woman [*kāfira*] and you will see my response before you hear it, and peace [be upon you]."[7] He is then said to have launched a major offensive against the Byzantine emperor and to have forced him to seek a new truce and to agree to repay the *jizya*.[8]

But, despite the perpetual state of war and continuous low-scale conflict between the two empires, especially at the *thughūr* (Muslim garrison cities; sing. *thaghr*), diplomacy was often employed to manage relationships with the nearby enemy, The perpetual state of war led to constant captivity of the "other," which often required maintaining diplomatic channels to coordinate ransoms. The upsurge in *jihād* during al-Rashīd's reign was thus paralleled by the creation of formal contact channels between the two empires, primarily to address the issue of prisoners.[9] Those contacts are said to have led to full ransom of all Muslim captives in the Byzantine Empire by 189/805.[10]

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5 Abū Khalīl, *Hārūn al-Rashīd*, 82.

6 Farūq ʿUmar Fawzī, *al-Khilāfa al-ʿAbbāsiyya* (Amman: Dār al-Shurūq, 1998), 1:345.

7 Ibn al-Athīr, *al-Kāmil fī l-taʾrīkh*, ed. Muḥammad Yūsuf al-Daqqāq (Beirut: Dār Ṣadir, 1965), 6:185.

8 Ibn al-Athīr, *Kāmil*, 6:185.

9 Hugh Kennedy, "Byzantine-Arab Diplomacy in the Near East from the Islamic Conquests to the Mid Eleventh Century," in *Byzantine Diplomacy: Papers from the Twenty-fourth Spring Symposium of Byzantine Studies*, ed. J. Shepard and S. Franklin (Aldershot, UK: Variorum, 1992), 134.

10 Ibn al-Athīr, *Kāmil*, 6:193.

Socio-economically, the early ʿAbbāsid era was one of great prosperity. Tax collection in al-Rashīd's time is said to have amounted to 70 million dinars, which most historians agree was a large budget.[11] This wealth reflected positively on Baghdad, where expenditure was massive.[12] Baghdad's impressive wealth meant that it attracted immigrants from across the empire, and it thus "included different ethnicities, Persians, Byzantines, Indians and Nabataeans."[13] That amalgam led to the rise of *shuʿūbīyya* (claims of ethnic superiority) among the various ethnic groups. Arabs, for example, claimed that they were superior to other groups because they had always been an independent nation, before and after the advent of Islam, despite their proximity to strong empires; that they were famed for superior manners and qualities such as generosity; and that all other Muslims were indebted to them as carriers of the banner of Islam and supporters of the Prophet. Likewise, other groups continuously asserted their own cultural superiority over Arabs.[14]

1 Al-Shaybānī: a Jurist-Judge

Muḥammad b. al-Ḥasan al-Shaybānī (131–89/748–804), one of the leading early Ḥanafī jurists and often referred to together with Abū Yusūf as Abū Ḥanīfa's companions, was a prolific writer.[15] He is credited with playing the most important role in documenting the school's early thought. Abū Ḥanīfa is often referred to as the founder of the Ḥanafī school, but like other scholars, there is ample evidence that Abū Ḥanīfa's authority was ascribed posthumously.[16] But even in mainstream narratives adopting the hypothesis that Abū Ḥanīfa is the founder of the Iraqi school, there is no denial that al-Shaybānī is credited with consolidating the views of the school through their documentation in his books, which are considered by authoritative modern Muslim scholars to be

11 Ḥasan Ibrāhīm Ḥasan, *Taʾrīkh al-Islām al-sīyāsī wa-l-thaqāfī wa-l-ijtimāʿī*, 9th ed. (Cairo: Maktabat al-Nahḍa al-Miṣriyya, 1980), 2:62.

12 Ḥasan, *Taʾrīkh*, 2:50.

13 Muḥammad Abū Zahra, *al-Shāfiʿī: Ḥayātuh wa ʿaṣruh, araʾuh wa fiqhuh* (Cairo: Dār al-Fikr al-Arabī, 1948), 49.

14 Aḥmad Amīn, *Duḥa al-Islām* (Cairo: Lajnat al-Tarjama wa-l-Nashr, 1938–43), 1:49–55.

15 He is said to have been the most prolific of the second/eighth century. See Ṣalāḥ al-Munajjid's introduction to *Sharḥ Kitāb al-Siyar al-kabīr*, by al-Shaybānī, ed. Ṣalāḥ al-Munajjid, 2nd ed. (Cairo: Maʿhad al-Makhṭūṭāt bi-Jāmiʿat al-Duwwal al-ʿArabiyya, 1971), 1:11.

16 Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 158.

the primary sources elaborating on the school's formative juristic positions.[17] More important for this book, al-Shaybānī earned a reputation for his works regulating Muslim relations with non-Muslim communities in times of war and peace. His books on this subject led to the establishment of the Shaybani Society for International Law.[18] While al-Shaybānī's fame in the West can be attributed, at least in part, to Khadduri's translation of his *Siyar*[19] in the mid-1960s, his status in the Islamic tradition and in the history of the development of the legal regulation of armed conflict is indeed well earned, and not just in the Islamic tradition.

1.1 *Al-Shaybānī's Works*

Despite, or perhaps because of, his fame in the Islamic tradition, attribution of individual authorship to al-Shaybānī is challenging and has consumed much debate in academic circles, which further complicates attempts to examine in context his work on matters relating to armed conflict. Al-Shaybānī addressed *siyar* (conduct with non-Muslims) in many of his numerous books, specifically in *al-Siyar al-kabīr, al-Siyar al-ṣaghīr, al-Jāmiʿ al-ṣaghīr*, and *Kitāb al-Aṣl*. Some scholars believe that books suffixed *al-Ṣaghīr* are summaries of the arguments of Abū Ḥanīfa and Abū Yūsuf, his two masters, reviewed and approved by Abū Yūsuf, while books suffixed *al-Kabīr* include his own legal reasoning.[20]

Unfortunately, *al-Siyar al-ṣaghīr* and *al-Siyar al-kabīr* were lost. The Ḥanafī jurist al-Sarakhsī (d. 489/1096) dictated a commentary on al-Shaybānī's five-volume *al-Siyar al-kabīr* and named it *Sharḥ al-Siyar al-kabīr* (hereon, *Sharḥ al-siyar*). However, the book is said to have been dictated from memory by al-Sarakhsī to his students during an imprisonment that denied him access to al-Shaybānī's originals.[21] As Khadduri notes, al-Sarakhsī's version "may be regarded as an exposition of Shaybānī's doctrine on the *siyar* as he [al-Sarakhsī] understood them."[22] Since this book aims to examine al-Shaybānī within his sociopolitical context, it would be wrong to rely on *Sharḥ al-siyar*, because the "commentary represents Ḥanafī doctrines as they were understood in the fifth

17 Muḥammad Abū Zahra, *Abū Ḥanīfa: Ḥayātuh wa ʿaṣruh, arāʾuh wa fiqhuh* (Cairo: Dār al-Fikr al-ʿArabī, 1947), 233.

18 al-Munajjid, introduction, 14.

19 Lit. paths or tradition, but used in Islamic jurisprudence to refer to legal regulation of interaction with non-Muslim communities.

20 Abū Zahra, *Abū Ḥanīfa*, 234.

21 Khadduri, Majid, introduction to, *The Islamic Law of Nations: Shaybānī's Siyar*, by al-Shaybānī, trans. Majid Khadduri (Baltimore, MD: Johns Hopkins University Press, 1966), 44.

22 Khadduri, introduction to *Siyar*, 44.

century of the Islamic era [eleventh century CE] and not the second century [eighth century CE]."[23]

At the same time, it is equally problematic to treat *Sharḥ al-siyar* as al-Sarakhsī's since many modern Muslim scholars perceive ideas in the text as essentially al-Shaybānī's. For example, Ṣalaḥ al-Munajjid, who edited the text, attempted to distinguish between al-Shaybānī's contribution and al-Sarakhsī's, but he maintained that the attempt is strictly his own impression of the text.[24] It seems, however, that al-Munajjid's attempt is achieving more authority than initially anticipated. For example, Abū ʿAbdullah Muḥammad Ḥasan al-Shāfiʿī, who edited the text again in 1997, uses the exact same distinction between the two jurists earlier made by al-Munajjid without reference to al-Munajjid, which interestingly shows that posthumous attributions of authorship continue to the present day.[25]

Another book written by al-Shaybānī addressing the issue of armed conflict is *al-Aṣl*, a treatise on different legal subject matters in Islamic law, one of whose chapters addresses *siyar*. However, contextualizing the text is still somehow problematic because some authors argue that it was refined and edited by later scholars, hence elaborating later Ḥanafī doctrine. The most extreme version of this argument is the one made by Calder to post-date the text as well as other formative jurisprudential texts.[26] Building on Calder's arguments, Abou El Fadl argues that the section dealing with rebellion in *al-Aṣl* reflects views that were too developed for the early Ḥanafī school, an argument later examined in this chapter.[27] The technique employed by Calder was, however, subject to much critique in Islamic scholarly circles, and several inadequacies were found in his approach.[28] Recent works by Behnam Sadeghi and Mehmet Boynukalin are perhaps the most elaborate academic responses to Calder's claims, with regards to authenticity of texts authored by al-Shaybānī, and after examining the text's tone, debate, style, and format, both concluded that the works examined were authored by al-Shaybānī, even if narrated by disciples.[29]

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23 Khadduri, introduction to *Siyar*, 44.

24 al-Munajjid, introduction, 27.

25 Abū ʿAbdullah Ismail al-Shāfiʿī, introduction to *Sharḥ Kitāb al-Siyar al-kabīr*, by Muḥammad Ibn al-Ḥasan al-Shaybānī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), iii.

26 Norman Calder, *Studies in Early Muslim Jurisprudence* (Oxford: Clarendon Press, 1993), 39–66.

27 Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2002), 145.

28 See e.g. Zaman, "Caliphs," 14–16.

29 Behnam Sadeghi, "The Authenticity of Two 2nd/8th Century Ḥanafī Legal Texts: The *Kitāb al-Āthār* and *al-Muwaṭṭaʾ* of Muḥammad b. al-Ḥasan al-Shaybānī," *Islamic Law and*

Conversely, because of the master-disciple relationship between Abū Ḥanīfa and al-Shaybānī and the lack of written work by Abū Ḥanīfa himself, al-Shaybānī's books are often viewed as documenting Abū Ḥanīfa's juristic views. Abū Zahra even argues that al-Shaybānī must have had access to memoirs written by Abū Ḥanīfa and that he relied on such memoirs when documenting the school's juristic views.[30] Khadduri holds that the "book on the *Siyar* in the *Kitāb al-Aṣl* may therefore be regarded as essentially the contribution of Abū Ḥanīfa and his circle."[31] Thus, contrary to *Sharḥ al-siyar*, where elaboration by a successor delineates the lines of juristic originality, *al-Aṣl* cannot be attributed solely to al-Shaybānī, because of the assumed influence of his predecessors. Nevertheless, *al-Aṣl* is arguably more suitable for this book because al-Shaybānī was a contemporary of Abū Ḥanīfa, which in essence means that their views, as well as Abū Yūsuf's, were shaped by the same historical context. Additionally, as noted by Abū Zahra and Boynukalin, *al-Aṣl* highlights disagreements between al-Shaybānī, Abū Yūsuf, and Abū Ḥanīfa.[32] Accordingly, one can safely assume that in areas where disagreements are not mentioned, the three earliest leaders of the school agreed to the reasoning. For the analysis conducted in this chapter, I rely on Khadduri's translation and Boynukalin's recently compiled *al-Aṣl*, which includes the *Siyar* chapter. Since Boynukalin claims Khadduri's compilation of the *Siyar* chapter contains some flaws,[33] arguments used in this chapter were cross-checked in both compilations.

1.2 *Al-Shaybānī and* Uṣūl al-Fiqh

Aside from complications faced in his writings on *siyar*, al-Shaybānī's work is made harder to address by the lack of a declared jurisprudential theory – most of his books are devoid of rationalization for extrapolated rules.[34] "If we read Muḥammad's [al-Shaybānī's] books, we seldom find *qiyās* where the *ʿilal* [sing. *ʿilla*, trans. *ratio legis*] and the deduction process are stated."[35] In addition to the lack of explicit reference to the deductive/inductive process in his *furūʿ* work, al-Shaybānī did not write a book focusing on elaborating his/the school's *uṣūl* theory. Al-Shaybānī's approach to jurisprudence is hardly surprising considering that his works were written in the early stages of development of sys-

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Society 17 (2010), 291–319, and Mehmet Boynukalin, introduction to *al-Aṣl, by Muḥammad b. al-Ḥasan al-Shaybānī* (Beirut: Dār Ibn Ḥazm, 2012), 105–75.

30 Abū Zahra, *Abū Ḥanīfa*, 211.

31 Khadduri, introduction to *Siyar*, 45.

32 Abū Zahra, *Abū Ḥanīfa*, 235; Boynukalin, introduction, 44.

33 Boynukalin, introduction, 175.

34 Abū Zahra, *Abū Ḥanīfa*, 264.

35 Abū Zahra, *Abū Ḥanīfa*, 217.

tematic legal reasoning, where the discipline of *uṣūl* was yet to be formulated and articulated.[36] However, the lack of material elaborating on early Ḥanafī juristic theories does not necessarily indicate that al-Shaybānī's, or his two masters', approach to legal reasoning was devoid of any pattern. Many classical jurists (e.g. al-Bazdawī (d. 493/1100), al-Sarakhsī) and modern scholars (e.g. Abū Zahra, Schacht, Boynukalin) attempted to lay down the theoretical foundations of early Ḥanafī work, predominately drafted by al-Shaybānī.[37] As Abū Zahra points out, later reconstructions of Ḥanafī jurisprudential theory should be viewed with caution due to potential over-sophistication of early Ḥanafī thought.[38] However, they can still form the basis for assessing Ḥanafī work, at least as a manifestation of generally accepted hypotheses on early Ḥanafī theories in classical times. After all, the Ḥanafīs, referred to as *ahl al-raʾy* (people of opinion), were never the arbitrary opinion-based scholars their opponents accused them of being.[39] Often, their reasoning followed a systematic pattern, where most rulings reflected unarticulated forms of *qiyās* (analogical deduction) informing the rule.[40] As a matter of fact, Boynukalin lists in his introduction to *al-Aṣl* several reiterations of al-Shaybānī's understanding of what one might anachronistically refer to as *uṣūl al-fiqh.*

This book relies on al-Sarakhsī's book on *uṣūl*, Abū Zahra's biography of Abū Ḥanīfa and Boynukalin's introduction to *al-Aṣl*. Because of the unique intellectual position of al-Sarakhsī as the narrator of al-Shaybānī's books, his theory of *uṣūl* might have been influenced by what he believed to be al-Shaybānī's jurisprudential technique. As al-Sarakhsī says, his *uṣūl* book aims to clarify the sources (*uṣūl*) of his commentaries on al-Shaybānī's books to those who aim to rely on those books.[41] In parallel, the study also relies on Abū Zahra's book on Abū Ḥanīfa and his jurisprudence and Boynukalin's introduction to *al-Aṣl* as examples of modern mainstream Muslim interpretation of early Ḥanafī *uṣūl* theory.

An examination of al-Sarakhsī's articulation of the Ḥanafī *uṣūl* theory indicates a highly sophisticated system, a system that is unlikely to have been adopted in the second century AH. He dwells on many technicalities of the language that do not seem to have been considered by al-Shaybānī in his early

36 Wael Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 74.

37 Abū Zahra, *Abū Ḥanīfa*, 264.

38 Abū Zahra, *Abū Ḥanīfa*, 218.

39 Hallaq, *Origins*, 116.

40 Hallaq, *Origins*, 116.

41 al-Sarakhsī, *Uṣūl al-Sarakhsī*, ed. Abū l-Wafā l-Afghānī (Cairo: Dār al-Kitāb al-ʿArabī, 1952), 1:10.

writings, such as the definition of a command and a prohibition from the linguistic and the legal perspectives. However, the book offers an insight into the sources of law accepted by the early Ḥanafīs. Al-Sarakhsī, for example, shows how the early Ḥanafīs acknowledged the authoritativeness of *al-khabar al-wāḥid* (individually transmitted prophetic traditions).[42] This claim is given strong assertion in Boynukalin's work and his analysis of al-Shaybānī's *Kitāb al-Istiḥsān*.[43] He also argues that the sunna of the Companions[44] and *ijmāʿ* (consensus, regardless of when it was reached) were binding sources.[45] Boynukalin, however, asserts that al-Shaybānī disagreed with Abū Ḥanīfa in several instances over the hierarchy of the Companions' authoritativeness. For example, whereas Abū Ḥanīfa relied on Ibn Masʿūd on a particular matter, al-Shaybāni gave precedence to ʿAlī b. Abī Ṭālib on the same matter.[46] Al-Shaybānī also appears to have given more weight to *ḥadīth* than his master Abū Ḥanīfa, rejecting in some instances the master's position due to its contradiction with *ḥadīth*.[47]

Al-Sarakhsī argues that the Qur'ān and sunna of the Prophet would never contradict each other and that any detected contradiction was an outcome of ignorance of the history of abrogation.[48] Early Ḥanafīs, however, dismissed *ḥadīths* on the basis of contradictions with the Qur'ān.[49] Other sources, such as *qiyās* and opinions of the Companions, do not abrogate each other, because they do not oblige knowledge (*ghayr mūjib li-l-ʿilm*).[50] Additionally, al-Sarakhsī gives evidence to al-Shaybānī's familiarity with the legal technique of classifying sources on the basis of their scope of application to *ʿāmm* (general) and *khāṣṣ* (specific). For example, al-Shaybānī states that a person who sells a ring to someone, and then sells its stone to someone else, is making a valid sale because the second sale (specific) defines the first (general).[51] Whereas Abū Zahra (relying on al-Dahlawī) argues that such detailed analysis of *ʿāmm* and *khāṣṣ* and abrogation must have been a later innovation,[52] there is enough

42 al-Sarakhsī, *Uṣūl*, 1:332–33.
43 Boynukalin, introduction, 192.
44 al-Sarakhsī, *Uṣūl*, 1:114.
45 al-Sarakhsī, *Uṣūl*, 1:315.
46 Boynukalin, introduction, 203.
47 Boynukalin, introduction, 193.
48 al-Sarakhsī, *Uṣūl*, 2:12.
49 Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1953), 30.
50 al-Sarakhsī, *Uṣūl*, 2:12.
51 al-Sarakhsī, *Uṣūl*, 1:132.
52 Abū Zahra, *Abū Ḥanīfa*, 263.

evidence in the Islamic tradition, and in al-Shaybānī's work,[53] that early jurists and specialists of Qur'anic exegesis were, to some extent, familiar with the concept in the second/eighth and third/ninth centuries.[54]

Another possible guidance into early Ḥanafī methodology is Abū Zahra's biography of Abū Ḥanīfa. Abū Zahra examines another seminal Ḥanafī work on *uṣūl* authored by the prominent Ḥanafī jurist al-Bazdawī,[55] but he qualifies al-Bazdawī's approach in terms of its applicability to works authored by al-Shaybānī. In his analysis, Abū Zahra argues that Abū Ḥanīfa did not develop detailed theories of legal reasoning as much as general rules of evidence.[56] Those rules, according to Abū Zahra, were declared by Abū Ḥanīfa, who is quoted in *Tarīkh Baghdād* as saying that he relied primarily on the Qur'ān, then on the sunna, and then on statements of the Companions, but that he did not acknowledge the authoritativeness of others (in reference to al-Tābiʿūn, the authoritative successors of the Companions)[57] and accordingly relied on his own *ijtihād*.[58] He is also said to have relied heavily on *qiyā*s and to have abandoned "ugly" *qiyās* through *istiḥsān* and custom.[59]

For the purpose of this book, analysis of al-Shaybānī's work assesses conformity with the sources mentioned above without delving further into details of Ḥanafī *uṣūl* theories, to avoid measuring the text against standards developed at a much later stage of Islamic legal thought. It also keeps in mind that al-Shaybānī was more inclined than Abū Yūsuf and Abū Ḥanīfa to rely on *ḥadīth*, in line with "the rising importance of textual sources."[60] Moreover, more emphasis is laid on internal inconsistencies in the text itself rather than inconsistency with an overarching *uṣūl* theory.

1.3 *Al-Shaybānī's Life: In and Out of the Caliph's Court*

Al-Shaybānī was born to a wealthy family from Ḥarasta in Damascus, but shortly before his birth, his father moved to Wāsiṭ in Iraq.[61] According to Ibn

53 Boynukalin, introduction, 233.

54 Joseph Lowry, "The Legal Hermeneutics of al-Shāfiʿī and Ibn Qutayba: A Reconsideration," *Islamic Law and Society* 11, no. 1 (2004), 7–8.

55 See ʿAlāʾ al-Dīn al-Bukhārī, *Kashf al-asrār ʿan uṣūl Fakhr al-Islām al-Bazdawī*, ed. ʿAbdullah ʿUmar (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997).

56 Abū Zahra, *Abū Ḥanīfa*, 265.

57 Generation following the Companions of the Prophet.

58 Abū Zahra, *Abū Ḥanīfa*, 266.

59 Abū Zahra, *Abū Ḥanīfa*, 266.

60 Hallaq, *Origins*, 112.

61 Abū ʿAbdullah Muḥammad al-Dhahabī, *Manāqib al-Imām Abī Ḥanīfa wa sāḥibayh Abī Yūsuf wa Muḥammad b. al-Ḥasan*, ed. Muḥammad Zāhid al-Kawtharī and Abū l-Wafā

Sa'd and al-Baghdādī, al-Shaybānī's grandfather was a client of the famous Shaybān Arabian tribe, but neither biographer states whether or not the grandfather was Arab.[62] Khadduri believes that this silence indicates his ancestors were probably non-Arabs.[63] According to al-Baghdādī, al-Shaybānī's father served in the Umayyad army in Syria and seems to "have become well-to-do."[64] In a move that proved to be very significant to al-Shaybānī's career as a jurist, his father moved to al-Kūfa, a political and religious centre at the time.[65] Living in al-Kūfa introduced al-Shaybānī to Abū Ḥanīfa and allowed him to master Ḥanafī thought. Al-Shaybānī studied in Abū Ḥanīfa's circle until the age of eighteen and the latter's death. Because al-Shaybānī was exposed to Abū Ḥanīfa for only a short time, Abū Zahra's conclusion that al-Shaybānī accumulated most of his knowledge in Ḥanafi thought from Abū Yūsuf seems quite plausible.[66]

Al-Shaybānī continued to lecture on Ḥanafī thought until he was recommended by Abū Yūsuf to Hārūn al-Rashīd for appointment as a judge.[67] Sources agree that al-Shaybānī was reluctant to accept the appointment and was somehow coerced into it.[68] Al-Shaybānī's scepticism of judicial appointments is typical of the era, when many jurists perceived such appointments as limiting their ability to express their opinions without fear of authority.[69] As stated later in this chapter, al-Shāfi'ī reportedly rejected a similar appointment by al-Rashīd, and sources document Abū Ḥanīfa's harassment by the authorities for declining a judicial post.[70] Al-Shaybānī's reluctance may have been overestimated by biographers in light of this atmosphere of hostility to official appointments, but the fact that Ḥanafī biographers did not attempt to prove similar reluctance by Abū Yūsuf suggests that al-Shaybānī genuinely resented the role, at least initially. Besides, al-Shaybānī's comfortable financial situation probably contributed to his lack of interest in such posts: "Like Abū Ḥanīfa, he [al-Shaybānī] had inherited wealth from his father; unfettered by family demands, he could afford to put aside the material temptations that an official

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l-Afghānī (Cairo: Dār al-Kitāb al-'Arabī, 1947), 50.

62 Khadduri, introduction to *Siyar*, 28.

63 Khadduri, introduction to *Siyar*, 28.

64 Khadduri, introduction to *Siyar*, 28.

65 Khadduri, introduction to *Siyar*, 28.

66 Abū Zahra, *Abū Ḥanīfa*, 233.

67 Muḥammad al-Kawtharī, *Bulūgh al-amānī fī sirat Muḥammad b. al-Ḥasan al-Shaybānī* (Cairo: Maktabat al-Khānjī, 1936), 36–37.

68 Khadduri, introduction to *Siyar*, 32.

69 Hallaq, *Sharī'a*, 129.

70 Abū Zahra, *Abū Ḥanīfa*, 54.

position offered."[71] Some sources state that Abū Yūsuf's recommendation that al-Rashīd hire al-Shaybānī as a judge caused a permanent rift between the two.[72]

Al-Shaybānī, or his biographers, seem to have been keen to assert his independence as a judge even after he was appointed. It is said that he was sitting in the caliph's court and that everyone stood up for the caliph except for al-Shaybānī. When asked about this incident, al-Shaybānī is reported to have said, "I told him [the caliph] I hated to belong to a different class than the one you granted me. You chose me as a scientist [jurist] and I hated to leave that and belong to the class of servants."[73]

In a more significant and widely cited incident, al-Rashīd sought a *fatwā* from al-Shaybānī regarding the breach of an *amān* agreement with members of a Shīʿī rebellion. Unlike another judge who concurred with the caliph's right to breach the *amān* agreement, al-Shaybānī insisted on the inviolability of the *amān* and was accordingly dismissed from his role as a judge.[74] But al-Shaybānī seems to have become accustomed to his proximity to decision-making circles,[75] because he continued to live in Baghdad and did not move back to his early residence in al-Kūfa.[76] Moreover, he willingly accepted a later appointment as a judge by al-Rashīd.[77] Finally, when al-Rashīd sought another *fatwā* from al-Shaybānī regarding the breach of the covenant with a Christian tribe, the Banū Taghlib, for suspicion of cooperation with the Byzantines, al-Shaybānī gave a more flexible response than his earlier position.[78] While he held that the covenant with the Banū Taghlib may not have been breached, he was "cautious in expressing his opinion to the Caliph, who held the highest authority, by pronouncing that the latter's authority would be supreme."[79]

Apparently, al-Rashīd and al-Shaybānī's relationship suffered no further rifts. Al-Shaybānī continued in his position as a judge until his death. While he was never chief judge, he seems to have been very close to the caliph, at one point accompanying him on "an expedition to suppress a rebellion in

71 Khadduri, introduction to *Siyar*, 32.

72 ʿIzz al-Dīn al-Shaykh, *al-Imām Muḥammad b. al-Ḥasan al-Shaybānī: Muḥadith wa faqīh* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 44.

73 al-Shaykh, *al-Shaybānī*, 21.

74 al-Kawtharī, *Bulūgh*, 40.

75 Khadduri, introduction to *Siyar*, 33.

76 Khadduri, introduction to *Siyar*, 33.

77 Khadduri, introduction to *Siyar*, 33.

78 Khadduri, introduction to *Siyar*, 34.

79 Khadduri, introduction to *Siyar*, 35.

Samarqand."[80] When he died in al-Rayy, the caliph attended his burial. It is reported that the caliph said on the day of his burial, "I buried *fiqh* and *naḥw*[81] [grammar] on the same day."[82] But some sources claim that al-Shaybānī was not satisfied with his life as a judge. Al-Dhahabī reports al-Shaybānī as confirming these claims on his deathbed and saying, "What if I stand before God and he tells me, 'Why did you come to al-Rayy. Is it *jihād* in my path or the attempt to satisfy me?' What am I supposed to say?'"[83]

Whether or not al-Shaybānī was comfortable with the official post is hard to figure out, but it is an accepted fact that he assumed the position of a judge twice in his life and that he was very close to al-Rashīd. It is also noteworthy that al-Shaybānī owed his wealth and comfort to wars conducted with non-Muslims, considering that his primary source of wealth was his inheritance, which his father had accumulated as a soldier. In fact, had it not been for his father's wealth, al-Shaybānī might not have been able to reach his status in Islamic jurisprudence. Because of the resources available to him, al-Shaybānī could afford to spend extravagantly on his education and to perfect his knowledge of the religious sciences.[84] How that contributed to his approach to Islamic jurisprudence on *jihād* and armed conflict is, and will remain, unanswered.

1.4 *Al-Shaybānī: the Jurist-Judge and the Regulation of Armed Conflict*

It would be a limited understanding of al-Shaybānī's positions to read them as an attempt to legitimize the actions of the caliph. After all, as stated in his biographies, al-Shaybānī's conflicts with the caliph revolved around the conduct of the caliph in armed conflict. However, it would be equally limited to disregard the influence of his public office on his legal reasoning. The *'ulamā'* of the early 'Abbāsid caliphate were never interested in the complete separation of religion from the state, but they were devising a model that allowed for and encouraged the involvement of the political authority in the developed legal system.[85] In return, caliphs, including al-Rashīd, were keen to comply with, or at least consult, the opinions of jurists on matters relating to *jihād*.[86] This symbiotic relationship can be detected in al-Shaybānī's *al-Aṣl*, in its attempt to le-

80 Khadduri, introduction to *Siyar*, 34.

81 al-Kisā'ī, a famous grammarian, died on the same day.

82 Ibn Abī l-Wafā l-Qurashī, *al-Jawāhir al-muḍiya fī tarājim al-Ḥanafiyya*, ed. 'Abdul Fataḥ Muḥammad al-Ḥilw, 2nd ed. (Cairo: Hajar, 1993), 126.

83 al-Dhahabī, *Manāqib*, 59.

84 al-Shaykh, *al-Shaybānī*, 18.

85 Zaman, "Caliphs," 3–4.

86 John Kelsay, "al-Shaybani and the Islamic Law of War," *Journal of Military Ethics* 2, no. 1 (2003), 65.

gitimize and expand the Islamic empire and assert the caliph's authority in matters relating to *jihād*, and in its pragmatic tendency to accommodate the need to acknowledge non-Muslim nations. But an interest in a legitimate, legally regulated caliphate was not the sole factor guiding al-Shaybānī's approach to armed conflict. As detailed later, equally witnessed in his work are a tendency to accept social hierarchies and an attempt to open up a space for challenging the political authority.

1.4.1 The Islamic Empire and Hegemony

From the opening of *al-Aṣl*, it is easy to detect the focus on the spoils of war as a crucial and integral part of the legal system. Having dedicated a full chapter to the division and management of the spoils of war, al-Shaybānī continues to address the matter in most other chapters. In fact, the chapter on the conduct of the army in enemy territory offers less attention to legitimate targeting techniques than it does to proper conduct with regards to the division of the spoils of war. This interest is partly triggered by the abundance of Qur'anic texts addressing booty division. But Kelsay offers a convincing argument that the legal approach to booty division was equally a response to the need to mitigate tension between different ethnicities participating in conflict by formalizing the process of dividing booty, and that the legal system adopted by al-Shaybānī relied heavily on the institution of the caliphate as the channel for this formalization.[87] However, al-Shaybānī's reluctance to accept the presumed censorship of his official post, and his tendency to limit the power of the caliph, as articulated in the section below, indicates that his promotion of a strong caliphate reflected more a keen interest in a caliphal institution strong enough to manage the state of affairs of the Muslim *umma* than it did an attempt to augment the power of the caliph as an individual.

Limitations on permissible tactics and tools of destruction at war often are perceived as obstacles to the fully fledged use of force, translating into a relative disadvantage for an army. Al-Shaybānī's text, compared with other juristic works examined in this book, reveals a tendency to expand the army's freedom and destructive power in its conduct of conflict with the enemy, especially with regards to the destruction of enemy property and livestock. Al-Shaybānī argues that it is commendable for the army to destroy enemy property,[88] relying on the following Qur'anic verse: "Whatever you [believers] may have done to their palm trees – cutting them down or leaving them standing on their roots – was done by God's leave, so that he might disgrace those who defied

87 Kelsay, "al-Shaybani," 67.

88 al-Shaybānī, *Siyar*, 99.

him."[89] However, unlike al-Shaybānī's argument that destruction is commendable, the verse may be argued as an indication of mere permissibility. Moreover, the blanket recommendation in favour of destruction arguably contradicts Abū Bakr's widely cited instruction to the army: "Do not cut down fruit-bearing trees. Do not destroy an inhabited place. Do not slaughter sheep or camels except for food. Do not burn bees and do not scatter them."[90] As mentioned earlier, the Ḥanafīs upheld the opinions of the Companions as authoritative sources of law, so an attempt should have been made at least to mitigate Abū Bakr's instruction. In other words, reading the two sources in parallel may fairly be assumed to lead al-Shaybānī to argue that whereas destruction is permissible, it is reprehensible or undesired as he often does in other areas of law,[91] or to follow the same interpretive approach of scholars such as al-Shāfiʿī, who argued that Abū Bakr's instructions were specific to the Levant since Muslims were promised the territory by God. According to this reasoning, Abū Bakr instructed his men to refrain from destruction in this particular case because it would have disadvantaged Muslims as the future rulers of the territory.[92] But the Ḥanafīs make no such attempt, which might lead us to conclude that they were unaware of the tradition. Although the tradition is widely cited in *al-Mūwaṭṭa'* narrated by Yaḥya b. Yaḥya,[93] al-Shaybānī's narration lacks a *jihād* section, so makes no reference to it.[94] Controversy over authorship of *al-Mūwaṭṭa'* and presumed editing by later Mālikīs do not offer much insight into al-Shaybānī's knowledge of the tradition. Nevertheless, in his rebuttal of the critique offered by Abū Yūsuf to *Siyar al-awzāʿī*, al-Shāfiʿī states that al-Awzāʿī cites this particular tradition.[95] Thus we can fairly assume that Abū Yūsuf and al-Shaybānī came across this tradition. But even if we were to assume that al-Shaybānī and Abū Yūsuf were unaware of the tradition, we are left with the fact that the Ḥanafīs instruct Muslim warriors to destroy enemy territory despite the Qur'ān's neutral language on the matter.

89 Q 59:5.

90 Mālik b. Anas, *al-Muwaṭṭa'*, trans. ʿĀ'isha ʿAbdarahman al-Tarjumana and Yaʿqub Johnson, Center for Muslim Jewish Engagement, University of Southern California, online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muwatta/021.mmt.html>, accessed 18 January 2011.

91 Boynukalin, introduction, 263.

92 al-Shāfiʿī, *al-Umm*, 4:409.

93 Mālik b. Anas, *Mūwaṭṭa' al-Imām Mālik*, narr. Yaḥya b. Yaḥya al-Laythī, ed. Aḥmad Rātib ʿArmūsh (Beirut: Dār al-Nafā'is, 1977), 297.

94 Mālik b. Anas, *Mūwaṭṭa' al-Imām Mālik*, narr. Muḥammad al-Ḥasan al-Shaybānī, ed. ʿAbdul Wahhāb ʿAbdul Laṭīf (Cairo: al-Ahrām, 1994).

95 al-Shāfiʿī, *al-Umm*, 7:585.

A clearer example of the tendency to expand the enemy's destructive power is al-Shaybānī's approach to the treatment of enemy livestock. Al-Shāfiʿī and Ibn Ḥazm relied on the prophetic tradition, "Whoever kills a sparrow or above[96] without a right will be questioned by God"[97] to hold that animals may not be killed for military gain.[98] However, the Ḥanafīs argued that if animals acquired as part of the spoils were difficult to subdue and constituted a burden, they should be killed to prevent the enemy from using them.[99] It is again possible that al-Shaybānī was unaware of the tradition relied on by al-Shāfiʿī and Ibn Ḥazm. But the fact that the question was raised suggests that the issue was to some extent contentious and that a rationalization was needed for the disposition of animals, and it is clear that al-Shaybānī decided in this case that the primary interest was maximizing military gain through denying the enemy the opportunity to make use of this important asset.

Al-Shaybānī's interest in a strong army is also seen in his approach to legitimate targeting when besieging a city. Like other Muslim scholars, al-Shaybānī allowed the Muslim army to use relatively wide-ranging and indiscriminate weapons to attack a city, regardless of the damage likely to be inflicted on untargetable groups. While this position is not a novelty to Muslim jurisprudence and is proof of military realism,[100] the approach reflects an interest in maximally expanding the power of the military. Targeting a besieged city in such a manner, even if there were slaves, old men, women, children, and Muslims in it, was approved unconditionally. But when it came to Muslim children, the interest in a strong empire and a powerful army was mitigated, although not overruled, by the need to attempt to limit "collateral damage."[101] In this case, it is stipulated in *al-Aṣl* that "warriors should aim at the inhabitants of the territory of war and not the Muslim children."[102] Like other matters, the issue is put in the form of a question to Abū Ḥanīfa. In the case of Muslim children, he was asked if he approved of the use of indiscriminate weapons that are still on some level subject to human control of targeting, namely catapults and arrows. In the case of other categories, the tactics included methods that inevitably lead to indiscriminate destruction (for example, flooding with water and burning). Moreover, the precise targeting qualification in the case of Muslim

96 i.e. "or a more sophisticated animal."

97 al-Shāfiʿī, *al-Umm*, 4:369.

98 Ibn Ḥazm, *Muḥalla*, 7:295.

99 al-Shaybānī, *Siyar*, 99.

100 Kelsay, "al-Shaybani," 71.

101 John Kelsay, "Religion, Morality and the Governance of War: The Case of Classical Islam," *The Journal of Religious Ethics* 18, no. 2 (1990), 129.

102 al-Shaybānī, *Siyar*, 102.

children, contrasted with the unconditional approval in other cases, reflects a weaker inclination to protect other groups normally immune to targeting in the school's jurisprudence. In other words, gaining control of the city seems to have been more important than protecting adult Muslims and non-Muslim women and children.[103] That need in this particular case is not inferred from the reasoning, but was clearly and explicitly stated: "If the Muslims stopped attacking the inhabitants of the territory of war for any of the reasons that you have stated, they would be unable to go to war at all, for there is no city in the territory of war in which there is no one at all of these you have mentioned."[104]

Whereas more caution is necessary if Muslim children are involved, as inferred from Abū Ḥanīfa's position cited above, this caution is still outweighed by an interest in a strong and continuous *jihād* operation, as reflected in the reluctance to stipulate that Muslim warriors pay the *diyya* (blood money) for the loss of lives of un-targetable groups, including Muslim children. This reluctance is indeed in line with the general reluctance to hold any party to the conflict liable for damages, but one must also consider the fact that personal liability would have seriously disrupted the zeal of the warriors, an outcome that al-Shaybānī did not favour.

1.4.2 Asserting the Caliph's Authority

As mentioned earlier, al-Shaybānī's text displays a strong interest in consolidating the power of the caliph, which is not necessarily the same as allegiance to the caliph's person or assertion of his reign as an individual. Rather, the text seems more like an attempt to legitimize and establish the power of the institution itself, both as a representative of the Muslim nation as well as a domestic authority. This objective might have been heavily influenced by the interest in a powerful Muslim caliphate with the belief that centralized power is a necessary precondition to dominance internationally and enforcement of the religious law domestically, but it might also have been an outcome of exposure to a more centralized and stronger political institution during the ʿAbbāsid era. What is evident is that this objective seems to have dominated the text more than any other interest.[105]

One of the areas most reflective of this emphasis on central authority is the division of the spoils. For example, it is argued that if a slave is captured and is likely to be divided among the warriors, a warrior may not manumit that slave,

103 Nesrine Badawi, "Sunni Islam: Part 1: Classical Sources," in *Religion, War and Ethics: A Sourcebook*, ed. Gregory Reichberg and Henrik Syse (Cambridge: Cambridge University Press, 2014), 311.

104 al-Shaybānī, *Siyar*, 102.

105 Badawi, "Sunni Islam," 313.

because he does not know for certain that this particular slave will be in his share, even if his share exceeds the value of this slave.[106] This position is contrasted to an analogically similar position, where a share of the booty is assigned collectively to a group of warriors by the *imām*. In this particular case, it is permitted for the warrior to offer manumission to the slave before certainty of ownership. When asked about the similarity between the two situations, Abū Ḥanīfa is said to have argued that "the two situations are analogically the same, but in the first I would prefer to abandon analogy and follow *istiḥsān* [juristic preference] and hold that the emancipation before the division of the spoil is not permissible."[107] Clearly, the difference between the two positions was not caused by a difference in certainty of ownership. In both cases, the individual warrior is entitled to a share of the booty that exceeds the "value" of the slave but cannot exclusively claim ownership. Rather, the primary difference is the need to defer to the political authority of the *imām*, who decides on overall division.

The early Ḥanafīs' awareness of the artificial distinction of the permissibility of manumission before and after division of the spoil is made evident in their approach to the legal consequences of challenges posed to authority through "usage" of undivided booty. If a warrior were to have sexual intercourse with a slave girl before the division of the spoil, the punishment for *zina* would not apply, and parentage of the child would not be established, but the warrior would be expected to pay compensation for the unauthorized intercourse.[108] If the warrior were to steal something from the spoil, the *ḥadd* for theft would not be applied to him, because "he is entitled to a share,"[109] which shows that the tendency to emphasize the authority of the caliph could only go as far as limiting ownership, depriving slaves of manumission and, for the female slave and her child, parentage rights, but not to the extent of subjecting a Muslim to what appears to have been perceived as an illegitimate punishment for "consumption" on the basis of a semblance of ownership. This approach is hardly a deviation from Ḥanafī jurisprudence on the avoidance of *ḥudūd* in case of doubt. As a matter of fact, many jurists across the spectrum of Islamic jurisprudence have generally rejected any imposition of *ḥadd* punishment in instances where the law does not seem to apply neatly to the sanctioned situation or where the evidence is insufficient to establish the commission of the proscribed act, including analogous situations where a man engages in sexual

106 al-Shaybānī, *Siyar*, 114.
107 al-Shaybānī, *Siyar*, 116.
108 al-Shaybānī, *Siyar*, 115.
109 al-Shaybānī, *Siyar*, 115.

intercourse with a *mukātaba* slave (a slave with whom a conditional manumission contract exists).[110]

Al-Shaybānī's tendency to emphasize the need for an established bureaucratic state-centric system is also clear in his requirement that warriors register in the *diwān* (army register) whether they were cavalrymen or infantrymen, in order to determine their share of the booty. The early Ḥanafīs agreed that cavalrymen were entitled to a larger share of the booty.[111] Thus, if a cavalryman registered as an infantryman and then bought a horse and fought, he would not be allotted the cavalryman's share.[112] This rule was an innovation in evidentiary rules in Islamic law, where oral testimony and prevailing evidence, rather than formal registration, generally sufficed to establish evidence of a right. It further affirmed the authority of the caliphate in determining the share of the booty and in controlling and managing the army, and it recognized the need for stability in allocating financial resources.

Al-Shaybānī was equally reluctant to challenge state authority with regards to granting a security pact, *amān*. It is true that he acknowledged the legitimacy of *amān* granted by any member of the army, even if that member were a slave, relying on the prophetic tradition that "Muslims should support one another against the outsider; the blood of all Muslims is of equal value, and the one lowest in status [i.e. slave] can bind [all] the others if he gives a pledge of security."[113] However, he did not acknowledge an *amān* granted by a Muslim merchant or a Muslim captive to inhabitants of the territory of war, because "they are living undefended in the territory of war."[114] This position shows a degree of internal contradiction because the merchant or captive still enjoys Muslim identity and should accordingly enjoy advantage equal to other Muslims. After all, the text of the tradition does not offer any qualifications for *amān* granting by Muslims. Al-Shaybānī's unwillingness to acknowledge such an *amān* arguably came out of a fear that the merchant or the captive might be coerced by the inhabitants of the territory of war, as evidenced by his use of the term "undefended." However, suspicion of potential coercion would not normally amount to evidence in this particular case, especially since the testimony of the merchant or the captive can be sought to understand their motivations for granting *amān*. But for some reason, al-Shaybānī was not even

110 Intissar Rabb, "Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt," *Islamic Law and Society* 17, no. 1 (2010), 81.

111 al-Shaybānī, *Siyar*, 106–7.

112 al-Shaybānī, *Siyar*, 108.

113 al-Shaybānī, *Siyar*, 93.

114 al-Shaybānī, *Siyar*, 158.

willing to acknowledge *amān* granted by Muslims to their war captives if both parties testified to that effect. He was willing to acknowledge *amān* in that case only "[i]f *a group* of Muslims known to be of *just character* testified that a safe-conduct had been given by a party of *warriors* to the prisoners of war who were still *capable of resistance*."[115] In this case, it is clear that al-Shaybānī is attempting to restrict a supposedly egalitarian individualist mechanism of *amān*, despite the lack of authority to justify this attempt. Arguably, this position reflects the general inclination to treat non-Muslim lands as territories outside Muslim jurisdiction, leading to non-recognition of the legal act of *amān* in the territory of war. However, as later established, a non-Muslim ruler's ownership over slaves is recognized despite the different jurisdiction. Moreover, as mentioned above, *amān* granted in such situations may be recognized, but with the higher burden of proof of external testimony. So, if neither fear of the enemy nor non-recognition of legality in the territory of war are likely reasons for restricting *amān* granted by those who are in the territory of war, it would be fair to assume that the primary objective of the restrictions is the assertion of the need for the *imām*'s approval. In the case of approved *amān*, a slave is a member of the army, so may act on behalf of the state, but in the other mentioned cases, those individuals have failed to receive the formal proxy from the state to grant it.

Acquisition of legitimacy as a consequence of living under the banner of the Muslim state is further affirmed in the treatment of a Muslim living in the territory of war. Whereas a Muslim is generally allowed to maintain his marriage to a woman from the People of the Book, Ḥanafīs appear to have been reluctant to grant that privilege to such a person. According to them, if a man converted to Islam before Muslims assumed control over his city, his minor children followed his religion, and they were regarded as Muslims, but his wife became *fay'* (booty).[116] Although the wife's religion is not mentioned, one can fairly assume she was envisioned to belong to the People of the Book, because the marriage was not dissolved upon the man's conversion to Islam (before Muslims took over the city). But even if that assumption is unsubstantiated, it is at least reasonable to expect a distinction between a woman who belongs to the People of the Book and a woman who does not. However, the statement that the woman becomes *fay'* is general and appears to apply to all women.

Additionally, if the woman was pregnant, her child became *fay'* because the "[unborn] child who is [still] in the womb would have the same status" as her.[117] The treatment of the child is odd when compared to other areas of Islamic law,

115 al-Shaybānī, *Siyar*, 101 (my italics).

116 al-Shaybānī, *Siyar*, 139. Also in *Aṣl*, 7:457.

117 al-Shaybānī, *Siyar*, 139. (The clarifications in brackets are in the original translation.)

where the relationship between the unborn child and the father was not severed if the child was conceived in marriage. For example, the death of the father did not challenge parentage and did not deprive the child of inheritance. In fact, the father's inheritance was to be kept undivided until the child was born and the sex determined.

But in this case, the father and his family were deprived of the advantages that a family would normally enjoy in the territory of Islam, again arguably for absence of the political authority. As Ayoub notes, "The concept of *dār* is deeply interrelated with the political and legal dominance of the political leader over the jurisdiction of *dar al-Islam*."[118] One can argue that this deprivation is a deviation from Islamic legal reasoning in its approach to applicable regimes, where religion is the primary criterion in determining the treatment of the individual. By contrast, in this case, the treatment is determined by the location of habitation. Kelsay argues that the weight given to location is a natural outcome of the religiously minded legal system, because "the mission of a religious community (Muslims) is so conceived that a distinction is made between various territories."[119] Ayoub agrees that Ḥanafīs have been largely consistent in their insistence on the regime of *ikhtilāf al-dārayn*, whereby "*dar al-harb* is a legal concept designated to territories that are not under the political sovereignty of *dar al-Islam* or jurisdictions that do not hold any treaties with *dar al-Islam*."[120] Thus, it might be argued that such a differential treatment is an outcome of the school's reluctance to recognize the legal authority of acts committed in the territory of war, such as debt incurred in the territory of war.[121] But marriage between people in the territory of war seems to be recognized. For instance, if a woman is captured in the territory of war, her marriage is recognized for the duration of the *ʿidda* (waiting period during which the woman is not allowed to marry in order to ensure she is not pregnant, and to ascertain parenthood if she is), and if the husband is captured during that period, their marriage would remain valid.[122] It might also be argued that there is a *ḥadīth* that allows for some differential treatment between those living in the territory of war and those living in the land of Islam, but this differential treatment was limited to shares in spoils and did not extend to marriage and

118 Samy Ayoub, "Territorial Jurisprudence, *Ikhtilāf al-Dārayn*: Political Boundaries and Legal Jurisdiction," *Contemporary Islamic Studies* 2 (2012), 13.

119 Kelsay, "Religion," 131.

120 Ayoub, "*Ikhtilāf*," 4.

121 al-Shaybānī, *Siyar*, 171.

122 al-Shaybānī, *Siyar*, 182.

parenthood privileges. This *ḥadīth* was one of the first traditions used by al-Shaybānī in this text.

> You should then invite them to move from their territory to the territory of the émigrés [Madīna]. If they do so, accept it and let them alone. Otherwise, they should be informed that they would be [treated] like the Muslim nomads (Bedouins) [who take no part in the war] in that they are subject to God's orders as [other] Muslims, but they will receive no share in the ghanīma (spoil of the war) or in the fay'.[123]

The *ikhtilāf al-dārayn* regime was thus undeniably a primary influence in al-Shaybānī's treatment of marriage in the territory of war and its annulment, as argued by Kelsay and Ayoub. As Ayoub argues, a desire to assert the caliph's political authority and jurisdiction may also have been at the core of Ḥanafī thought. However, the relative inconsistency in the application of the doctrine of the non-recognition of legal acts committed in the territory of war leading sometimes to outcomes that are disfavourable to Muslims due to their residence in the territory of war outside the realm of caliphal authority may give us an insight into the early instances of articulation of such regime. It can also provide an indication of how such articulation may not have been as consistent as believed. It is perhaps telling that *Sharḥ al-Siyar al-kabīr*[124] distinguishes in this way between People of the Book and polytheists, where it is argued that a marriage to a woman from the People of the Book is acknowledged. This discrepancy supports Khadduri's argument that the *Sharḥ* is more indicative of the doctrine as understood, and perhaps reformulated, by al-Sarakhsī and may be seen as evidence that the doctrine was developed over time.[125]

Al-Shaybānī's interest in the centralization of political authority is also evident in his approach to the caliphate's conflicts with Muslim rebels. Although his regime offered a degree of protection and legitimacy to rebels, clearly it was also interested in affording a certain level of freedom, though limited, to the political authority.[126] The book refers extensively to the conduct of ʿAlī (the fourth caliph) with rebels and his unilateral promise to rebels that "whoever flees [from us] shall not be chased, no [Muslim] prisoner of war shall be killed, and no wounded in the battle shall be despatched."[127] Nevertheless, al-Shaybānī

123 al-Shaybānī, *Siyar*, 76. (The clarifications in brackets are in the original translations.)

124 al-Shaybānī's book compiled by al-Sarakhsī.

125 See Ayoub, "*Ikhtilāf*," 8.

126 Badawi, "Sunni Islam," 314.

127 al-Shaybānī, *Siyar*, 231. (The clarifications in brackets are in the original translations.)

adopts an innovative approach to limit the power of the rebels and set a condition of the non-existence of a group of rebels "with whom refuge might be taken, but if a group of them has survived with whom refuge might be taken, then their prisoners could be killed, their fugitives pursued and their wounded dispatched."[128] Abou El Fadl argues that this position is too advanced for the Ḥanafī doctrine at al-Shaybānī's time, but he acknowledges that "the idea that a rebel group that has access to reinforcements or that has a group with which it can take refuge is to be treated more harshly" probably circulated at the time.[129] It is unclear why Abou El Fadl considers this position too advanced for the Ḥanafīs and accepts al-Shāfiʿī's systemization of the legal regime on rebellion, despite the chronological proximity between al-Shāfiʿī and al-Shaybānī. In fact, al-Shāfiʿī – whose debates in *al-Umm* on rebellion are understood by Abou El Fadl as debates with an imaginary Ḥanafī interlocutor[130] – refers to an adversary who argues that if the defeated rebels have a group they may reunite with, their captives and fugitives may be killed and their wounded dispatched.[131] Therefore, barring strong evidence to the contrary, views on rebellion expressed in *al-Aṣl* are treated as early Ḥanafī views just as much as the rest of the arguments therein.

Al-Shaybānī does not explain why he deviates from the above-cited practice of ʿAlī and allows for more excessive force with rebels who may reunite with their companions, but evidently the rationale is to prevent these groups from reuniting with other rebels and continuing to fight the *imām*. This attempt is further proven by the unique willingness to use indiscriminate weapons against rebels. Unlike Ibn Ḥazm, who insisted on leaving an exit route for rebels during fighting,[132] the Ḥanafīs did not find it objectionable if the *imām* "used arrows, inundated [their positions] with water, attacked them with manjanīqs (mangonels), and burned them with fire."[133] This approach is alarming not only because it deprived the rebels of the opportunity to repent and cease fighting but also because it allowed the deaths of Muslims who might have been in the rebel camp, including Muslim women and children, in contravention of the general principle that a Muslim soul enjoys *ʿiṣma* (prohibition of killing).

128 al-Shaybānī, *Siyar*, 232.

129 Abou El Fadl, *Rebellion*, 145.

130 Abou El Fadl, *Rebellion*, 155.

131 al-Shāfiʿī, *al-Umm*, 4:316.

132 Ibn Ḥazm, *Muḥalla*, 11:117.

133 al-Shaybānī, *Siyar*, 236. (The clarifications in brackets are in the original translation.)

Furthermore, limits were set to ensure that only those who had a religious or political cause and who were sufficiently numerous enjoyed the advantages of rebellion. So, although rebels needed to be *muta'awils*[134] (i.e. possessing *ta'wīl*, an alternative religious, political, or legal interpretation that allowed them to challenge the authority of the *imām*), they also needed to amount to a significant threat as evidenced by their number, which meant that two *muta'awils* would not enjoy the privileges of rebellion.[135] Both conditions are not justified textually in *al-Aṣl*, and it seems that they were both meant to limit arbitrary access to advantages of rebellion for public security reasons. True, later generations of jurists accepted those two conditions to varying degrees, but it is significant that early instances of the promotion of the conditions were not textually inevitable and fit the objective of limiting avenues for challenging the political authority. The regime proposed in *al-Aṣl* clearly also requires significantly strong dissenters, as established by the numerical requirement but also, more important, by the assertion of the need for a *ta'wīl*, which Abou El Fadl perceives as a collective attempt by jurists to guarantee the subjection of the political authority to legal authority and the creation of a space for jurists to have a say over whether a *ta'wīl* existed in the said situation of dissent.[136]

Attempts to expand the powers of the *imām*, however, were often weighed against other interests. The interest in granting the *imām* privileges in his conflict with rebels, for example, was balanced by an attempt to offer some legitimacy for rebellion. The Ḥanafīs' position as detailed in this text – with its insistence on rejecting rebels' criminal responsibility for damages to life and property and the sanctity of rebel property[137] – is one of the earliest positions on rebellion. As detailed by Abou El Fadl, Muslim jurists were faced with a wide variety of potential approaches to rebellion, and they collectively resorted to the regime most protective of rebels, thus mitigating the need for obedience to the leader against the competing need of granting a certain level of legitimacy to rebels.[138] Abou El Fadl argues that this position was in line with the general Ḥanafī position of establishing separate spheres of jurisdiction, a position guided more by an interest in public order and stability than by an ideological inclination to attach legitimacy to rebellion. According to Abou El Fadl, the Ḥanafīs' acknowledgement of the separate jurisdiction of rebels in

134 al-Shaybānī, *Siyar*, 250.
135 al-Shaybānī, *Siyar*, 247.
136 Abou El Fadl, *Rebellion*, 130
137 al-Shaybānī, *Sīyar*, 238.
138 Abou El Fadl, *Rebellion*, 326.

other areas, such as taxation and adjudication, is proof that liability matters were simple extensions of the logic of separate spheres. Furthermore, al-Shaybānī argued that rebels should, like unbelievers, not be held accountable for damages. Such a comparison with unbelievers is far from an attempt to legitimize rebellion. Finally, the separate spheres of jurisdiction approach was interested primarily in stability and order.[139] Public order and stability were undeniably considered, but that does not rule out the potential for promoting other interests. In fact, Abou El Fadl's argument disregards the justification provided in the book for not holding rebels liable for damages. In the section on highway robbery, men who do not possess a *taʾwīl* are to be held accountable for damages because they "are not regarded as *mutaʾawil*s but as marauding adventurers."[140] Hence, the Ḥanafīs make it explicitly clear that their interest in waiving liability is not out of pragmatism but because *taʾwīl* provides rebels with legitimacy. Arguably, one can see a correlation between the insistence on some sort of legitimacy for *taʾwīl*-based rebellion and Abū Ḥanīfa's sympathetic attitude to wars of rebellion waged by ʿAlī's descendants and his keenness to mobilize people to fight on their side.[141] This sympathy appears to have influenced al-Shaybānī, not only as a jurist but also as a judge, as documented in the above-mentioned rift between himself and al-Rashīd, triggered by al-Shaybānī's reluctance to acknowledge the breach of a security pact with pro-ʿAlī rebels.

Another example is the relationship between the tendency to expand the military's freedom in its conduct of armed conflict with the enemy juxtaposed against the interest in asserting the political authority of the caliph. Whereas those interests often ran hand in hand, sometimes they did not fit smoothly together. For example, in the case of the treatment of non-Muslim prisoners of war, the text appears to lean towards destruction of the enemy at the expense of the caliph's discretion. Al-Shaybānī relies on an incident where Abū Bakr was asked "whether a prisoner of war taken from the Rūm (the Byzantines) [might be ransomed]. He replied that he should not be ransomed, even at the price of two mudds of gold, but that he should be either killed or become a Muslim."[142] The book refers to the views of al-Ḥasan al-Baṣrī and ʿAṭṭāʾ b. Abī Rabāḥ holding that a "prisoner of war should not be killed, but he may be

139 Abou El Fadl, *Rebellion*, 146–47.

140 al-Shaybānī, *Siyar*, 250.

141 Abū Zahra, *Abū Ḥanīfa*, 180.

142 al-Shaybānī, *Siyar*, 91. (The clarifications between brackets are in the original translation.)

ransomed or set free by grace."[143] But it places stronger emphasis on the impermissibility of freeing male captives. For example, if male prisoners of war constituted a transportation burden, the *imām* was expected to kill the men but spare the women and children.[144] When explicitly asked what choices the *imām* had with regards to male captives, Abū Ḥanīfa said that "the Imām is entitled to a choice between taking them to the territory of Islam to be divided [among the warriors] and killing them [while in the territory of war]."[145]

Neither al-Ḥasan al-Baṣrī nor 'Aṭṭā' was a Companion of the Prophet, which means their positions were not binding as per the early Ḥanafī position. But as Schacht points out, al-Shaybānī's approach to al-Baṣrī is inconsistent, often treating his opinion as a binding source of law.[146] Moreover, aside from the Ḥanafīs' reluctance to adopt al-Baṣrī's position, their tendency to limit the discretion of the *imām* in dealing with the lives of enemy males faced a major obstacle, the Qur'ān. A Qur'anic verse addressing the issue of prisoners of war lists ransom and grace as legitimate alternatives to consider when dealing with prisoners of war: "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."[147] Given how clearly relevant the verse is, it is odd that there would be no reference to the verse when addressing the issue of prisoners of war, even to refute the obvious interpretation of the verse and to prove that grace and ransom are impermissible with male captives. This approach can only be understood as an attempt to reinforce the power of the Muslim caliphate, even at the expense of the caliph's power, and to limit the possibility of leniency with the enemy.

1.4.3 Recognition of the Territory of War

The roles of Abū Yūsuf and al-Shaybānī as judges and their proximity to the management of public affairs appear to have led, in some instances, to their adopting a pragmatic attitude to "the other" and a certain degree of recognition of the relationship with those in the territory of war. For example, it is stated that if the slave woman of a Muslim were captured by the enemy and taken to the territory of war and that Muslim entered it under *amān*, the Muslim might not usurp her, because the non-Muslims "had taken her to a place of

143 al-Shaybānī, *Siyar*, 91.
144 al-Shaybānī, *Siyar*, 98.
145 al-Shaybānī, *Siyar*, 100.
146 Schacht, *Origins*, 32.
147 Q 47:4.

security."[148] Of course, part of the consideration is a general juristic aversion to treachery and violation of *amān*, but this case also indicates some level of recognition of reciprocity and the obligation to the other if entering the territory under an *amān* pact. Additionally, despite the claim that actions in the territory of war do not carry weight in the territory of Islam, a peace agreement with a ruler in the territory of war recognizes his right to his slaves, which means that even if these slaves were captured by a third party then bought by the Muslims, the ruler would be entitled to reclaim them.[149] These examples prove that early Ḥanafīs were, to some extent, pragmatic in their approach to non-Muslim territory. This pragmatism may have been influenced by continued exposure to the ʿAbbāsids' need for diplomatic relations with other empires and a recognition of the need for some degree of acknowledgement of those rival political entities. Holding an official position and involvement in the caliph's decision making must have shown the two judges that it was impossible to rule out diplomacy as an alternative to dealing with the "other," even if that "other" was a perpetual enemy of the caliphate, in line with the ʿAbbāsid resort to diplomacy, as detailed earlier in this chapter.

1.4.4 Assumed Social Hierarchy and Its Influence

The need to recognize the other and the above-mentioned interests was shaped to a great extent by the dominant view of class and gender at the time. The influence of those factors is hardly surprising considering the Ḥanafī accommodation of *ʿurf* (custom and historical legal traditions as sources of law).[150] One of the areas where gender impacts the regulation of *jihād* is in the distinction between free men and women, on the one hand, and slaves on the other. For example, slaves are deprived of a share of the spoils on the basis of two prophetic traditions. In the first, a slave asked the Prophet for a share of the spoils, but the Prophet did not give him a share, rewarding him instead with something of meaningless value.[151] The second tradition is traced back to Ibn ʿAbbās, who said that the Prophet did not give slaves a share of the spoils and only gave them compensation.[152] Ibn Ḥazm criticizes this ruling and argues that Ḥanafīs have not always adhered to Ibn ʿAbbās's views and that the first tradition was reported by an unknown transmitter.[153] He also mentions other

148 al-Shaybānī, *Siyar*, 137.
149 al-Shaybānī, *Siyar*, 152.
150 Boynukalin, introduction, 224.
151 al-Shaybānī, *Siyar*, 81.
152 al-Shaybānī, *Siyar*, 81.
153 Ibn Ḥazm, *Muḥalla*, 7: 332.

prophetic traditions that prove the Prophet gave slaves a share of the booty.[154] It is again difficult to ascertain the early Ḥanafīs' knowledge of the traditions reported by Ibn Ḥazm. Yet, the selective reliance on Ibn ʿAbbās arguably indicates an inclination towards denying slaves shares in the spoils.

Another incident of differential treatment was earlier mentioned as evidence of acknowledgement of the legitimacy of the territory of war, where a Muslim may not usurp his female slave captured by the enemy. But if the woman were a freedwoman, an *umm walad* (a slave who has given birth to her owner's child), a *mudabbara* (a slave whose slavery ends with the owner's death), or his wife, he would be entitled to pursue any means to restore her, which clearly supports the notion that status influenced the level of protection guaranteed to the individual.[155] Although slaves were entitled to protection because they were perceived as *dhimmī*s,[156] such protection was not strong enough to challenge the need to respect an *amān* pact. However, if the woman were a freedwoman, the need for protection outweighed the *amān*.

Sometimes perception of women as vulnerable and inferior worked to protect them, as they were perceived as equally vulnerable as children, so enjoyed a higher degree of protection than other categories. As mentioned earlier, killing female prisoners of war was strictly prohibited, even if was impossible to transport them, whereas there was a readiness to accept such an alternative with un-targetable adult males. Arguably, this protection stemmed from the prophetic tradition that explicitly prohibits the killing of women and children, which accordingly entitles those two categories to the highest degree of protection. But the prophetic tradition relied upon in the book instructs Muslims not to "kill children, women and old men."[157] For some reason, old men are disregarded in this case, and protection of life is guaranteed only to women and children, which leads us to fairly assume ascribed vulnerability to those two groups. Although this assumption ensures the protection of women, gender roles undeniably played a major role in this reasoning.

2 Al-Shāfiʿī and the Exclusionary Project

Despite challenges to al-Shāfiʿī's (d. 204/820) role in the development of Islamic jurisprudence, it is difficult to consult any work on the formative stage of

154 Ibn Ḥazm, *Muḥalla*, 7:322.

155 al-Shaybānī, *Siyar*, 137.

156 al-Shaybānī, *Siyar*, 136.

157 al-Shaybānī, *Siyar*, 92.

Islamic jurisprudence without coming across his name. One of the reasons he has assumed this status is his position between the so-called *ahl al-ra'y* (rationalists) and *ahl al-ḥadīth* (traditionalists). He is often referred to as a compromiser who established a new brand of jurisprudence reconciling the roles of text and reason in Islamic jurisprudence.[158] He has also long been treated as the founder of *uṣūl al-fiqh* in modern scholarship, but this status is challenged by findings made by Hallaq, who offers evidence that al-Shāfiʿī's work was not perceived as an *uṣūl* work in early bio-bibliographical literature.[159] Hallaq also argues that al-Shāfiʿī's assumed work addressing *uṣūl al-fiqh*, *al-Risāla*, is rudimentary and erratic compared to later, more sophisticated *uṣūl* works.[160] However, al-Shāfiʿī's prominent role in the development of Sunnī legal theory is asserted by other very important studies in the field, such as al-Shamsy's and Lowry's.[161] Lowry, for example, argues that al-Shāfiʿī's *al-Risāla* ought to be read as a holistic theory of religious knowledge (*bayān*) that impacts theology, law, and other forms of interpretation.[162] Lowry, however, agrees that *al-Risāla* was concerned primarily with asserting textual interpretation through sunna, as elaborated later in this chapter. But regardless of his contribution to *uṣūl al-fiqh*, al-Shāfiʿī's established authority makes him a key figure for exploration in this book, since he is one of the earliest contributors to the literature on armed conflict in Islamic jurisprudence. Moreover, unlike al-Shaybānī, al-Shāfiʿī was not close to the caliphal institution, since he did not assume any official position, apart from a brief appointment in Yemen early in his career. He thus represents an alternative, somehow independent, analysis of *jihād* in the early ʿAbbāsid era.

2.1 *From Destitution to Prominence*

While the early ʿAbbāsid caliphate enjoyed prosperity and glory unprecedented in the history of the Islamic state, al-Shāfiʿī himself did not enjoy the luxury associated with the strength of the Muslim empire until adulthood. Although many biographical works have been written on al-Shāfiʿī, most pre-modern writings reproduce the account provided by the Shāfiʿī jurist al-Bayhaqī (d.

158 Christopher Melchert, "Traditionist-Jurisprudents and the Making of Islamic Law," *Islamic Law and Society* 8, no. 3 (2001), 401.

159 Wael Hallaq, "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 25, no. 4 (1993), 590–91.

160 Hallaq, "Master Architect?" 591–92.

161 Joseph E. Lowry, *Early Islamic Legal Theory: The* Risāla *of Muḥammad ibn Idrīs al-Shāfiʿī* (Boston, MA: Brill, 2007), and Ahmed al-Shamsy, *The Canonization of Islamic Law: A Social and Intellectual History* (Cambridge: Cambridge University Press, 2013).

162 Lowry, *Risāla*, 57.

458/1066).[163] Most historians and biographers agree that al-Shāfiʿī descended from one of the families related to the Prophet (*āl al-bayt*)[164] and that he was born either in Gaza or its neighbouring city, ʿAsqalān.[165] Sources agree that despite his lineage, he led the life of a destitute orphan.[166] Like most posthumous biographies of the era, the chronology of events in al-Shāfiʿī's life is fraught with inconsistencies,[167] but for lack of an alternative to ascertain such chronologies, events referred to in those biographies will be relied on to offer a synopsis of his life.

His biographers document a constant need for financial revenue to ensure subsistence. His mother was unable to fund his schooling, which led him to assist his teacher in return for attending classes.[168] He also had to move to Yemen to work in an administrative job for financial reasons. During al-Shāfiʿī's stay in Yemen, the governor told Hārūn al-Rashīd that al-Shāfiʿī was conspiring for an ʿAlīd insurgency, triggering a series of events referred to by biographers as al-Shāfiʿī's *miḥna* (crisis, a term often used by biographers to refer to jurists' confrontation with the political authorities).[169] Al-Shāfiʿī was accordingly sent to Iraq to meet Hārūn al-Rashīd,[170] a meeting that is said to have changed the course of his life and provided him with lifetime financial security. Al-Shāfiʿī's biographers document a long debate between him, on one side, and al-Rashīd and al-Shaybānī, on the other. As Khadduri notes, biographical accounts of al-Shāfiʿī's life are loaded with legendary fabrications, casting doubt on the exceptional skill portrayed in those debates.[171] Chaumont also is sceptical of the hagiographical nature of those accounts and leans towards alternative accounts asserting al-Shaybānī's role in convincing the caliph to release al-Shāfiʿī.[172] But according to the accounts asserting al-Shāfiʿī's personal skills as a

163 Majid Khadduri, introduction to *al-Shāfiʿī's* Risāla*: Treatise on the Foundation of Islamic Jurisprudence*, trans. Majid Khadduri, 2nd ed. (Cambridge: The Islamic Texts Society, 1997), 8–9.

164 al-Bayhaqī, *Manāqib al-Shāfiʿī*, ed. Aḥmad Ṣaqr al-Sayyid (Cairo: Maktabat Dār al-Turāth, 1970), 77.

165 Abū Zahra, *al-Shāfiʿī*, 14. Some sources claim he was born in Yemen.

166 Abū Zahra, *al-Shāfiʿī*, 17.

167 E. Chaumont, "al-Shāfiʿī," in *Encyclopaedia of Islam*, 2nd ed., P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel and W. P. Heinrichs, Brill Online, accessed 27 December 2010.

168 Muḥammad ʿAbdul Raḥman b. Abī Ḥatim al-Rāzī, *Adāb al-Shāfiʿī wa manāqibuh*, ed. ʿAbdul Ghanī ʿAbdul Khāliq (Cairo: Maktabat al-Turāth al-Islāmī, 1954), 21.

169 Fakhr al-Dīn al-Rāzī, *Manāqīb al-Imām al-Shāfiʿī* (Cairo: al-Maktabat al-ʿĀlamiyya, 1986), 71.

170 al-Bayhaqī, *Manāqib*, 107.

171 Khadduri, introduction to Risāla, 8.

172 Chaumant, "al-Shāfiʿī."

basis for his release, when asked by the caliph if he was conspiring for an ʿAlīd rebellion, al-Shāfiʾī responded by saying,

> "O Prince of Believers, what would you say of two men, one sees me as a brother and the other sees me as a slave. Whom would I prefer?" He [Hārūn] said, "The one who sees you as a brother."[173] Al-Shāfiʿī then responded, 'That is you [your clan], Prince of Believers, you are descendants of al-ʿAbbās, they are descendants of ʿAlī, and we are Banū l-Muṭṭalib. You, descendants of al-ʿAbbās, see us as brothers and they [descendants of ʿAlī] see us as slaves."[174]

If true, this response was probably intended to achieve two important objectives: first, to refute logically the accusation, and second, to emphasize al-Shāfiʿī's noble lineage and his blood relation to the caliph.[175] Impressed by al-Shāfiʿī's knowledge and ability, al-Rashīd is reported to have asked al-Shāfiʿī for advice on managing the caliphate. Al-Shāfiʿī replied that the caliph should

> ensure that the *ḥarām* (sacred house) of god and the *ḥarām* of his prophet are renovated, secure the roads, manage affairs of the nation and give the descendants of the *muhājirūn* [those who left Mecca to Medina with the Prophet] and the *anṣār* [the inhabitants of Medina who welcomed the Muslim immigrants] their share of the booty.[176]

Despite credibility doubts shed on al-Rāzī's narrative,[177] it is noteworthy that the above quote specifically mentions division of the booty as a matter of prime importance. Singling out the booty system as one of the "salvation" measures recommended to al-Rashīd must be read in light of the ʿAbbāsid revolution's appeal to those who were deprived of their booty rights by the Umayyad dynasty.[178] Moreover, this focus proves more interesting when it is recalled that

173 Abū Zahra, *al-Shāfiʿī*, 23.

174 Abū Zahra, *al-Shāfiʿī*, 23.

175 Fakhr al-Dīn al-Razī, *Manāqib*, 73.

176 Fakhr al-Dīn al-Razī, *Manāqib*, 79.

177 It should be noted that Fakhr al-Dīn al-Rāzī's account of the *miḥna* is subject to serious challenges. For example, he claims that Abū Yūsuf and al-Shaybānī attempted to antagonize the caliph against al-Shāfiʿī and to assert his affiliation with ʿAlīd insurgencies. See Fakhr al-Dīn al-Rāzī, *Manāqib*, 71. But according to al-Rāzī, the *miḥna* happened in 184/800, whereas Abū Yūsuf died in 182/788. Moreover, other accounts such as Abū Ḥātim al-Rāzī's (see *Adāb*, 32) state that al-Shaybānī defended al-Shāfiʿī against the accusation and that al-Shāfiʿī became his student afterwards.

178 Farūq ʿUmar, *al-ʿAbbāsiyyūn al-awāʾil* (Beirut: Dār al-Irshād, 1970), 1:36, 73–75.

al-Shāfiʿī was a member of *āl al-bayt* and was accordingly entitled to a booty share that he had not received prior to this incident.

Al-Bayhaqī claims that al-Rashīd offered al-Shāfiʿī money after that debate and requested that he hold a judicial position, but al-Shāfiʿī refused to be appointed as a judge, distributing the money among the poor when he left the caliph's palace. His only request to al-Rashīd was to be granted his share of the booty as a member of *āl al-bayt*.[179] He lived in Baghdad for around two years, then moved to Mecca for around nine years. Afterwards, he is said to have returned to Baghdad for a few months, only to leave it again and reside in Cairo.[180] Having been granted his request for a share of the booty, al-Shāfiʿī was guaranteed financial independence and is reported to have lived comfortably between Baghdad, Mecca, and Cairo. For example, some sources state that he owned three slaves during his life in Egypt,[181] whereas others offer proof of ownership of one slave at the time of his death.[182] At the same time, sources report that he had little regard for the value of financial wealth, giving generously to the poor or spending his wealth to the extent that he went bankrupt more than once.[183]

Sources disagree over the reasons behind al-Shāfiʿī's choosing to reside in Egypt. Abū Zahra argues that he left Baghdad, around 198–9/813–14, because he did not wish to live in the capital during al-Maʾmūn reign as caliph, partly because "Persians had the upper hand.... It was not possible for this *Qurayshī* to accept living under a Persian government," and partly because of the rising influence of the Muʿtazila, whom al-Shāfiʿī thought "repulsive" and whose approaches he rejected.[184] Al-Bayhaqī, on the other hand, seems to argue that al-Shāfiʿī went to Egypt to spread his jurisprudential views in a territory other than the two established regional camps in Iraq and the Hijāz.[185]

Regardless of the reasons behind al-Shāfiʿī's move to Egypt, one can witness how his strong Arab lineage and the powerful Islamic empire contributed to his comfort and his revered intellectual independence. Had it not been for his blood relationship with the Prophet (and thus the caliph), he would not have been able to establish his noble status to al-Rashīd, and he would not have received a share of the booty. Similarly, as the ʿAbbāsid empire expanded and

179 al-Bayhaqī, *Manāqib*, 152.

180 Abū Zahra, *al-Shāfiʿī*, 25–27.

181 Amīn, *Duḥa*, 2:220.

182 Khadduri, introduction to *Risāla*, 17.

183 Kecia Ali, *Imam Shafiʿi: Scholar and Saint*, Kindle ed. (Oxford: One World Publications), loc. 807.

184 Abū Zahra, *al-Shāfiʿī*, 28.

185 al-Bayhaqī, *Manāqib*, 238.

consolidated its power, it received generous revenue, which reflected on the wealth of those entitled to shares in caliphal revenue, including al-Shāfiʿī. Both factors, al-Shāfiʿī's Arab/Islamic lineage and the strength of the Islamic empire, seem to have influenced al-Shāfiʿī's approach to the Islamic regulation of armed conflict, as established later in this chapter.

2.2 *Al-Shāfiʿī's Theory of* Uṣūl al-Fiqh

Al-Shāfiʿī is argued by many to have been the earliest jurist to have dedicated a book, *al-Risāla*, to the rationalization of jurisprudence and the theorization of the hierarchy of the sources, a field of study later referred to as *uṣūl al-fiqh*. Hallaq, however, argues that *al-Risāla* was written to establish the authority and supremacy of the Qur'ān and sunna rather than to set a theory for legal reasoning.[186] Al-Shāfiʿī's prominent role in early accounts of Islamic jurisprudence was thus attributable more to his synthesis of a reconciliatory approach to jurisprudence, an approach that affirms supremacy of traditions yet asserts the need for *qiyās*.[187] Hallaq concedes, however, that the reader can detect some hypotheses about legal reasoning in the book.[188] This section provides a brief summary of these hypotheses, referred to loosely in the rest of the chapter as al-Shāfiʿī's theory of *uṣūl*.

Lowry, who agrees with Hallaq that defending the sunna as an authoritative source of law was a primary objective of *al-Risāla*,[189] argues that the text aspires to "provide a general account of the fundamental structure of Islamic law, in which prophetic authority is only one element."[190] He argues that the common understanding of *al-Risāla* as a treatise focused on the "four" sources of law is erroneous because al-Shāfiʿī does not consistently refer to four sources; sometimes, he refers to two, three, or more sources.[191] Rather, Lowry posits that *al-Risāla* is an attempt to understand *bayān* (expression of God's will to humans) – a term frequently used in the text – primarily through the Qur'ān and sunna. In other words, *al-Risāla* is concerned primarily with how we understand *bayān* in a particular issue given the different channels of revelation.[192]

In *al-Risāla*, al-Shāfiʿī argues that God illustrated Man's obligations through four channels: through the Qur'ān (as in the prohibition on eating pork and

186 Hallaq, "Master Architect?" 592.
187 Hallaq, "Master Architect?" 600.
188 Hallaq, "Master Architect?" 592.
189 Lowry, *Risāla*, 8.
190 Lowry, *Risāla*, 11.
191 Lowry, *Risāla*, 12.
192 Lowry, *Risāla*, 24.

consuming wine); through the Qur'ān, with the specific method of upholding the obligation elaborated by the Prophet (as with prayer); through the Prophet, without any Qur'anic text indicating such an obligation; and through *ijtihād* (the human obligation to exert one's best effort in seeking God's satisfaction).[193]

2.2.1 The Qur'ān: General and Specific Verses and Mastery of Arabic

Al-Shāfiʿī contends that verses of the Qur'ān exhibit the unique features of the Arabic language. They are either general with the intent of generality, general with the intent of specificity, specific with the intent of generality, or specific with the intent of specificity.[194] General verses can sometimes simply indicate general application. For example, "There is not a creature that moves on earth whose provision is not His concern"[195] indicates that God is responsible for all living creatures.[196] Other verses could appear general, but in fact indicate both general and specific meanings. For example, "People, We created you all from a single man and a single woman, and made you into nations and tribes, so that you should get to know each other. In God's eyes, the most honoured of you are the ones most aware of him"[197] is general and specific. With regards to the creation of "mankind" into nations and tribes, it is general, but it is also specific in stating that the righteous is the most honoured because the classification upon the basis of righteousness is limited to those who are capable of it as indicated in other instances in the Qur'ān and sunna.[198] Finally, he argues that some verses appear general, but their intention is actually specific, such as, "Those whose faith increased when people said, 'Fear your enemy, they have amassed a great army against you'"[199] because "people" excludes the Prophet's Companions.[200] Finally, God commands pilgrims to "surge down where the rest of the people do"[201] is also specific because "it is certain that not all the people had been present at ʿArafa during the time of the Apostle, and that it was [only] the Apostle and those who had been with him were those to whom this communication was addressed."[202]

193 al-Shāfiʿī, *Risāla*, 68.
194 al-Shāfiʿī, *Risāla*, 96–101.
195 Q 11:6.
196 al-Shāfiʿī, *Risāla*, 98.
197 Q 49:13.
198 al-Shāfiʿī, *Risāla*, 98.
199 Q 3:173.
200 al-Shāfiʿī, *Risāla*, 98.
201 Q 2:199.
202 al-Shāfiʿī, *Risāla*, 101.

Al-Shāfiʿī argues that examples of general verses intended for a specific meaning prove that there is a need for mastering the Arabic language in order to understand the intention of the verses in terms of the specific and the general. He says that while a non-Arab would find the first verse the easiest to understand, the second slightly more difficult, and the third much more difficult, an Arab would find them equally clear.[203] As pointed out by Lowry, al-Shāfiʿī's analysis "feels much more like a theological claim about the special qualities of Arabic than an assessment of Arabic as a linguistic phenomenon."[204] In the above-mentioned verses, al-Shāfiʿī does not clarify why the ability to comprehend them is subject to proficiency in Arabic rather than to awareness of the general context of the Qurʾān and sunna. In the second verse, one would assume that a non-Arabic speaker would understand that believers are excluded from their enemies mentioned in the verse. The third verse refers to pilgrims following the footsteps of others. Naturally, that would mean that the followed cannot be "all people."

Considering al-Shāfiʿī's emphasizing that command of the Arabic language should be a basis for jurisprudential reasoning on linguistic grounds, Abū Zayd argues that al-Shāfiʿī's defence of the Arabic language and his claim in *al-Risāla* that the language, and subsequently the Qurʾān, were "pure" of foreign influence and infiltration indicates an "ideological bias" for Arabic and, more specifically, for the Qurayshī dialect. According to Abū Zayd, this bias reflects Arab favouritism and a resentment of the rising Persian influence in ʿAbbāsid times.[205] Of course, undeniably, *al-Risāla* was intended primarily at asserting the supremacy of Islamic sources and providing "a universal basis for Islamic judgment ... [to] supersede the various legal traditions."[206] But one cannot disregard the fact that emphasizing the Arabic language as a key tool for comprehending sources inevitably sets the Arab local tradition as a benchmark to interpretation of the universal one.

2.2.2 The Sunna and Its Role in the Interpretation of the Qurʾān

As Hallaq argues, one of the primary objectives of *al-Risāla* is "to define the role of the Prophetic Sunna in the law."[207] Al-Shāfiʿī does not recognize the

203 al-Shāfiʿī, *Risāla*, 101.

204 Lowry, "Hermeneutics," 10.

205 Naṣr Ḥāmid Abū Zayd, *al-Shāfiʿī wa tāʾsīs al-idiyulūjiyya al-wasaṭiya* (Cairo: Sinā li-l-Nashr, 1992), 15–16.

206 John Kelsay, "Divine Command Ethics in Early Islam: al-Shafiʿi and the Problem of Guidance," *The Journal of Religious Ethics* 22, no. 1 (1994), 103.

207 Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 29.

possibility of contradiction between the two main sources of law, the Qurʾān and the sunna. Accordingly, the two sources do not and cannot abrogate each other.[208] However, the sunna could specify and explain the Qurʾān. He argues that the sunna is a binding legal source because God has indicated in several incidents that all Muslims should obey the Prophet.[209] The sunna, according to him, can confirm rules in the Qurʾān, elaborate on obligations referred to generally in the Qurʾān, introduce a new rule not referred to in the Qurʾān,[210] specify general verses,[211] and provide evidence for abrogation of older verses.[212] Interestingly, the issue of booty comes to prominence again when he provides rules of inheritance as an example of sunna specifying general verses. He argues that verses addressing inheritance were specified by the sunna that required unity of religion as a condition for inheritance[213] and specified Banū l-Muṭalib and Banū Hāshim as the sole blood relatives of the Prophet entitled to a share of the booty.[214]

Finally, al-Shāfiʿī accepts *al-khabar al-wāḥid*, but the person "must merit confidence in his religion, and be known as reliable in his transmitting, comprehending what he transmits, aware of any pronunciation that might change the meaning of the tradition, [and] capable of transmitting the tradition word for word."[215] Again, the criteria for transmission assert mastery of Arabic as a condition for transmission of *ḥadīth.*

2.2.3 The relationship between the Qurʾān and the Sunna

The sunna cannot abrogate the Qurʾān, because "God has declared that He abrogated [communications] of the book only by means of other communications in it; that Sunna cannot abrogate the book, but that it should only follow what is laid down in the Book."[216] To support this argument, al-Shāfiʿī relied on a verse where the Prophet rejected others' demands for another Qurʾān, saying, "It is not for me to change it of my own accord; I only follow what is revealed to me."[217] He equally refused to allow the Qurʾān to abrogate sunna in order to

208 al-Shāfiʿī, *Risāla*, 123–25.
209 al-Shāfiʿī, *Risāla*, 109.
210 al-Shāfiʿī, *Risāla*, 120.
211 al-Shāfiʿī, *Risāla*, 154.
212 al-Shāfiʿī, *Risāla*, 141.
213 al-Shāfiʿī, *Risāla*, 104.
214 al-Shāfiʿī, *Risāla*, 106.
215 al-Shāfiʿī, *Risāla*, 239.
216 al-Shāfiʿī, *Risāla*, 123.
217 Q 10:15.

prevent abandonment of sunna,[218] and he argued that if a sunna were abrogated by the Qur'ān, a new sunna abiding by the new obligation or rule would exist, and in that case the sunna would be abrogated by the later sunna rather than by the Qur'ān.[219] Because he was reluctant to allow either of the two sources to abrogate the other, al-Shāfiʿī refused to acknowledge the possibility of conflict between the Qur'ān and the sunna.[220]

Although al-Shāfiʿī ruled out the possibility of conflict between the Qur'ān and the sunna, he acknowledged contradiction among *ḥadīth*s. He initially called upon jurists to attempt to reconcile the contradicting *ḥadīth*s with each other. If reconciliation attempts failed, "one should not be abandoned for the other except for a reason that shows that the one adopted is stronger."[221] When asked what that reason would be, al-Shāfiʿī stated that the *ḥadīth* more consistent with the Qur'ān was the one that should be adopted.[222]

2.2.4 Other Sources

Al-Shāfiʿī also recognized *ijmāʿ*, because "we know that the public can neither agree on anything contrary to the sunna of the Prophet nor on an error."[223] Al-Shāfiʿi acknowledged *qiyās*, more a tool than a source in itself, as one of the approaches to formulating legal rules. To him, *qiyās* was the extension of rulings revealed in the textual sources to analogous situations on which said sources were silent. "If the case in question is similar to the original meaning [of the precedent], no disagreement on this kind [is permitted]. The second, is applying *qiyās* on the basis of precedence if the examined situation resembles an established precedent."[224] Finally, he rejected *istiḥsān*, which he defines as stating an opinion without relying on a textual source or *qiyās.*[225] To sum up, al-Shāfiʿī's project was aimed at emphasizing the role of the *ḥadīth* in juristic interpretation, which led him to be "the first jurist consciously to articulate the notion that Islamic revelation provides a full and comprehensive evaluation of human acts."[226] This focus on textual sources will be the primary benchmark for assessing consistency in al-Shāfiʿī's work on *jihād.*

218 al-Shāfiʿī, *Risāla*, 126.
219 al-Shāfiʿī, *Risāla*, 126.
220 al-Shāfiʿī, *Risāla*, 184.
221 al-Shāfiʿī, *Risāla*, 204.
222 al-Shāfiʿī, *Risāla*, 213.
223 al-Shāfiʿī, *Risāla*, 286.
224 al-Shāfiʿī, *Risāla*, 290.
225 al-Shāfiʿī, *Risāla*, 305.
226 Hallaq, *Origins*, 117.

2.3 *Al-Shāfiʿī and the Regulation of Armed Conflict*

2.3.1 Islamic Hegemony and Revenue

2.3.1.1 *Definition of People of the Book*

Most jurists agree that the Qur'ān indicates that the People of the Book are granted the choice between paying *jizya* and converting to Islam, but the treatment of other non-Muslims spurred significant debate. The primary trigger for this debate was a *ḥadīth* in which the Prophet is reported to have ordered that the magi be treated like the People of the Book when he was asked about their status. Bonner argues that most jurists eventually agreed that the magi were monotheists of some kind,[227] but his argument disregards the nuances of the legal arguments on the matter. Although some jurists like al-Shāfiʿī adopted this position, al-Shaybānī[228] and the Mālikīs[229] argued that the magi were not People of the Book and that accepting *jizya* from them was proof that the regime applied to non-scriptuaries (whose religion was not based on a "holy" book).

Al-Shāfiʿī argued that the objective of *jihād* is to convert non-Muslims to Islam, citing numerous Qur'anic verses to that effect. In addition, he cited this *ḥadīth* to indicate that infidels, with the exception of the People of the Book, must convert or face death:

> I have been commanded that I should fight against people till they declare that there is no god but Allah, and when they profess it that there is no god but Allah, their blood and riches are guaranteed protection on my behalf except where it is justified by law, and their affairs rest with Allah.[230]

Thus, identification of the People of the Book has serious implications for targeting, since al-Shāfiʿī's hypothesis leads to the conclusion that any adult male[231] who is not a follower of a scripted religion may, and should, be targeted unless he converts to Islam. In order to support his argument that the magi are People of the Book, al-Shāfiʿī offered textual evidence from a prophetic *ḥadīth*, a Com-

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227 Michael Bonner, *Jihad in Islamic History* (Princeton, NJ: Princeton University Press, 2006), 89.

228 al-Shaybānī, *Siyar*, 224.

229 Mālik b. Anas, *al-Mudawana al-kubra li-l-Imām Mālik b. Anās al-Aṣbaḥī* (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 1:529.

230 *Saḥīḥ Muslim*, 1:32, trans. Abdul Hamid Siddiqui, Center for Muslim Jewish Engagement, University of South California, online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim/001.smt.html>, accessed 30 December 2010.

231 With the exception of monks, who are dealt with later in the chapter.

panion's statement (ʿAlī b. Abī Ṭālib), and interpretations based on *qiyās*. The first evidence, the prophet's *ḥadīth*, is one that is used by both juristic camps equally. According to al-Shāfiʿī, ʿUmar only took *jizya* from the magi after a Companion testified that the Prophet had taken it from the Hajar[232] magi and that he had heard the Prophet say, "Follow the same sunna with them that you follow with the People of the Book."[233] Al-Shāfiʿī says,

> If he [the Prophet] meant all infidels other than People of the Book, he would have said, and God knows better, "Follow with all infidels the same sunna that you follow with the People of the Book," but since he said, "Follow with *them*," then he specified *them*, and if he specified them, then *others are different* and those *others are non-scriptuaries* [do not follow a holy book].[234]

He additionally relied on the Qurʾān's reference to the existence of holy books other than the Torah and the Bible to prove that the magi might be People of the Book.[235] He also relied on a statement that ʿAlī is supposed to have made regarding the status of the magi. According to that tradition, two men, arguing over the reason for taking *jizya* from the magi, went to ask ʿAlī. ʿAlī said the magi had a book, but their king violated it, and to avoid the punishment stipulated therein, forged the religion.[236] Al-Shāfiʿī used this incident to prove that the magi were People of the Book, arguing that this incident was evidence that "ʿAlī ... did not know that the Prophet (pbuh) ... took *jizya* from them except because they are People of the Book. If *jizya* were to be taken from anyone other than People of the Book, ʿAlī would have said" so.[237] He also argued that no Companion cited the Prophet as having taken *jizya* from non-scriptuaries.[238]

Additionally, al-Shāfiʿī argued that *jizya* is not dependent on ethnicity or lineage, which precludes differential treatment for non-Arab non-scriptuaries. To prove that *jizya* is not dependent on *nasab* (lineage), al-Shāfiʿī stated that the Prophet had taken *jizya* from a man from Ghassān, from Arab People of the

232 In modern-day Bahrain.

233 al-Shāfiʿī, *al-Umm*, 4:245–46. Translation provided in Mālik, *Muwaṭṭaʾ*, 17.24.43, online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muwatta/017.mmt.html>, accessed 29 December 2010.

234 al-Shāfiʿī, *al-Umm*, 4:246 (my italics).

235 al-Shāfiʿī, *al-Umm*, 4:245.

236 al-Shāfiʿī, *al-Umm*, 4:245.

237 al-Shāfiʿī, *al-Umm*, 4:245.

238 al-Shāfiʿī, *al-Umm*, 4:245.

Book in Yemen and Najrān.[239] According to him, the Prophet taking *jizya* from Arab People of the Book proves that ethnicity does not play a role in determining status. In other words, he is arguing that there are possibly two criteria for determining whether or not a person is allowed to pay *jizya*, rather than being forced to convert. The first could possibly be ethnicity and in that case, Arabs would be denied the right to pay *jizya*, while non-Arabs would be allowed to pay it regardless of religion. To refute this argument, he states that the Prophet took *jizya* from Arab People of the Book. By virtue of *qiyās*, he deduces that if Arab People of the Book are allowed to pay the *jizya*, then the determinant factor for eligibility for *jizya* payment is not ethnicity. Accordingly, it is not possible to claim that non-Arabs are allowed to pay *jizya* on the basis of ethnicity and regardless of their religion. Since ethnicity is not the determinant factor of the right to pay *jizya*, then we are left with religion as the sole determinant of who may or may not pay *jizya*, with People of the Book entitled to claim the right to pay *jizya* and maintain their faith, and other non-Muslims left choosing between converting to Islam and death. In addition to *qiyās*, al-Shāfiʿī declares that allowing non-scriptuary non-Arab people to pay the *jizya*, while denying non-scriptuary Arabs the right to pay it, violates the principle of equality, because God never differentiated between Arabs and non-Arabs, neither in belief nor in disbelief.[240]

Despite his extensive arguments for including the magi among the People of the Book, one can detect several attempts to interpret the texts in al-Shāfiʿī's arguments that are not in congruence with his *al-Risāla* work on legal theory. First, he relies on the Prophet's *ḥadīth*, "Follow the same sunna with them that you follow with the People of the Book," to prove his argument. However, this reliance in itself is rather problematic for a formalist who claims that understanding the details of linguistic expression is necessary to understand the text. Even a person who is not a native speaker would understand from the language of the *ḥadīth* that the Prophet instructed similar treatment but did not state that the magi were People of the Book. In fact, a strictly literalist interpretation would argue that the analogy drawn between the magi and the People of the Book is specific to the sunna to be followed with them (in other words, payment of *jizya*). Following the approach adopted by al-Shāfiʿī in his linguistic interpretation of general and specific Qur'anic verses, the reference to similar treatment of "them" and "the People of the Book" indicates the existence of two distinct groups (People of the Book as belonging to one group and the magi to the second). Moreover, al-Shāfiʿī commented on the *ḥadīth* and

239 al-Shāfiʿī, *al-Umm*, 4:244–45.

240 al-Shāfiʿī, *al-Umm*, 4:342.

said that if the Prophet had been referring to all non-Muslims, he would have said so.[241] In this specific case, he allows his literalist interpretation to read the *ḥadīth* in a narrow and specific manner that prevents the inclusion of other People of the Book in the ruling regarding the magi. However, he disregards the fact that his own argument may be used against his inclusion of the magi as People of the Book. Similarly, arguably if the Prophet had wanted to say that the magi are, in fact, People of the Book, he would have said so, rather than instructing that they be treated like People of the Book.[242]

Although al-Shāfiʿī's reliance on ʿAlī's statement arguably is a possibly strong proof for his argument, it is still inconsistent when read against his approach to the positions of the Companions in dealing with armed conflict. For example, a later section of this chapter shows that al-Shāfiʿī deviates significantly from Abū Bakr's views on targeting old men and monks. Moreover, his claim that Companions did not report that the Prophet ever accepted *jizya* from followers of any religion other than the People of the Book is self-inferential since he uses his own arguments that the magi are People of the Book to neutralize the potential interpretation of this tradition to indicate that the Prophet may have accepted *jizya* from non-scriptuaries. In other words, he acknowledges that the Prophet took *jizya* from the magi, but he relies on his own understanding of the magi as People of the Book to prove that Companions never reported that the Prophet accepted *jizya* from non-scriptuaries, which in turn is relied on to prove that the magi are People of the Book.

Finally, his argument on the basis of the principle of equality is equally problematic, because the Prophet is reported by many jurists, including al-Shāfiʿī, to have granted all Meccans mercy without any condition, regardless of religion.

> He prohibited their killing, except for some individuals he named unless one of them fought and was killed [on the battlefield]. When gathered in the mosque, he told them, "What do you think I will do to you?" They said, "Good [treatment]. [You are] a generous brother and the son of a generous brother." He said, "Go, you are freed," and he didn't take as booty anything, whether big or small, from their property.[243]

True, al-Shāfiʿī argues that Mecca was "conquered" on the basis of an *amān* safety pledge, thereby protecting the property of its residents, but many other

241 al-Shāfiʿī, *al-Umm*, 4:246.

242 Badawi, "Sunni Islam," 310.

243 al-Shāfiʿī, *al-Umm*, 7:593–594.

jurists argue that Mecca was conquered by force.[244] Moreover, al-Shāfiʿī prohibits *imāms* from concluding long-term agreements with unbelievers containing conditions that contradict objectives of *jihād*. Since *jihad*'s primary objective according to him is to convert unbelievers, with the exception of People of the Book, or otherwise they must be killed, then the Mecca case would still be a special case of preferential treatment, even if it were conquered on the basis of a safety pledge.

As mentioned earlier, the suggestion that the magi are People of the Book limits the potential for followers of any other religion to "benefit" from the protection guaranteed under this system, thereby expanding the destructive power of the army in the conduct of armed conflict with them. Yet, the suggestion is particularly expansive of military might with regards to the acquisition of booty. Although People of the Book may avail themselves of the *jizya* regime before the commencement of battle – thereby protecting their property, including their women and children, who may otherwise be taken as captives – others are denied this privilege. Thus, if they refuse to convert, they may be fought with the objective of eliminating them and acquiring all their property, rather than imposing a simple fixed tax.

This approach undeniably asserts the supremacy of the Muslim caliphate in its relationship with its others by emphasizing their complete and full assimilation through conversion to Islam, or in other words, by emphasizing the elimination of the enemy as a political entity.[245] It also guarantees the Muslim caliphate a more abundant source of revenue through the potential wholesale acquisition of enemy property. As stated previously in this chapter, the Islamic-Byzantine border had reached a stalemate in terms of potential for expansion of the Muslim state, and the wars conducted between the two empires had reached their climax in terms of Islamic expansion, and "Muslim fighters no longer returned loaded with booty and slaves."[246] This change is likely to have guided al-Shāfiʿī to direct his attention to another potential venue for expansion, the east, where most Turks, Indians, and Chinese were not followers of any of the religions of the People of the Book according to his criteria, and whose property would all be subject to confiscation in the case of victory. One can even imagine how al-Shāfiʿī may have been responding to what he is likely to have perceived as illegal conduct of war in India, where *jizya* was accepted from Buddhists and Hindus for pragmatic purposes.[247]

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244 Ibn Rushd (al-Ḥafīd), *Bidāyat*, 2:163.

245 Badawi, "Sunni Islam," 310.

246 ʿUmar, *al-Khilāfa al-ʿAbbāsiyya*, 335.

247 Hugh Kennedy, *The Great Arab Conquests* (London: Wiedenfield and Nicolson, 2007), 306.

2.3.1.2 *Deliberate Targeting*

Like other Muslim jurists, al-Shāfiʿī argued that Muslims and non-Muslim women and children may not be targeted. But much like his rule formulation with regards to *jizya*, there are some gaps in the internal coherence of his arguments on targeting. Similarly, the overall approach to targeting offers strict limitations on the protection of the other and expands the military's powers to ensure that maximum harm is inflicted on the enemy.

Unlike his mentors, Mālik and al-Shaybānī, al-Shāfiʿī argued that all adult men, with the exception of monks, should be targeted. As detailed below, the primary proof he relied on was the alleged lack of textual sources prohibiting the targeting of anyone other than women or children. It should be noted that al-Shaybānī relied on a prophetic tradition to prove that the Prophet specifically instructed refraining from targeting older men. However, al-Shāfiʿī made no reference to this tradition, despite his alleged familiarity with al-Shaybānī's works. Mālik, on the other hand, primarily relied on a widely cited instruction given by Abū Bakr to the commander of the army:

> You will find a people who claim to have totally given themselves to Allah. Leave them to what they claim to have given themselves. You will find a people who have shaved the middle of their heads. Strike what they have shaved with the sword. I advise you ten things: Do not kill women or children or an aged, infirm person.[248]

Although al-Shāfiʿī states that he follows Abū Bakr's speech, except with regards to a later part prohibiting the burning of trees,[249] he seems to ignore that the speech ordered soldiers not to kill old men.[250] It is hard to assume that al-Shāfiʿī was unaware of the speech, because Mālik's *al-Mūwaṭṭa*' is confirmed to have been memorized by al-Shāfiʿī.[251] But his *al-Umm* does not refer to that element of the speech, acknowledging only the prohibition on targeting of monks.[252] In fact, in several other instances, he argues that monks may be targeted as well. It is unclear why al-Shāfiʿī would omit such reference, despite his declared knowledge of Mālik's book, especially given that he could have rejected the rule, as he did with the prohibition on the burning of trees. However,

248 Mālik, *Mūwaṭṭa*', online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muwatta/021.mmt.html>, accessed 18 January 2011.

249 al-Shāfiʿī, *al-Umm*, 4:369.

250 Mālik, *Mūwaṭṭa*', 297.

251 Abū Zahra, *al-Shāfiʿī*, 19.

252 al-Shāfiʿī, *al-Umm*, 4:340.

this rejection obviously gave him more grounds to build a case for targeting older men and any man regardless of whether or not he is fighting.

> If someone said, "What is the proof that infidels who are not fighting may be killed?" We say, "Companions of the Prophet (pbuh) killed Durayd b. al-Ṣumma.... [H]e was around one hundred and fifty years old, and the Prophet did not object to his killing, and I do not know any of the Muslims objecting to the killing of unbeliever males except for monks.[253]

Of course, one could argue that the lack of reference to those texts is possible proof for Calder's thesis that al-Shaybānī's *al-Aṣl* and Mālik's *al-Mūwaṭṭa'* were falsely attributed to the two masters. But as previously mentioned, Calder's hypothesis has been widely challenged by several scholars.[254] Moreover, al-Shāfiʿī's refutation of Mālikī theory in *al-Umm* makes numerous references to traditions in *al-Mūwaṭṭa'*,[255] suggesting prior circulation of the text, as well as his own familiarity with it.

Al-Shāfiʿī's approach to monks is indicative of a similar inclination to assert permissibility of targeting them, thereby expanding the power of the army in its conduct of military operations.[256] Although al-Shāfiʿī admits the authoritativeness of Abū Bakr's tradition with regards to monks, he argues in another part of the book that Abū Bakr never prohibited targeting monks and that if it were proven that he did, then he must have prohibited their targeting to avoid the army's distraction with those who are not likely to fight them and to encourage them to engage in military combat that is likely to inflict more damage on the enemy.[257] Al-Shāfiʿī was thus clearly aware of the reference to the prohibition of targeting monks in the Abū Bakr speech, even when he instructed that monks be targeted. It is unclear whether the difference in opinions on the matters in the same book were outcomes of his or his disciples' revisions of the book or the views reflected a change of position on al-Shāfiʿī's part, since it is well established that al-Shāfiʿī extensively revised his jurisprudence. But we have no tools to assist us in speculation over which view predated the other. Whether contradictions over the positions of monks reflected a change of view, what is most important is that al-Shāfiʿī was keen to mitigate Abū Bakr's

253 al-Shāfiʿī, *al-Umm*, 4:340.

254 See e.g. Wael Hallaq, "On Dating Malik's Muwatta," *UCLA Journal of Islamic and Near Eastern Studies*, 1 (2001–2), 47–65, and Lowry, "Hermeneutics," 1–42.

255 al-Shāfiʿī, *al-Umm*, 7:307–24.

256 Badawi, "Sunni Islam," 331.

257 al-Shāfiʿī, *al-Umm*, 4:406.

instructions in a manner that expanded the permissibility of targeting, even with categories he concedes were addressed therein.

2.3.1.3 *Indiscriminate Targeting*

Although al-Shāfiʿī acknowledges the prohibition on killing non-Muslim women and children, he argues that the prohibition applies to deliberate targeting rather than infliction of death on them during the course of action. However, if one traces the language used in his approach to targeting, one finds that he regards the targeting of women and children permissible in almost all situations except in cases of individual targeting. His interest in expanding the freedom of targeting by Muslim combatants is perhaps best understood if one contrasts the language used in the directives regarding the killing of non-Muslim women and children, on the one hand, with the prohibition on targeting Muslims, on the other hand, when launching an offensive against a non-Muslim army. Most jurists accept the rule that children and women may not be targeted. However, there seems to have been an extensive debate and a strong intellectual interest in the limitations on such prohibition, particularly in the use of "indiscriminate weapons." Although one might argue that using arms against a diverse group of people, knowing that the attack is likely to inflict harm on all of them, is an act of collective targeting, al-Shāfiʿī argues that the Prophet only prohibited the deliberate singling out of women and children for targeting.[258] To prove this assertion, he relies on several prophetic traditions that include the use of hurling machines against the people of Ṭāʾif and the Banū l-Naḍīr,[259] as well as on a *ḥadīth* attributed to the Prophet, in which the Prophet is reported to have been asked about the death of women and children during night raids and responded by stating that "they [women and children] are from them."[260] This *ḥadīth* is understood by al-Shāfiʿī and others to indicate that these women and children may be indiscriminately targeted during conflict.

> And if the enemy shields itself ..., there is nothing wrong with attacking them with mangonels, catapults, fire, scorpions, snakes, or anything they hate, or open up water on them so that they drown or get buried in mud, regardless of whether they have children, women, or monks with them.[261]

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258 al-Shāfiʿī, *al-Umm*, 4:347–48.

259 al-Shāfiʿī, *al-Umm*, 4:347.

260 al-Shāfiʿī, *al-Umm*, 4:337. The editor of *al-Umm*, Maḥmud Mutrajī, provides evidence that this prophetic tradition was abrogated by other traditions. See *al-Umm*, 4:337–383. Al-Shāfiʿī refutes this claim in *al-Risāla*. See Lowry, *Risāla*, 132–34.

261 al-Shāfiʿī, *al-Umm*, 4:347.

Lowry argues, in his analysis of al-Shāfiʿī's *al-Risāla*, that al-Shāfiʿī's claim that women and children may be killed in the course of fighting, but may not be individually targeted, in fact reflects an attempt to balance two seemingly conflicting *ḥadīths*, the one generally prohibiting the killing of women and children, and the other declaring that women and children killed during night raids are "from them."[262]

Although an aversion to directly targeting women and children may have led al-Shāfiʿī to the said conclusion, or perhaps the influence of other scholars such as al-Shaybānī as previously discussed, al-Shāfiʿī adopts a different tone when addressing the issue of Muslim presence in non-Muslim lands.[263] Despite a prohibition on killing non-Muslim women and children (or, at least, a directive not to do so), al-Shāfiʿi does not attempt to limit the use of "indiscriminate weapons" if they are present in targeted areas. But, when he anticipates the presence of Muslims in the land, he shows more reluctance to give soldiers the same freedom in attack.

> If they [the enemy] shield themselves with Muslim or non-Muslim children and the Muslims have already engaged in combat, then there is no problem in targeting the warriors and avoiding the Muslims and children. If they were not engaged, I prefer that they refrain from attacking them until they can fight them unshielded.[264]
>
> If there are Muslim captives in the territory or traders given *amān*, I hate attacking them with methods that are not discriminate such as burning or drowning or anything similar, but I do not blatantly prohibit it, for if the land is permissible [for attack], nothing indicates that the presence of a Muslim in it makes it prohibited. But I say it is hated [to resort to those methods] out of cautiousness, because we are allowed to avoid attacking it [even] if Muslims are not present in it, so if we fight this territory, we should attack it without using indiscriminate weapons such as burning or drowning.[265]

Al-Shāfiʿī thus portrays a bias similar to al-Shaybānī's for protecting Muslim life, despite the existence of textual sources equally prohibiting targeting both Muslims and non-Muslim women and children. Nevertheless, he goes a step further than al-Shaybānī, in that he states that causing the death of a Muslim

262 Lowry, *Risāla*, 132–33.

263 Badawi, "Sunni Islam," 335.

264 al-Shāfiʿī, *al-Umm*, 4:409.

265 al-Shāfiʿī, *al-Umm*, 4:348.

makes the warrior liable for *kaffāra* (repenting through commission of a particular act) via the manumission of a slave.[266] But contrasting the two positions shows a more genuine interest in sparing Muslim lives. This interest allows al-Shāfiʿī to resort to an approach that he harshly criticizes, namely *istiḥsān*, through instructing the army to avoid territories where damage is likely to be inflicted on Muslims. Yet, he is reluctant to employ the same reasoning when referring to the exclusive presence of non-Muslim women and children and the permissibility of an indiscriminate attack. Of course, one might argue that the prophetic *ḥadīth* allowing for the death of women and children during the course of fighting provides al-Shāfiʿī with some basis for making such a distinction between the presence of Muslims and the presence of non-Muslim women and children. But drawing an analogy between the unintentional deaths of women and children during a night raid and the deliberate targeting of an army, despite the use of women and children as a shield, is not accurate, especially if we see that in other instances, al-Shāfiʿī envisions the potential performance of this attack with a mitigated attempt to avoid groups reprehensible to inflict loss of life on such as Muslim captives.

Both al-Shāfiʿī's and al-Shaybānī's distinct approaches reflect the inconsistency of the expansion of warriors' resort to indiscriminate targeting when only non-Muslims are involved, an expansion aimed at widening legitimate force in armed conflict. Landau-Tasseron argues that the inclination to protect Muslim life and the willingness to dispose of non-Muslim combatants emanated from the distinct legal treatment of both, where the taking of Muslim life was *muḥarrama* (strictly prohibited), whereas taking non-Muslim life was *manhī ʿanhā* (forbidden).[267] But the jurisprudence of al-Shaybānī and al-Shāfiʿī does not indicate such a conscious distinction between instilling harm upon Muslims and non-Muslims. Neither jurist perceives targeting in the presence of non-Muslims legal and in that of Muslims illegal, and with the exception of the demand for *kaffāra* in the case of al-Shāfiʿī, neither jurist prescribes strict rules that change the course of action by the military. Thus, it is true that the bias is still evident in their treatment of the two groups, but it reflected itself in a subtler manner than the sharp legal/illegal distinction suggested by Landau-Tasseron.

266 al-Shāfiʿī, *al-Umm*, 4:349.

267 Ella Landau-Tasseron, "Non-Combatants in Muslim Legal Thought," *Center on Islam, Democracy and the Future of the Muslim World Monographs*, Series no. 1, Paper 3 (2006): 6–7, online: <http://www.futureofmuslimworld.com/research/pubID.60/pub_detail.asp>, accessed 9 March 2007.

2.3.1.4 *Destruction of Property*

Al-Shāfiʿī also expands the permissibility of destruction of property if it is likely to weaken the enemy's strength. In the statement below, al-Shāfiʿī encourages Muslims to destroy as much property as possible in an undefeated territory, again through the employment of the term *uḥibb* (prefer) and without reliance on any textual sources to support the call for destruction. It is true that al-Shāfiʿī relies on Q 59:5, which is arguably interpreted to permit destruction.[268] But as argued in the previous section, nothing in the verse indicates that it is *preferable* to destroy property.

> If Muslims attack a territory of war ... and they cannot win them and convert the territory to a territory of Islam or a land of truce, I prefer that they cut, burn, and vandalize whatever they can from their fruits and trees and take their property, especially light items, as booty. Whatever they can't take, they should burn and flood.[269]

In the above case, al-Shāfiʿī seems more interested in the power of the Islamic state and its revenue than in his stated objective for *jihād*. He starts off his chapter on *jizya* with a highly indicative verse from the Qur'ān, "I created *jinn* and mankind only to worship me,"[270] declaring that the objective of *jihād* is to get human beings to fulfil their raison d'être and worship God. This is contrary to Bonner's claim that al-Shāfiʿī's *jihād* regime focused on defensive warfare.[271] But his interest in the relentless destruction of the enemy's might shows that al-Shāfiʿī does not always appear more interested in converting non-Muslims to Islam than in consolidating Muslim power. After all, if the objective is to attract inhabitants of a city to a new religion, then destroying property to guarantee military advantage is unlikely to attract those inhabitants to the religion. This finding is corroborated by Griffel's analysis of al-Shāfiʿī's approach to apostasy. Griffel points out that al-Shāfiʿī is more interested in an alleged apostate's public pronouncement than in exploring his belief system. If a person declares himself to be a Muslim, then he may not be treated as an apostate.[272] Arguably in both cases the interest is hegemony, where undeclared belief is

268 al-Shāfiʿī, *al-Umm*, 4:368.

269 al-Shāfiʿī, *al-Umm*, 4:367.

270 Q 51:56.

271 Bonner, *Jihad*, 107, 160.

272 Frank Griffel, "Toleration and Exclusion: al-Shāfiʿī and al-Ghazālī on the Treatment of Apostates," *Bulletin of the School of Oriental and African Studies* 64, no. 3 (2001), 345.

irrelevant, and the simple act of submission through artificial espousal of the Islamic faith suffices.

2.3.2 Arab/Muslim Supremacy Within the Empire

After providing proof of the magi being People of the Book, which in turn means that the expansion of the right to pay the *jizya* is granted only to them, excluding all non-Arab non-scriptuaries, al-Shāfiʿī argues that the magi belong to a special category of People of the Book.[273] Generally, Muslims are allowed to marry and eat the food of the People of the Book. However, al-Shāfiʿī argues that the magi are allowed to pay *jizya* as People of the Book, but their status is different from Christians and Jews. Accordingly, Muslims may not eat their food, and Muslim men may not marry their women.

> Evidence in sources citing the Prophet (pbuh), and I do not know of anyone contesting that, indicates that he meant the people of the Torah and the Bible from the Israelites and not the magi…. And I do not know of anyone contesting that magi women may not be married and that their slaughtered animals may not be eaten. So consensus indicated that there are two judgements for the People of the Book, the women of some may be married and slaughtered animals eaten, and others whose women may not be married and slaughtered animals may not be eaten.[274]

In order to prove his thesis that not all the women of the People of the Book may be married and their slaughtered animals eaten, he argues that the permission only applies to Israelites and relies on ʿUmar saying, "Christian Arabs are not People of the Book. We are not allowed to eat their slaughtered animals or marry their women. I am not leaving them until they convert to Islam or I smite their necks."[275] However, in his attempt to prove the special status of the magi, al-Shāfiʿī contradicts himself in more than one way. First, he earlier argued that the Prophet had taken *jizya* from Arab Christians to prove that *jizya* is not dependent on ethnicity. Relying on this tradition presumably cancels out the ʿUmar tradition cited above. Second, nothing in ʿUmar's statement calls for distinguishing between those who may be married, and whose food may be eaten, and those who may only pay *jizya*. In fact, ʿUmar's statement on Arab Christians denies the permissibility of their food and their "right" to pay *jizya* on the basis of them not being People of the Book. Thus, the statement

273 Badawi, "Sunni Islam," 321.

274 al-Shāfiʿī, *al-Umm*, 4:258–59.

275 al-Shāfiʿī, *al-Umm*, 4:259.

arguably contradicts al-Shāfiʿī's distinction with its assertion of the link between payment of *jizya* and those two practices, since ʿUmar obviously links the two to each other, whereas al-Shāfiʿī argues that not all People of the Book are treated equally in terms of marriage and food sharing.

Al-Shāfiʿī's positioning of the magi as People of the Book might appear to be an expansive approach to the definition of the People of the Book through the inclusion of a new category among them. But practical implications prove that this definition leads to a limitation on the "enjoyment of the right" to pay the *jizya* by non-Muslims, which prevents them from living in Muslim lands and from continuing to enjoy their property. What is clear is that al-Shāfiʿī was faced, on the one hand, with the indisputable fact that the Rightly Guided Caliphs allowed the magi to live in the Muslim state and enjoy the "privileges" enjoyed by the People of the Book and, on the one hand, with the Qurʾanic reference to payment of *jizya* by People of the Book. In his attempt to mitigate sources and to resolve the seeming conflict between the Qurʾanic tradition and the prophetic *ḥadīth* on the treatment of the magi, he was unwilling to follow the approach taken by the Ḥanafīs, whereby all non-Arabs were allowed to pay the *jizya*. Hence he devised a new category for People of the Book, ones who may pay the *jizya*, but whose food may not be consumed and women not be married, despite the lack of textual basis for the existence of such a category. Alternatively, he could have argued that the Prophet's *ḥadīth* is specific in nature and that such a privilege is granted only to the magi. Although this argument conforms more closely to his theory of *uṣūl al-fiqh*, al-Shāfiʿī does not follow that line of argument and prefers to pursue the other option, positioning the magi as People of the Book. It might be that he was guided in this choice by the fear of expansion of the category of non-Muslims granted the status of *dhimmī*s through *qiyās*. This choice is particularly convenient, considering that he ends up creating a special category for the magi as People of the Book. This category is inferior to other categories of the People of the Book, since interaction with Muslims through marriage and food sharing is curtailed. Thus, the regime advocated by al-Shāfiʿī effectively leads to a scenario identical to an argument of specificity of the *ḥadīth* to the magi and *jizya* payment.

There is some indication that al-Shāfiʿī's distinction between People of the Book reflects an interest in Arab/Muslim supremacy. As mentioned in the Introduction, superiority debates existed between different ethnic groups. Although al-Shāfiʿī is said never to have engaged in similar debates, evidence from his biographies indicates a strong sense of pride in his Arab identity. This pride leads Abū Zahra to believe that al-Shāfiʿī left Iraq because of increasing Persian influence, and Abū Zayd to argue that in a*l-Risāla*, al-Shāfiʿī was interested in asserting Arab supremacy. Although Persian domination is a highly

contested issue, with some historians arguing Arabs always had the upper hand and others denying it, it is hard to contest that they enjoyed certain privileges and were close to decision-making circles. Al-Rashīd, for example, referred to his Persian minister as his father (before turning against the Barāmika).[276]

This increased power might have agitated al-Shāfiʿī, who seems to have shown suspicion of other ethnicities. For example, al-Rāzī documents an incident where one of al-Shāfiʿī's disciples bought him perfume, and when asked from whom he had bought it, he said a blonde man. Al-Shāfiʿī responded by ordering him to return it, because "he has never seen anything good from a blonde person."[277] In the context of the early stages of the Islamic state, it is fair to assume that most fair-coloured people did not come from Arab origins, and that the suspicion of blonde people is in fact revealing in terms of al-Shāfiʿī's ethnic perceptions. He equally showed allegiance to his Arab descent. For example, when given money by al-Rashīd, he is said to have distributed it among Qurayshī and Meccan men.[278] Meccans were not the only ones favoured by al-Shāfiʿī, according to al-Bayhaqī, who recounts a prophetic *ḥadīth* recited by al-Shāfiʿī indicating the purity of Medina and its protection by angels.[279] Perhaps the strongest indication of al-Shāfiʾī's favouring Arabs is his treatment of the issue of enslaving non-Muslim Arab men. Although he denies the claim that Arab non-Muslims may not be enslaved, he shows his preference for such an approach, saying, "If it were not a sin to wish for that, we would have wished for it."[280]

But this statement portrays that al-Shāfiʿī revered Islam as a source of identity and refused to let Arab identity trespass upon it. Accordingly, it would be shallow to assume that he allowed that bias to seep into his analysis to the extent of introducing the contradictions highlighted earlier. However, because of his strong reverence for Islam as an identity, he is likely to have been agitated by the increasing influence of the Barmakids and other Persian elites. Those elites were accused of heresy and of encouraging older Persian religions, to the extent that several poets wrote about their heresy and enthusiasm for non-belief.[281] In fact, the important ʿAbbāsid administrator al-Faḍl b. Sahl (d. 202/817–8) , a late convert to Islam after the fall of the Barmakids, played

276 Hugh Kennedy, *The Early Abbasid Caliphate* (London: Croom Helm, 1981), 116.

277 Ibn Abī Ḥatim al-Rāzī, *Adāb al-Shāfiʿī*, 130–31.

278 al-Bayhaqī, *Manāqib*, 116.

279 al-Bayhaqī, *Manāqib*, 121.

280 al-Shāfiʿī, *al-Umm*, 4:387.

281 Abū Khalil, *Amīr al-khulafā'*, 146.

a crucial role in the civil war between his patron al-Maʾmūn (d. 218/833), and his brother and predecessor al-Amīn (d. 198/813).[282] The suspicion of Persian subjects may have led al-Shāfiʿī to limit the inclusion of non-Muslims in the *jizya* scheme and to adopt a contradictory approach to the magi/Persians, an approach that acknowledged their established status as *jizya* payers but that aimed to limit their further integration into society.

In a further attempt to limit the expansion of the "right" to pay *jizya*, al-Shāfiʿī argues that People of the Book are only those who, or whose parents, adopted their religion before the transmission of the Qurʾān to the Prophet, and that anyone who newly adopts one of the "book" religions later than that date is treated like a pagan. If a Christian or a Jewish person converts to one of the other two religions, s/he is denied *dhimmī* status. Seemingly, al-Shāfiʿī was unable to find a textual source to back up this argument.

> The source we rely on [to prove that conversion of one of the people of the Book to another religion of the book is unacceptable] is that *jizya* is not accepted from anyone who adopts a book religion except if his parents or he himself adopted that religion before the transmission of Qurʾān and is accepted from anyone who adheres to his religion and the religion of his parents before the transmission of the Qurʾān.[283]

This statement gives the reader the impression that a solid rule for accepting *jizya* only from those who adopt one of the religions of the People of the Book before the advent of Islam was earlier established by al-Shāfiʿī. Nevertheless, the matter is very briefly dealt with in the section focusing on eligibility for *jizya* payment, and no proof is given for his statement that only those who had adopted a "book" religion before Islam were entitled to pay *jizya*. He simply treats his hypothesis that time of the adoption of the religion affects an individual's *dhimmī* status as an uncontested given and proceeds to address how one can establish time of adoption of a "book" religion:

> As for anyone, Arab or non-Arab, who encounters the advent of Islam before adhering to [one of] the religions of the People of the Book and wishes to pay *jizya* and be affirmed in his religion or to convert to [one of the] religions of the People of the Book, the *imām* may not accept *jizya*

282 Kennedy, *Early Abbasid Caliphate*, 117.

283 al-Shāfiʿī, *al-Umm*, 4:260.

> from him and should fight him until he converts to Islam, just as pagans are fought until they convert to Islam.[284]

It should be noted that this limitation again meets the objective of asserting Muslim hegemony during armed conflict, as well as within the boundaries of the state. In armed conflict, it expands the power of the army by limiting protection to those who converted before the advent of Islam, leading to consequences similar to those elaborated upon when addressing his definition of the People of the Book. But at the same time, it ensures stability and limited freedom of practice within the state itself. If conversion to one religion is translated in triumph of the said religion, then any attempt to convert from one scripted religion to the other is somehow an affirmation of a relative triumph of the religion converted to. If one were interested in limiting any legitimation of other religions and reluctantly accepted their habitation in Muslim lands, then any conversion would likely be faced with scrutiny.

2.3.3 Limiting the Caliph's Authority

2.3.3.1 *Freeing Female and Minor Captives*

In the previous section, al-Shaybānī was shown to deviate from the interest in asserting caliphal authority in favour of expanding the potential military might of the army. Interestingly, al-Shāfiʿī addresses the same issue dealt with by al-Shaybānī, the issue of grace and ransom of captives, to reach the opposite conclusion that male captives may be freed or ransomed, whereas women and children may not. In the case of victory, if men do not convert, they may be killed, graced upon, or ransomed in return for money or Muslim captives, which effectively gives the *imām* complete discretion in dealing with male captives.[285] However, women and children may only be taken as booty and divided as slaves according to booty rules.[286] They may not be released even if the captured people demand that they pay *jizya* for their women and children.[287] In order to justify this argument, al-Shāfiʿī relies on incidents in which the Prophet captured women and children and divided them like property, but he does not offer any source that prohibits freeing those two categories.[288] Again, the Qur'anic verse addressing ransom is sidelined in the reasoning. Although the verse does not specify gender and age as conditions for ransom or

284 al-Shāfiʿī, *al-Umm*, 4:247.
285 al-Shāfiʿī, *al-Umm*, 4:335.
286 al-Shāfiʿī, *al-Umm*, 4:335.
287 al-Shāfiʿī, *al-Umm*, 4:250.
288 al-Shāfiʿī, *al-Umm*, 4:335.

grace, al-Shāfiʿī does not offer any insight into his reasoning on the verse. One can speculate that he believes the verse was specified by the Prophet to adult men. Yet, as mentioned above, prophetic traditions relied on by al-Shāfiʿī do not indicate a reluctance to free women and children.

Moreover, al-Shāfiʿī, who treats women and children as property in this case and thereby denies them the opportunity for freedom from captivity and slavery,[289] treats women as independent individuals enjoying full capacity in other instances. In fact, he argues that if male non-Muslims convert to Islam before capture, their souls and properties are untouchable. Nevertheless, their women's legal position depends not on their men but on their own legal status, and they may thus be either enslaved or killed.[290] It is noticeable that the contradictory reasoning regarding the treatment of women leads in both cases to their enslavement, which leads the reader to question al-Shāfiʿī's approach and, perhaps, to assume that his main objective is to maximize revenue through enslaving women and children.

2.3.3.2 *Tipping the Power Balance in Favour of Rebels*

Just like al-Shaybānī, al-Shāfiʿī was interested in formulating a legal regime that limited the privileges of the political authority vis-à-vis rebels. Again, the competing interests of promoting stability and limiting the caliph's power in dealing with rebellion are weighed against each other, through asserting the necessity for *taʾwīl* and significant numbers, on the one hand, and denying rebel liability for damages caused to life and property and instructing that fleeing and wounded rebels may not be killed, on the other hand.[291] Interestingly, unlike his approach to collateral damage to Muslim life in conflicts with non-Muslims, al-Shāfiʿī does not demand *kaffāra* from rebels, in case of similar damages to Muslim life, hinting perhaps at an interest in suppressing potential routes for holding rebels legally accountable for rebellion.

Al-Shāfiʿī's approach to rebellion is indeed favourable to rebels in a context where rebels were often crucified and mutilated.[292] He argues that rebel weapons may not be used against them[293] and that indiscriminate weapons such as mangonels may only be resorted to in reciprocity or to avert serious damage to the *imām*'s people.[294] But what is of prime importance to us here is his ap-

289 al-Shāfiʿī, *al-Umm*, 4:335.
290 al-Shāfiʿī, *al-Umm*, 4:343–44.
291 al-Shāfiʿī, *al-Umm*, 4:303–4.
292 Abou El Fadl, *Rebellion*, 157.
293 al-Shāfiʿī, *al-Umm*, 4:318.
294 al-Shāfiʿī, *al-Umm*, 4:311.

proach to the issue of pursuing fleeing rebels. He argues that the existence of a group that they may reunite with does not affect the treatment of rebels and that captives are still not to be killed, the wounded not to be dispatched, and fugitives not to be pursued.[295] In doing so, al-Shāfiʿī relies more consistently on ʿAlī's conduct with rebels than his Ḥanafī contemporaries. However, his approach to a Qurʾanic verse that he holds primarily relevant to rebellion is less consistent. The verse states that "if two parties among the believers fight each other, then make peace between them. But if one of them transgresses (*baghat*) against the other, then fight, all of you, against the one that transgresses until it complies with the command of God."[296] The Qurʾanic verse uses the term *tafīʾ ila amr allah*, translated above as, "complies to God's command." However, the term *tafīʾ* carries several meanings and can also suggest physical retreat. Thus, arguably, the term could support al-Shāfiʿī's contention that retreating rebels may not be fought. He argues that the verse refers to retreat and does not address regrouping, thereby prohibiting pursuing fugitives even if they are fleeing to reunite with their army.[297] Nevertheless, al-Shāfiʿī does not address the fact that the verse conditioned retreat upon submission to God's command, possibly supporting the Ḥanafī argument that physical retreat does not suffice on its own to require the pursuit of rebels to end, since a retreat for regrouping and remobilization purposes is not a submission to God's command.

According to Abou El Fadl, al-Shāfiʿī seems interested in restricting the brutality with which rebels were treated by Islamic dynasties through setting up a pragmatic legal system that holds the ruler accountable regardless of rebel conduct and regardless of the justice of the ruler himself.[298] More important, unlike al-Shaybānī, al-Shāfiʿī elaborates on the qualifying nature of *taʾwīl*, arguing that an erroneous *taʾwīl* does not mean that legal regime of *baghy* (rebellion) does not apply to rebels.[299] Thus, al-Shāfiʿī's proposed legal system aimed at shaming caliphs into a more restrictive conduct of armed conflict with rebels, or as Abou El Fadl puts it, "It is as if al-Shāfiʿī is arguing to the ʿAbbāsids of his age, 'If you claim to be the rightful and just rulers, then this is how just rulers treat rebels.'"[300]

295 al-Shāfiʿī, *al-Umm*, 4:311.

296 Q 49:9. Translation provided in Abou El Fadl, *Rebellion*, 37.

297 al-Shāfiʿī, *al-Umm*, 4:311.

298 Abou El Fadl, *Rebellion*, 156.

299 Abou El Fadl, *Rebellion*, 156.

300 Abou El Fadl, *Rebellion*, 149.

3 Conclusion

The Muslim caliphate during the reign of Harūn al-Rashīd was undeniably a formidable power, and it is impossible that the jurists who witnessed that era were not aware of the impressive ability of that caliphate to rule over massive and diverse lands. To a great extent, one can argue that the relative strength of the caliphate in that era shaped the collective consciousness of jurists. Many notables leaned towards expanding permissible tactics in armed conflict. As an example, al-Shaybānī accepted indiscriminate targeting and tolerated deliberate, yet untargeted, deaths of untargetable categories, despite the lack of clear textual evidence to that effect. However, the individual nature of Islamic jurisprudence, and the relative independence enjoyed by jurists over the body of knowledge they produce and disseminate, means that as much as there were shared objectives, there were unique positions that are reflective of each's personal experience at the time, as well as of course, the theoretical approach to developing and articulating jurisprudence.

Al-Shaybānī's *al-Aṣl* can be read as a pragmatic statesman/jurist's attempt to weigh out and balance different and perhaps competing interests. However, it seems his primary interest lay in ensuring hegemony of the Muslim empire, as well centralization of authority. This cannot be read as mere subservience to the caliph. Rather, it should be seen as an attempt to promote internal stability, because of its balance and limitation by other interests, such as establishing Muslim suzerainty and lending legitimacy to rebellion. Public office also appears to have contributed to some level of acknowledgement of the enemy's legitimacy and a pragmatic attitude to "international relations." All these interests are qualified by the, perhaps subconscious, inclination to affirming established social structures and gender relations.[301]

On the other hand, although al-Shāfiʿī's proposal for armed conflict with non-Muslims also leads to the expansion of targeting techniques, it further narrows untargetable categories and limits alternatives for co-existence for the defeated if they do not fit into his definition of religions eligible to pay *jizya*. This approach simply relieves the Muslim combatant of restrictions on his conduct during conquest. Al-Shāfiʿī does set moral restrictions on the military, but the overall legal regime is more biased towards permissibility. In order to achieve this objective, al-Shāfiʿī seems to have been inclined to limit the caliph's discretion if such discretion were to limit the army's destructive power and curtail Islamic hegemony, as witnessed in his approach to freeing female and minor slaves.

301 Badawi, "Sunni Islam," 312.

But one cannot rule out the caliphate's role in al-Shāfiʿī's reasoning, nor position him as a lone champion of *jihād*. The ʿAbbāsid *jihād* policy at the time of Hārūn al-Rashīd was invested in small-scale attacks aimed at asserting Muslim hegemony rather than at converting the other. Additionally, al-Rashīd may have nurtured an atmosphere of hostility towards non-Muslims, allowing al-Shāfiʿī to restrict the access that the People of the Book had to the *jizya* regime. For example, al-Rashīd reportedly "ordered that the churches in the frontier provinces should be destroyed because the Christians were thought to be acting as a fifth column for the enemy."[302] Al-Shāfiʿī's approach to *jihād* might thus have been more extreme than the official policy, but in no way was it an aberration.

Al-Shāfiʿī's permissive approach to conflicts with non-Muslims is best contrasted with his restrictive approach to rebellion. He goes to some lengths to ensure rebel immunity from liabilities for damages and to guarantee that the caliph's exercise of power with Muslim rebels is heavily regulated. In return, restrictions imposed on rebels in order to be classified as rebels do not address their own conduct or legitimacy of the rebellion itself. *Taʾwīl*, even if erroneous, and the number threshold, were pragmatic restrictions necessary for maintaining public order and stability without creating the space for the caliph to exercise jurisdiction in terms of denying rebels the right to *baghy*. As Abou El Fadl points out, novel restrictions imposed by al-Shāfiʿī on the caliph's power appear interested in ensuring the supremacy of Islamic law by bringing caliphs under its jurisdiction, rather than treating caliphs as superior sources of legitimacy for the legal system.[303]

Al-Shāfiʿī's independence from the political authorities appears to have been a key factor in shaping his jurisprudence. It is no coincidence that al-Shaybānī, the jurist-judge, relatively expanded the caliph's authorities in his use of force with rebels and comparatively limited the use of force with infidels, through expanding the *jizya* regime and relying on a longer untargetable list of individuals. Apparently, al-Shaybānī came to realize that a restrictive *jizya* regime was an impractical alternative for the Muslim state. As for rebellion, he was evidently sympathetic to and as equally interested as al-Shāfiʿī in limiting the caliph's authority, but perhaps he was aware that caliphs are unlikely to accept a regime such as the one promoted by al-Shāfiʿī. On the other hand, al-Shāfiʿī, the outsider, adopted a harsher approach to wars with non-Muslims and a more restrictive approach to rebellion.

302 Kennedy, *Early Abbasid Caliphate*, 131.

303 Abou El Fadl, *Rebellion*, 149.

CHAPTER 2

The Muslim World at the Frontiers: Al-Andalus

This chapter examines scholarly work produced in eras of waning Muslim power where there was a strong sense of external threat. The first section looks at the Iberian peninsula during Muslim rule, in other words, al-Andalus.[1] It focuses on two prominent scholars as case studies, ʿAlī Aḥmad b. Ḥazm (d. 456/1064), who belonged to a strict literalist school of thought, the Ẓāhirī *madhhab*, and Abū l-Walīd b. Rushd ("Ibn Rushd al-Jadd (grandfather)," d. 520/1126), as a representative of the Mālikīs. Both jurists' authority was widely acknowledged in their time, and both continue to be considered influential by modern scholars. As a Ẓāhirī, Ibn Ḥazm is a representative of one of the best-known literalist schools of Muslim legal thought[2] and is accordingly an excellent case study for the purpose of this book because of the school's claim to reliance on text rather than on *raʾy* or any policy considerations. Moreover, Ibn Ḥazm witnessed one of the most violent and chaotic eras of Muslim rule in al-Andalus, namely the *ṭāʾifa* (party-state)[3] era. Ibn Rushd, on the other hand, represents another significant mainstream school of jurisprudence, the Mālikī school, which was the dominant school in al-Andalus. He also represents a different phase of juristic production in the history of Islamic jurisprudence, where the focus was primarily on the review of older seminal texts, a phase widely referred to as the era of *taqlīd*, translated loosely as following the tradition.[4] Thus, Ibn Rushd's writings did not claim innovation of legal thought in as much as they were commentaries on previous Mālikī works, an approach that still reflected policy considerations, as argued later in this chapter. Moreover, Ibn Rushd represents another significant era of al-Andalus's dynamic history, which is the era of the Almoravids (al-Murābiṭūn, a North African dynasty that rose to defend al-Andalus against the threat of invasion by Christian kingdoms and eventually ruled Muslim lands in the peninsula).

1 The modern-day Andalucía refers to a municipal province in Spain, which is smaller than the area known as al-Andalus during Muslim rule.

2 Wael Hallaq, *A History of Islamic Legal Theories* (Cambridge: Cambridge University Press, 1997), 32.

3 David Wasserstein, *The Rise and Fall of the Party-Kings: Politics and Society in Islamic Spain 1002–1086* (Princeton, NJ: Princeton University Press, 1985), 279.

4 The beginning of the era of *taqlīd* is subject to extensive debate. However, the example of *taqlīd* relied on here, Ibn Rushd, is often referred to as a *taqlīd* jurist. See Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 87.

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The second section examines another situation largely believed to have shaken the Muslim world in the pre-modern era, not the least because it eroded the long-standing caliphal institution. In the debate over armed conflict in the modern Muslim world, militant and mainstream forces alike often use Ibn Taymiyya (d. 728/1328) to support their arguments for expanding and restricting armed conflict respectively. References to Ibn Taymiyya's thought are made in almost every extensive study examined in the following chapters, whether by scholars like Abū Zahra or by militants like al-Ẓawāhirī. Such extensive reference is a testament to the undisputed authority and status of this Ḥanbalī scholar. However, posthumous reverence achieved by Ibn Taymiyya has been subject to extensive debate among modern writers. While al-Matroudi argues that Ibn Taymiyya enjoyed wide praise and support among most jurists,[5] El-Rouayheb contends that a detailed examination of bio-bibliographical literature proves that until the nineteenth century, Ibn Taymiyya did not have any significant influence outside Ḥanbalī circles.[6] However, Anjum quotes scholars like al-Dhahabī, normally critical of Ibn Taymiyya, to establish his revered status and appreciation for his "extraordinary personality and persona, heroic piety, asceticism, reformist activism, and single-minded all-out defense of what he believed to be the truth."[7] Since this book does not address any classical jurisprudence written after Ibn Taymiyya, it is unnecessary to take a position in this debate. What the book can attest to is his authority in the area of *jihād* in the modern literature examined, and hence his strong relevance to this work.

Since Ibn Taymiyya is often referred to as the primary inspiration behind contemporary Muslim militant thought,[8] a study of Muslim jurisprudence on armed conflict would be incomplete without an exploration of his work. In addition to his modern influence, Ibn Taymiyya's work is important for the purpose of this book because of the unique historical and political circumstances he witnessed. Born five years after the fall of Baghdad to the Mongols in 655/1258, and having had to flee his original birthplace of Ḥarrān because of

5 Abdul Hakim al-Matroudi, *The Ḥanbalī School of Law and Ibn Taymiyyah: Conflict or Conciliation* (London: Routledge, 2006), 20.

6 Khaled El-Rouayheb, "From Ibn Ḥajar al-Haytamī (d. 1566) to Khayr al-Dīn al-Ālūsī (d. 1899): Changing Views of Ibn Taymiyya Among Non-Ḥanbalī Sunni Scholars," in *Ibn Taymiyya and His Times*, ed. Yossef Rapoport and Shahab Ahmed (Oxford: Oxford University Press, 2010), 269.

7 Ovamir Anjum, *Politics, Law, and Community in Islamic Thought: The Taymiyyan Moment* (Cambridge: Cambridge University Press, 2012), 187.

8 Richard Bonney, *Jihad: From Qur'an to Bin Laden* (London: Palgrave, 2004), 111.

the Mongol threat,[9] Ibn Taymiyya's life and works were heavily influenced by the Mongol presence in the Muslim world, and are thus a great illustration of juristic reaction to this presence. As later detailed, Ibn Taymiyya had no faith in the Mongol rulers, who were new converts to Islam, and his juristic works were dedicated to discrediting them. In order to legitimize his attacks against the Mongols and his attempts to mobilize the masses in the *jihād* against them, he employed innovative legal reasoning that is worthy of detailed examination and analysis. In addition to his unique contribution to the literature on *jihād*, Ibn Taymiyya is also a very convenient figure for the purpose of this book because he is a true representation of juristic activism. His juridical positions were often translated into personal action, even if that meant taking up arms for *jihād*. His activism and evident interest in promoting what he perceived to be the orders of Allah often led him into conflict with the political authority, which makes him an interesting example of "rebel" jurists.

Section One: Andalusī Jurisprudence

1 Al-Andalus: Loss of Muslim Power

Al-Andalus, fully conquered by Muslims by 97/716, suffered from internal strife and political instability until the establishment of the Umayyad emirate by ʿAbd al-Raḥmān al-Dākhil, who fled the ʿAbbāsid revolution to establish an autonomous central government in the peninsula.[10] In 300/912, ʿAbd al-Raḥman III, a descendant of ʿAbd al-Raḥmān al-Dākhil, came to power, officially declaring himself caliph in 317/929.[11] His era, and that of his son al-Ḥakam, was characterized by heightened Islamic power forcing neighbouring Christian princes to pay an annual tribute to the emirate or else face punitive raiding by Muslim armies.[12] After al-Ḥakam's death, his eleven-year-old son, Ḥishām II, succeeded as caliph. While he maintained the title, practical rule was in the hands of his *ḥājib* (chamberlain), al-Manṣūr (d. 392/1002). Al-Manṣūr and his son al-Muẓaffar, who succeeded him as chamberlain, managed to maintain al-Andalus's regional power and their own authority as de facto rulers until the

9 H. Laoust, "Ibn Taymiyya, Taḳī al-Dīn Aḥmad," in *Encyclopaedia of Islam*, 2nd ed, ed. P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel, W. P. Heinrichs, Brill Online, accessed 21 December 2009.

10 Hugh Kennedy, *Muslim Spain and Portugal* (London: Longman, 1996), 27, 33.

11 Kennedy, *Muslim Spain*, 90.

12 William Montgomery Watt, *A History of Islamic Spain*, 3rd ed. (Edinburgh: Edinburgh University Press, 1971), 41.

latter's death in 398/1008.[13] But with the death of al-Muẓaffar and his brother's succession as chamberlain, al-Andalus and its power received a strong blow when the brother attempted to claim the caliphate. According to Watt, "The years from 1008 to 1031 are in some ways the most tragic quarter centuries in all history. From the pinnacle of its wealth, power and cultural achievement, al-Andalus fell into the abyss of bloody civil war."[14] The civil war resulted in the division of al-Andalus's land among various Arab, Berber, and Andalusī princes and the creation of numerous petty states. These petty states were in constant hostility with each other, which reflected negatively on the existing balance of power between the Muslims and their northern Christian neighbours.[15] Soon, relations between Muslim al-Andalus and its neighbours were reversed, as symbolized by the payment of *paria*s (tribute) by petty Muslim kings to their Christian counterparts.[16] Christian kings soon became involved in the conflicts between the *ṭā'ifa* kings, with the latter seeking their assistance against each other.[17] Eventually, the Christian kings realized the opportunity created by the power gap in al-Andalus and began to attack Muslim cities and regain control over strategic territory. The most significant turning point in that early stage of the Reconquista[18] was the Christian reacquisition of Toledo in 477/1085. According to Kennedy, this reacquisition "meant that al-Andalus lost its geographical heart and that its kingdoms were now scattered.... No part of the country could be wholly secure from Christian raids."[19] While such failure was attributable partly to Muslim leaders seeking Christian assistance, it was also triggered by the weakness of the Muslim petty states in comparison to their counterparts. A survey of historical accounts of that phase led Kennedy to conclude that Muslim armies became much smaller due to political division and financial constraints caused by being forced to pay *paria*s to Christian kings.

The weakness of the *ṭā'ifa* kings and their inability to defend Muslim lands led to widespread dissatisfaction among Muslim jurists and among the Andalusī population in general. Soon, even the *ṭā'ifa* kings themselves became aware of their inability to defend their territory against their northern

13 Watt, *Islamic Spain*, 84

14 Watt, *Islamic Spain*, 84.

15 Wasserstein, *Party-Kings*, 133.

16 Kennedy, *Muslim Spain*, 167.

17 Kennedy, *Muslim Spain*, 151.

18 A problematic yet widely used term. For a discussion of the shortcomings of the term Reconquista, see Alan Verskin, *Islamic Law and the Crisis of the Reconquista: The Debate on the Status of Muslim Communities in Christendom*, in *Studies in Islamic Law and Society*, vol. 39, ed. Ruud Peters and A. Kevin Reinhart (Leiden: Brill, 2015), 1.

19 Kennedy, *Muslim Spain*, 153.

Christian enemies, and an agreement was reached between some of the party kings and the jurists to contact the Almoravids to assist in defending Muslim Spain: "It was agreed that a mission led by the qaḍī of Cordoba, Ibn Adham, and al-Muʿtamid's wazīr, Ibn Zaydūn, should go seek Ibn Tāshfīn's [the leader of al-Murabiṭūn] support."[20] The Almoravids belonged to a puritanical religious/political movement that rose to power in North Africa. It started under the leadership of Ibn Yasīn (d. 451/1059), who was attempting to revive a religious ethos. Kennedy argues it was natural for Ibn Yasīn to engage in military activity, since "Islamisation and conquest went together like the prophet ... he sought to unite the tribes to conquer the outside world and to replace the tribal leadership with a religious one."[21] Eventually, Ibn Tāshfīn (r. 453–500/161–1107) assumed power, and his assistance was sought twice in al-Andalus. In the first instance, Ibn Tāshfīn helped stop Christian expansion and immediately returned to North Africa. However, when called upon again, he felt that Andalusī leaders "were not deeply attached to the Islamic religion,"[22] which, coupled with the wide juristic and popular support he received, led him to annex al-Andalus.[23] The conduct of the *ṭā'ifa* kings during their conflict with Ibn Tāshfīn led to further resentment of their rule. For example, al-Muʿtamid (r. 431–488/1050–1095) the ruler of Seville, sought the assistance of Alfonso VI the king of Castille and Leon (r. 1072–1109) against Ibn Tāshfīn, "so making all his enemies' accusations come true."[24] Other *ṭā'ifa* states soon followed suit, with the exception of the kingdom of Zaragoza in the north-east.[25] Nevertheless, of the lands reconquered by the Christians, only Valencia was reacquired by the Almoravids.[26]

The Almoravids' rule in al-Andalus echoed their philosophy of religious revival, and "from the very beginning they showed respect for the religious classes and relied on them for political as well as religious decisions."[27] As a matter of fact, Gómez-Rivas states that Ibn Tāshfīn only annexed al-Andalus after receiving the explicit endorsement of prominent jurists.[28] At the same time, ju-

20 Kennedy, *Muslim Spain*, 162.
21 Kennedy, *Muslim Spain*, 157.
22 Watt, *Islamic Spain*, 99.
23 Watt, *Islamic Spain*, 99.
24 Kennedy, *Muslim Spain*, 164.
25 Kennedy, *Muslim Spain*, 166.
26 Kennedy, *Muslim Spain*, 172.
27 Kennedy, *Muslim Spain*, 168.
28 Camilo Gómez-Rivas, *Law and the Islamization of Morocco Under the Almoravids: The Fatwas of Ibn Rushd, al-Jadd to the Maghrib*, in *Studies in the History and Society of the Maghrib*, ed. Amira K. Benison et al. (Leiden: Brill, 2014), 16.

rists welcomed the new rulers, who showed a zeal and respect for Islamic law and a willingness to "pursue the *jihad*."[29] Signs that the jurists' power was increasing included that they now headed the Friday prayer, normally headed by the ruler, and that they were given responsibility for the *bayt al-māl* (house of revenue).[30] But aside from the jurists, the traditional elites were marginalized by the new political structure in al-Andalus and lost their preferential status[31] because the Almoravids were heavily influenced by their traditional tribal ties and tended to limit power sharing to a very restricted group.[32]

Conflicts continued between the Almoravids and their northern Christian neighbours, and initially the Almoravids were militarily superior, despite their inability to regain territory from the Christians. However, their power gradually started to decline. Starting in 512/1118, "a new generation of Christian leaders from the new and expanding kingdoms began to push their frontiers southwards at the expense of the faltering *Almoravid* [al-Murābiṭūn] government."[33] As a result, the Almoravids' rule was met by some resistance and resentment among the political elite and inhabitants of the peninsula. The extent of this political rejection is, however, subject to scholarly debate.[34] Watt argues that the luxury witnessed by the military generals in the culturally rich cities of al-Andalus weakened their moral zeal.[35] Kennedy, on the other hand, argues that the decline of the Almoravids' power was attributable partly to Ibn Tāshfīn's son's takeover of the last remaining *ṭā'ifa* state of Zaragoza in the north-east, which aggravated the Christian kings and denied the Almoravids the buffer zone role played by that state.[36] The most famous uprising was the unrest in Córdoba in 515/1121, in which Ibn Rushd played a major role, as will be detailed later in this chapter. Internal chaos, as well as rising domestic threats to the rule of the Almoravids in North Africa, led to a power vacuum in the Iberian peninsula, and further chaos ensued until the Almohads (al-Muwaḥḥidūn) ruled all of al-Andalus by 567/1172 .

29 Kennedy, *Muslim Spain*, 168.
30 Kennedy, *Muslim Spain*, 179.
31 Watt, *Islamic Spain*, 101.
32 Kennedy, *Muslim Spain*, 160.
33 Kennedy, *Muslim Spain*, 179.
34 Gómez-Rivas, *Law*, 17.
35 Watt, *Islamic Spain*, 100.
36 Kennedy, *Muslim Spain*, 181.

2 Ibn Ḥazm and the *Ṭāʾifa* States

Ibn Ḥazm, whose father was a minister in al-Manṣūr (371–392/981–1002) and al-Muẓaffar's (392–398/1002–1008) courts,[37] was at the centre of political activity and Umayyad suzerainty in al-Andalus and enjoyed its wealth until his father's imprisonment in the civil unrest that ensued after al-Muẓaffar's successor attempted to take over the caliphate. After his father's death, the family house was destroyed, and Ibn Ḥazm sought refuge in Almeria, where he was imprisoned on suspicion of spreading pro-Umayyad propaganda.[38] After his release, he travelled to Córdoba to join an Umayyad attempt to regain power. He was appointed as a minister for two short-lived Umayyad caliphates, whose failures apparently forced Ibn Ḥazm to resign from public life and dedicate himself to scholarship.[39] During this time, he followed briefly the Shāfiʿī school, before adhering to Ẓāhirī thought, which eventually brought about against him the wrath of the Mālikī jurisprudential establishment in Córdoba.[40] He briefly taught Ẓāhirī thought with his master, Abū l-Khiyār (d. 426/1034), in the Great Mosque of Córdoba, but widespread Mālikī rejection of their views led the caliph to ban them from teaching.[41]

Ibn Ḥazm is often described as a man of great zeal and little tolerance for whatever he perceived as a deviation from the ultimate truth of revelation.[42] His zeal is evident in his harsh non-reconciliatory criticism of other scholarly views of Islamic law, as for example in his *al-Muḥalla*. Mālikī jurists who lent their support to those in power were not exempt from his unwavering criticism. Perhaps, it was this combative personality and approach to scholarship that precipitated his, and his students', harassment by other jurists.[43] The intimidation of Ibn Ḥazm reached its zenith shortly before his death, when the

37 Muḥammad Abū Zahra, *Ibn Ḥazm: Ḥāyatuhu wa ʿaṣruhu, arāʾūhu wa fiqhuhu*, 2nd ed. (Cairo: Maṭbaʿat Aḥmad ʿAlī Mikhīmar, 1954), 39.

38 R. Arnaldez, "Ibn Ḥazm, Abū Muḥammad ʿAlī b. Aḥmad b. Saīd," in Encyclopaedia of Islam, ed. P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel and W. P. Heinrichs, ed. Brill Online, accessed 23 January 2011.

39 Abū Zahra, *Ibn Ḥazm*, 42–43.

40 Samir Kaddouri, "Ibn Hazm al-Qurṭubī," in *Islamic Legal Thought: A Compendium of Muslim Jurists* (Studies in Islamic Law and Society, vol. 36), ed. Oussama Orabi et al. (Leiden: Brill, 2013), 217.

41 José Miguel Puerta Vílchez, "Abū Muḥammad Alī Ibn Ḥazm: A Biographical Sketch," in *Ibn Ḥazm of Cordoba: The Life and Works of a Controversial Thinker*, ed. Camilla Adang, Maribel Fierro, and Sabine Schmidtke (Leiden: Brill, 2012), 13.

42 Abū Zahra, *Ibn Ḥazm*, 8.

43 Arnaldez, "Ibn Ḥazm."

king of Seville ordered that the jurist's books be burned and that he be exiled to his ancestral village of Montija, where he died.[44]

Ibn Ḥazm was perhaps the ultimate embodiment of the pre-modern diverse intellectual, with expertise and ventures in various fields such as philosophy, literature, language, poetry, and comparative religion. He is claimed to have "produced 400 tomes amounting to approximately 80,000 pages."[45] His *al-fiṣal fī l-milal wa-l-niḥal* has often been referred to as one of the earliest Muslim works in comparative religion.[46] But the book is no more about other religions than it is about "erroneous" understandings of Islam. As Coope points out, the majority of the book was primarily a criticism of Muslim "heretic" creeds.[47] He also published a response, to a work supposedly written by the Andalusī Jewish minister Ibn Naghrīla.[48] But as mentioned in Ibn Ḥazm's response, Ibn Ḥazm was unable to locate the original text of the work, so relied on a refutation written by another scholar to write his piece. As Adang notes, it is doubtful that the established Jewish minister would risk his status by writing a piece critical of the Islamic faith.[49] It is hard to establish whether Ibn Ḥazm wilfully attributed such statements to Ibn Naghrīla – whose name only appears in the title of the letter[50] – but the response is indeed indicative of Ibn Ḥazm's views on the presence of non-Muslims in al-Andalus, as will be detailed later.

2.1 *Ibn Ḥazm's Jurisprudence: Ẓāhirī Theory of* Uṣūl al-Fiqh

Ibn Ḥazm adhered to the main principles of the Ẓāhirī theory of *uṣūl al-fiqh.* He only recognized the Qurʾān, the sunna, *ijmāʿ*, and *dalīl* (evidence). With regards to the obligatory nature of the Qurʾān and the sunna, Ibn Ḥazm states that the "Qurʾān is the source [*aṣl*] against which all *sharīʿa*s are measured, [so] we examined it and we found in it the obligation to obey the Prophet of God."[51]

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44 Vílchez, "Ibn Ḥazm," 19–22.

45 Kaddouri, "Ibn Hazm," 212.

46 According to some, *al-faṣl.*

47 Jessica A. Coope, "With Heart, Tongue and Limbs: Ibn Ḥazm on the Essence of Faith," *Medieval Encounters* 6, nos. 1–3 (2000), 104.

48 There is debate in the literature over the author of the claimed Jewish epistle. Some sources claim the author was Samuel Ibn Naghrīla (d. 447/1056). Others claim it was his son who succeeded him as a minister, Joseph Ibn Naghrīla (d. 458/1066). See Iḥsān ʿAbbās, introduction to *Rasāʾil Ibn Ḥazm al-Andalusī*, by Ibn Ḥazm, 2nd ed. (Beirut: al-Mūʾassasat al-ʿArabiyya lil-Dirāsāt wa-l-Nashr, 1987)3:18–19.

49 Camilla Adang, *Muslim Writers on Judaism and the Hebrew Bible: From Ibn Rabban to Ibn Hazm* (Leiden: Brill, 1996), 68.

50 Adang, *Muslim Writers*, 69.

51 Ibn Ḥazm, *al-Iḥkām fī uṣūl al-aḥkām*, ed. Maḥmūd Ḥāmid ʿUthmān (Cairo: Dār al-Ḥadīth, 1998), 111.

Ijmāʿ, on the other hand, is the consensus of the Companions over what they have learned from the Prophet,[52] and its authority again stems from the reference to it in the Qur'ān.[53]

Ibn Ḥazm emphasizes the importance of a well-connected and coherent chain of transmission for authoritativeness of sunna. He does not acknowledge *al-ḥadīth al-mursal* (a *ḥadīth* whose full chain of transmission cannot be authenticated)[54] as a source of law. Nevertheless, he acknowledges the authority of any sunna, regardless of the number of Companions who recited the prophetic tradition, because of his belief in the arbitrariness and the lack of textual basis for attachment of a number of transmitters as a condition for establishing the legitimacy of a *ḥadīth*.[55] Thus, *"khabar al-wāḥid al-ʿadl* [reported] from one to another [all the way] to the Prophet – peace and prayer be upon him – sets the obligation of both knowledge and action."[56] Commenting on Ibn Ḥazm's acknowledgement of the authoritativeness of *al-khabar al-wāḥid*, Tobgui argues that the resort to such sources can be considered somehow inconsistent with Ibn Ḥazm's approach to *uṣūl* and his emphasis on the necessity of certainty of the tradition.[57]

It should also be noted that Ibn Ḥazm, unlike most schools of jurisprudence, does not always consider actions of the Prophet indicative of a rule in Islamic law and restricts authoritativeness of sunna to textual traditions. The Prophet is an exemplary figure whose actions are to be emulated, but non-textual sunna only carry legal weight when conducted as an execution or clarification of a rule (*ḥukm*).[58] Because Ibn Ḥazm acknowledged only textual sunna, he didn't accept statements made by the Prophet's Companions indicating the Prophet's actions or speculating his intentions without transmission of the Prophet's words. In that case, the Companion's transmission would not be considered *isnād* (as part of the chain of transmission) of the rule,[59] because a statement transmitted back to the Prophet must be given verbatim.[60] He equally refused

52 Ibn Ḥazm, *Iḥkām*, 62.

53 Ibn Ḥazm, *Iḥkām*, 112.

54 See Ibn Ḥazm, *Iḥkām*, 161.

55 Ibn Ḥazm, *Iḥkām*, 119.

56 Ibn Ḥazm, *Iḥkām*, 131.

57 Carl Sharif al-Tobgui, "The Epistemology of *Qiyas* and *Taʿlil* between the Mu'tazilite Abu 'l-Husayn al-Basri and Ibn Hazm al-Zahiri," *UCLA Journal of Islamic and Near Eastern Law* 2 (2003), 344.

58 Ibn Ḥazm, *Iḥkām*, 166.

59 Ibn Ḥazm, *Iḥkām*, 230.

60 Ibn Ḥazm, *Iḥkām*, 243.

to acknowledge the Prophet's approval of an act by one of his Companions as an indication of an obligation on other Muslims.[61]

Ibn Ḥazm argues that the Qur'ān and sunna can abrogate each other, regardless of whether the sunna is *khabar wāḥid* or *mutāwatira* (ascertained by numerous chains of transmission).[62] Moreover, since the Prophet's concurrence of an act is an indication of its permissibility, if the Prophet witnessed an act committed by a Muslims without reprimanding the actor or denouncing the act, the Prophet's assumed acquiescence was taken as an indication of abrogating an earlier prohibition.[63] In other words, the Prophet would not have remained silent if one of his Companions had committed a prohibited act. Thus, his silence is an indication of abrogation of prohibition.

The two remaining sources are *ijmāʿ* and *dalīl*. *Ijmāʿ* proves the rule rather than establishes it. Accordingly, *ijmāʿ* must be supported by the Qur'ān and the sunna and be linked with a strong chain of consensus all the way back to the Companions of the Prophet.[64] The proof for authoritativeness of *ijmāʿ* is that Companions often disagreed with each other, hence their consensus is an indication of them witnessing the agreed opinion expressed by the Prophet.[65] Any disagreement by the Companions precludes *ijmāʿ* because their lack of consensus prevents one from adopting one view over the other.[66] *Dalīl* is a deductive tool that is relied upon to address diverse legal issues dealt with by jurists. Despite being a deductive tool, it is still distinct from *qiyās* or *raʾy*: "Some people ignorantly assumed that our statement of [reliance on] *dalīl* is a deviation from the text and consensus, and others assumed that *qiyās* and *dalīl* are one, but they erred in their assumption."[67] *Dalīl* achieves its authority either from the text or from consensus. *Dalīl* reliant on a text is divided into seven types. The first is where statements are made with a link between them, but in one of them, the result is not mentioned in the text, such as the Prophet's *ḥadīth* that "every intoxicant is *khamr* [wine] and every *khamr* is forbidden,"[68] which proves that whatever intoxicates is prohibited.[69] The second type is where a rule is made conditional on fulfillment of a condition, so once the condition is

61 Ibn Ḥazm, *Iḥkām*, 166.

62 Ibn Ḥazm, *Iḥkām*, 523.

63 Ibn Ḥazm, *Iḥkām*, 528.

64 Ibn Ḥazm, *Iḥkām*, 538.

65 Adam Sabra, "Ibn Ḥazm's Literalism: A Critique of Islamic Legal Theory (1)," *al-Qantara* 28, no. 1 (2007), 13.

66 Ibn Ḥazm, *Iḥkām*, 586.

67 Ibn Ḥazm, *Iḥkām*, 714.

68 Ibn Ḥazm, *Iḥkām*, 714.

69 Ibn Ḥazm, *Iḥkām*, 714.

fulfilled, the rule is applied.[70] The third type is when a term is used in the text, so the usage of that term would preclude its opposite being applicable in that particular case. The fourth type is a form of *istiṣḥāb* (continuity), where the object of the rule maintains its status until proven otherwise.[71] The three other types are logical extensions assumed from the text.[72] The other category of *dalīl*, the one deduced from *ijmāʿ*, is either accepting the narrowest agreed upon *ijmāʿ*, consensus on *istiṣḥāb*, consensus to abandon a particular statement, or consensus on the legitimacy of Muslim rule.[73]

Ibn Ḥazm's limiting his sources to texts, to consensus relying on a text, and to evidence for the nature of the rule stemming from the apparent meaning of the text, led him to deny other sources adopted by others. For example, he was highly critical of *qiyās* and any other form of analogical deduction because they allow jurists to expand beyond the instruction of the text.[74] He was equally critical of ruling on the basis of personal opinion[75] and of emulating other people, including the Companions.[76] Thus, according to Sabra, Ibn Ḥazm's Islamic legal theory was closed to the textual sources, which Ibn Ḥazm perceived to be unambiguous and unchanging, leading his perceived scope of Islamic law to be finite and limited to matters explicitly addressed in the texts.[77] Finally, Ibn Ḥazm argued that orders and prohibitions were to be taken as clear instructions of duty and obligation unless otherwise stated.[78] Accordingly, if a text was phrased as an order, it was to be taken as an instruction from God to Muslims to act according to the order and its apparent meaning. Orders could be understood as indicative of permissibility rather than obligation only if there were further textual evidence to indicate the lack of obligation.

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70 Ibn Ḥazm, *Iḥkām*, 714.

71 Abū Zahra, *Ibn Ḥazm*, 367–377.

72 Abū Zahra, *Ibn Ḥazm*, 367–377. Ibn Ḥazm gives examples of these three types, such as in the case of the statement of anything that intoxicates is prohibited, then we can deduce that some of the prohibited items are intoxicating, or like the deduction that Zayd is alive if we were to state that Zayd is writing, or finally the deduction that Abū Bakr is better than ʿUthmān if we are to state that Abū Bakr is better than ʿUmar and ʿUmar is better than ʿUthmān. See Ibn Ḥazm, *Iḥkām*, 715.

73 Ibn Ḥazm, *Iḥkām*, 714.

74 Ibn Ḥazm, *Iḥkām*, 58.

75 Ibn Ḥazm, *Iḥkām*, 799.

76 Ibn Ḥazm, *Iḥkām*, 850.

77 Adam Sabra, "Ibn Ḥazm's Literalism: A Critique of Islamic Legal Theory," in *Ibn Ḥazm of Cordoba: The Life and Works of a Controversial Thinker*, ed. Camilla Adang, Maribel Fierro, and Sabine Schmidtke (Leiden: Brill, 2012), 99.

78 Sabra, "Ibn Ḥazm's Literalism" (2012), 304.

Before moving on to Ibn Ḥazm's arguments on armed conflict, it is worth mentioning that despite the Ẓāhirīs being famed for their reluctance to employ human reason,[79] most scholars agree that Ibn Ḥazm employed sophisticated reason to prove his arguments. As Arnaldez has argued, "In carrying out his projects, he explains ideas and the relations between them with perfect clarity."[80] In fact, his criticism of interpretive tools often perceived as rational tools, such as *qiyās*, was often directed at their incoherence and illogical nature. He used the texts and analogical tools of schools to prove that rational assumptions of similarity fail to understand the complexity and intentions of revelation.[81] Ibn Ḥazm thus relied on reason in a limited, perhaps more argumentative, manner in order to prove his arguments and refute those of his opponents.[82] Although this cautious approach to reason "empties it of any capacity to decree on its own,"[83] it indicates Ibn Ḥazm's legal talent and his ability to approach the law in an exceptionally sophisticated and well-articulated manner.

2.2 *The Historical Context and Ibn Ḥazm's Rulings on War*

Most scholars agree that Ibn Ḥazm was a strong upholder of his *uṣūl* theory. Sabra argues that, "unlike some modern authors who have determined in advance what conclusions they wish Islamic law to reach, Ibn Ḥazm genuinely attempts to understand the meaning of the sacred texts."[84] And although Ibn Ḥazm's comparative religious works were polemical and excessively aggressive in comparison to other works, Ibn Ḥazm did not allow his biases against other religions to affect his legal treatment of inter-religious relations.[85] For example, in *al-Muḥalla*, Ibn Ḥazm argued that the Prophet's instruction to wash an unbeliever's vessel before using it cannot be extended to washing an unbeliever's clothes before using them, and that unbelievers may hold the Qur'ān,

79 A claim refuted in Amr Osman, *The Ẓāhirī Madhhab (3rd/9th–10th/16th Century): A Textualist Theory of Islamic Law* (Leiden: Brill, 2014).

80 Arnaldez, "Ibn Ḥazm."

81 Josep Puig Montada, "Reason and Reasoning in Ibn Ḥazm of Cordova," *Studia Islamica* 92 (2001), 169.

82 Montada, "Reason," 169.

83 Montada, "Reason," 170.

84 Sabra, "Ibn Ḥazm's Literalism" (2007), 10. Sabra also quotes two important French works, arguing that Ibn Ḥazm's method is logically consistent. See Abdel Magid Turki, *Polemiques entre Ibn Ḥazm et Bagi sur les principles de la loi musulmane* (Algiers: Etudie et Documents, 1973), and Y. Linant de Bellefonds, "Ibn Ḥazm et le Zahirisme Juridique," *Revue Algerienne, Tunisienne et Marocaine de Legislation et de Jurisprudence* 76 (1960), 1–43.

85 Adang, *Muslim Writers*, 253–54.

which proves that he did not allow his "biases" against non-Muslims to influence his legal reasoning.[86]

Only two scholars writing in English have examined a potential controversy in Ibn Ḥazm's reasoning. The first argues that Ibn Ḥazm, a literalist objector to anthropomorphism, was unable to find plausible interpretations for the reference to God in human terms, especially in reference to the well-known theological controversy over the Divine's possession of bodily organs.[87] The second scholar brings to our attention the limits of Ibn Ḥazm's theory that Islam abrogated previous monotheistic faiths by relying on Qur'anic verses stipulating positive rewards for faithful Jews and Christians.[88] What this section attempts to prove is that Ibn Ḥazm's approach to armed conflict was not as coherent as his jurisprudence is often viewed, and that his Ẓāhirism did not preclude political influences. It does not attempt to argue that every ruling reached by Ibn Ḥazm was inconsistent with his Ẓāhirī thought or that he deliberately twisted texts for political objectives. Rather, it argues that the inconsistencies highlighted here can be seen as potentially shaped by how Ibn Ḥazm related to the world around him rather than as a mere formalistic application of the textual sources.

2.2.1 Treatment of Non-Muslims

2.2.1.1 *Dhimmī*s

Ibn Ḥazm's rulings on *dhimmī*s show an inclination to restrict relative "privileges and freedoms" generally granted and agreed upon by other jurists. A key Qur'anic text here is: "Fight those of the People of the Book who do not [truly] believe in God and the Last Day, who do not forbid what God and His Messenger have forbidden, who do not obey the rule of justice until they pay the tax and agree to submit."[89] Most jurists treated this verse as a licence to allow People of the Book to pay *jizya*, even if their convictions were assumed to be false. Ibn Ḥazm, however, introduced novel conditions for accepting the extension of the *jizya* privilege to People of the Book.

Ibn Ḥazm provided a highly restrictive condition for accepting *jizya* from non-Muslim scriptuaries. He argued that *jizya* could only be accepted from Jews, Christians, and the magi if they declared that Muḥammad was a

86 Adang, *Muslim Writers*, 254–55.

87 Al Makin, "The Influence of Ẓāhirī Theory on Ibn Ḥazm's Theology: The Case of His Interpretation of the Anthropomorphic Text 'The Hand of God,'" *Medieval Encounters* 5, no. 1 (1999), 120.

88 Coope, "With Heart," 113.

89 Q 9:29.

prophet.[90] In order to justify this position, he relied on an incident where a Jewish man greeted the Prophet by his name. One of the Companions pushed the Jewish man and said, "Won't you say: Prophet of God?"[91] The Jewish man replied that they (Jews) call Muḥammad by the name given to him by his family. The Prophet answered that Muḥammad was indeed the name given to him by his family, and the Jewish man replied that the Prophet was correct and that he was indeed a prophet.[92]

> And in this account, Thawbān, May God be pleased with him, struck the Jew for not saying "Apostle of God," and the Apostle of God, God's blessings and peace be upon him, did not denounce him for it. And therefore it is true that it is an obligatory right, as, if it had not been permissible he [the Apostle] would have denounced it, and the Jew said to him: "You are a prophet," and the Apostle of God, God's blessings and peace be upon him, did not oblige him to renounce his religion because of it.[93]

Ibn Ḥazm also relied on the Qur'anic verse, "But if they break their oath after having made an agreement with you, if they revile your religion, then fight the leaders of disbelief – oaths mean nothing to them – so that they may stop."[94]

While Ibn Ḥazm generally refused to interpret texts beyond their literal meaning, he was seemingly comfortable with drawing a legal ruling here on the basis of inference from the above sources rather than an explicit stipulation.[95] As earlier stated, Ibn Ḥazm regarded the Prophet's silence or concurrence as simply indicative of permissibility rather than obligation, unless proven otherwise. Yet, the *ḥadīth* relied upon here does not explicitly or implicitly state that the Prophet instructed the Jewish man to acknowledge his prophethood. On the contrary, when the Jewish man showed earlier reluctance to call the Prophet "the Messenger of Allah" and argued that Jews call the Prophet by his name, the Prophet concurred by confirming that "Muḥammad is the name given to me by my family."[96] The Jewish man's "acknowledgement" that Muḥammad was indeed a prophet was done voluntarily, without instruc-

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90 Ibn Ḥazm, *al-Muḥalla bi-l-athār*, ed. Aḥmad Muḥammad Shākir (Beirut: al-Maktab al-Tijārī li-l-Ṭiba'a wa-l-Nashr, 1969), 7:316.

91 Ibn Ḥazm, *Muḥalla*, 7:317.

92 Ibn Ḥazm, *Muḥalla*, 7:317.

93 Ibn Ḥazm, *Muḥalla*, 7:317. Translation in Nesrine Badawi, "Sunni Islam Part 1: Classical Sources," in *Religion, War and Ethics: A Sourcebook*, ed. Gregory Reichberg and Henrik Syse (Cambridge: Cambridge University Press, 2014), 325.

94 Q 9:12.

95 Badawi, "Sunni Islam," 325.

96 Ibn Ḥazm, *Muḥalla*, 7:317.

tion. There is no further reference to the Prophet requiring the Jewish man's voluntary acknowledgement. The incident, if it implies anything, implies that the Prophet permitted Jews to call him by his name rather than the Messenger of Allah, or mutual recognition by the Prophet and the Jewish man that the Prophet may be called by either his name or his "title" as a prophet. However, Ibn Ḥazm argued that since the Prophet did not reprimand his companion for pushing the Jewish man, then his silence here indicates that the companion's act was right and obligatory, because if it were not, the Prophet would have denounced the act. But if one were to follow Ibn Ḥazm's rules of *uṣūl*, then the Prophet's silence would simply indicate the permissibility of the companion's act, not its obligatory nature. Moreover, following the same reasoning, one can argue that the Prophet did not reprimand the Jewish man for calling him by his name. In fact, there is more evidence in this instance to argue that the Prophet concurred with the Jewish man's calling him by his name because it was the name given to him by his family, or even possibly that the Prophet's response to the Jewish man in this case was a subtle denunciation of the companion's act. The Qur'anic verse used by Ibn Ḥazm similarly contradicts his theory of limitation on opinion and analogical deduction. The verse can be understood as allowing the killing or fighting of People of the Book who explicitly revile the religion or break their oaths to the Prophet, or both. The assumption that reviling the religion or explicitly denouncing the Prophet can be equated with a condition for explicit recognition of the prophethood of Muḥammad is accordingly ill-founded by strict logical deduction, let alone by the reasoning of a scholar who refused to acknowledge legal instructions beyond the literal, apparent textual meaning.

If the mere application of the sources hardly leads Ibn Ḥazm to the conclusion arrived at above, then perhaps this restriction on *dhimmī* status is best understood in light of Ibn Ḥazm's reactions to the political surroundings of his time. As a witness to the disintegration of al-Andalus, Ibn Ḥazm was in all likelihood outraged at the loss of Andalusī power vis-à-vis their Christian enemy. "The disintegration of al-Andalus was, of course, the opportunity for the Christian princes in the North, and, though occasionally still quarrelling among themselves, they did not fail to make use of the opportunity."[97] They attacked the northern Andalusī states, and "the pattern by which the small Christian states had paid tribute to the awesome state ruled from Córdoba was almost exactly reversed."[98] The reversal of the power structure encouraged Christians to aspire to the expulsion of Muslims from the peninsula. The Christian policy generated "a new fear, not only of losing political power in the peninsula but

97 Watt, *Islamic Spain*, 93.

98 Wasserstein, *Party-Kings*, 249.

having to leave Spain altogether."[99] Ibn Ḥazm's fear and shock is made clear by his own words, as quoted below, from Wasserstein. While it was directed primarily against Muslim kings and their weakness, it portrays anger at the advantage assumed by Christians and their capture of Muslim women, men, and children with the aid of some Muslim rulers:

> By God, I swear that if the tyrants were to learn that they could attain their ends more easily by professing the religion of the cross, they would certainly hasten to profess it! Indeed, we see that they ask the Christians for help and allow them to take away Muslim men, women and children as captives in their land. Frequently, they protect them in their attacks against the most inviolable lands and ally themselves with them in order to gain security.[100]

There is also no denying that Ibn Ḥazm perceived Christianity and Judaism as rivals to Islam in the Iberian peninsula, leading him to write extensively on their falsehood. In his *al-fiṣal*, Ibn Ḥazm's "knowledge of other religions coexists in interesting ways with a profound contempt for them; his polemic is a combination of erudition and furious outrage at the stupidity and wickedness of non-Muslims."[101] He perceives his task in the book as an attempt to reveal the fabrication of monotheistic religions' holy texts and establish that "anyone with a semblance of reason" would see that.[102]

In addition to being anxious over the rising power of his Christian neighbours, he was outraged by the position and power reached by Jews within the Muslim community: "They [Jews] had a large share in the operation of tax collecting and general administration. Such actions conflicted greatly with the normal Islamic prohibition on allowing *dhimmī*s, Jews or Christians, to be in a position of authority over Muslims."[103] As mentioned earlier, Ibn Ḥazm was particularly offended by the Jewish minister Ibn Naghrīla's alleged attack against the tenets of Islam. Ibn Ḥazm's response to this attack may have been triggered partially by the ascent of his Jewish colleague, especially when compared to his own downfall from power.[104] Regardless of Ibn Ḥazm's ulterior motives or the controversy over Ibn Naghrīla's authorship of the book allegedly

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99 Wasserstein, *Party-Kings*, 279.

100 Ibn Hazm translated in Wasserstein, *Party-Kings*, 280.

101 Coope, "With Heart," 102. For similar analysis of *al-fiṣal*, see Wasserstein, *Party-Kings*, 238, and Adang, *Muslim Writers*, 65.

102 Ibn Ḥazm, *al-Fiṣal fī l-milal wa-l-ahwā' wa-l-niḥal* (Cairo: al-Khānjī, 1899), 2:2.

103 Wasserstein, *Party-Kings*, 206.

104 Adang, *Muslim Writers*, 68.

criticizing Islamic faith, Ibn Ḥazm's intolerance for Jewish prominence is made clear in his response. In *al-Radd*, Ibn Ḥazm starts out by complaining to God about Muslim kings who diverted their attention to accumulating wealth at the expense of managing Muslim territory, which created the opportunity for *dhimmī*s to assume that role.[105] In the text, Ibn Ḥazm's response was even more aggressive than his usual approach with opponents, where he referred to the writer with several derogatory terms such as *lowly*, *rude*, *ignorant*, and *stupid*, and to Jewish belief as "altered disbelief and fabricated (*muḥarraf*) lies with the widest falsehood and stinkiest of meanings."[106] The rest of the text simply attempts to refute the arguments with the same aggressive manner and prove inadequacies within the Jewish faith.

Ibn Ḥazm was also probably as sceptical of Christian presence in Muslim-dominated territories, "where foreign interventions represent[ed] no more than attempts by Christian rulers to capitalize on the existence of Christian communities or institutions in Muslim Spain."[107] The usage by Christian leaders of Christian minorities as a pretext to intervene in Spain, more significant in the era of the party kings than in earlier phases of strong Muslim rule in al-Andalus, and the fact that Muslims could barely protect their territory, must have made the presence of Christian *dhimmī*s more a liability than an asset in Ibn Ḥazm's mind.

Ibn Ḥazm's anxieties are evident in his definition of subjugation/humbling, as referred to in the Qur'anic verse demanding that Muslims:

> Fight those who believe not in Allah and the Last Day and do not forbid what Allah and His Messenger have forbidden – such men as practice not the religion of truth, being of those who have been given the Book – until they pay the tribute out of hand and have been humbled.[108]

Many scholars define *ṣighār* (subjugation) as submission to the applicability of Islamic law, which Ibn Ḥazm also asserted, stating that "'humbling' is that the law of Islam binds them and that they make apparent naught of their disbelief, nor anything which is proscribed by the religion of Islam."[109] But, Ibn Ḥazm went further than this, stating that humbling/subjugation "entails that they do

105 Ibn Ḥazm, "Radd Abī Muḥammad b. Ḥazm ʿalā Ibn al-Naghrīla al-Yahūdī laʿanahū Allah," in *Rasāʾil Ibn Ḥazm al-Andalusī*, ed. Iḥsān ʿAbbās, 2nd ed. (Beirut: al-Mūʾassasat al-ʿArabiyya lil-Dirāsāt wa-l-Nashr, 1987), 3:41.

106 Ibn Ḥazm, "Radd," 3:45.

107 Wasserstein, *Party-Kings*, 231.

108 Q 9:29.

109 Ibn Ḥazm, *Muḥalla*, 7:346. Translation in Badawi, "Sunni Islam," 327.

no harm to a Muslim, nor take them as servants and that none of them take a position of power in which their command would bind a Muslim."[110] Whereas this demand was asserted by some other jurists, Ibn Ḥazm – a staunch critic of *taqlīd* and an advocate of a literalist, strict interpretation who demanded that acts not explicitly prohibited by the text ought to retain their permissibility – provides no justification for the above-mentioned prohibitions, prohibitions that largely resonate with his view of the place of non-Muslims in Muslim al-Andalus.

2.2.1.2 *Converts to Islam*

Ibn Ḥazm coupled his narrowing and restricting of *dhimmī* status with attempts to scrutinize non-Muslims' conversion to Islam, or more precisely to ensure converts' commitment to Islam before acknowledging their conversion. Again, his approach to conversion is innovative, in that it relies only weakly on textual sources. Despite the general Islamic acceptance of the *shahāda* (testimony that there is no god but God and that Muḥammad is his prophet) as a declaration of Islam, Ibn Ḥazm argued that, in order to be accepted as a Muslim, someone who belongs to the People of the Book must add that he is a Muslim and that he rejects all other religions.[111] From an extensive survey of Islamic jurisprudence on the regulations of *jihād*, as well as relevant textual sources, I have failed to find any textual basis for this condition. Hence, the absence of sources to support Ibn Ḥazm's proposition led him to rely on a series of *ḥadīth*s that make no reference to such a condition, and to adopt innovative arguments to prove this issue. He argued that anyone, other than People of the Book, who pronounces the *shahāda* is considered converted to Islam. But the Jews, Christians, and magi must add the above-mentioned denunciation of other religions. He then listed a few *ḥadīth*s that support his argument that idolaters are considered to have converted if they pronounce the *shahāda*. But he provided no evidence of references to the rejection of conversion of one of the People of the Book upon pronouncing the *shahāda*. Accordingly, he referred to the earlier mentioned incident of the Jewish man greeting the Prophet by his name, concluding that if the Jewish man were considered a Muslim for acknowledging Muḥammad as a prophet, then the declaration of the *shahāda* would be sufficient as proof of conversion of the People of the Book. However, the incident does not indicate rejection of *shahāda* as a declaration of faith by People of the Book, because acknowledging Muḥammad as a prophet and declaring one's faith through the formalistic pronunciation of the

110 Badawi, "Sunni Islam," 327.

111 Ibn Ḥazm, *Muḥalla*, 7:316.

shahāda are separate actions. The conclusion that the acts are of the same nature is a rational, albeit perhaps stretched, deduction that pays little attention to the intentions of the subject. Clearly, however, it is incompatible with his theory of *uṣūl al-fiqh*. In this narrative, there is no indication of the Jewish man's interest in Islam, nor is there an indication that he said the *shahāda* in its widely accepted format. Additionally, Ibn Ḥazm makes no reference to a textual source stipulating the requirement of saying "I am a Muslim and I renounce all other religions." Even if one were inclined to accept the stretched rejection of the *shahāda* as a proof of conversion, Ibn Ḥazm would still need to provide us with convincing textual evidence for the modified format he proposes and for the specification of this particular format to People of the Book.

But why would Ibn Ḥazm be reluctant to accept those converts, if conversion represents a defeat for competing faiths? His writing portrays an unwavering interest in one ultimate truth – Islam as he understands it. If he was willing to accuse his opponents of heresy for minor differences over legal issues, he could fairly be assumed to have been sceptical of unfaithful conversions. After all, as expected, there are several accounts of non-Muslims converting to Islam to guarantee their ascent to power in that era.[112] It is likely, the restrictions imposed by Ibn Ḥazm, even if formalistic and practically irrelevant, were responses to such conversions.

2.2.2 Conflicts Between Muslims

Aside from his tendency to restrict the freedoms of non-Muslims in Muslim territories, Ibn Ḥazm was heavily invested in devising a regime that could regulate the chaotic inter-Muslim fighting witnessed during the era of the party kings. By the time of Ibn Ḥazm, the doctrine of rebellion was well articulated to offer significant protections for rebels against excessive force by the caliphs.[113] Most jurists agreed on the need for a legitimate, even if erroneous, interpretation to qualify for *baghy* status. Considering the established juristic tradition of rejecting personal or tribal rebellion, and considering also Ibn Ḥazm's willingness to denounce any deviation from Islam as he perceived it, "it was natural for Ibn Ḥazm to disrespect the princes who requested the assistance of the Christians, showing them loyalty and paying them a poll tax."[114] Perhaps because of his uncompromising nature, and possibly after witnessing an extreme

112 Wasserstein, *Party-Kings*, 212.

113 See Khaled Abou El Fadl, *Rebellion and Violence in Islamic law* (Cambridge: Cambridge University Press, 2001).

114 Abū Zahra, *Ibn Ḥazm*, 97.

state of internal strife, his scepticism of warring parties led him to deviate from the traditional treatment of fighting between Muslims in jurisprudence.

Ibn Ḥazm made two unique contributions to the Islamic regulation of conflict between Muslims. While most other scholars focused on the obligation of the *imām* in his conflict with rebels and were silent on the obligation of rebels, Ibn Ḥazm set an obligation on rebels not to rebel against a just *imām* for worldly objectives and to refrain from terrorizing people on the road, from taking their money, and from shedding their blood.[115] If rebels committed any of these acts, their legal position was transferred from *bughā* (rebels; sing. *baghī*) to *muḥaribūn* (bandits; sing. *muḥārib*). Although the insistence on a valid interpretation was widely adopted by jurists, the conditioning of *baghy* status on conduct was definitely a novelty.

To support his argument for considering rebels who terrorize other bandits, Ibn Ḥazm relied on the Qur'anic verse commanding Muslims to fight transgressors until they comply with the command of God. The verse does not, however, provide for anything beyond fighting the transgressor, regardless of his conduct. The lack of obligation set on rebels in the verse led Ibn Ḥazm to consult other sources to prove his distinction. Accordingly, he relied on two *ḥadīth*s:

> There would arise at the end of the age a people who would be young in age and immature in thought, but they would talk (in such a manner) as if their words are the best among the creatures. They would recite the Qur'ān, but it would not go beyond their throats, and they would pass through the religion as an arrow goes through the prey. So when you meet them, kill them, for in their killing you would get a reward with Allah on the Day of Judgment.[116]
>
> [A] sect that would be among his Umma which would emerge out of the dissension of the people. Their distinctive mark would be shaven heads. They would be the worst creatures or the worst of the creatures. The group who would be nearer to the truth out of the two would kill them.[117]

While these two *ḥadīth*s do not go beyond an instruction to fight and kill those groups, Ibn Ḥazm argued that the description of the violating transgressor as

115 Ibn Ḥazm, *Muḥalla*, 11:97.

116 *Ṣaḥīḥ Muslim*, 5:2328, online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim/005.smt.html>, accessed 25 January 2011.

117 *Ṣaḥīḥ Muslim*, 5:2324.

the "worst of people" provides a legal basis for their transfer from the rebellion paradigm to banditry.[118] The three texts he relied on make no reference to rebels' conduct during conflict. The description of a group of rebels as "the worst" can hardly be seen as a legal basis for a literalist Ẓāhirī to conclude transfer from one legal framework to another, especially given that the transfer carries practical implications for how those rebels are to be treated.

Perhaps the best illustration of the magnitude of such deviation is a comparison with his own position on the definition of the just and the unjust (rebelling) party to the conflict. Although most other scholars accepted *baghy* as rebellion against the ruler, Ibn Ḥazm made no such distinction. On the contrary, he argued that "whoever forbids evil and promotes good, supremacy (*iẓhār*) of Qurʾān, sunna, and justice is not a transgressor, but the transgressor is the one who opposes him."[119] Most jurists equate transgression with rebellion and do not delve into the conduct of the ruler and how it affects his status before the law. By contrast, Ibn Ḥazm shifted towards fluidity of the legal system, whereby the primary criterion is adherence to Islam. Thus, he argued that the *imām* should be considered a *baghī* and the rebels be considered just groups and that this is justified by the Qurʾanic verse addressing rebellion,[120] since there is no basis in the verse for equating rulership with justice and rebellion with transgression.[121] This treatment of *baghy* is a strong example of deviation from his theory of *uṣūl*. In determining who the *baghī* (rebel) is in an ensuing conflict, he showed strict adherence to the sources and reluctance to go beyond instruction of the text in order to allow him to argue against the definition of transgression as rebellion against those in power. On the other hand, he used opinion-charged arguments in order to deduce inadmissibility of the regulation of *baghy* to groups rebelling against a just *imām* without *taʾwīl* and resorting to terror-inducing activities.

This contradiction reflects Ibn Ḥazm's interest in revolutionizing the legal framework of rebellion. His intellectual revolution seems to have been aimed at limiting, to the greatest extent possible, fighting parties' immunity from religious scrutiny, as noted by Abou El Fadl.[122] According to the framework suggested by Ibn Ḥazm, the *imām* is not guaranteed legitimacy by virtue of being a ruler, rather he is subject to fluidity of his position and transfer from legitimacy to transgression if his acts fall short of compliance with God's laws and

118 Ibn Ḥazm, *Muḥalla*, 11:98.

119 Ibn Ḥazm, *Muḥalla*, 11:98.

120 See Q 49:9.

121 Ibn Ḥazm, *Muḥalla*, 11:99.

122 Abou El Fadl, *Rebellion*, 214.

justice. At the same time, rebels are subject to the same criteria by being forced to conform to religious instructions and proper conduct, or otherwise they lose any protection proposed by the regulations on transgression/rebellion. Abou El Fadl suggests that the regime established by Ibn Ḥazm "did not distinguish between the need for law and order and the imperatives of correct belief."[123] In other words, Ibn Ḥazm was setting up an idealistic and moralizing regime that had little practical applicability. But this argument does consider that the existing political structure would have rendered the established tradition of rebellion irrelevant. To a great extent, the model envisioned by formative jurists like al-Shaybānī and al-Shāfiʿī, establishing the ruler as the legitimate authority and the rebel as the transgressor, had to negotiate a legal system with the widely acknowledged political authority. In that context, it is expedient to disregard legitimacy debates, because the entity in power will always perceive itself as legitimate, or at least present itself as such. Accepting the legitimacy of the ruler and, at the same time, establishing rules to govern his conduct with rebels, despite their error, effectively brings the ruler under the umbrella of the advocated legal system. But this assumed structure was simply irrelevant in the era of the *ṭā'ifa* states. With princes constantly fighting each other, rulers frequently changed. At the same time, those very rulers proved incapable of meeting Ibn Ḥazm's assumed model of Islamic governance, especially if they were subordinated to Christian kings and if they were interested in accumulating wealth, which Ibn Ḥazm harshly criticized. Rather, from his perspective, it was impossible (and at the same time undesirable) to establish legitimacy of rule for any of them. Thus, he was consciously and pragmatically seeking to destabilize their regime by undermining their presumed legitimacy on the basis of holding power and treating it as irrelevant in fighting between Muslims.[124] A legal system that lent legitimacy to whoever carried the banner of Islam was the most logical system to be advocated by Ibn Ḥazm in a society that he perceived to be in need of a true Islamic salvation. In other words, Ibn Ḥazm's proposed regime of rebellion was not an idealistic one. Rather, it was a frustrated response to the assumed failure of the established regime to regulate the state of affairs in his time, as well as an attempt to pave the path for a change in the political outlook on legitimacy.

On the other hand, the plunder and destruction of Andalusī land was also an extreme case that warranted an innovative response due to the terror and instability witnessed by citizens. In some instances, people built a mosque and a bath in their houses out of fear of the dangers they might incur if they

123 Abou El Fadl, *Rebellion*, 210.

124 Badawi, "Sunni Islam," 312.

ventured out on the street.[125] In this context, it would also make sense for Ibn Ḥazm to address a matter seldom addressed by other jurists, the conduct of rebels. As much as rulers lacked the legitimacy to guarantee their treatment as the just group, other fighters equally warranted scepticism with their resort to violent, terror-inducing tactics. It is reasonable to argue that, in order to control them, rebels who resorted to terrorizing tactics should be deprived of their privileges under this legal regime and be transferred to a more criminal zone, that of *ḥirāba*.

3 The Jurist-Judge in al-Andalus: Ibn Rushd al-Jadd

Ibn Rushd was a renowned jurist who held the position of chief judge of Córdoba. In line with the power enjoyed by the jurists during the rule of the Almoravids, Ibn Rushd was very influential in religious, as well as political, circles.[126] His influential status was particularly evident in the role he played in the Córdoban rebellion of 515/1121. There are different accounts of the cause behind the rebellion. Some claim it was triggered by a slave of the governor/soldier harassing/abducting a woman on the day of the Muslim *eid* (feast),[127] while ʿAnān reports that it was triggered by the accidental death of a boy at the hands of the soldiers of the governor.[128] Some sources indicate that Ibn Rushd's position on the rebellion, while unclear or undocumented, led him into disfavour by the political authority and forced, or perhaps triggered, him to resign as chief judge. Serrano believes that Ibn Rushd likely resented the compensation imposed on Córdoban subjects, so may have used the need to focus on his writings as a subtle excuse to distance himself.[129] Others argue that Ibn Rushd played a major role in putting an end to the rebellion and in brokering reconciliation between Ibn Tāshfīn and the people of Córdoba, a reconciliation that ended in the Córdobans paying for the damages caused in return for amnesty.[130] While al-Talīlī claims that Ibn Rushd's reconciliation attempts reflected his

125 Wasserstein, *Party-Kings*, 41.

126 Kennedy, *Muslim Spain*, 178.

127 See e.g. Gómez-Rivas, *Law*, 23–24.

128 al-Mukhtār al-Talīlī, *Ibn Rushd wa kitābuh al-muqaddamāt* (Tripoli: al-Dār al-ʿArabiyya lil-Kitāb, 1988), 273–74.

129 Delfina Serrano Ruano, "Ibn Rusd al-Jadd (d. 520/1126)," in *Islamic Legal Thought: A Compendium of Muslim Jurists*, ed. Oussama Arabi, David S. Powers, and Susan A. Spectorsky (Leiden: Brill, 2013), 301–2.

130 al-Talīlī, *Ibn Rushd*, 276.

support for the people against the political authority,[131] it should be noted that if he played a role in such a reconciliation, then he may have condoned a deal contrary to most juristic positions on the regulation of rebellion, since most jurists don't hold rebels liable for damage to life and property. In addition to being personally influential, Ibn Rushd belonged to an elite religious family famed for their contribution to the Islamic sciences.[132] The family's origins are contested. According to Kennedy, they descended from Arab roots,[133] but according to al-Talīlī, due to the lack of reference to their Arab origins in biographical literature, they must have descended from non-Arabs.[134]

Ibn Rushd is famed for his elaborate commentaries on Mālikī works, including his *al-Muqaddamāt* – a commentary on Malīk's *Mudawana* – and *al-Bayān wa-l-taḥṣīl* – a commentary on one of the most famous Mālikī texts from Muslim Spain, *al-ʿUtbīya/al-Mustakhraja. Al-ʿUtbīya* is a compilation of Mālikī *asmāʿ*, reports transmitted verbally from Mālik (d. 795/971) by his disciples. The compilation received serious scepticism with regards to its authenticity in both classical and modern scholarship.[135] However, the authenticity of the text is irrelevant for this book since Ibn Rushd treated the reports as authentic. Ibn Rushd's *fatāwa* are also compiled in a book titled *Fatāwa Ibn Rushd*. Like most jurists, Ibn Rushd is reported to have preferred intellectual work to judicial assignments, and he is said to have resigned from the position of judge in order to complete his work on *al-Bayān wa-l-taḥṣīl*. Ibn Rushd confirms this information in his introduction to the book, where he says he was unable to reconcile his judicial responsibility with his work on the book, so he sought relief from that responsibility.[136]

Despite his elaborate and prolific work on *furūʿ*, Ibn Rushd published no books on *uṣūl al-fiqh*. His focus on *furūʿ* is coherent with the Andalusī Mālikī tradition's relative lack of interest in *uṣūl*.[137] That said, it must be stated that Ibn Rushd was still famed for his knowledge and mastery of *uṣūl* theories across the different *madhāhib*. For example, his student and the famous

131 al-Talīlī, *Ibn Rushd*, 58.

132 al-Talīlī, *Ibn Rushd*, 83.

133 Kennedy, *Muslim Spain*, 178.

134 al-Talīlī, *Ibn Rushd*, 81.

135 Alfonso Carmona, "The Introduction of Mālik's Teachings in al-Andalus," in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2005), 50–51.

136 Ibn Rushd (al-Jadd), *al-Bayān wa-l-taḥṣil wa-l-sharḥ wa-l-tawjīh wa-l-taʿlīl fī masāʾil al-mustakhraja*, ed. Muḥammad Ḥijjī, 2nd ed. (Beirut: Dār al-Gharb al-Islāmī, 1988), 1:30–31.

137 al-Talīlī, *Ibn Rushd*, 53.

biographer Qaḍī ʿIyāḍ (d. 544/1149) specifically mentions his exceptional mastery of *uṣūl*.[138] In fact, Fierro argues that Ibn Ḥazm's textual project transformed the jurisprudential landscape in al-Andalus, leading many Mālikīs, including Ibn Rushd, to focus their efforts on the textualization of Mālikī jurisprudence. According to Fierro, "Ibn Rushd was able to insert early Maliki *raʾy* within the context of *uṣūl* methodology, without much substantial change being introduced in traditional Andalusi Maliki practice."[139]

Because of his focus on *furūʿ*, this section is more concerned with internal contradictions in Ibn Rushd's commentaries than contradiction with *uṣūl*. His commentary *al-Bayān wa-l-taḥṣīl* examines the different reports compiled by al-ʿUtbī in *al-Mustakhraja.* The reports were often contradictory, reflecting Mālik's frequent change of position, as well as the different views of his disciples.[140] Because some of the reports contradicted each other, his choice of the soundest report is examined to assess whether the choice might be indicative of policy preferences, especially where he disagrees with the prominent Mālikī jurist and Mālik's companion Ibn al-Qāsim (d. 191/806). Ibn al-Qāsim's reports were widely held as the most authoritative and widely respected reports among Andalusī Mālikīs.[141] The same approach is applied to his commentary on the renowned Māghribī jurist Saḥnūn's (d. 240/854) authoritative *al-Mudawana* and *al-Muqaddamāt al-Mumahadāt.* Additionally, reference is made to his compiled work, *Fatāwa Ibn Rushd*, as an indication of his position on the law in action.

3.1 Taqlīd *and the Legacy of the Predecessors*

Having worked primarily on commentaries on original texts, Ibn Rushd initially appears to have been less responsive than other original jurisprudents to policy considerations. In addition to commentaries limiting his ability to address issues and matters unaddressed in the works commented on, deviation from rulings commented on is also difficult, especially for a scholar belonging to an era where *taqlīd* and loyalty to the *madhhab* as a pattern of juridical reasoning had become more established. But closer examination of his works shows that Ibn Rushd was still responsive to various policy considerations and often found a way to manoeuvre within this strict system of scholarship to

138 Qāḍī ʿIyāḍ, *al-Ghunaya*, ed. Zuhayr Jarār (Beirut: Dār al-Gharb al-Islāmī, 1982), 54.

139 Maribel Fierro, "Proto-Malikis, Malikis, and Reformed Malikis in al-Andalus," in *The Islamic School of Law: Evolution, Devolution and Progress*, ed. Peri Bearman, Rudolph Peters, and Frank E. Vogel (Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2005), 75.

140 Carmona, "Introduction," 54.

141 Carmona, "Introduction," 54.

promote certain interpretations of the law. More important, even his *taqlīd*, when consistently employed, is indicative of support for the juristic/judicial culture to which he belonged. This defence of the juristic tradition is common to *taqlīd* works.[142]

Ibn Rushd partially achieved his elite and influential status from belonging to the class of judges/jurists who were highly appreciated and respected during the time of the Almoravids, as mentioned earlier. He participated actively in the call for the Almoravids to intervene to defend Muslim Spain against encroachment by the Christians and their removal of the *ṭā'ifa* kings.[143] Ibn Rushd was also highly appreciated by the Almoravids, who were themselves puritan adherents of Mālikī thought. This appreciation is evident in his *Fatāwa* compilation, in which princes from the Almoravids specifically request his opinion on particular judicial issues.[144] The general appreciation of jurists,[145] as well as his renowned status gained by virtue of his judicial and juridical fame, are likely to have influenced his adherence to his school of thought and its positions.

However, Ibn Rushd was confronted with potentially contradictory positions within the school, and he dedicated himself to reconciling these positions, sometimes in a manner that introduces a novel position that seems more in line with the context he lived through. For example, Mālik is reported to have been asked about the punishment of a spy, to which he replied that he had not heard anything about spies and that the matter should be left to the *ijtihād* of the *imām*, while the prominent Mālikī jurist, Ibn al-Qāsim said he thought he should be beheaded and his repentance should not be accepted.[146]

The reader might assume that the two statements reflect different positions, where one specifies a particular punishment, while the other asserts lack of textual support for a particular punishment, hence calling for the *imām*'s reliance on his own discretion. However, Ibn Rushd tries to prove that both positions are similar by stating that a spy should be subjected to *ḥirāba* punishment because his acts are more harmful and dangerous to Muslim interests than robbers and bandits. Thus, according to Ibn Rushd, Mālik meant that the *imām* may resort to his *ijtihād* to choose between killing the spy and his crucifixion.[147]

142 Hallaq, *Authority*, 120.

143 Kennedy, *Muslim Spain*, 164.

144 See e.g. Ibn Rushd (al-Jadd), *Fatāwa Ibn Rushd*, ed. al-Mukhtār al-Talīlī, 2nd ed. (Beirut: Dār al-Gharb al-Islāmī, 1987), 3:1423.

145 Kennedy, *Muslim Spain*, 179.

146 Ibn Rushd, *Bayān*, 2:537.

147 Ibn Rushd, *Bayān*, 2:537.

> A spy is to be subjected to the same *ḥukm* (ruling) as a *muḥārib* (highway robber) but his repentance may not be accepted, like the heretic and false witness, because he had taken his previous [sin] lightly. The *imām* may not be granted a choice [in his punishment], except between killing and crucifixion, because mutilation and banishment wouldn't prevent his corruption on earth and his enmity to Muslims, and that is how we ought to understand Mālik's statement.[148]

Ibn Rushd provides no juristic analysis to support attaching the *ḥirāba* punishment to spying other than the simple fact that spying is more dangerous to Muslims than robbers and bandits. This statement is far too general and subjective to be construed as a solid basis for the *qiyās* advocated by Ibn Rushd. Moreover, the two statements made by Mālik and Ibn al-Qāsim make no reference to *ḥirāba*, so his justification for limiting Mālik's allowance for the *imām*'s discretion to implement the punishment of *ḥirāba* is an interesting innovation. Such an innovation seems not only meant to assert coherence in a situation of seemingly diverse positions within the school, but is also indicative of tactful manoeuvring within the school doctrine to portray coherence on an issue that happens to be of sensitive and timely importance to the Iberian peninsula.

Ibn Rushd is equally innovative in his interpretation of a prophetic tradition in order to prove his analysis of the punishment of spies and reach the conclusion that they must be killed. According to this tradition, a companion, Ḥāṭib, wrote to Mecca leaking information about Muslims, but the Prophet found out. ʿUmar asked the Prophet to let him kill him, but the Prophet refused to let ʿUmar do so because Ḥāṭib was one of those Muslims who had fought alongside the Prophet in Badr and because he had apologized to the Prophet, who had accepted his apology.[149] Ibn Rushd stated that the tradition is a specific one and may not be used for analogy, but he went further than this, arguing that the tradition proves that spies must be killed because the Prophet did not reject ʿUmar's request in principle.[150] But silence with regards to the principle of killing spies is hardly proof of the Prophet's acceptance, because it is impossible to deduce the Prophet's intentions with regards to spies other than Ḥāṭib in this particular incident.

Ibn Rushd's attempt to reconcile the legal reports and strive for homogeneity within the school is asserted by Verskin in his analysis of the evolution of

148 Ibn Rushd, *Bayān*, 2:537.

149 Ibn Rushd, *Bayān*, 2:537.

150 Ibn Rushd, *Bayān*, 2:537.

the juristic discourse towards a Muslim man's entitlement to wife and children in the territory of war, a matter discussed in the previous chapter in the context of Ḥanafī jurisprudence. According to Verskin, Ibn Rushd, unlike other scholars in al-Andalus, leant towards depriving a man of his wife and children if he lived in the territory of war. He did so by relying on Mālik and Ṣaḥnūn's rather brief views on the matter. Verskin provides evidence that Ibn Rushd may have been influenced by the political atmosphere in the Iberian peninsula – large tracts of Muslim land were being lost to Christian neighbours, leading Ibn Rushd and others, including incidentally Ibn Ḥazm, to instruct Muslims who converted to move to the territory of Islam and to discourage Muslims from travelling to the land of non-Muslims, since such travel would subject them to non-Muslim laws.[151] This ban on travel, however, lacked a firm legal grounding in early Mālikī texts and required novel arguments to find resonance in the concept of *hijrā* (emigration).[152] Gómez-Rivas also provides a great deal of evidence, in his analysis of Ibn Rushd's *fatāwa*, of the jurist's remarkable ability to move away from literal *taqlīd* towards a nuanced analysis of the Malīkī doctrine.[153] Thus, although Mālikī law was reformulated and developed by Andalusī jurists like Ibn Rushd, often innovatively, it remained loyal to the legal tradition and made sure to argue from within the framework of the *madhhab* to lend legitimacy to new arguments.[154] Innovations and new arguments found in Ibn Rushd's jurisprudence generally conformed to that conclusion.

3.2 *Hegemony: a Recurring Theme*

Much like Ibn Ḥazm, Ibn Rushd felt a continued threat from al-Andalus's Christian neighbours, which impacted his jurisprudence and his analysis of Mālikī texts. Whenever he was unable to reconcile contradictory reports of Mālik's positions, he was more inclined to accept positions that allowed Muslims more freedom in their conduct with their enemies. But this approach does not reflect an attempt by Ibn Rushd to adapt to the Almoravids' policy of pursuing *jihād* in al-Andalus, a policy that preceded the Almoravids on the peninsula: "[I]t was [rather] the presence of the Christian-Muslim frontier that was most influential in shaping regional attitudes (among other things) over jihad; this frontier's movement and militarization affected Iberians and Maghribīs, and even Christians and Muslims, in profoundly similar ways."[155]

151 Verskin, *Islamic Law*, 55.
152 Verskin, *Islamic Law*, 61.
153 Gómez-Rivas, *Law*, 76.
154 Verskin, *Islamic Law*, 133.
155 Gómez-Rivas, *Law*, 93.

Perhaps, the most enlightening instance of Ibn Rushd's zeal for maintaining Muslim hegemony in the peninsula is his role in alerting Ibn Tashfīn to the participation of non-Muslim *dhimmī*s in the raids conducted by the Christian king of Aragon against Muslim lands and his issuing a *fatwā* depriving Christians of their *dhimmī* status and demanding their expulsion from Muslim lands.[156]

Ibn Rushd's anxiety over neighbouring Christian powers is clear in his works on *jihād* and rebellion. In a report on Mālik's position on raids, he is said to have answered by saying he didn't know what to say and appeared to hate them.[157] In another incident, Mālik said he disapproved of (*lā uḥibb*) going on raids before Muslims had invited non-Muslims to Islam, even if the message of Islam had reached the non-Muslims: "I see that they should not be fought until preached and they should not be raided."[158] Commenting on the first report, Ibn Rushd states that Mālik hated raids because he was troubled by the name and not the act itself if correctly performed.[159] Yet, Ibn Rushd neither states the correct manner for raiding nor justifies his attempt to gauge Mālik's intentions in a manner that allows for raids. In the second report, Ibn Rushd claims that Mālik's disapproval of unprompted raids is an indication of permissibility because he does not state that Muslims have to refrain from raids. At the same time, Ibn Rushd disregards Mālik's second reiteration that non-Muslims who are aware of the message of Islam should not be raided. This technique might be acceptable considering that the usage of the term "disapprove" often falls under the category of *makrūh* (reprehensible) rather than *muḥarram* (forbidden). However, Ibn Rushd does not consistently employ such analysis when dealing with Mālik's positions. For example, when asked about recruitment of Christian *dhimmī*s into the army, Mālik responded by stating he did not like the *imām* giving them permission to participate in the army.[160] In commenting on Mālik's position, Ibn Rushd takes that statement as indicating prohibition because "it is not permissible, according to Mālik, may God have mercy on him, and all his companions, for the *imām* to seek assistance from unbelievers in fighting unbelievers."[161] In another incident addressing the matter of trading in non-Muslim lands, Mālik said he did not like going to non-Muslim lands for trade purposes, which Ibn Rushd takes as an indication of prohibition because

156 Ruano, "Ibn Rushd," 307.
157 Ibn Rushd, *Bayān*, 2:521.
158 Ibn Rushd, *Bayān*, 2:546.
159 Ibn Rushd, *Bayān*, 2:523.
160 Ibn Rushd, *Bayān*, 3:5.
161 Ibn Rushd, *Bayān*, 3:6.

Mālik had also said that it was not the business of scholars to determine something to be permissible or forbidden and that they were satisfied with using other words like "acceptable," "unacceptable," "preferred" and "disapproved."[162]

The issue of ransom given to non-Muslims in order to free Muslim captives was apparently another contentious issue among Mālikī jurists. The Mālikī jurist Ashhab (d. 204/820) reported that Mālik was asked about ransoming Muslim captives with horses, weaponry, and wine. Mālik responded by stating that it was acceptable to use horses and weapons but rejected ransoming with wine because one should not engage in a wrongful act for the purpose of a rightful act.[163] Despite the lack of reference to necessity, Ibn Rushd interprets Ashhab's report as indicating that it is only permissible to ransom a Muslim captive with weapons and horses if there is no alternative.[164] He also dismisses the Andalusī Mālikī jurist Ibn Ḥabīb's (d. 248/853) view that ransoming with horses and weapons may be permissible if it does not give the enemy military advantage.[165] He argues that Ibn al-Qāsim's view that it is better to ransom with alcohol than horses and weapons is the soundest, and he refutes Ashhab's report by stating that giving weapons to the enemy is as equally sinful as giving them alcohol, yet alcohol is less harmful to Muslim interests.[166] True, Ibn Rushd conforms to the tendency to follow Ibn al-Qāsim's views, but one cannot dismiss the reasoning, which sets harm to Muslim interest as a criterion. Considering that Ibn Rushd deviates from Ibn al-Qāsim's views on some issues, favouring his view in this instance suggests he disliked ransom for weaponry and its potential for empowering the enemy. Again, this position is hardly surprising in a scholar who lived during a time of perpetual war with hostile neighbours.

Another issue contested among earlier Mālikī jurists was how those who had defected to *dār al-ḥarb*, then returned to Muslim lands as messengers, should be treated. Ibn Rushd lists the different positions on the matter. Ibn al-Qāsim believed that the messenger's *amān* ought to be upheld, even if he were an apostate Muslim, and that the *imām* should refrain from *istitāba* (the choice between reverting to Islam and the death penalty). If he were a slave to a Muslim or a *dhimmī*, property over him may not be claimed by the master.[167] Saḥnun, on the other hand, argued that his *amān* should be upheld if he was granted an *amān* pledge that specified that he was protected even if he were an

162 Ibn Rushd, *Bayān*, 4:171.
163 Ibn Rushd, *Bayān*, 3:81.
164 Ibn Rushd, *Bayān*, 3:81.
165 Ibn Rushd, *Bayān*, 3:81.
166 Ibn Rushd, *Bayān*, 3:81.
167 Ibn Rushd, *Bayān*, 3:32.

apostate or a slave.[168] Ibn Rushd deviates from the general Andalusī tendency to follow Ibn al-Qāsim, advocating a third position, adopted by Ibn Ḥabīb, stating that the messenger's *amān* should be revoked, regardless of the conditions stipulated in the *amān* pledge. To support his choice, Ibn Rushd argues that *amān* would be invalid because if it were unconditional, then the messenger's true status could not have been accounted for when it was granted, deeming the pledge invalid. If the *amān* stipulated that it should be upheld even if the messenger were a slave or an apostate, the *amān* would still be invalid, because in the case of the apostate, the *amān* would contradict a *ḥadd*, which was unacceptable, and if the messenger were a defected slave, the *amān* would encroach upon the rights of the slave owner, which was equally unacceptable.[169]

Ibn Rushd's choice, although soundly reasoned, is a further indication of his inclination to adopt a harsher position towards defectors. His reluctance to accept other views, including sending the messenger back to the enemy and refusing to allow him to stay in *dār al-Islām*,[170] portrays little tolerance for any concrete or symbolic lenience with the enemy and those who choose to defect to it, a position again hardly surprising from a jurist who is highly critical of any form of alliance with the Christian enemy.

3.3 *Faith in the Political Authority*

As a member of the political institution, and a famed judge and jurist who enjoyed a strong relationship with a puritan government that showed allegiance to the Mālikī *madhhab*, Ibn Rushd appears to have been inclined to trust the political authority and its judgement, often giving the *imām* discretion to choose the most suited course of action rather than stating a rigid position. That ought not to be understood as mere subservience to political authority. As mentioned earlier, Ibn Rushd's relative distance from the political authority on the Córdoban rebellion may have precipitated his resignation from the office of chief judge, and at any rate indicated that he was unwilling to serve the interests of the political authority at the expense of what he assumed to be the correct application of the law. Much like al-Shaybānī, however, it seems that once Ibn Rush assumed an official role and became closer to the ruling elite, he lead a life of relative comfort, and afforded the political authority discretionary authority whenever appropriate. He stated, for example, that the *imām* could decide whether to ransom, free, kill, or enslave captives.[171] That position was

168 Ibn Rushd, *Bayān*, 3:32.
169 Ibn Rushd, *Bayān*, 3:32.
170 Ibn Rushd, *Bayān*, 3:33.
171 Ibn Rushd, *Bayān*, 2:561.

widely held by many jurists and was to some extent an established juristic tradition. Its rationalization by Ibn Rushd, however, makes it worthy of mention. Mālik is reported to have been asked about ʿUmar b. al-Khaṭṭāb's stating that no captives old enough to shave were to be brought back alive. Mālik answered that ʿUmar had meant they should not be spared, in other words that they should be killed.[172] However, in *al-Mudawana*, there is a reference to Mālik being asked about killing captives, and he is reported to have said that whoever was feared (i.e., whoever was deemed dangerous to Muslims) should be killed. When the reporter of the question was asked whether the *imām* could choose to either kill or spare the lives of captives, he reiterated that he only heard Mālik say that whoever was feared should be killed.[173] Mālik's words might be understood as indicating that he was reluctant to accept killing captives who did not pose a threat to Muslims, since he was generally asked about captives and he chose to specify dangerous ones as those who are permissible to kill. In another incident, Mālik was reported to have stated that if it is not known whether a captive is dangerous, he should be killed.[174] On the other hand, ʿUmar's instructions are understood by other jurists, including Ibn Ḥazm, as obligating the killing of all adult male captives. However, Ibn Rushd attempts to dismiss the potential conflict between ʿUmar's instructions and Mālik's views by interpreting the issue of treatment of captives as a matter purely subject to the discretion of the *imām*. In doing so, he actually disregards the presumed instructions of both ʿUmar and Mālik, where each sets a clear criterion for killing captives – either on the basis of gender and age or because they are a threat to Muslims. Ibn Rushd comes up with an alternative reasoning, one that moves away from any instruction to kill particular captives and gives the *imām* full discretion to spare the captive, even if he is a dangerous adult male.

Ibn Rushd's inclination to expand the ruler's discretion is evident also in his approach to intra-Muslim wars of rebellion. He accepts the established jurisprudential tradition of distinguishing between banditry and rebellion on the basis of *ta'wīl*.[175] However, as Abou El Fadl points out, he dedicates more attention to the issue of banditry and simply argues that those who rely on erroneous interpretations, or *ahl al-ahwā'* (people following their whims), are not to be treated as bandits.[176] He does not develop an elaborate legal position on the

172 Ibn Rushd, *Bayān*, 2:561.

173 Mālik b. Anas, *al-Mudawana al-kubra wa yalīha Kitāb al-Muqaddamat*, rep. Saḥnūn b. Saʿīd al-Tanūkhī and ʿAbdul Raḥman b. al-Qāsim (Beirut: Dār al-Kutub al-ʿIlmiyya, 1994), 1:501.

174 Mālik Ibn Anas, *al-Mudawana al-kubra wa yalīha Kitāb al-Muqaddamat*, 5:193.

175 Abou El Fadl, *Rebellion*, 251.

176 Abou El Fadl, *Rebellion*, 253–54.

treatment of rebels after rebellion with regards to responsibility for rebellion and contents himself with pointing out the different Mālikī positions on the matter.[177] In short, "Ibn Rushd's discourse on what he calls *ḥarb al-muta'awwilīn* [fighting by those with an interpretation] is short and non-committal."[178]

Another tactic Ibn Rushd employs to ensure the ruler maintains power over the ruled is how he emphasizes previous works in his commentaries to promote a particular view. In *al-Bayān wa-l-taḥsīl*, he refers to the issue of rebellion by *dhimmī*s. Ibn al-Qāsim reports that Mālik was asked about rebelling *dhimmī*s and that Mālik made a distinction between those under the rule of a just *imām* and those subject to an unjust one. If *dhimmī*s rebelled against a just *imām*, they lost their protection status, whereas if they rebelled against an unjust one, they should neither be fought nor killed, and their women and children could not be taken as captives.[179] In his commentary on this issue, Ibn Rushd begins by reiterating that Mālik's companions agreed that if "*dhimmī*s breached their agreement, refrained from paying *jizya* and rebelled without an excuse, they became enemies and people of war."[180] Then, he dedicates the rest of the commentary to proving why *dhimmī*s lose their status in that case, but he fails to examine the other situation envisioned by Mālik (rebellion against an unjust *imām*). In fact, he does not even mention that *dhimmī*s maintain their status in that particular case. His failure to address rebellion against an unjust *imām* leaves the reader focused on the loss of status by rebellious *dhimmī*s as being the only route for dealing with such rebellions, rather than its being one of the two alternatives envisioned by Mālik. It is a focus that is, in addition to its revelation of faith in the political authority, also assertive of the fear of the rise of Christian power in the peninsula and the utilization of Christian subjects to allow for, or create the space for, neighbouring Christian influence.

Ibn Rushd's faith in the political authority and his tendency to allow it discretion is hardly surprising, given that he was one of the most influential judges during the time of the Almoravids, who relied heavily on jurists to provide them with juridical advice.[181] Ibn Rushd's *fatāwa* collection is testament to the state's faith in him and in its tendency to resort to his opinions when faced with complicated legal issues. Prince Abū l-Ṭāhir Tamīm b. Yūsuf b. Tāshfīn (d. 520/1126), for example, inquired about Ibn Rushd's opinion on Muslim

177 Abou El Fadl, *Rebellion*, 255.
178 Abou El Fadl, *Rebellion*, 255.
179 Ibn Rushd, *Bayān*, 2:609.
180 Ibn Rushd, *Bayān*, 2:610.
181 Kennedy, *Muslim Spain*, 179.

property taken as booty by the people of Toledo when they raided Muslim lands during a truce between both parties. Such property was later found in the hands of traders when they came to al-Andalus for commercial purposes. The prince wanted to know whether Muslims were entitled to reclaim this property from those traders.[182] This example, among other examples in his *fatāwa* compilation, is indicative of the ruling elite's tendency to resort to Ibn Rushd to provide his legal opinion on complex governance issues. This would justify his position in trusting the authority with wide discretion, knowing that the ruling class at that time would resort to jurists' advice and expertise to determine how to employ such discretion.

3.4 *Pragmatism in Issues Covered*

A survey of Ibn Rushd's works on *jihād* shows that he was more interested in matters that were likely to be faced by a Muslim judge rather than in theoretical issues unlikely to come up as real-life conflicts between Muslim parties. An issue like targeting, for example, is given hardly any interest in his analysis and work, whereas issues such as division of booty and conflicts over slave ownership are given considerable prominence. Arguably, Ibn Rushd was heavily influenced by the primary works he was commenting on, as one can detect the same pattern of interest in matters of war affecting intra-Muslim relations rather than matters affecting the way the enemy is treated during conflict. However, as illustrated in this chapter, primary works did not prevent Ibn Rushd from manoeuvring the original texts he was commenting on in order to promote the positions he advocated, which would lead to further examination of the reason why Ibn Rushd spent less time than his predecessors in addressing matters related to targeting, permissible weapons, and similar issues, especially given that these issues were referred to, even if briefly, in the primary texts. In that light, his lack of attention to expanding on those matters can only be understood as the judge in Ibn Rushd influencing the jurist and leading him to show less interest in issues that were unlikely to lead to legal disputes within the jurisdiction of the Andalusī Muslim judge. A prisoner of war was unlikely to bring a case on how their family members were killed during conflict, whereas a dispute over booty and its division might reach the judge's courts.

182 Ibn Rushd (al-Jadd), *Fatāwa Ibn Rushd*, ed. al-Mukhtār al-Talīlī, 2nd ed. (Beirut: Dār al-Gharb al-Islāmī, 1996), 3:1423.

4 Remarks on Andalusī Jurisprudence

Ibn Ḥazm's general treatment of conduct of hostilities portrays a strong and recurrent theme: interest in reviving Islamic power. What is clear from his non-legal views is that he was severely disturbed by the weakness of the Muslim state in al-Andalus and the rise of Christian power at the northern border. This book argues that Ibn Ḥazm's jurisprudence with its inclination to fiercer conduct with non-Muslims, restricting the grant of *dhimmī* status, and allowing those who converted from one holy religion to the other to be fought and killed, on the basis that they had breached the contract of *dhimma*, must be read in relationship to his views on Muslim relations with those northern neighbours. Moreover, this interest in Muslim power caused him to be sceptical of converts to Islam and to impose restrictions on conversion in order to guarantee the strength of faith among Muslim subjects.

On the "domestic" front, Ibn Ḥazm was aware of the blurriness of legitimacy and the worldly interests of the warring parties. Arguably, it was his witnessing of the bloodshed caused by this "unreligious" conduct of hostilities that led him to propose a unique legal framework that guaranteed that all warring parties were put under scrutiny, a framework that ignored no one and that equally deprived everyone of solid legitimacy.

Ibn Rushd, equally disturbed by the hostile neighbour that kept al-Andalus in perpetual war for centuries, attempted to eliminate instances that would allow the enemy military advantage, seen, for example, in his position on the ransom of Muslims held captive by the enemy with weaponry, as well as his relatively harsher position on espionage. But, he was less troubled by the corruption of the political authority. Unlike Ibn Ḥazm, who was in ongoing conflict with the widely discredited *ṭā'ifa* kings, Ibn Rushd enjoyed a strong relationship with the circle of government during the time of the Almoravids. Moreover, the Almoravids relied heavily on jurists and were eager to perform their *jihād* duty. This model of governance arguably gave a jurist like Ibn Rushd sufficient confidence in the political regime to expand its discretion in applying the law.

The juridical reasoning of both jurists, however, was influenced by other factors, one of the most important of which was *ijtihād* versus *taqlīd*. As mentioned earlier, Ibn Ḥazm resented *taqlīd* and did not feel obliged to follow a predecessor's legal reasoning, while Ibn Rushd was a loyal follower of the Mālikī school. Although both jurists were sensitive to policy considerations, they employed different tactics. Ibn Ḥazm engaged directly with primary sources to promote his position, whereas Ibn Rushd predominantly disguised

his views under the rubric of *tarjīḥ*,[183] choosing among the different positions within the school, even if the result was a novel position not necessarily advocated by earlier jurists.

Section Two: the Mongol "Threat"

5 Ibn Taymiyya and "Quasi"-Muslims

5.1 *Historical Background: the Mongols and Ibn Taymiyya*

5.1.1 Mongol Control of Muslim Lands

To understand Ibn Taymiyya's (d. 728/1328) positions, an examination of the historical era from the fall of Baghdad and the rise of Mongol rule in the Middle East is necessary. Unfortunately, because Mongolian was not a written language before Chinggis Khān,[184] historical works on the Mongol empire often relied on narratives provided by the "other" or the "subject," who were ready to stereotype the Mongols as "uncivilized nomadic Barbarians."[185] Although this hindrance might pose a challenge to this book, its impact is rather limited because the aim here is to understand Ibn Taymiyya's political stance on the Mongol invasion rather than to offer an objective narrative thereof. Nevertheless, whenever an alternative narrative of the other is decipherable, it is relied on to offer a balanced perspective on the claims made by Ibn Taymiyya against the Mongols.

The Mongols invaded the Muslim world after Mongol traders to the Muslim central Asian kingdom of Khwārizm were killed by the Muslim ruler Muḥammad Khwārizm Shāh (r. 596–616/1200–1220 in 614/1218, leading Chinggis Khān (r. 602/1206–624/1227) to wage war against this kingdom and eventually bring about its demise. According to Morgan, "Contemporary historians were unanimous when they wrote about the horrors that accompanied" the Mongol invasion."[186] The Muslim heartland was exposed to this calamity first-hand through an influx of refugee survivors.[187] The effect on Muslim

183 Hallaq argues that this process, like other juristic tools, was never detached from social and political realities. See Wael Hallaq, *Sharīʿa: Theory, Practice, Transformations* (Cambridge: Cambridge University Press, 2009), 78.

184 David Morgan, *The Mongols* (Cambridge, MA: Blackwell, 1990), 6.

185 David Ringrose, *Expansion and Global Interaction* (New York: Longman, 2000), 5.

186 Morgan, *Mongols*, 74.

187 Muḥammad al-Tūnjī, *Bīlād al-Shām ibān al-ghazw al-maghūlī* (Beirut: Dār al-Fikr al-ʿArabī, 1998), 31.

consciousness is best illustrated by prominent Muslim historian Ibn al-Athīr (d. 630/1233):

> I have refrained for many years from mentioning this incident because of how grave I found it.... Who finds it easy to write the obituary of Islam and Muslim... ? I wish my mother had not given birth to me or that I had died and was long forgotten before it happened.[188]

After the death of Chinggis Khān in 624/1227, his successors carried on with the expansion of the empire. Eventually, Möngke Khān (r. (649–657/1251–1259) assumed power, and sent Hülegü (d. 663/1265) on a mission to Persia and Iraq, one of whose objectives was to eliminate the Nizārī Ismāʿīlīs, a sect of Shīʿism pejoratively referred to as the "Assassins"[189] because of their alleged attempt to assassinate Möngke.[190] Hülegü was also to demand submission from the Muslim caliph; if the caliph refused, he was to be eliminated.[191] Finally, the mission included an attempt to invade Syria and Egypt.[192] After taking over Persia and eliminating the Nizārī Ismāʿīlīs, Hülegü headed to Baghdad in 656/1258.

After a fifty-day siege, Baghdad fell to the Mongols, marking the practical end of the Muslim caliphate, which had endured for six centuries. After his surrender, the caliph was murdered, the city was pillaged, and thousands were killed.[193] Although Hülegü later estimated the death toll at two hundred thousand, al-Qazwīnī put the estimate at eight hundred thousand.[194] After the conquest of Baghdad, Hülegü's army headed to Syria, swiftly taking Aleppo and Damascus, and "the crusader ruler of Antioch and Tripoli hastened to make his submission and to join forces with the all-conquering Mongols."[195] Möngke died in 657/1259 before the Mongol army could advance towards Egypt. Instead, Hülegü returned home, handing over the mission to his commander, Kedbuqa, who was defeated by the Mamlūk army of Egypt at ʿAyn Jālūt in

188 Ibn al-Athīr, *al-Kāmil fī l-taʾrīkh*, ed. Muḥammad Yūsuf al-Daqqāq, 4th ed. (Beirut: Dār al-Kutub al-ʿIlmiyya, 2003), 10:399.

189 For more on the Nizārī Ismāʿīlīs see Farhad Daftary, "Assassins," *Encyclopaedia of Islam*, 3rd ed., ed. Gudrun Krämer, Denis Matringe, John Nawas, and Everett Rowson, Brill online: accessed 22 December 2009.

190 Morgan, *Mongols*, 148.

191 Morgan, *Mongols*, 148.

192 Morgan, *Mongols*, 148.

193 Ringrose, *Expansion*, 5.

194 Morgan, *Mongols*, 151.

195 Morgan, *Mongols*, 155.

658/1260, the battle that marked the beginning of the end of Mongol expansion in the Middle East, as they were eventually forced to retreat from Syria.[196]

5.1.2 The Īlkhānids

Hülegü's successors ruled Muslim Persia and Iraq and were referred to as the Īlkhānids. With the exception of Tegüder (r. 681/1282–683/1284), who was overthrown shortly after assuming power, Ghāzān (r. 694/1295–703/1304) was the first Mongol leader to convert to Islam, but his adherence to the faith was contested by some Arab sources, including Ibn Taymiyya, as detailed later. The Mongols are said to have adopted a pragmatic attitude to religion: "They were well aware that it was easier to rule a conquered country if the new rulers adopted the religion that justified their political authority."[197] There is evidence, however, that Ghāzān was genuine, perhaps even fanatic, about his faith. He took it upon himself, for example, to destroy Buddhist places of worship, and he ordered Mongol shaman clergy and Buddhist monks to either convert to Islam or leave Persia.[198] He also reinstated the payment of *jizya* by Christians and Jews.[199] Despite his conversion, Ghāzān continued to attack Syria and attempt to annex it.[200]

5.1.3 Ibn Taymiyya's Early Life

Ibn Taymiyya was born to a family of scholars. Biographers do not address his lineage, stating simply that he was born in Ḥarrān, leading Abū Zahra to conclude that he was of non-Arab lineage.[201] From a young age, Ibn Taymiyya proved his competence in religious sciences, succeeding his father as the director of the Sukkariyya *madrasa* (school) at the age of twenty-three and teaching Qur'anic exegesis at the Umayyad mosque from the age of twenty-four.[202] He was renowned for his exceptionally strong memory and his dedication to the religious sciences, which led one of his contemporary scholars to write a poem describing him as a "miracle of time."[203] He was also prolific in his writings and

196 Morgan, *Mongols*, 156.

197 Ringrose, *Expansion*, 8.

198 Rajab Muḥammad ʿAbdul Ḥalīm, *Intishār al-Islām bayn al-maghūl* (Cairo: Dār al-Nahḍa al-ʿArabiyya, 1986), 194.

199 Denise Aigle, "The Mongol Invasions of Bilād al-Shām by Ghāzān Khān and Ibn Taymīyah's Three 'Anti-Mongol' Fatwas," *Mamluk Studies Review* 11, no. 2 (2007), 107.

200 ʿAbdul Ḥalīm, *Intishār*, 197.

201 Abū Zahra, *Ibn Taymiyya: Ḥayātuh wa ʿasruh, arāʾuh wa fiqhuh* (Cairo: Dār al-Fikr al-ʿArabī), 18.

202 Laoust, "Ibn Taymiyya."

203 Ibn Kathīr, *al-Bidāya wa-l-nihāya* (Cairo: Hajar, 1997), 18:298.

interests, both in volume and in disciplines covered. Unlike other jurists, he was equally expert in *ʿilm al-kalām* (theology), Qurʾanic exegesis, and other religious disciplines.[204] As mentioned earlier, Ibn Taymiyya's authority in his lifetime is contested. Seemingly, however, he enjoyed a devout following among a minority of Ḥanbalī scholars, although according to Bori, most Ḥanbalīs and Shāfiʿīs perceived him as something of an embarrassment.[205] Nevertheless, his commitment to *jihād* against the Mongols won him wide popular support.[206]

5.1.4 Tension with the Political Authority

Initially, Ibn Taymiyya enjoyed a strong relationship with the Mamlūks. When, for example, he once entered Sulṭān al-Nāṣir's court (r. ,1294–694–1293/396 741/1341–709/1309 ,708/1309–698/1299), "the Sultan broke out with established practice and walked across the room, took Ibn Taymiyya by the hand and walked with him before praising him to the group."[207] In his analysis of Ibn Taymiyya's jurisprudence on evidentiary rules, Johansen argues that Ibn Taymiyya was a member of the Mamlūk legal elite and "was dependent on Mamluks and sultans ... to whom he turned for help trying to carry out his program of implementing a Sunni state."[208] However, al-Matroudi argues that Ibn Taymiyya's lack of interest in a public post is an indication of his independence from the ruling elite.[209] What al-Matroudi seems to miss in his analysis is that Ibn Taymiyya's defiance of attempts by the authorities to alter his thought do not contradict the potential for a strategic alliance between the two to solidify "legitimate" Muslim authority, especially in its battle with other illegitimate rulers, and in light of his argument that the rulers, the *ʿulamāʾ*, and the public needed to cooperate in order to achieve his "socio-political vision for the community," premised on rulers being subject to the *sharīʿa*, as articulated by the *ʿulamāʾ*.[210]

Ibn Taymiyya was extremely vocal in his criticism of and antagonism towards those who did not fit his criteria for proper Sunnī Islam, including the Shīʿa, the Christians and Jews, the Ṣūfīs, and the Mongols. His uncompromising

204 Abū Zahra, *Ibn Taymiyya*, 20.

205 Caterina Bori, "Ibn Taymiyya wa-Jamāʿatuhu: Authority, Conflict and Consensus in Ibn Taymiyya's Circles," in *Ibn Taymiyya and His Times*, ed. Yossef Rapoport and Shahab Ahmed (Karachi: Oxford University Press, 2010), 41.

206 Bori, "Ibn Taymiyya," 43.

207 al-Matroudi, *Ḥanbalī*, 17.

208 Baber Johansen, "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263–1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof," *Islamic Law and Society* 9, no. 2 (2002), 180.

209 al-Matroudi, *Ḥanbali*, 18.

210 Anjum, *Taymiyyan Moment*, 269.

rejection of the "other" often got him in trouble with the political authority, whenever authorities failed to follow suit with his attacks against those groups. In 693/1293, he and another scholar heard of a Christian man from Suwaydā' censuring the Prophet. After raising the matter to the deputy sultan, they encountered this man together with a crowd of sympathizers. The Christian was injured by a member of the public. When the sultan heard of the incident, he imprisoned both scholars.[211] During his imprisonment, Ibn Taymiyya wrote his famed book *al-Ṣārim al-maslūl ʿalā shātim al-rasūl*.[212]

In 699/1300, he was subject to an "inquisition" on account of a charge that his work titled *al-Ḥammawiyya al-kubrā* was a form of "anthropomorphism (*tashbīh*)."[213] He was exonerated by the Shāfiʿī judge who examined his case.[214] Ibn Taymiyya was still relentless in his attacks on those he believed to have strayed from the true message of Islam, including the Shīʿa of Kasrawān, followers of Ibn al-ʿArabī (a Muslim philosopher),[215] and a Jewish group attempting to evade paying the *jizya*.[216] According to Ibn Kathīr, three further "inquisitions" were held in Damascus to examine his *al-Wāsiṭṭiya*.[217] According to Jackson, the inquisitions were not triggered by *al-Wāṣiṭṭiya*. Rather, it was Ibn Taymiyya who referred to it as a counter-offensive tactic. The matter was not resolved, so he was sent to Cairo for further examination, where he was convicted of anthropomorphism and imprisoned in the Citadel for a year and a half.[218] Even though he made strong arguments in Cairo, "Ibn Taymiyya's uncompromising position in the traditional/rational debate turned into a zero/sum game," forcing his inquisitors to recommend imprisonment.[219] Ibn Taymiyya's leaning towards revelation as a source of knowledge does not, however, preclude his mastery of rational analyses and techniques, argued by some to have been possibly influenced by the Ashʿarīs, whose arguments and positions he partially tolerated.[220] As Anjum notes, Ibn Taymiyya believed in the importance of rational refutation of reason-based arguments to pre-empt a short-sighted rationalist perception that revelation is flawed if seen as

211 Ibn Kathīr, *Bidāya*, 17:665.
212 Laoust, "Ibn Taymiyya."
213 Laoust, "Ibn Taymiyya."
214 Abū Zahra, *Ibn Taymiyya*, 31.
215 Laoust, "Ibn Taymiyya."
216 Abū Zahra, *Ibn Taymiyya*, 37.
217 Ibn Kathīr, *Bidāya*, 18:53–56.
218 Laoust, "Ibn Taymiyya."
219 Sherman Jackson, "Ibn Taymiyyah on Trial in Damascus," *Journal of Semitic Studies* 39, no. 1 (1994), 56.
220 Anjum, *Taymiyyan Moment*, 189.

contradicting reason,[221] since according to him revelation and proper reason never contradict each other.[222]

After his release, the deputy sultan requested that the shaykh stay in Egypt so that people would benefit from his knowledge;[223] in another version, he was prohibited from leaving Egypt as a condition for his release.[224] According to Abū Zahra, Ibn Taymiyya's third imprisonment in Egypt and later house arrest in Alexandria were triggered by his attack on Sufism, a creed popular among the ruling class.[225] He was allowed to return to Cairo only when the dethroned al-Nāṣir, with whom he enjoyed a strong relationship, returned to power.[226] In 712/1312, he returned to Damascus, where he spent some time on writing. When the sultan discovered, however, that Ibn Taymiyya had issued a *fatwā* on repudiation that contradicted the predominant Ḥanbalī view, the sultan wrote to Ibn Taymiyya instructing him to refrain from issuing that *fatwā* (to those members of the public seeking it).[227] Ibn Taymiyya briefly obeyed the sultan but soon returned to his original position. When the sultan was informed, Ibn Taymiyya was again imprisoned in Damascus, this time for five months.[228] His final imprisonment was triggered by an old *fatwā*, dug up by his rivals, in 726/1326, which stated that Islam prohibited tomb visits. The sultan appointed a committee of jurists to examine the *fatwā*, in Ibn Taymiyya's presence in Damascus, and the jurists found that he had abused the sources to reach this conclusion. He was accordingly imprisoned in Damascus, where he remained until his death in 728/1328.[229]

5.1.5 Promotion of *Jihād*

As mentioned earlier, Ibn Taymiyya's relationship with the Mamlūks was not always tense. His popularity with the public and his keenness on *jihād* proved highly beneficial to the Mamlūk rulers of Egypt and Syria. He was appointed by Sulṭān al-Manṣūr Lājīn (696–1297/698–1299), for example, "to exhort the faithful to the *jihad* at the time of the expedition undertaken by the sultan against the kingdom of Little Armenia."[230] In 699/1300, Ghāzān attacked Syria and

221 Anjum, *Taymiyyan Moment*, 181.
222 Anjum, *Taymiyyan Moment*, 201.
223 Ibn Kathīr, *Bidāya*,18:74.
224 Laoust, "Ibn Taymiyya."
225 Abū Zahra, *Ibn Taymiyya*, 58–60.
226 Abū Zahra, *Ibn Taymiyya*, 62.
227 Abū Zahra, *Ibn Taymiyya*, 69.
228 Abū Zahra, *Ibn Taymiyya*, 71.
229 al-Matroudi, *Ḥanbalī*, 20.
230 Laoust, "Ibn Taymiyya."

ended up besieging Damascus. Unlike the Mālikī and Shāfiʿī judges and other members of the ruling elite who fled to Egypt, Ibn Taymiyya remained in Damascus and met Ghāzān to dissuade him from attacking Damascus.[231] He was allegedly firm with Ghāzān, leading Ghāzān to grant the people of Damascus *amān* after Ibn Taymiyya told him:

> You claim you are a Muslim and you have with you a *qaḍī* [judge], an *imām* [prayer leader], *shaykh* [jurist], and *muʾadhdhinūn* [prayer caller (sing. *mūʾadhdhin*)], and your father and grandfather were infidels but they never did what you did. They issued a pact and respected it, but you issued a pact and betrayed it.[232]

Ibn Taymiyya's intellectual support for *jihād* was effective because he also translated his words into action, taking part in two Mamlūk expeditions against the Shīʿīs of Kasrawān for their alleged cooperation with the Mongols and the Franks.[233] When the Mongols prepared to attack Damascus for another time in 700/1300, he travelled to Egypt to urge the sultan to send his soldiers to defend the city.[234] In 702/1302, he participated in the decisive victory against the Mongols in the battle of Shaqḥab. He argued that those Mongols, rather than being *bughā*, were similar to the Khawārij who had fought ʿAlī, which made them legitimate targets.[235] Finally, he fought alongside al-Nāṣir, swiftly defeating the Mongols in 712/1313.[236]

5.2 *Ḥanbalī* Uṣūl al-Fiqh

Although Ibn Taymiyya is famed for adopting his own rulings, which departed from the predominant Sunnī positions, including those of the Ḥanbalī *madhhab*,[237] he is still considered a Ḥanbalī because his *uṣūl* theory follows Ḥanbalī methodologies.[238] Additionally, he often positioned his deviation from established Ḥanbalī opinions as a return to Ibn Ḥanbal's thought, from which other Ḥanbalīs had strayed.[239] But his interest in the primacy of the re-

231 Ibn Kathīr, *Bidāya*, 17:718–19.

232 Abū Zahra, *Ibn Taymiyya*, 34.

233 Laoust, "Ibn Taymiyya."

234 Abū Zahra, *Ibn Taymiyya*, 36.

235 Ibn Kathīr, *Bidāya*, 18:23.

236 Laoust, 'Ibn Taymiyya.'

237 Benjamin Jockish, "*Ijtihād* in Ibn Taymiyya's *Fatāwa*," in *Islamic Law: Theory and Practice*, ed. Robert Gleave and Eugenia Kermeli, 2nd ed. (London: I. B. Tauris, 2001), 129.

238 Abū Zahra, *Ibn Taymiyya*, 378. See also al-Matroudi, *Ḥanbalī*, 41.

239 al-Matroudi, *Ḥanbalī*, 41.

vealed sources means that he was "adamant that the dominant opinion in the Ḥanbalī school, derived from Aḥmad's reported rulings and methodology, is not necessarily the same as the correct ruling in God's law,"[240] thereby reserving the right to disagree with established school rulings.

Like scholars of the established Sunnī schools, Ibn Taymiyya believed that the Qurʾān and the sunna were the primary sources of law. Both cover every aspect of Islamic law,[241] and the Prophet "clarified all matters of religion, its *uṣul* and *furūʿ*, its hidden [*bātin*] and evident [*ẓāhir*] and its science and its practice."[242] The Qurʾān, however, is only abrogated by the Qurʾān, never by the sunna. Stoning as a punishment for adultery is often relied on as an example of sunna abrogating the lashing punishment stipulated in the Qurʾān. Ibn Taymiyya argued, however, that there was a stoning verse in the Qurʾān and that the verse was verbally abrogated, while its *ḥukm* remained.[243] The third source, *ijmāʿ*, according to Ibn Taymiyya, is when all Muslim scholars agree on a particular *ḥukm*.[244] There are two types of *ijmāʿ*, the definitive (*qatʿī*) and the speculative (*ẓannī*). Definitive *ijmāʿ* is when it is proven that there is consensus, while speculative consensus is construed from research of the positions of the scholars without finding disagreement over a particular topic. Ibn Taymiyya argued that consensus is often wrongly assumed and that it is always easier to rely on the Qurʾān and sunna because there can be no consensus that does not coincide with the text.[245] It should be noted that he did not deem a position reliant on *ijmāʿ* invalid if it failed to mention the text from which it stemmed, but merely stated that if one were to re-examine any issue where there is consensus, it would always coincide with a text.[246] Nevertheless, it is invalid to claim that *ijmāʿ* abrogates a text or that a text corroborated by *ijmāʿ* might have existed but the text was lost and *ijmāʿ* lived as the proof thereof.[247] Agreement of the Companions does not amount to *ijmāʿ*, but is nevertheless a possible additional proof of a *ḥukm*, but if the Companions disagree with each other,

240 Yossef Rapoport, "Ibn Taymiyya's Radical Legal Thought: Rationalism, Pluralism and the Primacy of Intention," in *Ibn Taymiyya and His Times*, ed. Yossef Rapoport and Shahab Ahmed (Karachi: Oxford University Press, 2009), 200.

241 Ibn Taymiyya, *Majmūʿat al-fatāwa*, ed. Khayrī Saʿīd (Cairo: al-Maktabat al-Tawfīqiyya, 2000), 19:103.

242 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 19:92.

243 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 20:227.

244 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 20:10.

245 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 19:115.

246 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 19:115.

247 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 19:118.

their positions may not be taken as proof.[248] The fourth source Ibn Taymiyya acknowledged is *qiyās*, where the *ʿilla* of the *ḥukm* is common in both the *aṣl* and the *farʿ* and there is no hindrance to the application of *qiyās* in the *farʿ*.[249] There are two types of *qiyās*. The first is when there is no significant difference between *aṣl* and *farʿ* from a legal perspective. For example, the Prophet said that if a mouse falls into a container of ghee, the mouse and the surrounding ghee can be removed and the rest eaten. An insignificant difference would be if it were a cat instead of a mouse.[250] The second type is when the text stipulates a *ḥukm* for a particular matter and the same *ratio legis* is found in other matters.[251] Again, there can be no contradiction between text and proper *qiyās*. If a contradiction is found, then *qiyās* was improperly construed.[252] According to Ibn Taymiyya, improper *qiyās* is often attributable to a misunderstanding of *istiḥsān*, which according to Ibn Taymiyya entails the abandonment of *qiyās* if the *ʿilla* is specific to one *ḥukm* and may not be applied to the other *ḥukm*.[253] If properly construed, Ibn Taymiyya accepts this form of *istiḥsān* and argues that it was applied by the founders of the four Sunnī schools.[254]

5.3 *Ibn Taymiyya and Armed Conflict*

5.3.1 Non-Muslims

One of the challenges that faces the researcher when examining Ibn Taymiyya's work is his immense scholarly production. Ibn Taymiyya's works were compiled by different editors under different headings. However, many of these compilations overlap in covering his writings. Within the same edition, one is also faced with the fact that Ibn Taymiyya's arguments can appear circular with his frequent digression from one matter to the other.[255] The following texts are most relevant to this chapter:

– *Majmūʿat al-fatāwa*: This is the most extensive compilation of Ibn Taymiyya's work. Volumes 4, 28, and 35 are of special relevance to this chapter because they collectively address issues relating to rebellion and conflicts with non-Muslims. The *fatāwa* were compiled initially by the Saudi scholar

248 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 20:10.

249 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 20:287.

250 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 19:164.

251 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 20:287.

252 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 20:317.

253 Ibn Taymiyya, *Jāmiʿ al-masāʾil*, ed. Muḥammad Azīz Shams (Jeddah: Majmaʿat al-Fiqh al-Islāmī, 1002), 2:186.

254 Ibn Taymiyya, *Jāmiʿ al-masāʾil*, 2:186.

255 Wael Hallaq's introduction to *Ibn Taymiyya Against the Greek Logicians* (New York: Oxford University Press, 1993), l–li.

ʿAbdul Raḥman al-Qāsim and his son. This text is relied upon as the primary text; other texts are compared against it for redundancy.

– *al-Fatāwa al-kubra* (followed by *al-Ikhtiyārāt al-ʿilmiyya*):[256] all the *fatāwa* in this compilation were published in *Majmūʿat al-fatāwa*. However, additional material in *al-Ikhtiyārāt al-ʿilmiyya* is examined in parallel.
– *Kitāb al-Jihād*:[257] This book is a compilation of matters relevant to *jihād* in *Majmūʿat al-fatāwa.* It was examined for reference and to ensure relevant *fatāwa* from the compilation in volumes other than the ones referred to above are examined.
– *Qāʿida fī qitāl al-kuffār*:[258] This is a controversial summary of a *risāla* (treatise) allegedly written by Ibn Taymiyya, in which he supposedly argues against offensive *jihād.* Although the *Risāla* is treated as authentic by prominent authors such as Abū Zahra,[259] many other specialists, including ʿAbdul Raḥman al-Qāsim, who compiled *Majmūʿat al-fatāwa*, doubted his authorship, to the extent that it was banned in Saudi Arabia in the 1940s. Whereas some contend that the treatise was not written by Ibn Taymiyya, due to its alleged prohibition of offensive *jihād*, others believe that the treatise was abridged by later scholars, an abridgement that stripped it of its original intention.[260] To date, I have not come across any conclusive study on the attribution of the treatise. Apparently, those who are interested in expanding permissible acts in *jihād* dismiss the treatise without solid proof, whereas those advocating restriction employ it as a potential tool against the other camp. Unable to ascertain authorship, I decided to limit analysis of Ibn Taymiyya's work to matters relating to battles with "unfaithful" Muslims (i.e., to battles with Mongols and Shīʿa). After all, Ibn Taymiyya's analysis of the conduct of armed conflict with non-Muslims in *al-Fatāwa* and *al-Risāla* is brief and seems to build on previously established traditions, without dedicating much attention to the elaboration of his chosen rulings. Nevertheless, before moving on to addressing Ibn Taymiyya's approach to the abovementioned issues, the below paragraphs address the issue of contradictions between the treatise and the *fatāwa* compilation.

256 Ibn Taymiyya, *al-Fatāwa al-kubra* (Beirut: Dār al-Qalam, 1987).

257 Ibn Taymiyya, *Fiqh al-jihād*, comp. Zuhāyr Shafīq al-Kabī (Beirut: Dār al-Fikr al-ʿArabī, 1992).

258 Ibn Taymiyya, *Risāla fī qitāl al-kuffār*, ed. Sulaymān al-Sanīʿ (Riyadh: Jāmiʿat al-Malik Saʿūd, 1946).

259 Abū Zahra, *Ibn Taymiyya*, 318.

260 Sulaymān al-Kharāshī, "Aqwāl al-ʿulamāʾ fī al-risāla al-mansūba ila Shaykh al-Islām Ibn Taymiyya fī al-jihād," online: <http://www.saaid.net/Warathah/Alkharashy/32.htm>, accessed 4 July 2011..

Both texts incline towards a targeting policy close to the Ḥanafī,[261] Mālikī,[262] and Ḥanbalī[263] traditions – that those who are incapable of participating in combat are not to be targeted. The *Risāla* argues that women, children, and anyone "unprepared for fighting such as monks, the old, the infirm, the blind and the insane" are not to be targeted.[264] In the *fatāwa*, Ibn Taymiyya reiterates the prohibition of targeting those same exact categories.[265] However, when addressing killing monks and forcing them to pay *jizya*, he argues that only monks who have deserted social life may not be targeted "because they are detached from people, locked up in the *sawāmiʿ*, silos."[266] If monks offer support to the war with Muslims or if they live among other Christians and engage in activities like trade and agriculture, they are to be killed during combat and pay *jizya* during peacetime.[267]

His position on *jizya* payment is less consistent in both texts. In the *fatāwa*, he is satisfied with stating the different scholarly views on *jizya* payment, without favouring a particular view. "People of the Book and the magi are to be fought until they become Muslims or pay the *jizya* out of hand and in subjugation. Jurists disagreed over others in terms of accepting the *jizya* from them, but the majority do not accept it from Arabs."[268] In the *Risāla*, he argues that the Qurʾān, the sunna, and the practice of the Rightly Guided Caliphs indicate that there is no difference between the People of the Book and others, which means they are all entitled to pay the *jizya*. To prove his argument, he relies on the fact that the magi were entitled to that "privilege" and refutes the claim made by al-Shāfiʿī and Ibn Ḥazm that the magi had been People of the Book who had strayed from their correct belief.[269]

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261 al-Shaybānī, *The Islamic Law of Nations: Shaybānī's* Siyar (Baltimore, MD: Johns Hopkins University Press, 1966), 14. 91–92, 101.

262 Mālik, *al-Mudawana*, 1:499.

263 Ibn Qudāma, *al-Mughni*, ed. ʿAbdullah b. ʿAbd al-Muḥsin al-Turkī (Riyadh: Dār ʿĀlam al-Kutub, 1999), 13:178.

264 Ibn Taymiyya, *Risāla*, 1–3.

265 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:210–11.

266 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:384.

267 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:385. The Arabic words used are *al-qatl ʿind al-muḥarāba, wa bi-akhdh al-jizya ʿind al-Musalāma*. This could also be translated to indicate that they are to be killed when they fight and pay *jizya* when they commit to peace. However, the above-mentioned translation is chosen because all Ibn Taymiyya's writings, including the treatise, incline towards the established juristic tradition that those who would not normally fight or those cannot fight (rather than those who don't actually fight) may not be targeted.

268 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:211.

269 Ibn Taymiyya, *Risāla*, 11.

The above-mentioned examples from both texts are indicative of slight difference, but they do not suffice to prove that *al-Risāla* was not written by Ibn Taymiyya, because the different positions stipulated above can be perceived as elaborations of Ibn Taymiyya's view. One can argue, for example, that he believes that those unprepared to fight are not to be targeted in general, and that the exception with regards to treatment of monks is an indication that he believes monks residing in cities are prepared to fight. Similarly, his general statement on different juristic views with regards to *jizya* payment may be clarified through examination of the *Risāla* to prove that he is inclined towards the position deeming all non-Muslims eligible to *dhimmī* status.

The most debatable aspect in both works, however, is his position on offensive *jihād.* In the *Risāla*, he argues that Muslims can only commit aggression against those who commit aggression against them, and that retribution may not exceed the initial aggression.[270] He refutes arguments calling for offensive *jihād* and offers an alternative interpretation of texts to support his argument. For example, in reference to the *ḥadīth* that allegedly states that the Prophet was ordered to fight people until they become Muslims (cited by al-Shāfiʿī to support offensive attacks), Ibn Taymiyya argues that the *ḥadīth* referred merely to incidents where fighting may be permissible for that purpose, not to clear instructions. He argues that interpretations like al-Shāfiʿī's contradict texts and consensus, since the Prophet "never did this, and his biography [shows that] he did not fight whoever was peaceful with him."[271] However, the *fatāwa* state that the objective of *jihād* is for "religion to be all to God and for God's word to be the supreme and whoever resists that is to be fought according to the agreement of Muslims."[272] He also says that "*sharīʿa* obliged (*awjabat*) fighting unbelievers."[273] Those statements may be understood as indications of contradictions with *al-Risāla*. However, a closer reading suggests that contradictions are exaggerated. In the *Fatāwa*, Ibn Taymiyya also says, "Killing entails evil and corruption but *fitna* [encouraging disbelief] by the unbelievers is greater. Yet, he who doesn't prevent Muslims from upholding and promoting [*iqāmat*] the religion of God, then the damage of disbelief falls only upon himself."[274] At the same time, the non-offensive message is qualified in the *Risāla*, where he argues that People of the Book may be fought to prevent *fitna* and to ensure

270 Ibn Taymiyya, *Risāla*, 2.
271 Ibn Taymiyya, *Risāla*, 3.
272 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:210.
273 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:211.
274 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:211.

that religion is all to God.[275] He also argues that an understanding that only those who fight may be fought fails to comprehend the sources, since aggressors may be killed, whether they are engaged in fighting or not: "Whoever, from the people of combat, causes fear among Muslims and may fight, he is to be killed when he is fighting [*qā'im*] or not [*qā'id*], asleep or taken captive."[276]

Both works thus conform to some extent to Ibn Taymiyya's approach to the objective of *jihād.* Sharif argues that "*jihad*, according to Ibn Taymiyya is the struggle to remove polytheism and persecution and to make way of a world with the Islamic system."[277] This argument misses the fact that the quotes mentioned above show that Ibn Taymiyya was less interested in the removal of polytheism than in its persecution or *fitna.* He appears to have been inclined to accept offensive *jihād* if waged against an enemy who transgresses on Muslims' divine duty to spread the religion of God, including its social and political system. Offensive *jihād* thus differs from aggression, since the attacked commits aggression when it prevents the spread of religion. In conclusion, this reading shows that contradictions between the *Risāla* and the *Fatāwa* are less extreme when examined in detail. Whether or not they were both written by Ibn Taymiyya is a complicated question that requires a separate study.

Ultimately, as noted above, Ibn Taymiyya's position on combat with non-Muslims is far less relevant to this book than his primary interest in armed conflict, that is, conflicts within the borders of Muslim territories, or in other words, conflicts with Mongols and heretical creeds. As noted by Abou El Fadl, "Ibn Taymiyya was preoccupied with the external threat posed to Islam by the Mongols and with the internal threat posed by what he considered to be heretical ideologies."[278] Because Ibn Taymiyya was troubled by rising Shīʿa influence and the danger of the Mongol empire, he was particularly interested in addressing this issue in his writings on *baghy* and *jihād*. Contrary to his position on conflict with non-Muslims, which reiterated views from within the established jurisprudential tradition, and contrary also to his recognition of established regulations of *baghy* among warring Muslims relying on *ta'wīl*,[279] his approach to conflicts with Shīʿa and converted Mongols offered innovative

275 Ibn Taymiyya, *Risāla*, 2.

276 Ibn Taymiyya, *Risāla*, 4.

277 Mohammad Farid b. Mohamad Sharif, "*Jihād* in Ibn Taymīyyah's Thought," *The Islamic Quarterly* 49, no. 3 (2005), 188.

278 Abou El Fadl, *Rebellion*, 276. The below section dealing with Mongols shows how the perception that Mongols posed an "external" threat despite their conversion to Islam should be viewed with scepticism.

279 For a detailed examination of Ibn Taymiyya's position on rebellion by an acknowledged Muslim group, see Abou El Fadl, *Rebellion*, 275–79.

analysis of the sources. The remainder of this chapter, therefore, focuses primarily on his positions on conflicts with those groups, especially since militant works studied in the next chapter rely extensively on Ibn Taymiyya, primarily on his approach to rulers whose adherence to Islam was deemed unsatisfactory.

Before addressing Ibn Taymiyya's approach to the above-mentioned groups, a brief note on his legal reasoning is necessary. Unlike legal treatises dealing with abstract issues of law, Ibn Taymiyya's writings examined here, excluding the *Risāla*, belong to the *fatāwa* genre and are thus more explicit in their relationship with existing context. Although he touches upon general issues when providing his *fatāwa*, the compilation was, theoretically, a response to specific questions rather than an exposition of elaborate theory applicable to other situations. Ibn Taymiyya's writings, however, differ significantly from Ibn Rushd's compilations, examined in the previous chapter. Ibn Rushd's commentaries are commentaries on Mālikī *fatāwa* that seem to have been responsive to more general issues than Ibn Taymiyya's. It is impossible, at least for the purpose of this book, to ascertain if questions posed to Mālik were different from those addressed to Ibn Taymiyya. One cannot thus conclude that Ibn Taymiyya was uniquely specific in his approach. Nevertheless, what is clear is that Ibn Taymiyya invested much energy in examining the theology and practice of existing "enemies" rather than offering abstract analysis that bears weight on existing reality.

5.3.2 The Mongols

As mentioned earlier, Ibn Taymiyya was troubled by the Mongol threat faced by Syria and dedicated much of his life and thought to fending off that threat. Unlike the early Mongols, however, who were easy to position as infidels attacking Muslims, most of the subjects of the Īlkhānids in Persia were Muslims, and with the conversion of Ghāzān to Islam, the task of defining the conflict with that enemy became more daunting. The complexity of the situation is reflected in Ibn Taymiyya's legal analysis and categorization of the Mongols, which appears confused and often inconsistent. As mentioned earlier, most jurists categorized conflicts into three types: wars with non-Muslims, wars with apostates, and rebellion wars (*baghy*). Ibn Taymiyya's approach to the Mongols, however, draws from all categories and relies on another category, referred to as *khawārij*, a term used initially to refer to the group of Muslims that rebelled against ʿAlī b. Abī Ṭālib, the fourth caliph, for accepting adjudication in his conflict with Muʿāwiya b. Abī Sufyān, the fifth caliph.[280] Ibn Taymiyya

280 In this chapter, the Khawārij refers to the group rebelling against ʿAlī, whereas *khawārij* refers to the legal category applied by Ibn Taymiyya.

argues that most early jurists distinguished between the Khawārij and the rebels who relied in their rebellion on a legitimate, even if misguided, interpretation of *sharīʿa*.[281] Although Ibn Taymiyya does not identify those early jurists, he offers different sources to support this hypothesis. First, he relies on a prophetic *ḥadīth* reportedly transmitted by ʿAlī and similar to the ones relied on by Ibn Ḥazm, stating that young men with a fanatic, shallow commitment to religion will rebel and that they should be killed.[282]

He thus argues that because of their straying from religion, ʿAlī was happy to fight the Khawārij and did not wait for them to commence fighting. His approach to the Khawārij differed significantly from the position he took with Muʿāwiya, whom he was reluctant to fight because Muʿāwiya relied on a legitimate *taʾwīl*.[283] Ibn Taymiyya, however, makes no attempt to refute the claim made by earlier jurists like al-Shāfiʿī that ʿAlī told the Khawārij he would not deny them access to God's mosques and would guarantee their share of the booty.[284] Al-Shāfiʿī also reports that Caliph ʿUmar b. ʿAbdul ʿAzīz instructed his companions not to fight the Khawārij until they initiated fighting.[285] To further prove his point, Ibn Taymiyya argues that textual sources and consensus (of the Companions) show that there was always a distinction between Companions rebelling against ʿAlī and the Khawārij. He argues that ʿAlī took the Khawārij's property as booty.[286] Again, Ibn Taymiyya fails to refute or address the alternative claim made by al-Shāfiʿī – that ʿAlī did not take the Khawārij's property and weapons as booty. Of course, Ibn Taymiyya cannot be expected to refute every juristic argument. But he argues that the Ḥanafīs and al-Shāfiʿī invented the tradition of a unified approach to rebellion and that their approach to the *khawārij* had no legal basis.[287] If that is the primary argument used by Ibn Taymiyya, then one should reasonably expect a refutation of the sources relied on to support this unified approach.

But Ibn Taymiyya's analysis is not limited to the category of *khawārij*, at least in terms of sources. He draws, for example, on traditional *jihād* (wars with infidels) sources. For example, he relies on the Qurʾanic verse "[Believers], fight them until there is no more persecution,[288] and all worship[289] is devoted to

281 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:302.
282 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:303.
283 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 35:37.
284 al-Shāfiʿī, *Umm*, 4:309.
285 al-Shāfiʿī, *Umm*, 4:309.
286 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:303.
287 Abou El Fadl, *Rebellion*, 62.
288 *Fitna*. Also translated as "encouragement" or "promotion of disbelief."
289 The Arabic word is *dīn*, also translated as "religion."

God alone"[290] to refer to the conflict. This verse was traditionally used to refer to conflicts with non-Muslims and interpreted to mean that those who prevent the religion of Allah from spreading across the globe should be fought until it does. However, in this context, Ibn Taymiyya argues the verse states that "all faith should be Allah's faith and the Mongols do not abide by 'all of Allah's faith."[291] Accordingly, "if some aspects of the faith are Allah's and parts of it are not, fighting is imperative until all religion is Allah's religion."[292] This interpretation deviates to some extent from the interpretation adopted by Ibn 'Abbās and al-Ḥasan, among other Companions, as quoted by al-Ṭabarī (d. 310/923) in his exegesis stating that *fitna* in this verse refers to *shirk* (attributing partners to Allah).[293]

He also argued that the Mongols perceived Islam as one of many holy religions that eventually lead to Allah and accordingly showed excessive tolerance of other religions like Christianity and Judaism.[294] This tolerance, according to him, amounted to disbelief in Allah because "with the agreement of all Muslims, whoever justifies following any religion other than the religion of Islam or a *sharī'a* other than Muḥammad's *sharī'a* is an unbeliever, *kāfir*."[295] To prove his position, he relies on these Qur'anic verses: "As for those who ignore God and His messengers and want to make a distinction between them, saying, 'We believe in some but not in others,' seeking a middle way; they are really disbelievers: We have prepared a humiliating punishment for those who disbelieve,"[296] and argues that such tolerance of other religions amounts to disbelief in some parts of the Qur'ān.[297] If one were to examine this argument in detail, major ambiguities and inconsistencies would be found. First, the term "agreement of all Muslims" is vague and misleading, and it is unclear whether Ibn Taymiyya is claiming a case of consensus. More important, it is unclear how Ibn Taymiyya deduces by virtue of *qiyās* that disbelief in some prophets is analogous to tolerance of other religions, or even believing that those other religions legitimately lead the individual towards God.

290 Q 8:39.

291 Ibn Taymiyya, *Majmū'at al-fatāwa*, 28:300.

292 Ibn Taymiyya, *Majmū'at al-fatāwa*, 28:300.

293 al-Islam website, Saudi Ministry of Awqāf, online: <http://quran.al-islam.com/Tafseer/DispTafsser.asp?nType=1&bm=&nSeg=0&l=arb&nSora=8&nAya=39&taf=TABARY&tashkeel=0>, accessed 9 January 2010.

294 Ibn Taymiyya, *Majmū'at al-fatāwa*, 28:307.

295 Ibn Taymiyya, *Majmū'at al-fatāwa*, 28:307.

296 Q 4:150–51.

297 Q 4:150–51.

Whereas Ibn Taymiyya employs references to the Khawārij and *jihād*, it is unclear how he perceives the Mongols, or as a matter of fact, the Khawārij. He hints at juristic disagreement over the Khawārij's status as Muslims and argues they are either treated as *bughā* or as unbelieving apostates. However, although he argues they are not like *bughā*, he acknowledges that ʿAlī did not see them as apostates.[298] Nevertheless, Ibn Taymiyya also draws on the regime of apostasy and argues that the Mongols should be fought because they do not abide by the rulings of Islam, and relies on Abū Bakr's *ridda* wars as a source to justify his proposition that the Mongols are similar to the groups who refused to pay the alms tax after the death of the Prophet and who were accordingly fought by Abū Bakr.[299] Nevertheless, he does not explicitly claim that the Mongols are apostates; rather, he uses the apostasy wars as proof of the legitimacy of targeting those who claim to be Muslims if their Islam is corrupt. To prove his point, Ibn Taymiyya spends a lot of time attempting to assert their infidelity to Islam. In doing so, he often exaggerates their straying from the message of Islam or highlights acts that were by no means unique to the Mongols. For example, he argues that their religion is corrupt because they killed and captured Muslims in the conflicts in Syria;[300] but at the same time, he legitimizes killing Mongol captives and the wounded from their camp.[301] By his logic, one would be faced with a vicious circle, where Muslim groups challenge the Islam of others for engaging in conflict with them, whereas they allow that privilege to themselves. If one were to go beyond Ibn Taymiyya's one-dimensional portrayal of the Īlkhānids in Persia and examine other historical accounts of the same events, we would find that mutual accusations of infidelity were made during this conflict, and that the Mongol ruler claimed to be defending Islam. In a letter to Sulṭān al-Nāṣir, Ghāzān states that his attack on Syria was triggered by "the attacks by Egyptian soldiers against Mardin and its lands in the holy month of Ramadan honoured by other nations in the region, the month when Satan is locked up and the doors of hell are closed."[302] He also blames Egyptian soldiers for "committing sins that idolaters would not commit and violating women and children" and argues that he only acted in support of those vulnerable groups against those soldiers who "were

298 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:304.

299 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:305.

300 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:297.

301 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:303.

302 Quoted in ʿAbdul Ḥalīm, *Intishār*, 200. Of course, the "mixed" status of Mardin was subject to extensive analysis by Ibn Taymiyya, studied in detail by Michot, *Muslims Under Muslim Rule* (Oxford: Interface Publishers, 2006).

spreading corruption on Allah's land,"[303] in direct and evident reference to the legal regime of *ḥirāba*. This correspondence, although significant in portraying the fluidity of claims of aggression and self-defence in this conflict, could at worst transform the Mongols to the category of *bughā* rather than *khawārij*, because their defence of another group was at least defensible as a *ta'wīl* that the Mamlūks were committing *ḥirāba* and ought to be fought. Even this designation is problematic in light of divided Muslim rule, considering that the regime of *baghy*, as highlighted earlier, seems to be most suited to the caliphate as the sole political unit. It is, of course, true that Ibn Taymiyya, as rightly pointed out by several scholars, adopted a pragmatic stance towards Muslim governance and did not attach himself to the notion of the caliphate as a legally necessitated institution. He saw it more as a rational attempt to meet the demands of the Muslim community, that may possibly be replaced by alternative political institutions meeting such demands.[304] Yet, Ibn Taymiyya does not provide an alternative criterion for determining a legitimate *imām* in the situation at hand, other than through vague references to adherence to Islam and, instead of thoroughly addressing this controversy, he inconsistently reverts to the regime of *baghy.* He argues that the Mongols have no *ta'wīl*,[305] even though the *amān* granted by Ghāzān to the people of Syria stated that the rulers of Egypt and Syria were not abiding by Islam and were vandalizing Muslim property.[306] He even goes as far as to argue that the Mongols are aware that the Mamlūks and their subjects are better Muslims than they are and that they do not claim to be fighting in defence of Islam.[307] Of course, one can argue that Ibn Taymiyya was unaware of those communications and arguments. But, as Aigle notes, the *fatāwa* of Ibn Taymiyya indicate strong knowledge of the Īlkhānids' political views.[308] Moreover, Ibn Taymiyya's heavy involvement in the conflict and the truce with Ghāzān suggest that he must have been aware of the Mongol ruler's claims, but he fails to make any reference to these claims, even to refute them.

He also argues that most of the Mongol army did not pray and that they did not have a *mū'adhdhin* or an *imām* in their camp, using that as a further justification for accusing them of straying from Islam. However, other sources state that Ghāzān never embarked on a battle without prayers.[309] In fact, in his own

303 'Abdul Ḥalīm, *Intishār*, 200.
304 Anjum, *Taymiyyan Moment*, 265.
305 Ibn Taymiyya, *Majmū'at al-fatāwa*, 28:318.
306 'Abdul Ḥalīm, *Intishār*, 201.
307 Ibn Taymiyya, *Majmū'at al-fatāwa*, 28:318.
308 Aigle, "Mongol Invasions," 106.
309 'Abdul Ḥalīm, *Intishār*, 196.

words, Ibn Taymiyya refuted that argument in his previously cited interaction with Ghāzān, where he claimed Ghāzān came to Damascus with a judge and a prayer leader.[310] Ibn Taymiyya also argued that the Mongols did not impose *jizya* on non-Muslims (i.e., they did not abide by established principles of Islamic law). However, it is also documented that Ghāzān reinstated the *jizya*.[311] Ibn Taymiyya acknowledged that himself in the *Fatāwa*, where he states that Ghāzān's minister, Nawrūz, imposed it on non-Muslims.[312] He also claimed that the Mongols were fighting to force people to come under the banner of Chinggis Khān's empire and that they gave him a godly status similar to Jesus's in Christianity.[313] This was despite the fact that Ghāzān attempted to gain autonomy for his dynasty from the Khān, refusing to inscribe the latter's name on coins because of his infidelity and replacing it with the Muslim *shahāda*.[314] Ibn Taymiyya's contradictory statements about the practices of the Mongols thus suggest that his dissatisfaction with Mongol Muslim faith led him to introduce novel legal arguments that deliberately conflated *jihād* against Muslims, apostasy, *baghy*, and the treatment of *khawārij*, which he claims to be distinct from the traditionally upheld regime of *baghy*, of which he was generally sceptical. This conflation of categories may be seen as a manifestation of Anjum's argument for Ibn Taymiyya's principled pragmatism and reformist reorientation of Muslim jurisprudence,[315] but Ibn Taymiyya's inconsistent approach to the Mongols' practice of Muslim faith, and his reluctance to develop a coherent reinterpretation of intra-Muslim conflict in a world of multiple authorities, indicates a commitment to predetermined rejection of Mongol rule.

Finally, he accuses the Mongols of being unfaithful to the message of Islam because they relied heavily on the Shīʿa in the conduct of their affairs, and he criticizes them for appointing Nāṣir al-Ṭūsī as a minister, which can be considered a manipulation of Muslim sentiments against the Mongols through the insertion of a figure said to have encouraged Hülegü to kill the Muslim caliph

310 Abū Zahra, *Ibn Taymiyya*, 34.

311 Aigle, "Mongol Invasions," 106.

312 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:374. Apparently, the choice to attribute those acts to Nawrūz was intended to evade the fact that *jizya* reinstatement was under Ghāzān's rule. Nawrūz was a minister and a military commander under Ghāzān. He is said to have played a major role in the Īlkhānids' conversion. However, after a power struggle, Nawrūz was executed by Ghāzān. See Rene Grousset, *The Empire of the Steppes: A History of Central Asia*, trans. Naomi Walford, 8th ed. (New Brunswick, NJ: Rutgers, 2002), 380.

313 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:306.

314 ʿAbdul Ḥalim, *Intishār*, 193.

315 Anjum, *Taymiyyan Moment*, 184.

in the attack on Baghdad.[316] But in reality, the reference to al-Ṭūsī, whose role in the early Mongol invasions is contested, does not affect the legal status of Muslim Mongols and the rules of conflict with them, because al-Ṭūsī died in 1274, whereas Ghāzān converted to Islam in 1295.[317] Moreover, it is hard to argue that the appointment of a Shīʿa minister rendered the entire ruling system unfaithful to Islam. The last ʿAbbāsid caliph had appointed a Shīʿa minister, Ibn al-ʿAlqamī, whom Ibn Taymiyya refers to as an example of Shīʿa treason and cooperation with the Mongols,[318] yet he does not seem to believe that this appointment is cause for doubting the piety of the caliph.

Ibn Taymiyya's keenness on promoting *jihād* reflected also on his attitude to those who might claim they were coerced into fighting alongside the Mongols. In a response to a question about targeting and killing those who say they were forced to fight in the Mongol army, he argues that the Prophet ordered those who were coerced, to drop their swords and refrain from fighting, relying on the following *ḥadīth*:

> There would soon be turmoil. Behold! there would be turmoil in which the one who would be seated would be better than one who would stand and the one who would stand would be better than one who would run. Behold! when the turmoil comes or it appears, the one who has camel should stick to his camel and he who has sheep or goat should stick to his sheep and goat and he who has land should stick to the land. A person said: "Allah's Messenger, what is your opinion about one who has neither camel nor sheep nor land?" Thereupon, he said: "He should take hold of his sword and beat its edge with the help of stone and then try to find a way of escape [if he can]. O Allah, I have conveyed (Thy Message); O Allah, I have conveyed (Thy Message); O Allah, I have conveyed (Thy Message)." A person said: "Allah's Messenger, what is your opinion it I am drawn to a rank in spite of myself, or in one of the groups and made to march and a man strikes with his sword or there comes an arrow and kills me?" Thereupon he said: "He will bear the punishment of his sin and that of yours and he would be one amongst the denizens of Hell."[319]

316 Morgan, *Mongols*, 153.

317 Morgan, *Mongols*, 158.

318 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:310.

319 *Saḥīh Muslim*, 41:6896, online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/041.smt.html>, accessed 2 June 2011.

The *ḥadīth* instructs everyone not to engage in fighting in incidents of turmoil and argues that anyone who kills another Muslim coerced into fighting would have sinned. However, Ibn Taymiyya selectively relies on this *ḥadīth* to argue that the one coerced by the Mongols should drop his sword and refrain from fighting and allow himself to be killed,[320] even though the Prophet does not refer directly to refraining from defending oneself on the battlefield if escape is unachievable. Moreover, Ibn Taymiyya fails to acknowledge the dual application of the *ḥadīth* to those fighting on both sides, which would include the Syrians and the Egyptians. However, Ibn Taymiyya is aware of the potential for the *ḥadīth* to limit the freedom of the Mamlūk army, and he tactfully avoids that limitation by claiming that the war with the Mongols is not a *fitna*, but rather worse, because the side of the Mongols is not abiding by *sharīʿa*, much like apostates. Accordingly, anyone coerced into fighting alongside the Mongols is under a stronger moral and legal responsibility not to fight, even in defence of his life.[321] However, he does not pay attention to the fact that if one were to claim Mongols are apostates, then the *ḥadīth* would be irrelevant because it refers to fighting between Muslims.

In order to further prove his argument, Ibn Taymiyya relies on another *ḥadīth*, according to which the Prophet told Ibn al-ʿAbbās – after the latter claimed that he had been coerced into fighting the Muslims during the battle of Badr – that his appearance (*ẓāhiruh*) was against the Muslims and that his intentions were only evident before Allah, indicating that he did not accept his alibi.[322] However, an analogy cannot be made between this *ḥadīth* and anyone claiming to have been coerced into fighting alongside the Mongols, because the *ḥadīth* refers to an infidel enemy, whereas the situation here involves a Muslim coerced into fighting under the banner of an officially Muslim army. Ibn Taymiyya also fails to recognize the possible application of another *ḥadīth* potentially leading to a contrary position, when Usāma b. Zayd was reprimanded for killing a man who said the *shahāda* and the Prophet instructed Ibn Zayd to trust the man's words rather than what he believed to be the man's intentions, telling him, "His tongue conveys what is in his heart."[323]

5.3.3 Other Muslim Groups: the Shīʿa

In addition to his position on the Mongols, Ibn Taymiyya was equally fervent about legitimizing and promoting conflict with the Shīʿa. Again, it is unclear

320 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:316.

321 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:316.

322 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:315.

323 See Ibn Ḥazm, *Muḥalla*, 7:317.

whether he perceived the Shīʿa as *khawārij* or apostates. For example, he argues that criticism of the early Companions of the Prophet is considered a deviation from the established (*ẓāhira*) corroborated (*mutawātira*) Islamic *sharīʿa*, necessitating fighting and *jihād* until they refrain from this act.[324] In this case, criticism of the Companions is grouped with other acts normally treated as acts of apostasy, such as refraining from prayer, fasting, and payment of *zakāt*. At the same time, he chooses on other occasions to refer to the Shīʿa as *khawārij*, arguing that they are similar to the Khawārij in their refusal to abide by the sunna of the Prophet.[325] The primary obstacle to understanding Ibn Taymiyya's position on the Shīʿa is his vagueness with regards to whether or not *khawārij* are considered Muslims, as detailed in the previous section.

In addition to the employment of *khāwarij* and apostasy language, Ibn Taymiyya resorts to *ḥirāba* in order to legitimize fighting the Shīʿa. He argues that whoever refuses to submit to Allah and his Prophet is considered to have fought (*ḥārab*) them. According to him, if jurists include bandits in their definition of *ḥirāba*, then those who do not believe that Muslim blood and money are sanctified and who legitimize fighting Muslims are closer to the *ḥirāba* verse and more deserving of being fought.[326] By employing the regime of *ḥirāba*, Ibn Taymiyya, like Ibn Ḥazm, overrides a long tradition of treating *ḥirāba* as a non-political crime. Unlike Ibn Ḥazm, who expands *ḥirāba* to political conflicts if methods that terrorize the public or threaten the vulnerable in a manner akin to methods employed in crimes traditionally falling under the *ḥirāba* regime are employed, Ibn Taymiyya allows for the application of *ḥirāba* if the group in question simply defies Islamic principles. To prove this point, Ibn Taymiyya relies on the *ḥirāba* verse, stating that "those who wage war against God and His Messenger and strive to spread corruption in the land should be punished by death, crucifixion, the amputation of an alternate hand and foot, or banishment from the land."[327] Despite the verse's theoretically defensive nature, Ibn Taymiyya uses it in a manner that allows for initiation of fighting against those who do not abide by God's obligations because their reluctance to submit to the divine is an offensive act (*ḥirāba*) against God and his prophet. To further support this argument, he relies on a verse addressing new converts' reluctance to abandon *riba* (usury): "You who believe, beware of God: give up any outstanding dues from usury, if you are true believers. If you do

324 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:300.

325 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:240.

326 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:276.

327 Q 5:33.

not, then be warned of war from God and His Messenger."[328] Although the verse may be relied on as proof that those who fail to uphold *sharīʿa* may be fought, Ibn Taymiyya goes further, arguing that the warning of war from God and his Messenger is an indication that usurers commit an act of fighting against God by persisting in the act.[329] However, the verse does not indicate in any manner that usury is an act of *ḥirāba* against God. Ibn Taymiyya's assumption that a warning of war is an indication that the group warned has committed an act of war is not supported by the above-mentioned verse. Thus, his conclusion that failing to abide by *sharīʿa* allows for applicability of *ḥirāba* and its established *ḥudūd*, does not seem to have a solid foundation and is more reliant on fusion of different verses referring to the term *ḥarb* or war in order to establish the applicability of the term *ḥirāba*, since it shares the same linguistic root.

It should also be noted that, in his analysis, Ibn Taymiyya commits the same "sin" that he attributes to the Shīʿa, the sin of *takfīr*, by accusing them of not being proper Muslims. As with his analysis of the Mongols, his categorization of the Shīʿa is biased and slippery. For example, he criticizes them for considering Jews and Christians better than Sunnīs,[330] whereas he himself refers to the Shīʿa as infidels and literally states that they are worse than Jews and Christians.[331] He also denounces them for making it lawful to kill Muslims and take their property, but he argues that they are legitimate targets and that their property may be taken as booty.[332]

In addition to the expansion of the regimes of apostasy and *khawārij*, Ibn Taymiyya adopts a harsher approach to repentance from these "sins" for political leaders of the group, arguing that whoever promotes an innovation (*bidʿa*) in religion should be killed, even if he repents or is not found to be *kāfir*. In order to justify his position, Ibn Taymiyya again resorts to *ḥirāba*, arguing that *ḥirāba* is not restricted to violent attacks against the religion, but includes propagation of a *bidʿa*, since such an act corrupts religion.[333] Moreover, he argues that the harsher treatment of the innovator is based on views of jurists like Ibn Ḥanbal who distinguish between the propagator of un-Islamic thought and his followers. For example, Ibn Ḥanbal deems testimony of the innovator

328 Q 2:278–79.
329 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:300.
330 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:276.
331 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:279.
332 Ibn Taymiyya, *Majmūʿat al-fatāwa*, 28:240.
333 Ibn Taymiyya, *Fatāwa*, 4:503.

invalid and accepts the testimony of followers.[334] However, his reliance on Ibn Ḥanbal is at the least expansive *qiyās*. It is unclear how Ibn Taymiyya sees the rejection of testimony as a basis for execution simply because both rulings share the premise of the distinction between the innovator and his followers. If anything, one can argue that Ibn Taymiyya's ruling that an innovator must be killed contradicts Ibn Ḥanbal's rejection of the innovator's testimony, because the rejection of testimony is an indication that there is no directive in Ibn Ḥanbal's work to terminate that person's life. In other words, if an innovator comes forward to the court, and the court refuses his testimony and is silent on his status, this indicates the inapplicability of the death penalty.

5.4 *Ibn Taymiyya and Armed Conflict: Concluding Remarks*

Ibn Taymiyya's work on conflict with the Mongols and Shīʿa seems troubled by the potential for employment of *baghy* to limit warfare techniques available to the Mamlūks in their conflicts with the Mongols, so he attempts to limit the application of this legal regime. Whereas he acknowledges the protective regulations of *baghy*, such as lack of liability for deaths and destruction of property, as well as prohibition of killing once their danger is eliminated, "[i]t is likely that he affirms such paradigms and rules of conduct more out of deference to the inherited legal precedents than from conviction."[335] Confronted with this established legal tradition, he intelligently avoids its application to these groups and comes up with an alternative legal regime, drawing upon wars with infidels, apostasy, and his uniquely defined doctrine of *khawārij*, thereby expanding the powers of the more righteous sect in its conflict with other Muslims.

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334 Ibn Taymiyya, *Fatāwa*, 4:503.

335 Abou El Fadl, *Rebellion*, 275.

CHAPTER 3

Mainstream Narratives

Despite militants' frequent attempts to claim that mainstream institutions and scholars are irrelevant, mainstream narratives undoubtedly offer an influential role in Muslim and non-Muslim understandings of the Islamic regulation of armed conflict. After all, mainstream institutions are widely recognized as authoritative representatives of Islam, and most mainstream scholars enjoy the legitimacy of traditional education, which is widely recognized as necessary for Islamic legal reasoning. This chapter examines mainstream scholarship, with the first section examining official contributions made by government institutions and the next one examining mainstream works and thoughts of individual scholars. But official or not, this book argues that the government-controlled institutions and individual scholars examined here share a common feature that is rather difficult to define, namely being "mainstream." Despite varying approaches, official and non-official scholarship share a common feature with regards to the issue of the regulation of armed conflict – both are keen to refute arguments made by militants and to defend the image of Islam by emphasizing the limitations posed by the legal tradition on the tactics of warfare.

As a case study in official narratives of armed conflict, this chapter focuses on official Egyptian institutions and looks at the role played by al-Azhar and the Egyptian Supreme Council for Islamic Affairs (ESCIA). Both government-controlled institutions convene international conferences to address issues relevant to the Muslim world. Although conference proceedings theoretically represent the views of the participants, they are also practically a representation of the government-approved message on the issue discussed. As detailed later, the Egyptian regime has historically enjoyed a strong authoritarian grip over its institutions, and it is highly unlikely that approaches that contravene the government's interest would be given such a forum. The choice of Egypt is primarily because of al-Azhar. Although government control has eroded some of its credibility, al-Azhar has maintained an elite status as one of the primary institutions for Islamic studies, attracting Muslim students from around the world. It is not, however, just an educational institution; it is an intellectual centre that plays a prominent role in shaping significant aspects of Muslim

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consciousness. As Zaman notes, "There is no single institution comparable to the Azhar of Egypt."[1]

Al-Azhar tends to play a dual role in the development of Islamic legal positions on the issue of armed conflict. On the one hand, it is an educational institution that houses academics from different ideological and political backgrounds, allowing for some diversity in positions and opinions. On the other hand, it is a government authority, whose senior officials are hired by the government and expected to conform to government policies. The main spheres of government influence on al-Azhar are arguably Majmaʿ al-Buḥūth al-Islāmiyya ("the Academy of Islamic Research," the Academy) and the Grand Shaykh of al-Azhar, who in turn is a member of the Academy. During its first twenty years, the Academy regularly held conferences to address issues of concern to Muslims. The proceedings of these conferences are relied on as indicative of the more official role played by al-Azhar. The Academy also issues statements in response to current affairs. Although these statements might be a useful resource, three main challenges face the analysis of such data. First, the Academy lacks a filing system for statements accessible to the public. After numerous visits to its secretariat, I was able to obtain only six statements issued by the Academy and six issued by Shaykh al-Azhar that might be of relevance. A further challenge is that the statements are generic and lack legal argumentation. Third, some of them are undated, which means that a contextual reading would hardly be accurate. Accordingly, in this analysis, I rely solely on the proceedings of the conference as examples of the official role of al-Azhar. The other governmental forum for exchange of Islamic scholarship examined in this chapter is al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya ("the Supreme Council for Islamic Affairs," the Supreme Council), which was established in 1960 by Nāṣir.[2] Whereas the influence of the Academy started to wane around the early 1980s,[3] the Supreme Council became more active in the late 1980s, launching its first general conference in 1988. Combined, the proceedings of the conferences held by these two government entities represent the view tolerated by the government on armed conflict from the 1960s until 2015, which is the date of the last Council conference examined in this book. Finally,

1 Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton, NJ: Princeton University Press, 2002), 150.

2 Najāt al-Zunayrī, *al-Majlis al-ʿalā li-l-shuʾūn al-Islāmiyya: Nāfizat Misr ʿalā l-ʿālam, taʾrīkh wa risāla* (Cairo: Matābiʿ al-Ūvist, 1995), 7.

3 Jakob Skovgaard-Peterson, "Yūsuf al-Qaraḍāwī and al-Azhar," in *Global Mufti: The Phenomenon of Yusuf al-Qaradawi*, ed. Bettina Graf and Jakob Skovgaard-Peterson (New York: Columbia University Press, 2009), 45.

I also examine a 2014 conference, held directly under the auspices of al-Azhar, that addressed extremism and terrorism. This conference is particularly relevant to assessing al-Azhar's response to the rise of ISIS.

In addition to official institutions, the chapter looks at two prominent independent scholars on the regulation of armed conflict. With the expansion of communication channels that allow for direct interaction between scholars and the public, mainstream traditional scholars are no longer influential solely by virtue of their participation in academic circles. Mass media is learning how to capitalize on the public's interest in scholars and their understanding of Islamic law. Accordingly, given the greater reach enjoyed by some independent scholars, the second section of this chapter examines individual scholarly approaches to the regulation of armed conflict by looking at the works of two scholars who received their formal education at al-Azhar but who went on to build a reputation independent of their initial affiliation with it, Yūsuf al-Qaraḍāwī (b. 1926) and Wahba al-Zuḥaylī (d. 2015). Al-Qaraḍāwī was forced to leave his home country, Egypt, after being denied employment at al-Azhar University for political activism;[4] al-Zuḥaylī was a professor at the University of Damascus and seems to have maintained an independent yet non-confrontational relationship with the authoritarian Syrian government, as evidenced by his relative silence on the Syrian revolution, despite posthumous claims that he privately expressed discomfort with violations committed by the regime.[5]

1 Official Institutions

1.1 *Historical Context: al-Azhar from 1952 to the Present*

In 1952, the Free Officers forced King Farūq (r. 1936–1952) to hand over the title of the monarch to his son, who was eventually overthrown and the monarchy abolished. Prior to this 1952 coup, al-Azhar had shown some support for the monarchy as an alternative to the Wafd party, which was perceived as secular.[6] In 1954, the Nāṣir regime clashed with the Muslim Brotherhood after they allegedly participated in an assassination attempt against him. The clashes highlighted the importance of al-Azhar to the regime as a political tool to counter

4 Skovgaard-Peterson, "al-Qaraḍāwī and al-Azhar," 35–36.

5 Radwān al-Sayyid, "al-Shaykh Wahba al-Zuḥaylī wa-l-taqlīd al-fiqhī wa al-thawra al-Sūriyya," *al-Sharq al-Awsaṭ* (14 August 2015), online: <https://aawsat.com/home/article/429266/رضوان-السيد/الشيخ-وهبة-الزحيلي-والتقليد-الفقهي-والثورة-السورية>, accessed 22 April 2017.

6 Gabriel R. Warburg, "Islam and Politics in Egypt: 1952–1980," *Middle Eastern Studies* 18, no. 2 (1982), 131. See also Daniel Crecelius, "al-Azhar in the Revolution," *Middle East Journal* 20, no. 1 (1966), 32.

the influence of the Brotherhood,[7] so the new regime courted al-Azhar for support until it gained enough confidence and power to limit al-Azhar's authority and ensure its dependence on the state.[8]

One of the most significant turning points in the relationship between al-Azhar and the state was the issuance of Law No. 103 of 1961, Reorganizing al-Azhar and Its Affiliated Institutions.[9] In addition to expanding al-Azhar's educational mission to include the applied sciences, the law converted al-Azhar into a government institution by submitting it to the powers of a new minister for al-Azhar and by stipulating the appointment of Shaykh al-Azhar and the university president by the head of state.[10] The Academy was created with the mission of "conducting Islamic research, reforming Islamic culture and eliminating its impurities and remnants of political and sectarian biases."[11] The first members of the Academy were likewise to be appointed by the head of state.

The new law deprived al-Azhar of its autonomy and submitted the religious institution to the powers of the head of state. But at the same time, it gave the clergy of al-Azhar a monopoly over religious interpretation in order to counter the Islamist threat posed by the Brotherhood and the rival Saudi kingdom.[12] The reformed institution effectively joined forces with other government institutions to promote the ideals of the regime, dedicating special focus to the congruency between Islam and the socialist model employed by Nāṣir.[13]

Commentators argue that this relationship, despite the government's apparent control over al-Azhar's scholars, granted al-Azhar significant powers in some elements of its relationship with the regime, powers that were more evident after the end of the Nāṣir era in 1970. When Sādāt took over, al-Azhar was already established as the legitimate voice of Islam in Egypt. Sādāt, who tried to revive Egypt's Islamic identity, offered al-Azhar's clergy the opportunity to enjoy an even stronger public presence.[14] Al-Azhar's administration, keen to accept the opportunity to revive Islamic consciousness, willingly cooperated

7 Warburg, "Islam and Politics," 136.

8 Warburg, "Islam and Politics," 136.

9 Egyptian Law No. 103 of 1961, Regarding Restructuring al-Azhar and Its Institutions, *Official Gazette* No. 153, 10 July 1961, Art. 15.

10 Ibid., Arts. 5 and 41.

11 Ibid., Art. 15.

12 Malika Zeghal, "Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam, and the State (1952–94)," *International Journal of Middle East Studies* 31, no. 3 (1999), 374.

13 Zeghal, "Religion and Politics," 380. See also Warburg, "Islam and Politics," 136, and Crecelius, "Revolution," 44.

14 Zeghal, "Religion and Politics," 381.

with the government in its attempt to undermine the leftist opposition: "After the 1972 student demonstrations, the *Shaykh al-Azhar*, Muḥammad Faḥḥām, described the leftist youth as unbelievers and implicitly proposed that they follow a pattern of conversion to Muslim practice and repentance."[15] More controversially, Sādāt was able to secure *fatwā*s supporting economic liberalization (contrary to the pro-socialist 1960s *fatwā*s) and his 1979 peace treaty with Israel.[16] But the relationship between Sādāt and al-Azhar was not always one of alliance. Seeing the opportunity to expand al-Azhar's public role and its "Islamization" of society, the institution became aware of its separate agenda and ended up clashing with the president more than once in the late 1970s.[17]

A new alliance appears to have been achieved after the assassination of Sādāt, when the political authorities and al-Azhar united against the common threat of militant Islam. Although such an alliance had existed since the time of Nāṣir and the fear of the Brotherhood, al-Azhar seemingly became rather apolitical in the early years of Mubārak's time in power. Mubārak appointed "at its head a *shaykh* whom he perceived as a quietist *ʿalim*, Gad al-Ḥaqq, a former Mufti and Minister of Waqfs, who was already well aware of how to answer the needs of the regime."[18] Subsequently, a full-fledged campaign was initiated, involving the issuance of *fatwā*s and publications to counter militant Islamist thought.[19] But Jād al-Ḥaqq's involvement in the battle against Islamists was more nuanced than full support for the regime. Al-Azhar and its Grand Shaykh used the renewed threat of militant Islam in the 1990s to gain leverage over the government. Jād al-Ḥaqq, for example, argued that "militants had emerged as a reaction to attacks on religion by intellectuals and the media, and because of the social effects of changing economic conditions and the mishandling of religion by state authorities."[20] Such leverage was evident in the recurring clashes between al-Azhar and the government "on a variety of sensitive issues, including population control, the practice of clitoridectomy, and censorship rights,"[21] and in the institution's influential role in suppressing freedom of

15 Zeghal, "Religion and Politics," 381.

16 Tamir Moustafa, "Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt," *International Journal of Middle East Studies* 32, no. 1 (2000), 7.

17 Warburg, "Islam and Politics," 139. See also Zeghal, "Religion and Politics," 383.

18 Zeghal, "Religion and Politics," 385. Jād al-Ḥaqq was appointed in 1982 and continued in office till his death in 1996.

19 Zeghal, "Religion and Politics," 385.

20 Steven Barraclough, "al-Azhar: Between the Government and the Islamists," *Middle East Journal* 52, no. 2 (1998), 240.

21 Moustafa, "Conflict," 3.

expression of intellectuals.[22] Although this analysis may prove to be accurate with regards to social issues, as evidenced by the opposition by many members of the Academy to the approved amendments to Law No. 12 of 1996 Issuing the Child Law,[23] it does not apply to issues that touch core political matters affecting the stability of the political regime in Egypt. As per the argument posed by Moustafa and Barraclough, challenging militant Islam represents al-Azhar's raison d'être from the government's perspective. Accordingly, any serious challenge in these areas is unlikely to be tolerated. This is evidenced by the many statements issued by Jād al-Ḥaqq's successor, Ṭanṭāwī (d. 2010) in support of the regime, such as his controversial statement relating to the lashing of journalists. In 2007, a journalist was accused of spreading a rumour that Mubārak had died and that the administration was concealing his death. Afterwards, the said journalist, Ibrahīm ʿIssa, was charged with libel and fabrication of information. Soon after, Ṭanṭāwī stated that journalists who "spread rumours and false information" are considered to have committed *qadhf*[24] and should be punished with eighty lashes.[25] The most obvious necessity for support for the regime came in 2011 with the protests against Mubārak in January. Key religious figures including ʿAlī Jumʿa (b. 1952), the Grand Muftī at the time, and Aḥmad al-Ṭayyib (b. 1946), the sitting Grand Shaykh, were called upon to denounce the protests. Both officials stated that such protests were a form of *khurūj* that is prohibited by God.[26] The public statements made by al-Azhar, however, were more ambiguous and less supportive of the regime. On 2 February 2011, the Academy issued a statement asserting the prohibition of any actions that might lead to the spilling or Egyptian blood or that might cause *fitna* (sedition), and calling on all parties to resolve the conflict politically, while taking into consideration President Mubārak's responsiveness to

22 Barraclough, "al-Azhar," 240.

23 Egyptian Law No. 12 of 1996, Issuing the Child Law, *Official Gazette* No. 13, 28 March 1996.

24 The crime and the said punishment are traditionally reserved for false accusation of adultery or fornication in Islamic legal interpretations.

25 al-Jazeera.net, "Baʿd muṭālabatihi bī taṭbīq ʿuqūbat al-jald fī qadāya al-nashr: Ṣaḥafiyū Miṣr yastahjinūn taḥrīḍ Shaykh al-Azhar ḍid al-Ṣuḥuf" (14 October 2007), online: <http://www.aljazeera.net/News/archive/archive?ArchiveId=1071529>, accessed 5 June 2011.

26 For Islam Series, "'Alī Jum'a: Thuwār yanāyir khawārij wa yajib qatluhum," Youtube video, 3:06, filmed January–February 2011, posted August 2013, online: <https://www.youtube.com/watch?v=RcZ9X_Ra5H0>, accessed 1 May 2017. Note: the title is inaccurate – although he says *khawārij* ought be killed, he also says that is not what he was calling for because the Prophet also prohibited killing; Islamic Egypt News, "Ra'y Shaykh al-Azhar: La yajūz al-thawra wa al-khurūj ʿalā l-Ḥākim Ḥusnī Mubārak," Youtube video, 1:51, filmed January–February 2011, posted June 2013, online: <https://www.youtube.com/watch?v=jHc0UjacnPs>, accessed 5 May 2017.

the demands of the protesting youths.[27] Less than a week after Mubārak was ousted, al-Ṭayyib held a press conference to debunk claims that al-Azhar had been complicit with or subordinate to the regime, asserting that it had always been committed to supporting liberation movements, whether in Egypt or outside it.[28] After the Supreme Council of Armed Forces (SCAF) assumed power, they issued a law in 2012 changing the appointment of Shaykh al-Azhar to election by the Esteemed Scholars' Authority (ESA), reinstated by the same decree.[29] However, the prominent Sunnī institution appears to have favoured taking less polarizing positions after the 25 January revolt. For example, while showing solidarity with the military institution's decision to remove President Mursī on 3 July 2013, al-Ṭayyib's use of language was far from religious in his commentary on Mursī's regime, and he asserted the need for a resolution of the conflict between two disputing parties that live on the same land.[30] More important, he leaned towards condemning the violent dispersal of the protests against the removal of Mursī, which lead to the death of hundreds of protestors.

> Al-Azhar al-Sharīf, in its attempt to gather the sides of this political conflict to a sincere and serious negotiation table to end this current crisis, asserts resolutely the sanctity of blood and the gravity of the responsibility [for spilling it] before God, the nation, and history. And al-Azhar announces its sorrow and grief for the falling of victims this morning, prays for them and consoles their families.[31]

It is unclear whether al-Ṭayyib's positions affected the relationship between al-Azhar and the state, considering that they deviated to some extent from the

27 "Majmaʿ al-Buḥūth al-Islāmiyya yuʾakid ḥurmat irāqat al-dam al-Misrī," *Ahram Daily* (2 February 2011), online: <http://gate.ahram.org.eg/News/36475.aspx>, accessed 24 April 2017.

28 Abdulrahman Elhadi, "Shaykh al-Azhar Aḥmad al-Ṭayyib mūwaḍiḥ mawqif al-Azhar min al-thawra wa yarud ʿalā l-ladhīn itahamūh bi-l-khiyāna," Youtube video, 14:35, filmed February 2011, posted March 2011, online: <https://www.youtube.com/watch?v=VcbQfHkK5ac>, accessed 5 May 2017.

29 Egyptian Law No. 13 of 2012, Amending Some Provisions of Law No. 103 of 1961, Regarding Restructuring al-Azhar and Its Institutions, *Official Gazette* No. 3, 19 January 2012.

30 On Ent, "Bayān faḍīlat al-Imām al-Akbar Shaykh al-Azhar al-Sharīf: D. Aḥmad al-Ṭayyib," Youtube video, 00:57, filmed July 2013, posted July 2013, online: <https://www.youtube.com/watch?v=r6uSefmXnp0>, accessed 1 May 2017.

31 <http://24.ae>, "Bayān Shaykh al-Azhar D. Aḥmad al-Ṭayyib ḥawl faḍ iʿtiṣāmay rabʿa al-ʿadawiyya wa-l-nahḍa," Youtube video, 2:31, filmed August 2013, posted 14 August 2013, online: <https://www.youtube.com/watch?v=sKEAxbZKLug>, accessed 1 May 2017.

established formula of full support for the regime on matters relating to religious violence, but the relationship between al-Ṭayyib and President al-Sīsī (r. 2014–) is said by many commentators to have witnessed a recent rift, as evidenced by the president's slight and soft-handed rebuke of al-Ṭayyib on account of al-Azhar's reluctance to condone conditioning divorce on official documentation, followed by a statement issued by al-Azhar asserting steadfastness on this matter of personal status, where al-Azhar has generally enjoyed relative control, as discussed earlier. Shortly after this mild confrontation, al-Ṭayyib and al-Azhar came under serious attack by many state-affiliated media outlets for failing to reform the religious discourse after a recent attack by ISIS against Coptic churches during Palm Sunday. This attack led al-Azhar's ESA to issue a statement in which it condemned the attacks, announced its support for the Church and unity in Egypt, stated that al-Azhar is the sole authority capable of propagating Islam's message of peace and tolerance, and condemned the apparent attempts to deceive the public and betray the tradition by slandering al-Azhar's curricula and by claiming that it breeds terrorists.[32]

Even if a serious rift does exist between the Grand Shaykh and the president, the causes of such a rift and its potential repercussions are open to speculation. But arguably, if al-Azhar were to fail to delegitimize violence, it would seriously risk its raison d'être with the state, as well as its internationally recognized stature as a primary authority and force of moderation. Additionally, one cannot rule out individual and collective inclinations of the institution to genuinely denounce and reject terrorist activities in the name of Islam, even if a well-articulated theory for such rejection is yet to be developed, as will be seen later.

1.2 *Official Narratives on Armed Conflict*

1.2.1 Majmaʿ al-Buḥūth al-Islāmiyya

Majmaʿ al-Buḥūth al-Islāmiyya (the Academy) is the primary research and *fatwā* institution at al-Azhar. It has fifty members, of which a maximum of twenty may be non-Egyptian. The fact that it is assigned the task not only of conducting research on Islamic law issues but also of "purifying [the Islamic culture] of impurities and ambiguities" and "clarifying the opinion on emerging sectarian [*madhhabīya*] or social problems on matters relating to

32 al-Yawm al-Sābiʿ, "Hay'at Kibār al-'Ulamā': Tashwīh Manāhij al-Azhar Tadlīs Fādiḥ li-Tazyīf Waʿy al-Nās," April 18, 2017, online: <https://www.youm7.com/story/2017/4/18/هيئة-كبار-العلماء-تشويه-مناهج-الأزهر-تدليس-فاضح-لتزييف-وعى/3195629>, accessed 20 April 2017.

faith"[33] means that it is crucial for the government to ensure that the "purification" and "clarification" processes fit its agenda.

Despite the law's stipulating an annual conference, the Academy's conferences have become less frequent in recent years,[34] slowing down after the eleventh conference, held in 1985,[35] with the Supreme Council becoming more active. However, the recent revival of the Academy's conferences is an indication that the Supreme Council is not meant to replace the Azharī institution. As of 2009, al-Azhar's library contained copies of all conference proceedings until 1985. An examination of the materials from these conferences reveals that interest in exploring the regulation of armed conflict was stronger in earlier conferences than in later ones. Examination of the pattern of focus on the subject matter shows that interest in *jihād* and the rules governing it was an academic one that aimed to portray the peaceful face of Islamic law as understood by the writers, but that the Israeli-Arab conflict in 1967 overrode that interest, with most scholars dedicating focus to mobilization efforts.

Unfortunately, the lack of relevant material from the 1990s onwards means there is no chance to explore positions on the regulation of armed conflict in light of significant and more contemporary developments. On the one hand, the early 1990s witnessed a surge in militant Islamist attacks in Egypt, as well as the Iraqi-Kuwaiti conflict. On the other hand, the early twenty-first century has witnessed the 9/11 attacks, the invasion of Afghanistan and Iraq, and the violence emanating from the aftermath of the Arab Spring. Accordingly, proceedings of conferences of the Supreme Council, and a 2014 conference on terrorism convened jointly by al-Azhar and Majlis Ḥukamāʾ al-Muslimīn,[36] are consulted to fill this gap.

1.2.1.1 *Al-Majmaʿ Before the 1967 Arab-Israeli War*

In his introduction to the first conference held in 1964, the Academy's secretary general Ḥub Allah emphasized the academic and practical importance of the newly established institution. He said that al-Azhar "continued its message and did not stop at the research of Islamic thought it inherited from

33 Law No. 103 of 1961, Art. 15.

34 Ibid., Art. 22.

35 Eleven conferences were held between 1964 and 1985, at an almost biannual rate, and three conferences were held in 2002, 2009, and 2010.

36 An "independent" international organization set up and funded by the United Arab Emirates in July 2014 to promote peace, tolerance, and unity. The organization is headed by Aḥmad al-Ṭayyib. For further details, see their official website: <http://www.muslim-elders.com/en/about-the-council/>.

predecessors, but renewed examination of God's book and the sunna of his prophet,"[37] emphasizing al-Azhar's intellectual role as a reformist institution exercising *ijtihād*. This examination was meant to respond not merely to theoretical and intellectual questions but also to modern and contemporary problems facing the Muslim world:

> New patterns of behaviour and modes of interactions and links require looking into *ijtihād* of the *imām*s and research of the jurists to extract what is suitable for the new form of life from these ideas, while preserving the holistic sources on which *sharīʿa* was established.[38]

In his speech, Ḥub Allah used a research paper on international relations published by the renowned scholar and a key figure in the study of "Islamic international relations" Abū Zahra (d. 1974) as an example of such a project and states that Abū Zahra's paper portrays how Muslims abide by their agreements regardless of other parties' religion or race.[39] Like much of the literature reviewed, the research aims to portray a non-violent image of Islamic law. Although this research is to be credited with innovative analysis and alternative reading as one of the earliest modern examinations of this issue, selectivity is again one of its primary features.

Initially, it appears that Abū Zahra's work aims to acknowledge controversy and challenges to the author's hypotheses regarding Islamic law, but acknowledgement of contradiction with classical works does not continue throughout the work. Abū Zahra is willing to acknowledge the various positions regarding reasons for waging war and the existence of some juristic positions advocating *jihād* for spreading the message of Islam. He is reluctant, however, to acknowledge positions that contradict his arguments about targetable categories. Like many modern authorities, Abū Zahra argues that those who do not participate in fighting are not to be targeted and relies on the following prophetic tradition, among others, to support his claim:

> Be warm to people and be patient with them and do not raid them until you call upon them [to join the religion]. There are no people on the face of the earth, whether they are people of clay or wool,[40] who I would not

37 Maḥmūd Ḥub Allah, "Kalima iftitāḥiyya," in *Majmaʿ al-Buḥūth al-Islāmiyya First Conference*, al-Azhar, Cairo, March 1964, 7.

38 Ḥub Allah, "Kalima iftitāḥiyya," 8.

39 Ḥub Allah, "Kalima iftitāḥiyya," 9.

40 Whether they live in clay houses or tents.

> prefer you bring to me as Muslims rather than bring their women and children and kill their men.[41]

On the basis of this *ḥadīth* and another famous tradition prohibiting the killing of women, children, and hired labour, Abū Zahra argues that the Prophet "forbade killing the one who does not fight."[42] His interpretation of these traditions cannot be said to deviate from Islamic jurisprudential techniques, especially since the *ḥadīth* prohibiting the killing of women stated that "she would not have fought," a statement that could be perceived as explicitly mentioning the *ʿilla* (ratio legis) for the prohibition of the killing women, and could thus be used as a basis for *qiyās* to conclude that those who do not fight may not be killed. But at the same time, Abū Zahra avoids referring to traditions examined in previous chapters, traditions that could be perceived as legitimate basis for expanding the targetable categories. More important, his analysis of the *ḥadīth*s that he cites is incapable of refuting counterarguments. The *ḥadīth* instructing Muslims to call upon people to join Islam, for example, could be interpreted to indicate general acceptance of the killing of men, since the Prophet says conversion is better than bringing women and children as captives and killing men. Such an interpretation would not conflict with the *ḥadīth* that prohibits the killing of women, because it can be said that the *ʿilla* for prohibiting the killing of the woman in that particular incident was that she would not have fought, rather than that she was not fighting. In other words, the prohibition could be understood to apply only to categories not expected to participate in the battle, rather than to anyone not participating in the battle.

Additionally, Abū Zahra's interpretation of prophetic traditions to prohibit targeting anyone not participating in combat is a novel one when contrasted to the juristic traditions dealt with in previous chapters. Generally speaking, classical and mediaeval jurists chose one of two approaches when dealing with the issue of targeting. According to the first approach, advocated by al-Shāfiʿī and Ibn Ḥazm, anyone may be targeted unless an explicit tradition is reported to prohibit this person's targeting. Hence, older men may be targeted. The second approach, advocated by al-Shaybānī, Ibn Rushd (al-Ḥafīd), and Ibn Taymiyya, inclines towards prohibiting the targeting of anyone who cannot or is unprepared to participate in fighting, normally through listing categories of people incapable of fighting. In neither of those two positions is there reference to

41 Muḥammad Abū Zahra, "al-Ilaqāt al-dawliyya fī l-Islām," in *Majmaʿ al-Buḥūth al-Islāmiyya First Conference*, al-Azhar, Cairo, March 1964, 295.

42 Abū Zahra, "Ilaqāt," 296.

actual participation in fighting. In other words, the prominent classical jurists focused on in this book believed that anyone capable of fighting or prepared to fight may be targeted, regardless of whether or not they participate in battle. Although Abū Zahra's reinterpretation of the authorities is welcome, his failure to acknowledge deviation from classical jurisprudence, and his reliance on this very same jurisprudence in other instances, indicates a certain degree of incoherence and selectivity.

In addition to being somewhat selective, Abū Zahra is not immune to circumventing history in order to support his arguments about the regulation of armed conflict. He does not acknowledge, for example, the existence of slavery at the time of the Prophet, arguing that slavery was introduced at the time of the Rightly Guided Caliphs in response to the context.[43] Not only does this argument fail to mention that classical jurists unanimously agreed that captives can be enslaved, it also attempts to evade discussion of the topic by claiming that it is not relevant to the research presented, despite the enslavement of prisoners of war being of evident relevance. More important, it disregards the numerous Qur'anic verses that can be understood to acknowledge the legitimacy of enslavement, such as the reference to the legitimacy of *malakāt al-aymān* (concubines) in "Prophet, We have made lawful for you the wives whose dowries you have paid, and any slaves god has assigned to you through war."[44] Even traditions relied on by Abū Zahra in his research could be understood to acknowledge slavery. For example, the *ḥadīth* indicating that the Prophet preferred that people convert to Islam, rather than be killed, and that their women and children be "brought to the Prophet," would most likely have been understood by classical jurists to indicate that the women and children should be taken as captives if members of their community did not convert. This understanding enjoys some legitimacy, considering that captives were commonly enslaved prior to Islam[45] and that traditions exist that claim that the Prophet concurred with Saʿd b. Abī Muʿādh's decision, in his arbitration between the Jewish tribe of Banū Qurayẓa and the Prophet after Banū Qurayẓa's defeat, that the men should be killed and the women and children enslaved.[46]

One other feature of Abū Zahra's work is that it tends to compare Islamic regulations to non-Muslim societies, with emphasis on the superiority of what

43 Abū Zahra, "Ilaqāt," 305.

44 Q 33:50.

45 Jonathan E. Brockopp, "Captives," *Encyclopaedia of the Qur'ān*, ed. Jane Dammen McAuliffe, Brill Online, accessed 6 November 2008.

46 al-Shaybānī, *Sharḥ Kitāb al-Siyar al-kabīr*, ed. Abū ʿAbdullah Ismail al-Shāfiʿī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 2:118.

he argues is the Islamic approach to interaction with the other. For example, he argues that Islamic law is based on undividable virtue, which means non-Muslims, unlike other societies, are to be treated equally to Muslims.[47] Although it is useful to examine legal systems on the basis of their treatment of the other as an insightful examination of biases within those legal systems, this critical examination appears one-sided in Abū Zahra's analysis. He pays no attention to the various others in Islamic jurisprudence in general and in issues relating to armed conflict in particular. Abū Zahra emphasizes examples of just treatment of non-Muslims during armed conflict, and gives examples thereof. For example, he argues that jurists guarantee the property of an individual granted *amān*, to the extent of withholding his property in case of his death in order to send it to beneficiaries of the inheritance, even if they are in the battlefield fighting Muslims.[48] But he fails to make any reference to challenges to his theory of equal treatment. As portrayed in earlier chapters, classical and mediaeval jurists offered two sets of treatments to adversaries during war depending on whether those adversaries were Muslim or non-Muslim, with Muslim adversaries offered more protection for their lives and properties during and after conflict.

It should not be denied, however, that Abū Zahra's work is of great significance to the development of scholarship on the regulation of armed conflict. It is true that Abū Zahra refuses to challenge established classical juristic works. For example, he does not acknowledge the fallibility of jurists, stating that jurists would not have wrongly classified the different territories of non-Muslims.[49] His research is, however, essentially an undeclared attempt to distance modern scholarship from established classical jurisprudence. In order to do this, he chooses to directly interpret the sources of the law in order to derive certain conclusions. He argues that jurists were not able to achieve the full "liberational" potential of the holy texts:

> We do not base that on sayings of jurists who were influenced by some conditions of their times, but we rely on a general principle stated in the Qur'ān and applied by jurists to the [relevant] subject of the text, but did not reach the maximum limit aimed for by the text.[50]

47 Muḥammad Abū Zahra, "al-Mujtamaʿ al-insānī fī ẓil al-Islām," *Majmaʿ al-Buḥuth al-Islāmiyya Third Conference*, al-Azhar, Cairo, October 1966, 404.

48 Abū Zahra, "Mujtamaʿ," 409.

49 Abū Zahra, "'Ilaqāt," 276.

50 Abū Zahra, "Mujtamaʿ," 394.

The flexibility Abū Zahra advocates in reading classical jurisprudence appears to be rather limited to calls for taking jurisprudence a step further, as stated in the above quote. But as explained earlier, his reasoning often exceeds his recommendations and adopts different and distinct rulings unsanctioned by classical jurisprudence. It is true that Abū Zahra's subtle alteration of established juristic tradition is arguably an extension of the centuries-old tradition of attributing novel interpretations to key figures and schools of thought to guarantee the salience of promoted positions,[51] but his inability to engage with those traditions despite widespread documentation of "assumed" juristic positions leaves this approach open to attack due to its hesitation between *taqlīd* and *ijtihād*.

One other distinctive feature of Abū Zahra's interpretive approach is that it focuses on general principles, arguing that Islam's relationship with the other is premised on ten principles: equality, human cooperation, human dignity, forgiveness and tolerance, freedom, virtue, justice, reciprocity, commitment to agreements, and maintenance of friendly relations. A principle-based approach undoubtedly would offer more flexibility of interpretation and allow for more reformist readings of regulations than a strict textual approach, and such a general, holistic approach undoubtedly would prove useful for modern jurists in developing a contemporary theory of armed conflict in Islamic law. He also relies on untraditional sources, such as the conduct of Salāḥ al-Dīn with his captives, which expands and alters the traditional understanding of Islamic law.[52] These techniques and arguments not only potentially prove useful for a reformist reading of the legal system, but they appear to have been the initial efforts towards formulating an emerging modern consensus on rules governing armed conflict in Islamic law.

As seen in subsequent works examined, most contemporary scholars argue along the same lines as Abū Zahra with regards to targeting and show the same reluctance to acknowledge the legitimacy of targeting groups not participating in fighting. Additionally, even if some of them are not willing theoretically to accept distancing modern scholarship from classical jurisprudence, they effectively employ their own techniques and directly interpret the sources, regardless of alternative interpretations provided by classical and mediaeval jurists. Whether or not contemporary approaches were influenced by Abū Zahra is hard to establish, but there is no denying that he is unanimously agreed upon as an authority with regards to armed conflict. If this new consensus

51 Wael Hallaq, *Authority, Continuity and Change in Islamic Law* (Cambridge: Cambridge University Press, 2001), 54.

52 Abū Zahra, "'Ilaqāt," 299.

consolidates, it could arguably be of equal authority to classical positions and may be built upon further in scholarship, but as mentioned earlier, the reluctance to acknowledge its modern basis and contradictions with classical scholarship prevents it from materializing into a significant and powerful project. As long as modern scholars continue to claim their allegiance to classical scholarship, their works will continue to be vulnerable to attacks and claims of deviation from classical jurisprudence. In other words, loyalty to the tradition becomes the benchmark for assessing modern arguments rather than the merits of those arguments.

One cannot assume, however, that Abū Zahra's approach is regarded as the unanimous modern interpretation of the Islamic laws of armed conflict. Al-Amīn, for example, also attempting to prove the non-violent nature of regulations governing war, acknowledges the potential for enslavement of captives. This position might appear more in accordance with classical jurisprudence. However, al-Amīn introduces a slight innovation to the regulation of enslavement. Whereas some classical jurists, such as al-Shāfiʿī,[53] argue that it is not preferable for the *imām* to release captives if Muslim interest does not require such a release, al-Amīn argues that the head of the state may "impose slavery on the rest of the captives if he believes that Muslim interest necessitates that."[54] This argument basically reverses the necessity argument in favour of releasing captives rather than enslaving them. So, by accepting the enslavement alternative, it is loyal to the tradition, but it innovatively shifts the weight of the *imām*'s power.

Although Abū Zahra and al-Amīn's works offer different reasoning with regards to the rules of armed conflict, both men display fluctuating loyalty to classical jurisprudence and are willing to recognize neither the contradiction between their works and classical works nor the innovative nature of their own approaches. Additionally, there appears to be an interest in proving Islamic law's "mercy" and "justice" in war in what appear to be responses to a sense of attack on Islamic law. That objective is in fact referred to in different conference proceedings. For example, the first conference (1964) recommendations state the need for "a wise plan to call for adherence to the path of God, to resist the challenges facing Islam and refute rumours around it."[55] It is unclear what

53 al-Shāfiʿī, *al-Umm*, ed. Maḥmūd Mutrajī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1993), 4:250.

54 ʿAlī ʿAbdul Raḥman al-Amīn, "ʿAwāmil intishār al-Islām," in *Majmaʿ al-Buḥūth al-Islāmiyya First Conference*, al-Azhar, Cairo, March 1964, 363.

55 "Tawṣīyāt al-muʾtamar," in *Majmaʿ al-Buḥūth al-Islāmiyya First Conference*, al-Azhar, Cairo, March 1964, 390.

might have triggered the sense of attack, but it is most likely a recurring theme in the ongoing debates on the challenges of modernity to the Islamic tradition.

1.2.1.2 *al-Majmaʿ After the 1967 Arab-Israeli War*

The subject focus in addressing armed conflict changed significantly after the 1967 war with Israel. Whereas before, attention was paid to the conflict with Israel because of the partition of Palestine in 1948 and what was perceived in Muslim and Arab circles as occupation, this attention grew after the occupation of Egyptian territory by Israel in the Sinai peninsula. In succeeding years, sessions and conference publications were dedicated exclusively to the war with Israel, but the focus shifted to the need to mobilize Egyptian, Arab, and Muslim forces to fight the Israelis. The emphasis on the defensive nature of *jihād* was continued, as with Grand Shaykh of al-Azhar, ʿAbdul Ḥalīm Maḥmūd (1973–1978), who reiterated *jihād's* focus on self-defence, prevention of injustice, and ensuring that oppressive rulers do not obstruct the propagation of the Islamic message.[56] Some arguments also resemble Abū Zahra's argument that Islamic law prohibits killing those who do not participate in fighting. Ghawsha, for example, adopts the same technique with regards to targeting and uses traditions that prohibit the killing of certain categories to deduce that those who did not participate in fighting are not to be targeted.[57] But his approach is equally contradictory. He relies, for example, on a tradition from ʿUmar b. al-Khaṭṭāb to prevent the killing of older people, but he fails to acknowledge the existence of an equally authoritative tradition claiming that ʿUmar stated that all adult men should be killed, a tradition relied on by Ibn Ḥazm to prove that adult men must convert to Islam in order for their lives to be spared.[58]

But the primary focus of most writings after 1967 is the obligatory nature of *jihād* in cases of self-defence and the rewards due to those who conduct wars of *jihād*. The need to shift focus from the rules of war to the benefits of participating in war and donating to it in case of self-defence is probably self-evident. To a great extent, the case for a defensive war against Israel could easily be made at least from an Islamic perspective, where a Muslim territory was taken over. Nāṣir's speech to the fifth conference (in 1970) is perhaps a good example of that position, where he says, "We do not want more than the rights that were

56 ʿAbdul Ḥalīm Maḥmūd, "al-Jihād," in *Majmaʿ al-Buḥūth al-Islāmiyya, al-Azhar Fourth Conference*, Cairo, September 1968, 42.

57 ʿAbdullah Ghawsha, "al-Jihād ṭarīq al-naṣr," in *Majmaʿ al-Buḥūth al-Islāmiyya, al-Azhar Fourth Conference*, al-Azhar, Cairo, September 1968, 241.

58 Ibn Ḥazm, *al-Muḥalla bi-l-athār*, ed. Aḥmad Shākir (Beirut: al-Maktab al-Tijārī li-l-Ṭibāʿa wa-l-Nashr, 1969), 7:299.

ours over the years and over time. We are working for peace. We resort to peace as God almighty asked us to do in the Qur'ān."[59]

One could also argue that the last priority during times of war would be unilateral regulations that bind one's own forces without setting any sort of obligation on the adversary. Additionally, regulations and limitations do not stimulate the necessary mobilization as much as an emphasis on obligations to fight, punishments for those who do not fight, and rewards of those who do: "*Jihād* is a *farḍ kifāya*[60] ... the whole nation cannot go out and fight. But *jihād* can transgress being *farḍ kifāya* and become *farḍ ʿayn*[61] and that is when the enemy enters the territory of Islam."[62] Finally, Egypt was not as wealthy as other Muslim and Arab nations, and the scholars were interested in tapping into the resources of wealthier states to share the burden of the conflict. That was why they emphasized more than once the need for those who are not neighbouring the enemy to contribute with money. The Prophet's Companions were often invoked as examples to be followed by Muslims in the conflict with Israel.[63]

That shift in emphasis meant less attachment to the project represented by Abū Zahra, aiming at proving the compatibility of Islamic law with so-called civilized principles. Although post-1967 writings do not attempt to challenge Abū Zahra's arguments, many unintentionally contradict his message in their diverted attention to mobilization. Another member of the Academy, for example, presenting a paper on the values of self-sacrifice during armed conflict in Islamic law, cites the incident of Kaʿb b. al-Ashraf, a Jewish man said to have verbally attacked the Prophet. Some Muslims went to his house and pretended they needed to talk to him about a specific matter and then killed him.[64] Although the author cites this incident as a sign of self-sacrifice, focusing on how those Muslims put their lives in danger, this incident challenges the theory that targeting is based solely on participation in fighting. In fact, this incident is relied on in *Sharḥ al-Siyar* to indicate how *amān* is only binding if clearly and unambiguously pledged, and to prove that because the Muslims had pretended that they wanted to talk to the victim, he did not qualify for

59 Jamāl ʿAbdul Nāṣir, "Kalimat al-mu'tamar," Majmaʿ al-Buḥūth al-Islāmiyya Fifth Conference, al-Azhar, Cairo, March 1970, 36.

60 An obligation fulfilled by the few on behalf of the collective.

61 An individual obligation on every member of the collective.

62 Muḥammad Abū Zahra, "al-Jihād," in *Majmaʿ al-Buḥūth al-Islāmiyya Fourth Conference*, al-Azhar, Cairo, September 1968, 74.

63 Muḥammad ʿAbdullah Māḍī, "al-Jihād fī sabīl Allah bi-l-māl," in *Majmaʿ al-Buḥūth al-Islāmiyya Fifth Conference*, al-Azhar, Cairo, March 1970, 91.

64 ʿAbdullah Kanūn, "al-ʿAmal al-fidā'ī fī naẓar al-Islām," in *Majmaʿ al-Buḥūth al-Islāmiyya Fifth Conference*, al-Azhar, Cairo, March 1970, 102.

amān.[65] The fact that it was necessary for Ibn al-Ashraf to be granted an *amān* to prohibit his killing, even if there was no battle for him to participate in then, indicates that his life was not considered immune, even in non-combat situations. More important, the incident is relied on by militants as a basis for terrorist attacks and to claim that the enemy may be deceived into a sense of safety in order to be attacked. Ghawsha also relies on al-Mawardī, who states that "whoever the message has not reached, we are prohibited from proceeding to fight them with surprise, or at night through killing and burning."[66] The condition of delivering the message of Islam indicates that al-Mawardī favours resorting to surprise fighting during the night and burning if people are familiar with the message of Islam, which again challenges the targeting conditions presented by Abū Zahra and others.

Innovative theories are also employed to serve the war mobilization agenda. Abū Zahra, for example, in a paper presented at the third conference (before 1967), adopts the mainstream classical view of the crime *ḥirāba*, stating that acts of *ḥirāba* such as armed robbery are criminal offences aimed at terrorizing people.[67] Maḥmūd, on the other hand, utilizes this legal regime in a manner that is more useful to the conflict with Israel. He states that "the enemies are fighting God and his prophet and anyone who allies with them is a fighter of God and his prophet, because he aides the victory of God's enemies over his allies" and then cites the *ḥirāba* verse to support his proposition, without referring to the prevalent reading of the legal regime of *ḥirāba* – as a regime governing criminal activities in Muslim lands.[68]

Another distinctive feature of the discourse on the 1967 conflict is the tendency to view it as a sign of societal decay and distance from true Islam, arguing that the only path to defeating the enemy is to return to Islamic principles. The conflict may have been perceived, at least partially, as a chance to reclaim al-Azhar's authority, eroded by Nāṣir, and to emphasize the institution's crucial role in the forthcoming era. Scholars appear to have been aware of their indispensable importance to the government in time of war, with the need to mobilize people through both national and religious messages. Additionally, the Academy's conferences seems to have been a suitable platform for a more general appeal for assistance from Muslim countries, leading Nāṣir to place on the Muslim scholars' shoulders the duty of mobilizing public opinion in

65 al-Shaybānī, *Sharḥ al-Siyar*, ed. Abū 'Abdullah Ismail al-Shāfi'ī, 1:188–91.

66 Ghawsha, "Jihād," 241.

67 Abū Zahra, "Mujtama'," 356.

68 Maḥmūd, "Jihād," 57–58.

Islamic countries.[69] Confident in their role, scholars appear to have perceived the conflict as a chance to correct the path of the nation. That confidence seems, however, to have been very cautious not to agitate the Egyptian government or attempt to erode its credibility. Thus, Nāṣir is, at least officially, excluded from the critique of drifting from religion.

> When Muslims were shocked with what happened, they were surprised that their God would give them up and deliver them to them [unbelievers]. But if they were fair, they would know their position from God's religion and that faith is not based on hope but on what is in the heart affirmed by action.... I do not doubt, and you are with me, that if we had won with the disruption and deviation of our society, we would have become more audacious to continue in the prohibitions of God.[70]
>
> Nevertheless, the right never dies. God sends this nation at the beginning of every hundred years someone to renew the matters of religion for it. We thank God almighty that this era witnessed the appearance of great men such as Jamal al-Dīn al-Afghānī, Shaykh Muḥammad ʿAbdū, Shaykh Rashīd Riḍā, and then the great man Jamāl ʿAbdul Nāṣir.[71]

1.2.2 al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya: Prior to the Arab Spring

Until those words were written, the Supreme Council has convened twenty-seven conferences, but I have only been able to locate proceedings of the first twenty-five conferences. In addition to the Council conferences, I have also relied on al-Azhar's 2014 joint conference to cover the discourse after the Arab Spring. It comes as no surprise that the proceedings of the Supreme Council's conferences dedicate significant focus to the issue of terrorism, even before the Arab Spring. The 1990s witnessed an escalation in the intensity of Islamist militant attacks within Egyptian borders, such as the 1993 attempted assassination of then prime minister ʿĀtif Sidkī, leading to the death of a female student in a nearby school and the infamous 1997 Luxor massacre. It should be expected, then, that the 1998 conference, "Islam and the Twenty-first Century," dedicated considerable effort to "the phenomenon of terrorism." The decline in domestic militant attacks in Egypt was paralleled by the rise in globalized attacks, with the height of intensity of such attacks witnessed in the 9/11 bombings. Again, the Supreme Council was quick to respond, with the conferences

69 Nāṣir, "Kalima," 36.

70 Ḥasan Khālid, "al-Jihād fī sabīl Allah," in *Majmaʿ al-Buḥūth al-Islāmiyya Fourth Conference*, al-Azhar, Cairo, September 1968, 164.

71 Khālid, "Jihād," 165.

"The Truth About Islam in a Changing World" (2002) and "Tolerance in Islam" (2003) both dedicating significant focus to armed conflict.

1.2.2.1 *Domestic Terrorism*

Internal Muslim warfare has always been a complex legal issue facing Muslim jurists, primarily because of the lack of clear prophetic precedents on armed conflict with a Muslim group. The works participating in the proceedings of the conferences show consensus on rejecting "terrorism" as a legitimate means of conflict. Some of the works, however, fail to offer any jurisprudential basis for such rejection and rely solely on rhetoric about tolerance in Islam.[72] But even scholars who attempt to offer a jurisprudential definition for the phenomenon fail to acknowledge the complexity of the issue. As detailed in Abou El Fadl's comprehensive study of rebellion, classical Muslim scholars used the Qur'ān, prophetic *ḥadīth*s and the Companions' *sịyar* to formulate a complex legal system dividing conflicts within the Muslim nation into *ridda*, *baghy*, and *ḥirāba*.[73] But most works presented at the conference emphasize that militant attacks are punishable under the regime of *ḥirāba*, without any reference to the possibility of an alternative regime applying to such conflicts. In the eighth conference (1996), Ḍayf relies on the *ḥirāba* verse to argue that "terrorists" spread corruption on earth because of the devastating impact of their acts, including killing police officers, killing bystanders in the course of fighting, widowing women, orphaning children, bereaving parents, and destroying property.[74]

Although such arguments can plausibly apply to *ḥirāba*, they disregard the fact that such damage does not necessarily deny the potential for militants to fall under the regime of *baghy*. Most classical jurisprudence limited *ḥirāba* to highway robbery and similar criminal behaviour and applied the regime of *baghy* to rebellion against a just *imām*. In the classical discourse, it was often presumed that *bughā* would cause a loss of life and property and they were not held liable for such losses. That is not to claim that modern Islamist militant

72 Aḥmad Marānī, "Mawqif al-Islām min ẓahirāt al-irhāb," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmịyya Tenth Conference*: *al-Islām wa-l-Qarn al-Ḥādī wa-l-ʿIshrūn*, Cairo, 2–5 Jul 1998, online: <http://elazhar.com/conf_au/10/34.asp>, accessed 6 June 2011. Note: many papers are presented under the same title.

73 Khaled Abou El Fadl, *Rebellion and Violence in Islamic Law* (Cambridge: Cambridge University Press, 2002), 61.

74 Nashʾāt ʿAbdul Jawād Ḍayf, "Mawqif al-dīn min al-irhāb wa-l-taṭaruf," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmịyya Eighth Conference*: *al-Islām wa Mustaqbal al-Ḥịwār al-Ḥaḍārī*, Cairo, 24–26 Jul 1996, online: <http://elazhar.com/conf_au/8/21.asp>, accessed 6 June 2011.

attacks fall neatly under the *baghy* regime stipulated by classical jurisprudence, nor is it to deny that the *ḥirāba* regime might apply, but it is to say that scholars dealing with Islam's position on terrorism should, at the very least, be expected to address the complexity of adapting definitions of crimes and acts of political violence developed by classical jurists to this modern-day phenomenon and refute alternative interpretations. Ibn Ḥazm and Ibn Taymiyya, for example, who present novel interpretations of rebellion, argue that, in some instances, rebellion may fall under the regime of *ḥirāba*, and they attempt to address and refute some of the established jurisprudential arguments on the matter.[75]

Khān confirms the application of *ḥirāba* to terrorists and says that under Islamic law, it is "different from *baghy* because *sharīʿa* encourages dialogue with *bughā* and if they are sincere in their claim and they corroborate it with honest witnesses, their claim is to be accepted and they are not to be treated like criminals."[76] So, despite awareness of the *baghy* regime, Khān does not explore the details of whether terrorist acts coincide with the definition and practices of *baghy*, simply dismissing the regime because of its consequences. He is unwilling to accept dialogue with terrorists, so he refuses to accept that *bughā* regulations might apply to them.

Al-Amīn, Muftī of Eritrea, makes the only attempt to address the application of *baghy* to terrorist activities and offers alternative reasoning to prove that Islamist militant tactics are illegitimate, hence undeserving of applicability of the regime. First, he argues that rebelling against the sultan is denounced by the Qurʾān and the Prophet and cites the verse, "You who believe, obey God and the Messenger, and those in authority among you"[77] and prophetic traditions that demand obedience to authority figures.[78] He also refutes the argument that governments' failure or reluctance to apply Islamic *sharīʿa* is proof of *ridda* of the rulers, which is, in turn, a legitimate cause for overthrowing the government. He cites numerous traditions that emphasize Allah accepting the repentance of individuals for any sin other than *shirk* (polytheism) to prove that the rulers cannot be treated as apostates.[79] Thus, he seems to be employ-

75 See Chapter 2.

76 Iqbāl Aḥmad Khān, "Mawqif al-adiyān tijāh al-irhāb wa-l-taṭaruf," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Eighth Conference*: *al-Islām wa Mustaqbal al-Ḥiwār al-Ḥaḍārī*, Cairo, 24–26 Jul 1996, online: <http://elazhar.com/conf_au/8/23.asp>, accessed 6 June 2011.

77 Q 4:59.

78 Aḥmad al-Amīn, "Mawqif al-Islām min ẓāhirat al-irhāb," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Tenth Conference*: *al-Islām wa-l-Qarn al-Ḥādī wa-l-ʿIshrūn*, Cairo, 2–5 Jul 1998, online: <http://elazhar.com/conf_au/10/35.asp>, accessed 6 June 2011.

79 al-Amīn, "Mawqif."

ing the quietest tradition advocated by Ibn Taymiyya to renounce rebellion against Muslim leaders, while rejecting his attempts to expand the potential against leaders whose Islam is suspect.[80] Finally, al-Amīn argues that foreign tourists are not legitimate targets, because they entered the Muslim territory by virtue of an official permission from the government, which amounts to *amān*.[81] While al-Amīn's paper lists the primary arguments often made by militants in support of their tactics, its brevity and lack of exploration of jurisprudential controversies surrounding each of the issues brought up makes it a very unconvincing attempt to refute militant thought. This is especially so when compared to more extensive militant revisionist works, exemplified by ʿAbdul ʿAzīz's *Wathīqat tarshīd al-jihād*, or when measured against militant works like al-Ẓawāhirī's *al-Tabriʾa*, written in response to ʿAbdul ʿAzīz.[82]

1.2.2.2 *International Terrorism*

International terrorist attacks in the 1990s and the early twenty-first century seem to have regenerated interest in the issue of Islamic regulation of warfare. *Jihād* becomes a new, dominant theme in the proceedings of the conferences, especially the fourteenth and sixteenth (2003 and 2004). But that interest fails to move scholarship further than earlier 1960s forums and the approaches offered there to this pressing and controversial issue. The approach adopted in the Academy's conferences portrayed certain methodological trends. First, scholarship suffered from the inherent selectivity witnessed in most projects addressing the issue. Second, in many instances, texts were often expanded beyond their traditional interpretation to prove the "peaceful" nature of the discourse. Third, many of the works examined relied primarily on rhetorical renunciation of violence rather than offer a thorough jurisprudential analysis. Finally, in some instances, the reader can detect defensive attacks on other religious traditions to prove the superiority of Islamic ethics of war. But an important contribution witnessed in those conference proceedings is an expansion of reliance on numerous historical precedents to prove their arguments about the law, which, as argued earlier, expands the tools of interpretation at modern revisionists' disposal.

1.2.2.3 *Texts Reinterpreted*

Many of the works published continue the modern tradition of relying on particular texts and juristic opinions to limit targeting to those fighting and

80 See Chapter 2.

81 al-Amīn, "Mawqif."

82 See Chapter 4.

disregarding contradictory texts and opinions. For example, Abū Ṭālib argues that war captives are to be treated kindly and lists two alternatives for dealing with captives: ransom and release. In order to prove his argument, he relies on only parts of the Qurʾanic verse dealing with the issue of captives that support his argument.[83] The part he relies on (in italics below) avoids the reference to "striking unbelievers" in the necks at the beginning of the 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. That* [*is the way*]. *God could have defeated them Himself if He had willed.*[84]

Moreover, Abū Ṭālib's argument makes no reference to the long juristic tradition upholding four alternatives for the *imām*, ransom, release, killing, and enslavement. Not only do the majority of classical jurists accept the killing of male captives, al-Ṭabarī's *ikhtilāf* (lit. difference, historically referring to comparative jurisprudence genres) states that jurists agreed that "if women and children were captured and taken to *dār al-Islām*, they become booty and the *imām* cannot grace them [with release] if the army captured them in a desert land that they do not own."[85]

Sometimes disregard for the legal tradition is made without any reference to the textual basis that would support the proposed position. Al-Khayāṭ, for example, argues that Islamic law prohibits confiscation of civilian property, then fails to cite any source of Islamic law that would support this claim,[86] a claim that deviates from the long tradition of jurists' treating enemy property as booty, as evidenced in previous chapters. He also argues that cities should not be destroyed, again without making any reference to sources other than a prophetic *ḥadīth* that prohibits the cutting of plants, disregarding juristic arguments that the prohibition of destruction of property emanated from an

83 Ṣūfī Abū Ṭālib, "al-Islām wa-l-akhar fī l-ilaqāt al-dawliyya: Nazra ʿāma," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Sixteenth Conference: al-Tasāmuḥ fī l-Ḥaḍāra al-Islāmiyya*, Cairo, 28 Apr–1 May 2004, online: <http://www.elazhar.com/conf_au/16/conf_16.pdf, 400>, accessed 7 June 2011.

84 Q 4:47.

85 al-Ṭabarī, *Kitāb al-Jihād wa Kitāb al-Jizya wa aḥkām al-muḥāribīn min Kitāb Ikhtilāf al-fuqahāʾ*, ed. Joseph Schacht (Leiden: Brill, 1933), 141. See also Ibn Rushd (al-Ḥafīd), *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid* (Cairo: Dār al-Ḥadīth, 2004), 2:144.

86 ʿAbdul ʿAzīz al-Khayāt, "al-Islām dīn al-salām: Mafhūm al-ḥarb wa-l-salām fī l-Islām," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Tenth Conference*: *al-Islām wa-l-Qarn al-Ḥādī wa-l-ʿIshrūn*, Cairo, 2–5 Jul 1998, online: <http://www.elazhar.com/conf_au/10/36.asp>, accessed 8 June 2011.

interest in preserving potential booty. In fact, al-Shāfiʿī argues that property hard to acquire should be destroyed to prevent the army from benefiting from it.[87] Whereas the prophetic tradition could prove useful to an argument against the destruction of property and cities, failure to address the controversy over booty and destruction of property weakens the potential for the argument to develop into a significant, coherent modern position.

But not all scholars show the same disregard for the juristic tradition. Al-Ṭabṭabāʾī offers one of the most rigorous examinations of classical jurisprudence on armed conflict and lists in detail the different juristic positions on the targeting of women, monks, hired labourers, and so forth.[88] However, he adopts an apparently neutral position on terrorism and its permissibility under Islamic law, arguing that *jihād* differs from terrorism because *jihād* is intended for combat with non-Muslims only, whereas terrorists target Muslims; that *jihād* is always justified (unlike terrorism); and that God always rewards participants in *jihād*, whereas "he only rewards participants in terrorism if their objective is justified."[89] Al-Ṭabṭabāʾī's seemingly neutral position means that the paper does not employ the restrictive approach to violence adopted by modern works and is thus not suited for examining the consistency of this approach in how it relates to classical jurisprudence. However, in another paper presented at the sixteenth conference, he tries to argue that opposition to authority, even peaceful protest, violates Islamic law because protests obstruct traffic and cause chaos,[90] an argument that became widespread after the 2011 revolt but that is unsuited for this discussion due to the lack of armed conflict in the said situation. Unlike his *jihād* analysis, this argument lacks any significant and well-supported textual basis.

1.2.2.4 *Attempts to Prove Superiority*

Another common tactic employed by many commentators is the attempt to prove Islamic law superior to other religious traditions of war, particularly Judaism. To a great extent, many scholars feel that Islam has been under attack

87 See Chapter 1.

88 Muḥammad ʿAbdul Razzāk al-Sayyid Ibrahīm al-Ṭabṭabāʾī, "Aḥkām al-jihād," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Fourteenth Conference: Ḥaqiqat al-Islām fī ʿAlām Mutaghayyir, Cairo, 20–23 May 2003*, online: <http://elazhar.com/conf_au/14/49.asp>, accessed 7 June 2011.

89 al-Ṭabṭabāʾī, "Aḥkām al-jihād."

90 Muḥammad ʿAbdul Razzāk al-Sayyid Ibrahīm al-Ṭabṭabāʾī, "al-Taṭaruf wa-l-irhāb: Dirāsa sharʿīya," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Tenth Conference*: *al-Islām wa-l-Qarn al-Ḥādī wa-l-ʿIshrūn*, Cairo, 2–5 Jul 1998, online: <http://www.elazhar.com/conf_au/16/conf_16.pdf, 892>, accessed 7 June 2011.

recently for its legitimation of "violence against the other" and feel that they need to fend off this argument by proving other religious traditions' inclination towards violence. This sense of attack is best articulated by Sulṭān al-ʿUlamāʾ:

> Perhaps Islam is the only religion that is defamed and held responsible if one of its believers commits a mistake, whereas we find that throughout history, and until now, whoever conducts terrorist operations and heinous acts from the adherents of other … religions, their acts are not relegated to [their religions] and it is not said that the Chrisitan or the Jewish or other religions are the ones that instigate such acts.[91]

Possibly, the choice of Judaism as the religion against which most scholars compare the Islamic tradition of armed conflict is simply a comparison against the other Abrahamic religion with a strong legal emphasis, but one cannot ignore the impact of the Israeli-Palestinian conflict on this project. In their commentary on terrorism, many presenters argue that the West often ignores state terrorism conducted by Israel against Palestinians and complain about Islam being singled out as a religion that condones violence. Jumʿa, the Egyptian Grand Muftī at the time, for example, cites different verses from the Torah to argue that "the notion of war is not a detested concept from the Talmudic perspective; it seems that wars stemmed from the Talmudic *sharīʿa*, conducted with the blessing and aid of God."[92] Abū Ṭālib cites some Talmudic verses that supposedly instruct the destruction of whole cities and killing of their inhabitants and then argues that those verses inspire modern Israeli military practices, "and if Palestinians defend their legitimate rights and resist the Israeli occupation, they are accused of terrorism and violence."[93]

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91 Muḥammad ʿAbdul Raḥīm Ṣultān al-ʿUlamāʾ, "Mawqif al-Islām min al-irhāb," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Tenth Conference*: *al-Islām wa-l-Qarn al-Ḥādī wa-l-ʿIshrūn*, Cairo, 2–5 Jul 1998, online: <http://www.elazhar.com/conf_au/16/conf_16.pdf>, 1167, accessed 7 June 2011.

92 ʿAlī Jumʿa, "al-Jihād fī l-Islām," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Fourteenth Conference: Ḥaqiqat al-Islām fī ʿĀlām Mutaghayyir, Cairo, 20–23 May 2003*, online: <http://elazhar.com/conf_au/14/44.asp>, accessed 7 June 2011.

93 Abū Ṭālib, "al-Islām wa-l-akhar," 401. It is interesting to see how Muslim scholars commit the same mistakes they often accuse "orientalist" scholars of committing when examining Islamic law. None of the presenters appeared to be an expert in Jewish law and its deductive techniques. Texts were simply quoted to support arguments that the legal system condoned harsh treatment of the other, without understanding the context behind those texts or how they were interpreted within the legal tradition. Moreover,

1.2.2.5 *Beyond the Text: Historical Arguments*

Another potentially interesting approach is a reliance on historical precedents to prove a particular point of view about the law. Whereas acts of the Prophet and the Rightly Guided Caliphs[94] have traditionally constituted a source of law, other precedents were never officially recognized as authoritative. But in some of the papers presented, arguments about Islamic ethics of war rely on historical narratives to prove the researcher's position. Jumʿa, for example, relies on statistical data about the rate of conversion to Islam to prove it was too slow to have been forceful.[95] Sālim offers an interesting analysis of a precedent relied upon by many jurists to justify a harsher treatment of the People of the Book. He shows that ʿUmar's pact with the people of Jerusalem, cited in different historical sources as a basis for *jizya* contracts, does not stand up to historical scrutiny, arguing that the harsher clauses, such as standing up when they see a Muslim passing, were fabrications.[96] He argues that most sources mention such conditions in the format of the People of the Book promising to abide by such conditions, which is unlikely because normally the caliph would state the conditions of the pact, especially ones that limit the freedom of the other. He also argues that the Prophet's pacts never stipulated similar conditions, and it is unlikely that ʿUmar would deviate from the Prophet's pacts. Finally, he argues that a pact with such offensive conditions goes against the spirit of Islam and should, therefore, be regarded with considerable scepticism. He also relies on the conquest of Constantinople by Muḥammad al-Fātiḥ (r. 848–50/1444–6, 855–86/1451–81), to prove the lenience of Muslim warriors with enemies.[97]

This critical historical assessment of traditions – often relied on to refute "tolerant" arguments, citing statistics that contest the claimed "brutality" of Muslim conquests, and relying on historical incidents not traditionally considered to constitute a legal source – expands the sources available for scholars examining the Islamic regulation of armed conflict. Such an expansion could prove useful to the modern researcher in any attempt to reform and

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much like the often criticized link between terrorism and Islam, scholars argued that practices of the modern Israeli state stem from Judaism.

94 With authoritativeness varying depending on the *madhhab*.

95 Jumʿa, "Jihād."

96 ʿAbdul Raḥmān Sālim, "Bayn al-ʿuhda al-ʿUmariyya wa ʿahd Muḥammad al-Fātiḥ lī ahālī al-Qusṭanṭīniya," in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Sixteenth Conference: al-Tasāmuḥ fi l-Ḥaḍāra al-Islāmiyya*, Cairo, 82 Apr- 1 May 2004, online: <http://www.elazhar.com/conf_au/16/conf_16.pdf, 1075>, accessed 7 June 2011.

97 Sālim, "Bayn al-ʿuhda," 1089.

contextualize classical jurisprudence by offering an alternative set of rules that could be relied upon.

1.2.3 The Supreme Council and al-Azhar after the Arab Spring

We see a renewed interest in terrorism in the last five conferences of the Council, all dedicated to the issues of terrorism and *takfīr* (deeming one an apostate). Of those five conferences, I examine the first three as part of my examination of Modern mainstream jurisprudence and its reaction to the creation of ISIS, its claim to the caliphate and its insistence on the apostasy of its opponents. Al-Azhar also convened a conference in December 2014 titled "al-Azhar in Confrontation with Terrorist Thought," covering four primary themes: "Correction of Concepts," with papers published addressing the caliphate, *takfīr*, *ḥākimiyya*, and *jihād;* "Extremism," covering extremist ideologies and the role of al-Azhar in combating them; "Terrorism and Its Threat to International Peace," covering means to combat terrorism; and "Citizenship and Peaceful Coexistence," covering respect for diversity and citizenship in Islamic law. The Supreme Council conferences examined focused on the dangers of *takfīr* and the issuance of *fatwā* without knowledge, errors of extremists and the role of preachers in deconstructing extremist thought. Despite the rise of ISIS, with its ideological pronouncements of *takfīr*, and its claims for re-establishing a caliphate and re-introducing slavery, the conference proceedings are generally exceptionally brief in their analysis of those complex issues, despite their ambitious claims to be confronting terrorist ideologies. Much of the papers are filled with rhetorical statements about terrorism, with little jurisprudential analysis. This section will, however, focus on the arguments around the notions of *takfīr* and the caliphate due to their direct relevance to the arguments made by ISIS, as seen in the next chapter, and due to coverage of analysis of terrorist activities and *jihād* in the sections covering the timeframe prior to the Arab Spring.

1.2.3.1 *The Caliphate*

The primary theme in the papers published on the caliphate is that the caliphate is one of many political institutions devised to govern Muslim affairs. Being a human creation naturally means that alternative modes of governance, as devised by Muslims, are equally legitimate from an Islamic point of view. Al-Sayyid argues, for example, that the caliphate is a product of the circumstances of the death of the Prophet and the agreement of the Muslim nation on Abū Bakr's appointment as a *khalīfa* (successor) to the Prophet and that gradually, "this expression carried a religious character, as if it were a system

ordained by Islam or instructed by the Prophet."[98] He asserts that the diversity in the selection of the four Rightly Guided Caliphs attests to divine wisdom and proves flexibility in paths towards governance.[99] This view is similarly endorsed by the Palestinian Ministry of Endowment presentation in the twenty-fourth Supreme Council conference, with a slightly different approach. In its paper, the ministry attempts to prove that the Islamic Imāmate (or caliphate) is not a cornerstone of religion by relying predominantly on modern jurisprudential works as well as the Shafiʿī jurist, al-Jūwaynī (d. 478/1085). Yet, the presentation does not show any attempt to address contrasting juristic views.[100] Alternatively, al-Najjār argues that while the caliphate is an *aṣl* that must be fulfilled, circumstances make it difficult to attain. Thus, it may be replaced by a league of Muslim nations premised on respect for the sovereignty of each Muslim state.[101] Yet, most scholars addressing the issue of the caliphate assert the contextual nature of jurisprudence relating to its necessity[102] and its relationship with non-Muslim states.[103] Interestingly, another new feature in the literature on the caliphate in the conferences is the assertion of the ruler's duty to respect public will, promote rights of individuals, and more important, public scrutiny over the ruler since he was either chosen or accepted by the public.[104] It is, of course, difficult to discern the correlation between such statements and the Arab Spring, but it is worth noting that the overall atmosphere in the region, even within traditionally authoritarian regimes, such as the Gulf states, signalled out the Syrian regime for its oppression and loss of legitimacy on account of atrocities committed against the Syrian people. On the other hand,

98 Bashshār ʿAwād Maʿrūf, "Niẓām al-khilāfa niẓām mustaḥdath," in *al-Azhar fī muwājahāt al-fikr al-irhābī* conference, Cairo, 03–04 December 2014, 2nd ed. (Cairo: Dār al-Quds al-Arabī, 2016), 54.

99 Maʿrūf, "Niẓām al-khilāfa," 54.

100 Wizārat al-Awqāf wa-l-Shuʾūn al-Dīniya, "Ishkāliyat al-ʿilāqa bayn al-dīn wa-l-sīyāsa" in al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Fourth Conference, "ʿAẓamat al-Islām wa-akhṭāʾ baʿḍ al-muntasibīn ilayhi," Cairo, 28 Feb–1 Mar, 2015 (Cairo: Maṭābiʿ al-Ahrām, 2015), 60.

101 ʿAbdullah al-Najjār, "Mustajadāt fiqh al-khilāfa" in *al-Azhar fī muwājahāt al-fikr al-irhābī* conference, Cairo, 03–04 December 2014, 2nd ed. (Cairo: Dār al-Quds al-Arabī, 2016), 65–67.

102 Maʿrūf, "Niẓām al-khilāfa," 55, and al-Najjār, "Mustajadāt," 69.

103 al-Najjār, "Mustajadāt," 67.

104 Maʿrūf, "Niẓām al-khilāfa," 55, Raḍwān al-Sayyid, "al-Dawlat al-Islāmiyya wa-l-khilāfa," *in al-Azhar fī muwājahāt al-fikr al-irhābī* conference, Cairo, 03–04 December 2014, 2nd ed. (Cairo: Dār al-Quds al-Arabī, 2016), 24. ʿAbdullah al-Najjār, "al-Tawẓīf al-sīyāsī l-il-Dīn: ḥaqīqatuh wa-athāruh," in al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Fourth Conference, "ʿAẓamat al-Islām wa-akhṭāʾ baʿḍ al-muntasibīn ilayhi," Cairo, 28 Feb–1 Mar 2015 (Cairo: Maṭābiʿ al-Ahrām, 2015), 60.

the regime headed by al-Sīsī boasted strong popular support, despite its record on liberties, hence potentially passing the legitimacy test, designed, perhaps specifically, to erode the Syrian regime's legitimacy.

Despite their claim to be confronting militant and terrorist thought, the conferences fail significantly to address the foremost challenge posed by ISIS, the obligation of the caliphate to adhere to the *sharīʿa*. Although ISIS dedicated significant effort to proving that a caliphate must adhere to *sharīʿa* to maintain its legitimacy, relying on Ibn Taymiyya's and Ibn ʿAbdul Wahhāb's works, the papers presented on the caliphate were brief and dismissive when discussing the issue. True, some asserted the implementation of *aḥkām al-sharīʿa*,[105] but Maʿrūf leans towards a more flexible and diluted understanding of Islamic law premised on *maqāṣid*,[106] while al-Sayyid makes the boldest claim to governance being a matter of politics rather than religion.[107]

It is clear that none of these works offers a solid, coherent argument that could withstand the ISIS challenge. Perhaps, the brevity is intentional, considering the difficult position those scholars find themselves in when examining this issue. If they were to adopt al-Sayyid's position, they would be advocating complete withdrawal of the *sharīʿa* from governance, and thereby face serious challenges to their own legitimacy and at the same time create their own authority and grip over some social issues, a grip gained over decades of confrontation and cooptation with the Egyptian regime, as well as other Arab regimes. If, on the other hand, they were to elaborate on how Arab regimes adhere to the *sharīʿa*, this would certainly prove tricky considering the many questions raised over what many see as the "secularization" of the legal regimes in the region.

1.2.3.2 *Takfīr*

The other significant issue covered as part of the conferences is the issue of *takfīr*. The series of papers starts out with a paper published by al-Ṭayyib denouncing the concept of *takfīr* and framing al-Azhar's position as an extension of Ashʿarism and Maturidism's distinction between beliefs and actions,[108] where failure to perform obligatory "actions does not erode belief in its core,

105 Muḥammad ʿImāra, "al-Khilāfa al-Islāmiyya," in *al-Azhar fī muwājahāt al-fikr al-irhābī conference*, Cairo, 03–04 December 2014, 2nd ed. (Cairo: Dār al-Quds al-Arabī, 2016), 31; Muḥammad Rāʾfat ʿUthmān, "al-Khilāfa," in *al-Azhar fī muwājahāt al-fikr al-irhābī conference*, Cairo, 03–04 December 2014, 2nd ed. (Cairo: Dār al-Quds al-Arabī, 2016), 45.

106 Maʿrūf, "Niẓām al-khilāfa," 57.

107 al-Sayyid, "al-Dawla al-Islāmiyya," 24.

108 Two prominent classical theological schools asserting belief as the primary tenet of religious identity.

but the believer remains a believer even if he falls short in obedience or commits sins."[109] He quotes several Qur'anic verses and *ḥadīth*s in support of his claim, such as the distinction between believers and those who do good deeds as two distinct categories in "Those who believe, do good deeds, keep up the prayer, and pay the prescribed alms will have their reward with their Lord: no fear for them, nor will they grieve,"[110] and other Qur'anic verses that refer to Companions of the Prophet having committed major sins without describing them with *kufr*.[111] He does not, however, address any of the jurisprudence or textual sources relied upon by the proponents of *takfīr*, an approach consistently adopted by the other papers addressing *ḥākimiyya* and *takfīr* in this section.

In the Supreme Council twenty-fourth conference, Abū ʿAṣī shows some attempts to address the issue of *takfīr* and argues that *takfīrīs* (those who espouse *takfīr* of others), have relied on Ibn Taymiyya, Ibn Qayyim and Ibn ʿAbdul Wahhāb, whose works are at odds with the majority of jurists.[112] He also presents some basic principles that prohibit *takfīr*, yet in those principles, he acknowledges that denial of prophetic ordinances constitutes major *kufr* necessitating the application of earthly rules relating to apostasy.[113] It is clear that this approach leaves the space open for claims of *takfīr* with regards to the denial of what may be seen as a *qatʿī* rule of Islamic law, itself a contested category of law. More importantly, this view is not significantly different from the views offered by ISIS's ideologue, al-Binʿalī. Of course, it is highly likely that mainstream scholars who employ those views are much more restrictive in their understanding of what constitutes definitive knowledge, the denial of which establishes apostasy, but it is still noteworthy that the methodological position on the establishment of apostasy does not necessarily counter claims made by ISIS and similar militant groups.

A serious cause for concern with the proceedings of the conference is that none of the propositions, or perhaps rudimentary arguments, shows a serious attempt to engage with jurisprudence providing for alternative understanding of criteria of the caliphate and obligations of the caliph, nor do they make an attempt to address the various sources, whether Qur'anic verses, *ḥadīth*s, or

109 Aḥmad al-Ṭayyib, "Khutūrat al-takfīr," in *al-Azhar fī muwājahāt al-fikr al-irhābī* conference, Cairo, 03–04 December 2014, 2nd ed. (Cairo: Dār al-Quds al-Arabī, 2016), 74.

110 Q 2:277.

111 , al-Ṭayyib, "takfīr," 76.

112 Muḥammad Sāmī Abū ʿĀṣī, "al-Fikr al-takfīrī: al-munṭalaqāt wa-l-natā'ij," in al-Majlis al-ʿAlā li-l-Shu'ūn al-Islāmiyya Twenty Fourth Conference, "'Aẓamat al-Islām wa-akhṭā' baʿḍ al-muntasibīn ilayhi," Cairo, 28 Feb–1 Mar 2015 (Cairo: Maṭābiʿ al-Ahrām, 2015), 502.

113 Abū ʿĀṣī, "al-Fikr al-Takfīrī, 510.

other sources relied upon to prove that adherence to Islamic law is a necessary condition of the caliphate. Finally, there is absolutely no attempt to examine the significant issue of the status of subjects of said states if the state significantly deviates from the implementation of Islamic law, even by those who claim that such implementation is a necessary requirement of the caliphate. This negligence is ironic considering the conference's focus on terrorism. One might be inclined to argue that the rise of ISIS is a new phenomenon that has taken the Islamic world by surprise and that responses by mainstream institutions and scholars may legitimately be expected to show slight delay, but that would be to disregard the existence and propagation of ideas articulated by ISIS for decades. In the case of Egypt, the modern reiteration of this brand of *takfīrī* militant Islam has been around since the 1960s, according to Aḥmad al-Ṭayyib, the Grand Shaykh himself.[114]

Despite the brevity and the lack of serious engagement with the arguments presented by militant groups such as ISIS with regards to *takfīr* and *ḥākimiyya*, there is a clear consensus among the scholars participating in the conferences that one of the primary factors contributing to extremist thought is unqualified jurisprudence, the lack of faith in proper religious institutions and the attacks against al-Azhar and other mainstream institutions. ʿArajāwī, for example, states that those who issue *fatwā* without the necessary training and knowledge lead followers astray.[115] He also argues that criticism of mainstream scholars in the media erodes their legitimacy, and leads the youth towards extremist ideologues.[116] Yet, despite his claims for the need for specialists to be given a voice in countering militant thought, his arguments against *takfīr* are hardly unchallengeable. First, like many participants in the different conferences, he relies on the prophetic *ḥadīths* reprimanding Muslims for *takfīr* of fellow Muslims like "If somebody accuses another of Fusuq (by calling him 'Fasiq' i.e. a wicked person) or accuses him of Kufr, such an accusation will revert to him (i.e. the accuser) if his companion (the accused) is innocent."[117] He also relies on Ibn Taymiyya stating that no Muslim had the right to deem *another Muslim* an unbeliever, even if he had erred until evidence is brought against that other Muslim and that whoever is proven to be a Muslim, his faith is not to be

114 al-Ṭayyib, "Khutūrat al-takfīr," 72.

115 Mustafa ʿArajāwī, "al-Asbāb al-Mūʾdiya li-dhāhirat al-takfīr," in al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Third Conference, "Khuṭūrat al-fikr al-takfīrī wa-l-fatwā bidūn ʿilm" Cairo, 25–26 Mar, 2014 (Cairo: Maṭābiʿ al-Ahrām, 2014), 44.

116 ʿArajāwī, "al-Asbāb," 45.

117 *Ṣaḥīḥ al-Bukhārī*, *The Translation of the Meanings of Sahih al-Bukhari, Arabic/English*, trans. by Muhammad Muhsin Khan (Chicago: Kazi Publications, 1979), Volume 8, Book 73, Number 71, Quoted in ʿArajāwī, "al-Asbāb," 23

questioned on the basis of uncertain claims.[118] It is evident that both the textual *ḥadīth* sources nor Ibn Taymiyya's views may still be used as basis for *takfīr* if the Muslim accusing the other of apostasy has not erred and can provide certain evidence for his claim. The paper presented, however, makes no attempt to address this potential challenge, especially in light of Ibn Taymiyya's well known views leaning towards acknowledgement of *takfīr* under certain conditions, as discussed in Chapter 2.

One other technique employed by several papers presented in the conference is to dismiss controversial practices such as *takfīr* or indiscriminate targeting on the basis of the need for an official endorsement of the state. In the case of apostasy, several papers have asserted that apostasy in the present day can only be proven by evidence and pronounced by a judge. In the case of indiscriminate targeting, al-Hudhud acknowledged permissibility on the basis of the night raids *ḥadīth*, but again conditioned them on receiving instructions from the *imām*.[119] Again, much like the reliance on the prophetic *ḥadīth*s or Ibn Taymiyya's views on *takfīr*, this approach does not provide solid basis for dismissing organizations like ISIS, who claim the existence of a legitimate *imām* and have created parallel justice systems.

1.2.4 Official Narratives: Concluding Remarks

The above analysis portrays that scholarship published by official government authorities appears intent on proving Islamic law's congruity with international law. Even if international law is not explicitly relied on or invoked, principles such as participation in fighting as a condition for targeting bring heavy influence on modern scholars' approaches. This keenness stems from the tendency to perceive Western principles of law as benchmarks for civilization, which causes many of them to attempt to prove the similarity, or in some cases the superiority, of Islamic law. That perception is perhaps triggered by a sense of attack against the Muslim faith and civilization in general, as detailed earlier. To achieve this objective, scholars adopt unique interpretive approaches and re-examine textual sources. These approaches could, potentially, reform jurisprudence, but the reluctance of modern scholarship to engage with classical jurisprudence that may contradict their intellectual positions on *jihād*, while selectively relying on corroborating jurisprudence from the same body

118 ʿArajāwī, "al-Asbāb," 25

119 Ibrāhīm al-Hudhud, "Wāqiʿ al-khiṭāb al-dīnī al-muʿāṣīr: muqāraba fī al-waṣf wa-l-ḥal" in *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Fifth Conference: Rūʾyat al-aʾima wa-l-duʿāt li-tajdīd al-khiṭāb al-dīnī wa-tafkīk al-fikr al-mutaṭarif*, Cairo, 14–15 Nov 2015, 12.

of jurisprudence, sets adherence to classical texts as the benchmark for assessing modern works, which often comes to the disadvantage of those works.

Moreover, government association prevents scholars from examining any argument that might erode the legitimacy of the ruling elite or allow for any challenge to its status and conduct of affairs. This reluctance leads many scholars to dismiss and ignore a potentially useful legal regime that could help govern the acts of the government and militant groups: *baghy*. There are of course serious challenges that face the application of the crime of *baghy* to modern intra-Muslim conflicts. First, it is hard to apply a legal regime that is premised on the religion (and in some instances religiosity) of the ruler and rebels to the modern state apparatus, with its relative emphasis on citizenship and equality of individuals before the law. Moreover, the practice of militant groups equally turns a blind eye to this legal regime and claims apostasy of the state in order to manoeuver under the less restrictive regime of *ridda.* But perhaps, at least at the intellectual level, one should explore the potential of the *baghy* regime for bringing both parties under a framework that offers stronger restrictions to armed conflict on both sides. Hence, the question of how to adapt this regime to modern states, as well as other questions about the challenges facing potential invocation of Islamic laws of war, should be addressed by the body of Muslim scholars, but in order to do so, a level of independence from the orbit of the state, as well as freedom from claimed yet unattainable adherence to juristic tradition, is necessary.

Finally, the reasons for decline in the sophistication of juristic analysis, as evidenced in the recent conferences, is unclear. Possibly, association with the state, particularly the Egyptian state, at a critical time in Egyptian history after the oscillation in religious positions with the turmoil of the overthrow of the Mubārak regime and the subsequent overthrow of the Mursī regime, leads scholars to hesitate in adopting a definitive position. In this atmosphere, it is possible that scholars fear articulating a sophisticated view on those matters. It is also possible that they find the thin line between maintaining their relevance as Muslim jurists in Muslim states and denying the need of applicability of Islamic law difficult to tread. As mentioned earlier, there is a consistent concern with the erosion of legitimacy of established religious institutions. In some instances, scholars have accused the media of deliberately eroding the legitimacy of mainstream institutions like al-Azhar.[120] In other instances, some scholars acknowledged that the institutions themselves need to be more

120 ʿArajāwī, "al-Asbāb," 45.

selective with the figures they rely on to present their views.[121] But one of the primary reasons behind possible erosion of legitimacy, independence from state control is never addressed.

2 Mainstream Independent Scholarship

2.1 *Yūsuf al-Qaraḍāwī*

Arguably, no contemporary scholar has gained as much fame and stirred as much controversy as Yūsuf al-Qaraḍāwī. In the past decade, al-Qaraḍāwī has moved from being a voluntary exile in Qatar to leading the prayer in Taḥrīr Square after the 25 January 2011 uprising to being a fugitive against whom a number of sentences have been issued since 30 June 2013. On the international scene, he is a key figure in Muslim Europe, heading the European Council for Fatwa and Research and the International Union of Muslim Scholars, but he is often seen as a force of radicalism by Western states; the United States has revoked his visa, and Britain and France have denied him entry on separate incidents.[122] His status, in addition to his impressive treatise on *jihād*, makes him a natural choice for examination in this book.

Losing his father at the age of two, al-Qaraḍāwī was brought up by his mother and financially supported by his paternal uncle.[123] A prominent student with a promising future, he enrolled at al-Azhar despite his uncle's reluctance. He joined the Muslim Brotherhood during his student years. According to him, the founder of the Brotherhood, Ḥasan al-Banna (d. 1949), was different from his teachers, who were traditional employees primarily interested in their salaries.[124] Al-Banna left a long-lasting impression on al-Qarāḍawī, an impression that shaped his academic and political career. Al-Qaraḍāwī was arrested twice because of his membership in the Brotherhood. The first time was shortly after the assassination of the then prime minister al-Nuqrāshī and the

121 Aḥmad Maḥmūd Karīma, "Nadharāt fī fitnat al-takfīr wa-ṣuwar li-takfīr al-muslimīn," in al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Third Conference, "Khuṭūrat al-fikr al-takfīrī wa-l-fatwā bidūn ʿilm." Cairo, 25–26 Mar, 2014 (Cairo: Maṭābiʿ al-Ahrām, 2014), 89.

122 "French Visa Ban Blow to Al Qaradawi," *Gulf News* (27 March 2012), online: <https://gulfnews.com/news/gulf/qatar/french-visa-ban-blow-to-al-qaradawi-1.1000137>, accessed 3 May 2018.

123 al-Qaraḍāwī website, "Ḥawl al-Qaraḍāwī: Mudhakirāt al-Qaraḍāwī," online: <http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=1766&version=1&template_id=217&parent_id=1>, accessed 10 June 2011.

124 "Ḥawl al-Qaraḍāwī."

ensuing dissolution of the organization in December 1948.[125] After his release, al-Qaraḍāwī enrolled at the faculty of Uṣūl al-Dīn at al-Azhar and graduated to work as a faculty member there. He claims to have campaigned actively for reforms of al-Azhar and to have drafted a short memorandum detailing his vision for such reform, but his efforts were halted by his second and third arrests in 1954 on account of the Brotherhood's alleged attempt to assassinate Nāṣir.[126]

After facing some difficulties, al-Qaraḍāwī managed to pursue postgraduate studies at al-Azhar University in Qur'anic and *ḥadīth* studies, but his history of activism meant he was denied employment as a teacher at any of al-Azhar's institutes.[127] He managed to secure a job as a teacher in a private school in Cairo, until he moved to the Ministry of Awqāf (endowments) in an administrative job. He enjoyed a strong relationship with Shaltūt (d. 1963), who had become the Grand Shaykh of al-Azhar (1958–1963). Al-Qaraḍāwī asked to be transferred to al-Azhar, where he was assigned the task of editing and compiling Shaltūt's writings. Later, he was commissioned to work on his famous book, *al-Ḥalal wa-l-ḥarām fī l-Islām* ("The permissible and the prohibited in Islam"), directed at a European and U.S. audience.[128] He was then seconded by al-Azhar to the Qatari government, but his secondment was delayed for security reasons.

The move to Qatar signalled a new, concrete step towards al-Qaraḍāwī becoming an embodiment of the phenomenon of an "international *ʿalim*."[129] The most significant point in his career as a global Sunnī figure came with the establishment of al-Jazeera Satellite TV channel, based in Qatar. The channel significantly widened his appeal, making his program, *al-Sharīʿa wa-l-ḥayā*, a flagship program. Together, the *ʿalīm* and the satellite channel enjoyed a symbiotic relationship, where "the seriousness of al-Jazeera has reflected the seriousness of Qaraḍāwī and vice versa."[130] Al-Qaraḍāwī heads the International Union of Muslim Scholars and is the Chairman of the European Council for Fatwa and Research, in addition to being a member of numerous organizations. He was twice asked to accept the role of the General Guide of the Muslim Brotherhood but declined the role. According to Tammam, al-Qaraḍāwī was aware that his role and reputation transcended that of the organization

125 "Ḥawl al-Qaraḍāwī."

126 "Ḥawl al-Qaraḍāwī."

127 "Ḥawl al-Qaraḍāwī."

128 "Ḥawl al-Qaraḍāwī."

129 Skovgaard-Peterson, "al-Qaraḍāwī and al-Azhar," 37.

130 Ehab Galal, "Yūsuf al-Qaraḍāwī and the New Islamic TV," in Graf and Skovgaard-Peterson, eds., *Global Mufti*, 162.

and was able to manage courteously his relationship with the Brotherhood in a manner that ensured his independence and appeal to a wider audience.[131]

It should also be noted that al-Qaraḍāwī was invited in 2008 to join the Academy by the late Grand Shaykh of al-Azhar, Ṭanṭāwī. Al-Qaraḍāwī, who had been a critic of the Academy, accepted the invitation and participated in its thirteenth conference. However, when the Academy issued a *fatwā* condoning the building of a controversial wall along the Egyptian-Israeli border, al-Qaraḍāwī condemned the *fatwā* and did not attend the 2009 conference.[132] After the 2011 revolution and upon the reinstatement of the ESA by virtue of the law issued by SCAF in 2012, he was also appointed as a member of the authority. Upon the removal of Mursī from power by the military in 2013 and the ensuing attack on protesters against the coup, al-Qaraḍāwī resigned from the authority and the Academy.[133] It is worth noting, however, that while al-Qaraḍāwī had supported protests against Mubārak,[134] he strongly condemned popular protests against Mursī[135] despite his strong support for protests against Mubārak,

2.2 *al-Qaraḍāwī and* Uṣūl al-Fiqh

On more than one occasion, al-Qaraḍāwī has emphasized the authority of the Qur'ān and sunna as the primary sources of jurisprudence. He argues that knowledge of the whole body of both sources, beyond texts traditionally perceived as legal, is essential to the *mujtahid* because non-legal texts can have

131 Husam Tammam, "Yūsuf Qaraḍāwī and the Muslim Brothers," in Graf and Skovgaard-Peterson, eds., *Global Mufti*, 73.

132 ʿAmr Jād, "Fatwā Yūsuf al-Qaraḍāwī bi tahrīm al-jidār al-fūladhī tuhadid bi inhā ʿudwīyatuh fī Majmaʿ al-Buḥūth al-Islāmiyya," *al-Yawm al-Sābiʿ* (25 January 2009), online: <http://www.youm7.com/News.asp?NewsID=177577&SecID=162&IssueID=94>, accessed 10 June 2011.

133 Qaraḍāwī website, "Istiqālat al-Shaykh al-Qaraḍāwī min Majmaʿ al-Buḥūth al-Islāmiyya" (21 December 2013), online: <http://www.qaradawi.net/new/Articles-7047>, accessed 2 May 2017.

134 Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age* (Cambridge: Cambridge University Press, 2012), 267. Although it is not directly relevant to the subject matter of this book, it is also noteworthy that al-Qaraḍāwī took a strong position against protests in Bahrain in 2011, accusing the movement of sectarian interests. See CNN bi-l-ʿArabiyya, "al-Qaraḍāwī: Thawrat al-Bahrayn madhhabīya tastahdif al-sunna" (7 February 2013), online: <http://archive.arabic.cnn.com/2011/bahrain.2011/3/19/qaradawi.bahrain/>, accessed 2 May 2017.

135 corleonecorleone2003 (Youtube-username), "al-Qaraḍāwī: al-Khurūj ʿalā Mursī ḥarām," Youtube video, 10:28, filmed June 2013, posted June 2013, online: <https://www.youtube.com/watch?v=gNDgNLFOGfg>, accessed 1 May 2017.

significant outcomes if used by a good *mujtahid*.[136] Knowledge of the Qur'ān and the sunna entails knowledge of Arabic, of the occasions of revelation the texts, and abrogation rules.[137] But al-Qaraḍāwī is sceptical of expanding abrogation, arguing that it is unreasonable to claim that "the verse of the sword abrogated more than one hundred verses of the Qur'ān."[138] He also states that one should be cautious of earlier claims of abrogation because the term was initially used expansively to include any limitation or specification of a text by another text.[139] He acknowledges the authoritativeness of *ijmāʿ* but argues that it is often excessively claimed and that a new *ijmāʿ* could replace an older one.[140] Finally, he argues that a jurist should take into consideration the *maqāṣid al-sharīʿa* (the objectives of the *sharīʿa*) because no legal rule can ever contradict the general principles of the legal system.[141]

2.3 *Wahba al-Zuḥaylī*

This section looks at another scholar who dedicated significant focus to the regulation of armed conflict in Islamic law, Wahba al-Zuḥaylī. Although al-Zuḥaylī did not enjoy as wide an appeal as al-Qaraḍāwī, he seems to have similarly benefitted from the globalization of the mass media. In addition to membership of several regional unions, he was a registered expert in the *fiqh* academies of the United States and India.[142] His paper on public international law and Islamic law is widely circulated by the International Committee of the Red Cross.[143] He also used the internet to create a direct channel of communication with a wider audience, with a *fatāwa* section on the website dedicated to answering queries from Muslims. Like al-Qaraḍāwī and many other mainstream scholars, al-Zuḥaylī was educated at al-Azhar. He also received a Ph.D. in law from Ain Shams University in Egypt. His doctoral dissertation, published as a book titled *The Effects of War in Islamic Jurisprudence*,[144] is the primary focus of this section as an example of his thought.

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136 Yūsuf al-Qaraḍāwī, *al-Ijtihād fī l-sharīʿa al-Islāmiyya: Maʿ naẓrā taḥlīlīya fī l-ijtihād al-muʿāṣir* (Kuwait: Dār al-Qalam, 1996), 19.

137 al-Qaraḍāwī, *Ijtihād*, 32–35.

138 Yūsuf al-Qaraḍāwī, *Fiqh al-jihād* (Cairo: Maktabat Wahba, 2009), 21

139 al-Qaraḍāwī, *jihād*, 21.

140 al-Qaraḍāwī, *Ijtihād*, 37–38.

141 al-Qaraḍāwī, *Ijtihād*, 43.

142 Wahba al-Zuḥaylī website, "Sīra ẓātīya," online: <http://www.fikr.com/zuhayli/biograpy.htm>, accessed 12 June 2011.

143 Wahbeh al-Zuhili, "Islam and International Law," *International Review of the Red Cross* 87, no. 858 (2005), 269–283.

144 Wahba al-Zuḥaylī, *Athār al-ḥarb fī l-fiqh al-Islāmī*, 3rd ed. (Damascus: Dār al-Fikr, 1981).

2.4 *al-Zuḥaylī and* Uṣūl al-Fiqh

Al-Zuḥaylī states that scholars agree on the authoritativeness of the Qurʾān, sunna, *ijmāʿ*, and *qiyās* and that those sources must be adhered to in the order given.[145] He argues that any act condoned in the Qurʾān is either obligated or recommended, any act denounced in its verses is either prohibited or disapproved, and any act allowed is simply allowed.[146] The third source, *ijmāʿ*, is *ijmāʿ* of scholars of a particular era; public opinion is irrelevant. According to him, *ijmāʿ* in modern times can be achieved through Islamic academies and jurisprudential councils on the condition of proper criteria for selection of participants.[147] With regards to *qiyās*, he argues that it promotes Muslim interest. Since Islam maximizes peoples' interest, expansion of the applicability of rules on the basis of similar *ʿilla*s means the further promotion of such interests.[148] He accepts *istisḥān* and *maṣālīḥ mursala* and argues that those sources do not indicate opinion-based jurisprudence; rather, they reflect a true understanding of the law and its objectives. Finally, he argues that general principles govern jurisprudence.[149] The first rule is that the law must promote people's interest, including preventing harm and *ḥaraj* (embarrassment or inconvenience).[150] The second rule is that the law must protect Allah's rights, as well as the rights of the individual.[151] The third principle prohibits *ijtihād* where there is a definitive text.[152] The fourth rule allows for abrogation because of Allah's consideration for changing interests.[153] The fifth rule demands that contradictions between texts must be managed, either through reconciliation or abrogation, depending on the authority of the texts and the possibility of reconciliation. If the sources are authoritative, the jurist must first seek reconciliation, then weigh out the evidence of the texts, then employ abrogation, then finally, if none of the aforementioned is possible, the two texts are disregarded.[154]

145 Wahba al-Zuḥaylī, *al-Wajīz fī uṣūl al-fiqh*, 2nd ed. (Damascus: Dār al-Fikr, 1999), 21.
146 al-Zuḥaylī, *Wajīz*, 33.
147 al-Zuḥaylī, *Wajīz*, 54.
148 al-Zuḥaylī, *Wajīz*, 61.
149 al-Zuḥaylī, *Wajīz*, 217.
150 al-Zuḥaylī, *Wajīz*, 217.
151 al-Zuḥaylī, *Wajīz*, 231.
152 al-Zuḥaylī, *Wajīz*, 231.
153 al-Zuḥaylī, *Wajīz*, 237.
154 al-Zuḥaylī, *Wajīz*, 245–46.

2.5 *Features of al-Qaraḍāwī and al-Zuḥaylī's Approach to Armed Conflict*

2.5.1 Direct Interpretation of the Qur'ān and Sunna

One of the primary features of al-Zuḥaylī's and al-Qaraḍāwī's works is that they do not shy away from *ijtihād*. This approach is classified by Nafi as *salafī* reformism because "this current of Salafism calls for *ijtihād*, emphasizes the role of reason, and is influenced by the idea of progress."[155] Al-Qaraḍāwī is indeed keen on promoting *ijtihād* and is critical of those attempting to limit its application in modern times: "It is an exaggeration and a negligence of reality to claim that old books have an answer to every new question."[156] Al-Zuḥaylī is equally critical of blind allegiance to classical jurisprudence, arguing that such jurisprudence addressed the issue of *jihād* in accordance with the era in which it was written.[157] He argues, for example, that the objective of *jihād* is to fight aggression by others and reach peace agreements with other nations. To prove the defensive nature of *jihād*, he takes the example of a *ḥadīth* such as:

> I have been commanded that I should fight against people till they declare that there is no god but Allah, and when they profess it that there is no god but Allah, their blood and riches are guaranteed protection on my behalf except where it is justified by law, and their affairs rest with Allah.[158]

He argues that this *ḥadīth* is specific to Arab infidels who were committed to fighting Islam and that because non-Arabs are allowed to pay *jizya*, a common practice at the time, then the *ḥadīth* can only apply to Arabs whose aggression is established.[159] Accordingly, the *ḥadīth* cannot be used as proof that all those who are capable of fighting may be targeted regardless of whether they participate in fighting. Al-Qaraḍāwī also endorses this interpretation when addressing this *ḥadīth*.[160] Again, the Qur'anic verse "When the [four] forbidden months are over, wherever you encounter the idolaters, kill them, seize them, besiege them, wait for them at every lookout post"[161] is examined by both scholars within its context to prove it is related to aggressive infidels. Al-Zuḥaylī

155 Basheer M. Nafi, "Fatwā and War: On the Allegiance of the American Muslim Soldiers in the Aftermath of September 11," *Islamic Law and Society* 11, no. 1 (2004), 102.

156 al-Qaraḍāwī, *Ijtihād*, 101.

157 al-Zuḥaylī, *Athār*, 194.

158 *Saḥīḥ Muslim*, *1:32*.

159 al-Zuḥaylī, *Athār*, 121–22.

160 Yūsuf al-Qaraḍāwī, *Fiqh al-jihād* (Cairo: Maktabat Wahba, 2009), 1:330.

161 Q 9:5.

argues that the verse relates to infidels who breached their agreement with the Prophet and were ready to fight him.[162] He also argues that the verse should be read in conjunction with other Qur'anic verses instructing Muslims to refrain from aggression.[163] Parallel reading would support his contextual reading of the verse and affirm that non-aggression is a general principle in the Qur'ān. Al-Qaraḍāwī also states that the verse should be read in the context of the whole chapter, "al-Tawba," which he argues is revealed in the context of pagans who breached their pacts with the Prophet and is thus limited specific to them.[164]

2.5.2 Position on Classical Jurisprudence

Unlike most scholars who deal with the issue of armed conflict, both scholars are bold enough to acknowledge existing juristic arguments that contradict their promoted positions. They both acknowledge, for example, that most classical scholarship permitted the killing of captives, and they offer a detailed examination of the evidence relied on by classical scholars to support this position. Also, they reject classical positions that claim that Q 47:4 (stating that once captives are defeated, a bond needs to be kept on them; in other words, they should be kept alive) was abrogated. They both claim that incidents of killing captives by the Prophet were specific incidents rather than indications of general rules of law.[165] In light of his arguments that the Qur'ān never allowed killing captives, al-Qaraḍāwī also argues that international agreements regarding prisoners are now binding on Muslims, prohibiting attacks against their lives.[166]

The two scholars' innovation with regard to the legal tradition is not, however, always made evident in their writings. Al-Qaraḍāwī, for example, disagrees with al-Shāfiʿī's willingness to use mangonels and other indiscriminate weapons against those who are hiding in a fortress, regardless of the presence of women, children, and monks. He argues that such tactics may only be resorted to in case of military necessity. In order to refute al-Shāfiʿī, he relies on other scholars who disagree with him and quotes Ibn Rushd (al-Ḥafīd) in *Bidāyat al-mujtahid* listing the different jurists disagreeing with al-Shāfiʿī.[167] However, al-Qaraḍāwī still offers a somehow sanitized image of the juristic

162 al-Zuḥaylī, *Athār*, 117–118.
163 al-Zuḥaylī, *Athār*, 117–118.
164 al-Qaraḍāwī, *Jihād*, 1:284–85.
165 al-Zuḥaylī, *Athār*, 433–37, and al-Qaraḍāwī, *Jihād*, 2:842–47.
166 al-Qaraḍāwī, *Jihād*, 2:851.
167 al-Qaraḍāwī, *Jihād*, 1:594.

position in his resort to such tactics, giving the impression that al-Shāfiʿī adopted a solitary, strict position on targeting fortified locations. But if one were to consult Ibn Rushd (al-Ḥafīd)'s work relied upon by al-Qaraḍāwī, we find that he said that the majority of jurists agreed on using mangonels regardless of the presence of women and children.[168]

Al-Zuḥaylī is also relatively willing to admit the existence of jurisprudential authority contradicting his arguments. When addressing the issue of targeting, he acknowledges that al-Shāfiʿī and the Ẓahirīs accepted killing those who do not fight, but he argues that most scholars did not accept the killing of a non-combatant. Here, he relies on the complexity of the term *muqātil* in the jurisprudential tradition. Although the term is now used to refer to a fighter, it was commonly used by jurists to refer to able adult men or, more precisely, to men who were willing to or capable of fighting, regardless of whether they in fact fought. Ibn Rushd (al-Ḥafīd) states that some jurists prohibited the killing of those incapable of or unprepared for fighting rather than those who do not fight: "Those who claimed the *ʿilla* was the ability to fight because of the prohibition of killing women despite their infidelity excluded those who could not fight or *who were not prepared to fight* such as the farmer and hired labour."[169]

Of course, one could build on the opinions of those limiting targeting to those categories of people prepared or able to fight and develop a targeting regime that protects non-combatants by arguing that most modern-day civilians are neither capable nor willing to participate in fighting once war breaks out. But al-Zuḥaylī is not willing to acknowledge his relative innovation in the field and is keener on proving Islamic jurisprudence's reluctance to allow the targeting of those who do not participate in the fighting. His approach results in the familiar modern approach that pretends to be loyal to the tradition without actually adhering to it.

2.5.3 Engagement with Militant Thought

Al-Zuḥaylī's book does not really address militant arguments, and it cannot be expected to do so, because the first edition of the book was published in the 1960s (i.e., before the surge in Islamist militant operations and thought). But al-Qaraḍāwī makes some attempts to address the primary jihadist arguments. Although his approach to militant arguments is rather brief in comparison to jihadist revisionist works,[170] it is more willing than most mainstream scholarship to engage with such arguments. This willingness is indeed an outcome of

168 Ibn Rushd (al-Ḥafīd), *Bidayāt*, 2:148.

169 Ibn Rushd (al-Ḥafīd), *Bidayāt*, 2:148 (my italics).

170 See Chapter 4.

familiarity with militant thought by virtue of his involvement with the Brotherhood. Although the Brotherhood is not a militant organization and continues to renounce militant tactics, its key figure, Sayyid Qutb, is perceived as an inspirational militant figure. Al-Qaraḍāwī also seems to enjoy some level of legitimacy within some conservative fundamentalist circles, possibly as an outcome of his bold *fatwā*s, like the one on suicide bombing examined later,[171] and as evidenced by his mediation with the Taliban over the preservation of Buddhist monuments.[172]

Al-Qaraḍāwī argues that illegitimate governments are acknowledged by jurists as long as they successfully come to power. He then delves into the primary argument relied on by militant groups to justify their campaigns in Muslim territories: apostasy of the regime.[173] Militant groups argue that most modern Muslim regimes are apostates and must be fought. They believe that casualties inflicted upon civilians in the course of their conflict with the regime are justified either on the basis of the apostasy of the subjects or on the basis of *tatarus* (lit. shielding, jurisprudentially referring to the targeting of non-Muslims shielded by untargetable categories, including Muslims, women, and children). Al-Qaraḍāwī argues that it is very difficult to establish the apostasy of those regimes because very few of them "boast their enmity to Allah's *sharīʿa*, permitting what Allah prohibited, prohibiting what Allah permitted, disregarding what Allah obliged [upon us] and not following the path of believers."[174] He also argues that those rulers maintain Islam as the religion of the state and lists numerous juristic opinions and traditions that call upon Muslims to refrain from unfounded accusations of apostasy.[175] But al-Qaraḍāwī does not address the traditions and juristic opinions heavily relied on by militant ideologues to support their claims of apostasy and the legitimacy of their actions on that basis. While he selectively relies on Ibn Taymiyya to prove the defensive nature of *jihād*, he does not attempt to examine Ibn Taymiyya's thought, despite Ibn Taymiyya's relevance as the primary jurist relied on by militants in their claims of apostasy, as he admits. He simply argues that Ibn Taymiyya's *fatāwa* envisioned the fighting of apostate regimes by a Muslim ruler, rather than by rebels, and relies upon this technicality to dismiss Ibn

171 Zaman, *Radical Age*, 310.

172 Alexandre Caeiro and Mahmoud al-Saify, "Qaraḍāwī in Europe, Europe in Qaraḍāwī: The Global Muftī's European Politics," in Graf and Skovgaard-Peterson, eds., *Global Mufti*, 132.

173 See Chapter 4.

174 al-Qaraḍāwī, *Jihād*, 2:1067.

175 al-Qaraḍāwī, *Jihād*, 2:1065.

Taymiyya's detailed analysis of declaring a regime un-Islamic.[176] He also does not address the numerous prophetic traditions relied on by militants to prove the apostasy of the Muslim regimes.

He also resorts to *maṣlaḥa* to claim that even apostate regimes should not be fought, unless one is sure of the ability to fight the regime, because "the resort to force inappropriately often leads to major catastrophes."[177] As mentioned earlier, emphasis on *maṣlaḥa* is a common tool in al-Qaraḍāwī's jurisprudence. Salvatore argues that al-Qaraḍāwī's *maṣlaḥa* is "a tool for reasserting control of *maṣlaḥa* through the *ulama* and a means for intervening on matters related to the common interest"[178] and that this tactic has helped al-Qaraḍāwī position himself and other scholars of "moderation" as alternatives to extremist thought and as influential leaders of modern Muslim society. Al-Qaraḍāwī's approach to the issue of the apostasy of the regime does indeed create the space for the jurist to scrutinize the ruler's acts, as well as determine legitimate acts to be taken in the event that the ruler has indeed strayed beyond redemption. By setting the evident apostasy of the regime and its commission of grave prohibited acts as conditions to legitimize rebelling against the regime, an opportunity is created for scholars to scrutinize the acts of the government, and a self-censorship atmosphere is encouraged among governments to avoid losing the legitimacy battle waged against them by Islamists. According to al-Qaraḍāwī's argument, even partially secular governments are still legitimate under Islamic law. By ensuring their legitimacy, al-Qaraḍāwī is ensuring that rulers are still somehow accountable to this legal system, even if they strip it of many of its essential elements. Moreover, even if rebellion were proven legitimate in the case of clear and evident apostasy of a regime as established by the scholars, scholars would still play a prominent role, since the *maṣlaḥa* consideration would require their expertise in Islamic law in order to weigh the toleration of an apostate regime against the potential hazards of rebellion. To a great extent, his seemingly contradictory positions sanctioning violence in Libya and Syria may be read as a claim to such a space he aims to carve out for himself as an arbiter of legitimacy.[179]

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176 al-Qaraḍāwī, *Jihād*, 2:1032. As noted in Chapter 2, Ibn Taymiyya does not solely refer to the Mongols as apostates.

177 al-Qaraḍāwī, *Jihād*, 2:1067.

178 Armando Salvatore, "Qaraḍāwī's Maṣlaḥa: From Ideologue of the Islamic Awakening to Sponsor of Transnational Public Islam," in Graf and Skovgaard-Peterson, eds., *Global Mufti*, 241.

179 Zaman, *Radical Age*, 268. Zaman legitimately reasons that the sanctioning of the use of force against oppressive regimes in the Arab Spring, as in the case of Libya, contrasted to the case of Tunisia and Egypt, was an outcome of the excessive use of force by the former.

Al-Qaraḍāwī also addresses the issue of targeting tourists. His argument resembles jihadist revisionist works in its emphasis on a modern visa being a form of *amān*.[180] He lists juristic traditions that show that the *amān* is granted once safety is ensured, whether directly or indirectly. He also argues that apostasy of the regime is irrelevant because what matters is the tourist's belief in a pledge of safety from any Muslim.[181] Interestingly, despite his reliance on the condition of a legitimate authority to dismiss the legitimacy of random militant groups fighting apostate regimes, al-Qaraḍāwī asserts the classical juristic approach that *amān* is granted by any Muslim to expand applicability of the pledge of safety to tourists, which shows that his approach to legitimacy and authority is to some extent selective. So, whereas fighting an apostate regime must be done by the legitimate authority, *amān* may be granted by anyone. However, it should be noted that *amān* as a regime detailed in classical jurisprudence is a strong impediment to militant practices targeting tourists in Muslim territories. Nevertheless, al-Qaraḍāwī fails to address the textual and juridical basis for the militant arguments listed in the next chapter, such as their reliance on the incident of Kʿab b. al-Ashraf to claim legitimacy of their tactics.

2.5.4 Transnational Militant Operations

Al-Qaraḍāwī's approach to transnational militant operations is especially worthy of attention. It is well known that al-Qaraḍāwī supports militant attacks against Israeli settlements, an opinion that was controversial enough to have him barred from entering the United States and the United Kingdom,[182] but he condemns any other forms of attacks against civilians.[183] In *Fiqh al-jihād*, he lists the reasons for considering the Palestinian case a special one. First, Israeli society is a "usurper colonialist settler racist occupier,"[184] where every adult is either in the army or enlisted in the army reserves. Second, Israeli society is a special case because it is an invader society attempting to replace Palestinian society and take over their land, which means a *jihād* conducted against Israelis is a defensive one.[185] Third, Israelis are accordingly *ahl al-ḥarb*, which legitimizes attacks against their life and property.[186] Fourth, he relies on *tatarus*

180 In fact, al-Qaraḍāwī accuses revisionist works of plagiarizing his earlier writings on *jihād*. See al-Qaraḍāwī, *Jihād*, 1:17.

181 al-Qaraḍāwī, *Jihād*, 2:1177–79.

182 Caeiro and al-Saify, "Europe," 125.

183 al-Qaraḍāwī, *Jihād*, 2:1084–85.

184 al-Qaraḍāwī, *Jihād*, 2:1086.

185 al-Qaraḍāwī, *Jihād*, 2:1086.

186 al-Qaraḍāwī, *Jihād*, 2:1086.

arguments to prove that any accidental damage caused to untargetable categories is legitimate.[187] Fifth, he argues that modern war mobilizes the whole society to participate in it and provide it with the necessary financial resources, which means that every citizen is, in effect, participating in the war.[188] Finally, this is a case of necessity, which means Muslims may conduct impermissible acts.[189] After legitimizing the attacks, al-Qaraḍāwī offers justification for "suicide operations," arguing that suicide operations are in fact acts of martyrdom, because "if the person who commits suicide dies fleeing in retreat [from life], the martyr dies as a proceeding attacker."[190]

However, al-Qaraḍāwī, together with other Muslim intellectuals, condemned the 9/11 attacks and relied on the *ḥirāba* verse to prove that such an offence is prohibited.[191] Sadiki states that "the majority of learned scholars sympathize with the Palestinian cause and suicide bombing, even against civilians, is considered martyrdom, not terrorism,"[192] yet, and as noted by Cook and Zaman, it is hard to show strict jurisprudential basis for condoning Palestinian suicide operations, while denouncing the 9/11 attacks.[193] In fact, al-Ẓawāhirī's justifications for the attacks, detailed in the next chapter, are almost identical to al-Qaraḍāwī's. But unlike most other scholars, who simply attempt to present their arguments as jurisprudential ones, al-Qaraḍāwī's notion of *maṣlaḥa* is best employed in making this distinction. First, he argues that martyrdom operations should target primarily Israeli soldiers and that any damage to the lives of children, non-combatant women, or old men should be only accidental and necessary. The fact that such damage is tolerated in case of necessity does not allow for the expansion of the resort to such tactics. As noted by Caerio in his study of al-Qaraḍāwī's position on mortgages in Europe, al-Qaraḍāwī is "adamant against exporting the fatwa,"[194] maintaining the authority and the freedom of the jurist in dealing with each specific situation on its own merits.

187 al-Qaraḍāwī, *Jihād*, 2:1087.

188 al-Qaraḍāwī, *Jihād*, 2:1087.

189 al-Qaraḍāwī, *Jihād*, 2:1088.

190 al-Qaraḍāwī, *Jihād*, 2:1089.

191 Nafi, "Fatwā," 80.

192 Laribi Sadiki, "One 'Islam,' Many 'Islams': Understanding the Arab-Islamic Perspective on 11 September in a Globalising World," *Irish Studies in International Affairs* 13 (2002), 52.

193 David Cook, "The Implications of Martyrdom Operations for Contemporary Islam," *The Journal of Religious Ethics* 32, no. 1 (2004), 144, and Zaman, *Radical Age*, 275.

194 Alexandre Caeiro, "The Social Construction of Sharīʿa: Bank Interest, Home Purchase, and Islamic Norms in the West," *Die Welt des Islams* 44, no. 3 (2004), 371.

> We permitted such operations to the brothers in Palestine because of their special circumstances in defending themselves, their family, their children and their *ḥurma* (protected possessions), forcing them to resort to those operations, because they had no other alternatives. We did not permit those operations outside Palestine due to the lack of a necessity that permits and obligates [the attacks].[195]

In addition to asserting the authority of the jurist to address seemingly similar situations differently, al-Qaraḍāwī emphasizes the special nature of the conflict, as noted earlier. According to him, the war with Israel is a war where the enemy is attempting to annihilate the Palestinians, which justifies the tactics. But as argued by Cook and Sadiki, al-Qaraḍāwī's response is internally inconsistent.[196] However, its inconsistency does not stem from the distinction between operations in and outside Israel as Cook and Sadiki claim, because a pragmatic reasoning is provided for that distinction, regardless of whether or not one is inclined to accept it. Rather, it is his attempt to claim definitive jurisprudential and textual basis for both positions that renders his approach inconsistent, especially in light of his recent extension of permissibility to attacks against the Syrian army.[197] Alternatively, if al-Qaraḍāwī had adopted a contextual, policy-oriented approach that acknowledged the possibility for multiple interpretations of the texts and the juristic tradition, it would have been more difficult to accuse him of incoherence.

2.5.5 Approach to *Baghy*

Unlike the literature published by state institutions, al-Qaraḍāwī is willing to acknowledge the regime of *baghy* as a legitimate legal regime. However, unlike most classical jurists, who were pragmatic enough to disregard the legitimacy of rebellion as a factor in determining the rules applied to the conflict,[198] al-Qaraḍāwī makes it clear that "armed rebellion against him [the Imām] is

195 al-Qaraḍāwī, *Jihād*, 2:1092.

196 Cook, "Martyrdom," 144, and Sadiki, "Islams," 52.

197 Ten TV, "al-Bayt baytak: al-Shaykh Yusūf al-Qaraḍāwī yuṣdir fatwā tubīḥ tafjīr al-intiḥarī li-nafsahu bunā' 'alā ṭalab al-jamā'a," Youtube video, 4:19, posted November 2015, online: <https://www.youtube.com/watch?v=Bl4rsbnqBBM>, accessed 2 March 2017. It should be noted, however, that a serious distinction between Israel and Syria is that his justification for an attack in Syria is directed solely against the military and not civilians, hence the potential challenge is primarily in the legitimacy of presumed suicide in those attacks.

198 Abou El Fadl, *Rebellion*, 326.

prohibited *baghy* that must be ended unless the *imām* commits evident *kufr*."[199] He also divides disobedience to the ruler into three types: highway robbers (who are not considered *bughā*), individual dissenters with no powers (whom he equates with highway robbers), and *khawārij*.[200] By using the term *khawārij* to refer to rebels, al-Qaraḍāwī is invoking the legacy of a group negatively associated in the minds of Muslims with the rebellion against ʿAlī and his assassination, thus reiterating the atrociousness of the act.

But al-Qaraḍāwī is not attempting to abolish the whole regime of *baghy*. On the contrary, he reiterates the just and humane nature of the regime. He also argues it was inspired by the Rightly Guided Caliph, ʿAlī b. Abī Ṭālib, which means its regulations must be upheld and respected. He relies on juristic positions to show that those who retreat, are wounded on the battlefield, or are captured during the course of fighting may not be killed. He also quotes jurists stating that those who do not fight may not be killed. *Bughā* may not be fought using particularly destructive weapons such as mangonels or any weapons of mass destruction.[201]

Unlike his analysis of other conflicts, al-Qaraḍāwī is extremely faithful to the juristic tradition and offers minimal innovation of the rules adopted by jurists, but he fails to address a very important loophole in his analysis, evidenced by juristic positions on *baghy*. Most jurists created a distinctive code for *bughā* because they were Muslims – tactics employed in conflicts with non-Muslims were inappropriate for fighting adherents of the same religion. The rejection of killing the wounded, the captured, or those retreating was often articulated to point out that practices employed with non-Muslims could not be resorted to with *bughā*. Similarly, the ban on weapons of mass destruction was because of the reluctance to inflict such damage on Muslims. But al-Qaraḍāwī does not address this controversy, and he leaves a very critical question unanswered: if the rules for fighting *bughā* were similar to those stipulated for fighting unbelievers, why did jurists create this special branch of law?

The contradiction is even more evident in al-Zuḥaylī's work. Al-Zuḥaylī again lists the regulations of *baghy* without any reference to modern-day application. But when listing those regulations, he mentions the difference between the techniques employed in their combat with those applicable to non-Muslims and lists several regulations that contradict his claims about the conduct of conflict with non-Muslims.

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199 al-Qaraḍāwī, *Jihād*, 2:995.

200 al-Qaraḍāwī, *Jihād*, 2:997–98. Al-Qaraḍāwī cites jurisprudence stating there are four types but only mentions three of them.

201 al-Qaraḍāwī, *Jihād*, 2:1004–7.

> The *ḥukm* of fighting them differs from fighting the unbelievers in eleven ways, as clarified by al-Qarāfī. Those are that the purpose of fighting them is to stop them and not to kill them, their retreaters should not be pursued, their wounded should not be killed and their captives should not be killed, their money should not be taken as booty and their children should not be captured, an infidel may not be relied on in their combat, a peace agreement stipulating their payment of money may not be made, mangonels may not be used against them, their plantations may not be burnt and their trees may not be cut down.[202]

3 Mainstream Scholarship: a New Consensus?

It is clear that across the board, there is an interest in preserving the image of Islam and defending it against claims of violence. But another important factor influencing scholarly works is the scholar's relationship with the political regime. Independent scholars are more willing to acknowledge rebellion and its regulation than scholars closely affiliated with the Egyptian regime. In addition to its widely established authoritarian nature, the regime is in a constant battle with Islamist militant groups, and its allies are often called upon for support in this battle. Although independent scholars are also competing with militants over legitimacy as carriers of the banner of Islam, they are distant enough to show some acknowledgement of a long historical tradition that could prove pragmatically useful.

At any rate, it seems that rules governing *jihād* are being altered by a new modern consensus among mainstream scholars. As evident from this chapter, modern Muslim scholars have agreed on the main themes in the regulation of armed conflict. For example, they seem to agree that anyone not participating in fighting should not be targeted and that captives should not be killed. This consensus could prove useful to attempts to limit the destruction ensuing from any form of armed conflict involving Muslims.

But in order for this consensus to prove useful and effective, many issues need to be addressed. First, scholars need to be aware of and reflect on the influence of international humanitarian law on their thinking and assess the potential dangers of such influence. Is the legitimacy of their attempts likely to be eroded by an attempt to live up to a Western-inspired legal system? Does the reliance on IHL, even if unintentional, strip Islamic law of legal regimes that are potentially more restrictive and protective of life and property, such as the

202 Wahba al-Zuḥaylī, *al-Fiqh al-Islāmī fī uslūbih al-jadīd* (Beirut: Dār al-Kitāb, 1974), 393.

rules governing rebellion? More important, can they continue to attempt to squeeze the Islamic legal tradition into the confines of IHL without honest recognition of the gap between their hypotheses about the law and the long juristic tradition? All these questions need to be examined by modern scholars in order for any reform project to prove meaningful and legitimate.

CHAPTER 4

Contemporary Militant Approaches

1 The Complexity of Militant Literature

Despite the vast gap between the objectives of contemporary mainstream Muslim thought and those of their militant counterparts, both camps exhibit strong similarities in their juristic methodologies and tactics. Much like mainstream thinkers widely discredited by opponents for their selective reliance on classical jurisprudence, Islamic militant jurisprudential production portrays similar selectivity. But before examining examples of militant thought, the term "Islamist militant" needs to be defined. In some contexts, the term "Islamist militancy" might be taken to include justification of resort to violence on Islamist bases. However, this book focuses on the actual resort to violence to achieve these objectives as a key criterion of militancy. Many non-violent Muslim (and non-Muslim) thinkers ideologically agree with resort to violence in some cases, especially to protect Muslim lands, which has often been the primary pretext for militant operations, until the recent rise of the "Islamic State" (ISIS), and sometimes even in its case. Thus, for the purpose of distinguishing between the two camps, violent militant action is used here as the defining factor for militancy.

In addition to defining militancy, other challenges face any researcher attempting to examine modern militant jurisprudence, namely scope and authenticity. Militant groups are far from homogeneous, and their ideologies vary widely, with some committed to what has come to be known as global *jihād*, while others focus on the notion of the "closer enemy," thereby dedicating their attention to what they refer to as secular infidel regimes governing the Muslim world. Within such camps, even within individual militant organizations, there are varying positions on the scope of *takfīr*, targeting strategies, enslavement, and other issues. Any sample selected to represent these groups inevitably would be unrepresentative. Moreover, the advent of the internet as a publishing tool has led to an explosion in militant literature.[1] For example, *Minbar al-tawḥīd wa-l-jihād*, al-Maqdisī's militant website, which publishes

1 Gilles Kepel, "General Introduction," in *Al-Qaeda in Its Own Words*, ed. Gilles Kepel and Jean-Pierre Milelli, trans. Pascale Ghazaleh (Cambridge, MA: The Belknap Press of Harvard University Press, 2008), 3.

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works of Islamist militants, lists around two hundred authors.[2] At the same time, the inaccessibility of some material further complicates the process, with the recent crackdown on many websites, blogs, and Twitter accounts belonging to militant organizations. True, this complexity has led scholars of Islamist movements to focus more on high-profile figures like ʿAbdullah ʿAzzām, Usāma Bin Lādin, and al-Ẓawāhirī,[3] and much work needs to be spent on examining other influential figures, like Nāṣir al-Fahd, referred to later in this chapter. Although this chapter reiterates the interest in prominent militant ideologues like Sayyid Imām, al-Ẓawāhīrī, and the young, recently killed Turkī al-Binʿalī, it does so because it attempts to offer a glimpse into the two most prominent/infamous militant organizations of recent history, namely al-Qāʿida and ISIS. Another related obstacle is the continued crackdown on militant websites.[4] However, as noted by Diāa' Rashwān, it seems that governments are keen to maintain some level of access to militant thought, as evidenced by their hesitant toleration of websites like *Minbar al-tawḥid*.[5] Since militant works are aimed at mobilizing sympathizers and recruiting new individuals, they provide a valuable insight into the thought of militant groups. Finally, the internet poses a strong challenge to attempts to contextualize works published via that medium: authenticity. It is true that publication of most militant works on the internet ensures relatively easy access to otherwise difficult-to-acquire and clandestine material, but it makes authorship a contentious issue, especially with such clandestine groups.[6] But these challenges, while valid, should not prevent analysis of these works. After all, the authenticity of works has always been a challenge when it comes to Islamic jurisprudential texts,[7] and as long as the texts are widely perceived to have been authored by a particular person, then there is nothing to prevent them from being treated as such.[8] In the case of works examined in this chapter, ʿAbdul ʿAzīz's post-revision works were published in a daily Egyptian newspaper, which proves his authorship. His

2 *Minbar al-tawḥīd wa al-jihād*, online: <http://www.tawhed.ws/f>, accessed 21 June 2011.

3 See e.g. Gilles Kepel and Jean-Pierre Milelli, eds., *Al-Qaeda in Its Own Words*, trans. Pascale Ghazaleh (Cambridge, MA: The Belknap Press of Harvard University Press, 2008); Mary Habeck, *Knowing the Enemy: Jihadist Ideology and the War on Terror* (New Haven, CT: Yale University Press, 2006); Osama Bin Laden, *Messages to the World: The Statements of Osama Bin Laden*, ed. Bruce Lawrence (New York: Verso, 2005).

4 Richard Bonney, *Jihād: From Qur'an to Bin Laden* (London: Palgrave Macmillan, 2004), 367.

5 Diāa' Rashwān, interview by author, 25 February 2008.

6 Kepel, "Introduction," 5.

7 See e.g. Chapter 1 for controversy over al-Shaybānī's works and Chapter 2 for similar controversy over Ibn Taymiyya's authorship of the treatise on *jihād*.

8 Kepel, "Introduction," 5.

pre-revision works, as well as al-Ẓawāhirī's, are cited on *Minbar al-tawḥīd*, which is considered an authoritative collection of militant works. In the case of Turkī al-Binʿalī, the works of his relied on here are widely circulated under his name by militant circles on different publishing forums.

In its analysis of al-Qāʿida, this chapter examines two of the most sophisticated activist and revisionist militant works, where "activist" means actively involved in militant work, and "revisionist" means seeking to limit the scope of *jihād* as practised previously. These are best exemplified in the exchange between al-Ẓawāhirī and a key figure said to have largely influenced his thought, Sayyid Imām ʿAbdul ʿAzīz. In the case of ISIS, the book focuses on Turkī al-Binʿalī's work on *tawḥīd*, loosely translated as "monotheism" but more accurately described in his case as the sole belief in Allah and his laws; the relationship between *tawḥīd* and the doctrine on *takfīr*; in addition to the group's English newsletters: *Dabiq* and *Rumiyah*.

Whereas the extensive jurisprudential book titled *Masāʿil fī Fiqh al-Jihād* and authored by Abu ʿAbdullah al-Muhājir in 2004 has indeed left an influential imprint on ISIS's ideology, it is not examined in this book due to its more general outlook and due to its focus on targeting and combat techniques, which are issues examined extensively in the section on al-Qāʿida.

2 al-Qāʿida Debated

This section examines the 2007–8 debate between Aymān al-Ẓawāhirī, al-Qāʿida's ideologue, and Sayyid Imām ʿAbdul ʿAzīz,[9] a former leader of the Egyptian militant group, al-Jihād, and widely referred to as its ideologue,[10] who published a widely discussed revisionist document, "Wathīqat tarshīd al-jihād fī Misr wa-l-ʿālam" ("The document of prudence in *jihād* in Egypt and the world").[11] The document denounced many of the military tactics employed by al-Qāʿida and was promptly followed by a long rebuttal by al-Ẓawāhirī, *al-Tabriʾa: Risāla fī tabriʾat ummat al-qalam wa-l-sayf min manqasat tuhmat al-khawr wa-l-daʿf* ("Exoneration: A treatise in exoneration of the nation of the pen and the sword from the defect and the accusation of frailty and weakness").[12] Al-Ẓawāhirī's riposte was followed by a further response by ʿAbdul ʿAzīz, "al-

9 Also known as ʿAbdul Qādir b. ʿAbdul ʿAzīz and Dr Fadl.

10 See e.g. Fahmī Hūwaydī, "Mulāḥaẓāt ʿalā l-murājaʿāt," *al-Ahram* (11 December 2007), 11.

11 Sayyid Imām ʿAbdul ʿAzīz, "Wathīqat tarshīd al-jihād fī Misr wa-l-ʿālam," *al-Masry al-Youm*, published in a series of articles from 18 November 2007 to 4 December 2007.

12 Ayman al-Ẓawāhirī, *al-Tabriʾa: Risāla fī tabriʾat ummat al-qalam wa-l-sayf min manqasat tuhmat al-khawr wa-l-daʿf*, January 2008, online: <http://www.tawhed.ws/a?a=3i806qp0>, accessed 21 June 2011.

Ta'riya li Kitāb al-Tabri'a" ("Exposure of the exoneration book").[13] Analysing this written debate rather than attempting to cover the vast militant production of al-Qā'ida provides a snapshot of both active and revisionist thought within militant ideologies Moreover, the mutual accusations of selective reliance on Islamic texts and jurisprudence offer a rare opportunity for understanding how militant thinkers respond to such accusations and the techniques they employ to refute them.

'Abdul 'Azīz's revisionist work is not the first in Egypt or the region. Members of al-Jamā'a al-Islāmiyya[14] issued a collective renunciation of violent tactics in 1997, followed by a collection of works revisiting their earlier held views.[15] Similar experiences were witnessed in Morocco, Algeria, Yemen, and Saudi Arabia.[16] According to Rashwān, a leading Egyptian expert on Islamist militancy, certain factors contributed to the development of the Egyptian militant revisionist experience at the time. First, the popularity of the liberation model adopted by Hezbollah and Hamas helped cast doubt on the effectiveness of the notion of the closer enemy (*al-'aduw al-qarīb*) and its focus on toppling Muslim regimes.[17] In fact, Nājiḥ Ibrāhīm, the leading revisionist figure in al-Jamā'a, argues that internal strife between Muslims only fed into Israeli interests and helped it impose its hegemony in the region.[18] Second, the heavy-handedness with which the Egyptian state handled militants made commitment to violence extremely taxing.[19] Third, according to Rashwān, aging in prison deradicalized militants imprisoned in their youth.[20] Hamzawy and Grebowski add that violence committed in Egypt discredited militant groups among Egyptians, which deprived the two organizations of potential sympathizers.[21] This view is confirmed by Cook, who argues that the death of a

13 'Abdul 'Azīz, "al-Ta'riya li Kitāb al-Tabri'a," *al-Masry al-Youm*, published as a series of articles from 18 November 2008 to 2 December 2008.

14 A militant group established in Egypt in the 1970s.

15 Nājiḥ Ibrāhīm 'Abdullah, "al-Jamā'at al-Islāmiyya bayn al-mubādara wa-l-murāj'a," in *al-Murāja'āt min al-Jamā'at al-Islāmiyya illa al-jihād*, ed. Diāa' Rashwān (Cairo: al-Ahrām, 2008), 39.

16 'Abdullah, "al-Jamā'at al-Islāmiyya," 39. See also Khalil al-Anani, "Jihadi Revisionism: Will It Save the World?," Middle East Brief No. 35, Crown Center for Middle East Studies, Brandeis University, April 2009, online: <http://www.brandeis.edu/crown/publications/meb/MEB35.pdf>, accessed 21 June 2011.

17 Rashwān, "al-Murāja'āt: al-Ma'na, al-siyāsa, al-dalālāt," in *al-Murāja'āt min al-Jamā'at al-Islāmiyya illa al-jihād*, ed. Diāa' Rashwān (Cairo: al-Ahrām, 2008) 14.

18 Rashwān, "Murāja'āt," 15.

19 Rashwān, "Murāja'āt," 15. See also Amr Hamzawy and Sarah Grebowski, "From Violence to Moderation: al-Jama'a al-Islamiya and al-Jihad," Carnegie Papers No. 20, Carnegie Middle East Center, Carnegie Endowment for International Peace, Washington, D.C., April 2010, 3.

20 Rashwān, "Murāja'āt," 15.

21 Hamzawy and Grebowski, "Moderation," 3.

schoolgirl at the hands of al-Jihād during an assassination attempt against Prime Minister ʿĀtif Ṣidqī in 1993 was "paradigmatic of a public relations disaster for radicals, as it raised the following question: if they were trying to establish a just Muslim state, why did a little girl have to die?"[22] On the other hand, critics like al-Ẓawāhirī argue that any revisionist work issued from inside Egyptian prisons, notorious for their infamous torture techniques, should be automatically suspect.[23]

2.1 *ʿAbdul ʿAzīz and al-Ẓawāhirī: from Comradeship to Enmity*

Al-Ẓawāhirī and ʿAbdul ʿAzīz crossed paths as leading figures in al-Jihād. With the death of Nāṣir and the ascent of Sādāt to power in 1970, Islamists were given more freedom to propagate their ideologies.[24] Such freedom ended up with the establishment of al-Jamāʿa al-Islāmiyya, the umbrella organization for most modern Egyptian Islamist militant movements.[25] But the relative mutual toleration between Sādāt and Islamist movements was disrupted by the 1979 peace accord with Israel, which angered many Islamist groups. As a reaction to the peace accord, ʿAbdul Salām Faraj (d. 1982), a key militant figure later executed for the assassination of Sādāt, founded al-Jihād the same year.[26] Both ʿAbdul ʿAzīz and al-Ẓawāhirī met as students at the Faculty of Medicine at Cairo University in the early 1970s.[27] ʿAbdul ʿAzīz claims that he never participated in an Islamist organization until his departure from Egypt in 1983, after accusations of involvement in Sādāt's assassination.[28] However, a lawyer previously imprisoned for participation in Islamist organizations, Montaṣṣir al-Zayāt, states that ʿAbdul ʿAzīz was the leader (*amīr*) of the cell created by al-Ẓawāhirī in 1968.[29] Whether or not he was officially involved in any organization, ʿAbdul ʿAzīz authored two seminal jihadist texts, *al-ʿUmda fī iʿdād al-ʿudda* ("The reference on making preparations [for *jihād*]") and *al-Jāmiʿ fī ṭalab al-ʿilm al-sharīf* ("The comprehensive [book] in the pursuit of honourable knowledge"). The first text, *al-ʿUmda*, was considered al-Jihād's constitution.[30] Both texts, presumably authored between 1989 and 1992, are said to have been

22 David Cook, "Islamism and Jihadism: The Transformation of Classical Notions of *Jihad* into an Ideology of Terrorism," *Totalitarian Movements and Political Religions* 10, no. 2 (2009), 182.

23 al-Ẓawāhirī, *Tabriʾa*, 5.

24 Montaṣṣir al-Zayāt, *al-Jamāʿat al-Islāmiyya: Rūʾiya min al-dākhil* (Cairo: Dār Miṣr al-Maḥrūsa, 2005), 36.

25 al-Zayāt, *Jamāʿat*, 67.

26 Bonney, *Jihād*, 288.

27 Jarret M. Brachman, *Global Jihadism: Theory and Practice* (New York: Routledge, 2009), 74.

28 "al-Ḥāya fī Sijn Ṭura al-Miṣrī Tuḥāwir Ṣāḥib Wathīqat tarshīd al-jihād fī Misr wa al-ʿālam," *al-Hāya* (8 December 2007), 15.

29 al-Zayāt, *Jamāʿat*, 135.

30 al-Zayāt, *Jamāʿat*, 136.

found in the possession of many militant Islamists.[31] As a matter of fact, in a 2013 televised interview ʿAbdul ʿAzīz asserted that *al-ʿUmda*, but not *al-Jāmiʿ*, was used by Bin Lādin as a primary source for teaching *jihād*.[32] ʿAbdul ʿAzīz and al-Ẓawāhīrī met again in Pakistan, where according to al-Zayāt, ʿAbdul ʿAzīz was also al-Ẓawāhirī's *amīr*.[33] In 1993, ʿAbdul ʿAzīz moved to Sudan, from where he maintained contact with al-Ẓawāhirī. ʿAbdul ʿAzīz often asserted that he was opposed to the operations conducted by al-Ẓawāhirī in Egypt at the time,[34] but Brachman claims that he continued to provide religious and juristic justification for such operations.[35] Regardless of his past involvement with al-Jihād, it is widely accepted that ʿAbdul ʿAzīz's official association with militant organizations ended when he moved to Yemen to practice medicine. Thereafter he was arrested by the Yemenis and later turned over to the Egyptian authorities, remaining in prison until his release after the 25 January 2011 uprising.[36]

The warm relationship between ʿAbdul ʿAzīz and al-Ẓawāhirī was permanently severed as of 1994.[37] ʿAbdul ʿAzīz claims the rift was caused by al-Ẓawāhirī's resorting to indiscriminate violent operations in Egypt, operations he has long objected to.[38] However, Brachman cites jihadist accounts stating that ʿAbdul ʿAzīz was infuriated when al-Ẓawāhirī refused to credit his shared authorship of *al-Ḥaṣād al-murr* ("The bitter harvest"),[39] a book written as a critique of the Muslim Brotherhood and its toleration for the Egyptian regime.

Al-Ẓawāhirī came from a privileged Egyptian family of renowned doctors, diplomats, and religious scholars, including a grand shaykh of al-Azhar.[40] From his early involvement with militant groups, he was committed to militant attacks rather than the non-violent Islamic transformation of society.[41] He was imprisoned in the aftermath of the Sādāt assassination and was tor-

31 Brachman, *Jihadism*, 74.

32 Ismail Elsherif, "al-Duktūr Faḍl Munaẓẓir al-Jihādīyīn maʿ ʿImād Adīb," Youtube video, 01:23:43, posted 15 April 2013, <https://www.youtube.com/watch?v=72q5_wGhWSU>.

33 al-Zayāt, *Jamāʿat*, 136.

34 ʿAbdul ʿAzīz, "Taʿriya," *al-Masry al-Youm* (18 November 2008), online: <http://www.almasry-alyoum.com/article2.aspx?ArticleID=186860>, accessed 21 June 2011.

35 Brachman, *Jihadism*, 75.

36 Brachman, *Jihadism*, 75.

37 Rashwān, "Murājaʿāt," 17.

38 ʿAbdul ʿAzīz, "Taʿriya" (18 November 2008).

39 Brachman, *Jihadism*, 75.

40 Stephane Lacroix, "Ayman al-Zawahiri: Veteran of Jihad," in *al-Qaeda in Its Own Words*, ed. Gilles Kepel and Jean-Pierre Milelli, trans. Pascale Ghazaleh (Cambridge, MA: The Belknap Press of Harvard University Press, 2008), 148.

41 al-Zayāt, *Jamāʿat*, 136.

tured in prison to implicate his colleagues.[42] Although he later stated in court that he had confessed under duress (and used the trial to expose to international journalists the severe torture the defendants endured),[43] ʿAbdul ʿAzīz used that incident to discredit al-Ẓawāhirī as treacherous.[44] According to Lacroix, prison was a turning point for al-Ẓawāhirī. Before prison, he was committed to regime change but was convinced it should be achieved through a coup d'état to avoid collateral damage.[45] But the torture and humiliation he experienced in prison radicalized him, leading him to endorse the more violent military tactics of the 1990s.[46]

Al-Ẓawāhirī later moved to Pakistan and met Bin Lādin in 1986.[47] For some time, Afghanistan seemed like a miracle solution to the problem of Islamic militancy faced by Arab regimes. In addition to allowing those regimes to help their U.S. ally in its Cold War efforts to deal a blow to the U.S.S.R., it meant disposing of the threat posed by militants to those regimes.[48] After all, the leader of the Arab jihadists in Afghanistan, the Palestinian ʿAbdullah ʿAzzām (d. 1989), was more interested in fighting external enemies than Arab regimes.[49] Al-Ẓawāhirī, who was more committed to confrontation with the Egyptian regime, directed his attention to Bin Lādin, whose links with Saudi funders attracted al-Ẓawāhirī.[50] Thus, al-Ẓawāhirī attempted to draw Bin Lādin away from ʿAzzām.[51] But the Iraqi invasion of Kuwait meant a divergence of interests between the two comrades. When Saudi Arabia resorted to U.S. support in the liberation of Kuwait, Bin Lādin offered assistance to the Saudi regime to avoid reliance on "infidels," but was snubbed.[52] Bin Lādin's primary objective was to fight the U.S. occupier of the holy land of Saudi Arabia. On the other hand, al-Ẓawāhirī was committed to the removal of the un-Islamic Egyptian regime.[53] The chaos in Afghanistan after the withdrawal of the U.S.S.R. led both al-Ẓawāhirī and Bin Lādin to travel to Sudan, each to pursue his inde-

42 al-Zayāt, *Jamāʿat*, 150.

43 Lacroix, "Veteran," 153.

44 ʿAbdul ʿAzīz, "Taʿriya" (18 November 2008).

45 Lacroix, "Veteran," 151.

46 Lacroix, "Veteran," 152.

47 Bonney, *Jihād*, 358.

48 Gilles Kepel, "The Origins and Development of the Jihadist Movement: From Anti-Communism to Terrorism," *Asian Affairs* 35, no. 2 (2003), 94.

49 Lacroix, "Veteran," 155.

50 Lacroix, "Veteran," 154.

51 Lacroix, "Veteran," 155.

52 Lacroix, "Veteran," 156.

53 Lacroix, "Veteran," 156.

pendent *jihād* objectives.[54] Al-Ẓawāhirī engaged in several militant operations in Egypt in the 1990s, including an assassination attempt against the prime minister, killing a schoolgirl. But as mentioned earlier, these operations eventually failed because of a security crackdown and the failure of those groups to shift public opinion in their support. According to Kepel, al-Ẓawāhirī's failure to maintain *jihād* in Egypt led him to ally with Bin Lādin.[55] In 1998, Bin Lādin, al-Ẓawāhirī, and other leaders of militant groups issued a statement establishing the World Islamic Front Against the Jews and the Crusaders.[56] The failure of the Oslo Accords and the second Palestinian *intifāḍa* provided the opportunity for the Front to attempt to win over Muslim hearts and minds.[57] After the Front was established, several attacks were launched against U.S. targets, including U.S. embassies in Tanzania and Kenya in 1998, the warship U.S.S. *Cole*, and finally, the 9/11 attacks.[58]

As Esposito notes, scholars have disagreed over why al-Ẓawāhirī shifted his focus from the closer enemy, Egypt, to the further enemy, the United States.[59] Kepel argues it was a strategic choice triggered by the realization that it was easier to mobilize the masses against an external, non-Muslim enemy.[60] Bonney believes that al-Ẓawāhirī convinced Bin Lādin to adopt more violent, indiscriminate attacks, while Bin Lādin converted al-Ẓawāhirī to strategic warfare against the further enemy.[61] Esposito notes that some other experts believe that al-Ẓawāhirī always had a more international outlook.[62] However, this belief fails to account for al-Ẓawāhirī's history of militant work and his focus on Egypt, except for the brief interruption of the Afghan war. At any rate, the alliance between the two helped set up one of the most widely recognizable militant organizations, with a complex and far-reaching global network.

2.2 Murājaʿāt al-Jihād*: a Militant Debate*

To a great extent, the exchange between al-Ẓawāhirī and ʿAbdul ʿAzīz mirrors many other contemporary works on the issue of armed conflict in Islam, with

54 Lacroix, "Veteran," 156.

55 Gilles Kepel, *The War for Muslim Minds: Islam and the West* (Cambridge, MA: The Belknap Press of Harvard University Press, 2004), 2.

56 Kepel, *Minds*, 92.

57 Kepel, *Minds*, 2.

58 Kepel, *Minds*, 92–93.

59 John L. Esposito, *Unholy War: Terror in the Name of Islam* (New York: Oxford University Press, 2002), 20.

60 Kepel, *Minds*, 2.

61 Bonney, *Jihād*, 358–59.

62 Esposito, *Unholy War*, 20.

most of the debate addressing issues relating to the legitimacy of engaging in armed conflict with different categories of political establishments/states, rather than on the rules governing the conduct of the armed conflict itself. This focus is understandable in the context of the debate – the initial document published by ʿAbdul ʿAzīz, as evident from its title, with its focus on prudence in *jihād*, aimed at limiting the application of *jihād* in modern times. Al-Ẓawāhirī's book was a refutation and a challenge to the document, examining rules of undertaking *jihād* rather than rules regulating it. However, the three documents under examination here dedicate some attention to issues relating to the conduct of *jihād*, notably indiscriminate targeting and *amān*. In addition to touching upon other issues addressed in the documents when relevant, this chapter focuses on the analysis of these two issues.

2.2.1 Targeting

Tatarus (shielding), which refers to situations whereby targetable groups shield themselves behind untargetable groups, such as women, children, and Muslims,[63] as well as to unintentional harm/killing inflicted upon these groups in the course of fighting, occupied the minds of jurists like al-Shaybānī, al-Shāfiʿī, and Ibn Ḥazm. The issue of *tatarus* is brought up in ʿAbdul ʿAzīz's treatise in his discussion of terrorist attacks targeting non-Muslim states. He argues that the multireligious nature of modern states means that any attack against a non-Muslim state potentially leads to injury or death of resident Muslims.[64] He refutes the reliance on *tatarus* as a legal tool to allow Muslim killing on two bases. First, he argues that jurists do not allow the killing of a Muslim in the course of fighting unless it is in the course of *jihād al-daf*ʿ (defensive *jihād*) and is absolutely necessary.[65] Second, he states that an attack inside a state of unbelievers (*bilād al-kuffār*) is not analogous to the situations of *tatarus* referred to in early jurisprudential books, where the situation envisaged by jurists was Muslims taken captive and placed at the front of the non-Muslim army to prevent the Muslim army from fighting.[66]

This particular obstacle was dismissed by ʿAbdul ʿAzīz in his earlier books. In *al-Jāmi*ʿ, he quotes Ibn Ḥazm's position that a Muslim should never live in non-Muslim territories unless obligated,[67] and in *al-ʿUmda*, he argues that Muslims

63 Referred to by some as civilians, but as previous chapters and this chapter show, this reference is inaccurate.

64 ʿAbdul ʿAzīz, "Tarshīd," *al-Masry al-Youm* (25 November 2007).

65 ʿAbdul ʿAzīz, "Tarshīd" (25 November 2007).

66 ʿAbdul ʿAzīz, "Tarshīd" (25 November 2007).

67 ʿAbdul ʿAzīz (authored under ʿAbdul Qādir b. ʿAbdul ʿAzīz), *al-Jāmiʿ fī ṭalab al-ʿilm al-sharīf*, 618, online: <http//www.tawhed.ws/a?a=85ud42ss>, accessed 12 April 2010.

may be killed in the course of fighting apostate governments, citing Ibn Taymiyya's position that the coerced can be killed.[68] He also cites a prophetic *ḥadīth* stating that those who are coerced into fighting alongside corrupters will be resurrected in accordance with their intentions.[69] In fact, ʿAbdul ʿAzīz argued that such an obstacle would "jeopardize *jihād* in both forms [defensive and offensive], since there is no country that does not have Muslims intermixed with *kuffār*."[70]

Given that the "Tarshīd" document is in effect a revision of the author's earlier views, retractions are to be expected. The author would normally be expected, however, to refute those earlier views rather than simply to rely on the general prohibition of killing Muslims without making any attempt to counter views widely held by other militants. Moreover, ʿAbdul ʿAzīz is not even willing to acknowledge that there is a contradiction between the "Tarshīd" document and his earlier works. When asked in an interview about this contradiction, he said, "What is in *al-ʿUmda fī iʿdād al-ʿudda* and *al-Jāmiʿ* are abstract *aḥkām* [i.e., mere *ʿilm*, in this case, jurisprudence] that should not be interpreted and applied to reality except by someone qualified to issue/pronounce *fatwā*."[71] That justification is hardly satisfactory, partly because the books were written by a jihadist in jihadist circles and were not a mere intellectual exercise. But primarily, it is unsatisfactory because the claim elevates his book to the status of an authoritative primary text in an attempt to avoid scrutiny. Whereas it is common to argue such an interpretation of the Qurʾān, sunna, and other sources, or possibly even to argue that classical jurisprudential texts should only be examined by specialists, it is a novelty to argue that contemporary commentaries cannot be examined or analysed by non-specialists.

In addition to contradicting earlier works, ʿAbdul ʿAzīz's claim that Muslims can be killed unintentionally only in defensive wars moves away from most classical juristic positions, including from those of many jurists on whom ʿAbdul ʿAzīz relies in other parts of his work, such as al-Shāfiʿī and al-Shaybānī. He fails to mention that both these scholars allowed the Muslim army to attack a fortress, even if Muslims were present.[72] Logical interpretation would lead the reader to understand an attack against a fortress as an act of offensive rather than defensive *jihād*, especially if one were to employ a restrictive

68 ʿAbdul ʿAzīz (authored under ʿAbdul Qādir b. ʿAbdul ʿAzīz), *al-ʿUmda fī iʿdād al-ʿudda*, 323, online: <http//www.tawhed.ws/a?a=85ud42ss>, accessed 12 April 2010.

69 ʿAbdul ʿAzīz, *ʿUmda*, 314.

70 ʿAbdul ʿAzīz, *ʿUmda*, 314.

71 Interview with ʿAbdul ʿAzīz, "al-Ḥāya fī Sijn Ṭura al-Miṣrī tuḥāwir ṣāḥib Wathīqat tarshīd al-jihād fī Miṣr wa-l-ʿālam," *al-Hāya* (12 December 2007), 15.

72 al-Shāfiʿī, *Umm*, 4:409; al-Shaybānī, *Siyar*, 102.

understanding of defence that precluded *jihād* against a country colonizing or exercising hegemony over Muslim territories.

The other point ʿAbdul ʿAzīz raises against such attacks stems from the means by which the individual conducting the attack enters *bilād al-kuffār*, the visa. He argues that the visa is a form of *amān* granted to the individual by the host country. Among his sources, he argues that al-Shaybānī says that "if the Muslim forges their handwriting and enters on its basis *bilād al-kuffār*, he is obligated to be loyal to them."[73] In addition to relying on verses and *ḥadīth*s that denounce treachery in general, he also relies on a prophetic *ḥadīth* stating that whoever commits injustice against someone with whom there is a pact or a *dhimmī*, will not smell Heaven.[74] Looking at ʿAbdul ʿAzīz's earlier works, it is clear that he believes strongly in the modern entry and residence visa systems as forms of *amān*, as evident from his earlier position in *al-Jāmiʿ*, where he argues that a visa entitles the entrant to the protection of soul and property.[75] The analogy of the visa to the pact of *amān* is one of ʿAbdul ʿAzīz's strongest arguments because of the wide respect for *amān* across jurisprudential works.[76]

It should be noted, however, that ʿAbdul ʿAzīz's reliance on *amān* to denounce terrorist attacks is a tactical choice that allows him to refrain from addressing the primary issue – unintentional harm caused to untargetable groups. His argument leaves us, for example, with little guidance about the jurisprudential ruling on a Muslim national of a non-Muslim state committing a terrorist attack in that non-Muslim state without needing *amān* to be in that particular country, a tactic that has recently seen a significant surge with ISIS's reliance on nationals of Western states. ʿAbdul ʿAzīz does make some secondary arguments to support his rejection of such attacks. He argues, for example, that the Prophet always fought outside city borders, where combatants and non-combatants were distinguishable.[77] But he makes no reference to widely cited claims that the Prophet besieged Banū l-Naḍīr and allowed their trees to be burnt,[78] hence inflicting harm beyond enemy combatants. He also moves away from the common interpretation of the prophetic *ḥadīth* said to have allowed night raids even if women and children were present during the course of fighting, by stating that the *ḥadīth* was in reference to night combat.[79] And

73 ʿAbdul ʿAzīz, "Tarshīd" (25 November 2007).
74 ʿAbdul ʿAzīz, "Tarshīd" (25 November 2007).
75 ʿAbdul ʿAzīz, "Tarshīd" (25 November 2007).
76 al-Ṭabarī, *Ikhtilāf*, 25–37.
77 ʿAbdul ʿAzīz, "Tarshīd" (25 November 2007).
78 ʿAbdul ʿAzīz, *ʿUmda*, 349.
79 ʿAbdul ʿAzīz, "Tarshīd" (25 November 2007).

he does not address the wide juristic interpretation considering the *ḥadīth* to have been in reference to night raids. Arguing that the reference is to combat and not raids assumes an active battle between two parties rather than one party raiding the other and surprising it. Such an interpretation allows ʿAbdul ʿAzīz to avoid dealing with any possible analogy between a night raid, which by its nature does not distinguish between those who may be targeted and those who may not, and modern terrorist attacks. In fact, in *al-ʿUmda* he argues that the prohibition against killing women and children is a prohibition against targeting them if they are distinguishable from the enemy, since the aforementioned *ḥadīth* allows *bayāt* (lit. awaiting at night),[80] defined by Ibn Qudāma (d. 620/1223) as raiding and attacking the enemy by surprise without being able to distinguish between men, women, and children.[81]

Seemingly, ʿAbdul ʿAzīz and al-Ẓawāhirī are equally aware that the schoolgirl Shaymāa's death during the attack against the prime minister damaged public sympathy for militant operations. ʿAbdul ʿAzīz is intent on capitalizing on this damage. In his argument against indiscriminate attacks, he colourfully laments how "the shrapnel rested in a frail body going by the name of Shaymāa."[82] To some extent, it feels as though ʿAbdul ʿAzīz is convinced he does not need to offer a detailed argument to prove a point most of the public would be willing to adhere to – the idea that no justification can be provided for the death of such a young girl.

Aware of the damaging effect of the reference to this incident, al-Ẓawāhirī offers a very detailed response to the issue of indiscriminate attacks and the casualties to women and children. First, he refers to the *ḥadīth* on night raids relied on by ʿAbdul ʿAzīz and cites Ibn Qudāma and other jurists to prove the *ḥadīth* is understood as a licence for indiscriminate night attacks.[83] Second, he argues that indiscriminate attacks are permissible because catapults were used by the Prophet against the people of al-Ṭā'if.[84] Third, he argues that jurists allow the killing of Muslims if they are used as shields by non-Muslims. The fact that untargetable shields may be killed in the course of fighting with non-Muslims is then relied on as a further proof that indiscriminate attacks are permissible. Here, al-Ẓawāhirī provides a survey of different juristic views on attacks against non-Muslims shielded by those who may not be targeted. He

80 ʿAbdul ʿAzīz, *ʿUmda*, 345.

81 al-Ẓawāhirī, *Tabriʾa*, 33.

82 ʿAbdul ʿAzīz, "Tarshīd" (22 November 2007).

83 al-Ẓawāhirī, *Tabriʾa*, 32–33, 130–31.

84 al-Ẓawāhirī, *Tabriʾa*, 132.

starts off with Mālik and al-Awazaʿī and their rejection of such attacks.[85] He then moves on to scholars who allow it if necessary but order the payment of blood money to Muslims who are injured in the process,[86] and quotes scholars like al-Shāfiʿī who allow the killing of women and children if they are not specifically targeted and who reluctantly state that it is permissible to resort to indiscriminate tactics like burning and drowning if Muslims are present.[87] Finally, he quotes the Ḥanafīs, whose position is the most flexible in its allowance of such tactics and its reluctance to oblige the army to offer any compensation.[88] In order to counter the public relations damage/adverse reactions caused by Shaymāa's death, al-Ẓawāhirī is keen to go out of his way to prove compassion for the death of the child. Although he argues that women and children may be killed in the course of indiscriminate attacks, he claims the Ṣidqī attack was planned on the assumption the school was undergoing renovation (i.e. that there were no students present there).[89] Additionally, despite his reliance on jurists who do not impose the payment of compensation in the event of the accidental deaths of Muslims, he says that his group is willing to apply other juristic positions demanding the payment of compensation and offer such compensation to the girl's family.[90] According to this narrative and the blood money proposal, al-Ẓawāhirī offers a position that largely adheres to al-Shāfiʿī's position on killing Muslims shielding non-Muslims, including the payment of compensation and the attempt to avert damage by aiming at non-Muslims and limiting damage to Muslim children, a position fraught with its own complexities, as discussed in Chapter 2.

Aside from this tactical attempt to appease public opinion and neutralize the effect of the girl's death, al-Ẓawāhirī's analysis of indiscriminate targeting is worthy of examination. The juristic survey offered by al-Ẓawāhirī, and his willingness to quote classical juristic positions that contradict his own, give an initial sense of credibility and an impression to readers that his argument is more grounded in the juristic tradition than ʿAbdul ʿAzīz's. But al-Ẓawāhirī, who is very critical of ʿAbdul ʿAzīz for stretching analogical deduction to equate modern distinct regimes such as visas with *amān*, falls into the same trap of indifference to the historical context. For example, his attempt to create an analogy between weapons of mass destruction (including nuclear weapons)

85 al-Ẓawāhirī, *Tabriʾa*, 123.
86 al-Ẓawāhirī, *Tabriʾa*, 124.
87 al-Ẓawāhirī, *Tabriʾa*, 127.
88 al-Ẓawāhirī, *Tabriʾa*, 126.
89 al-Ẓawāhirī, *Tabriʾa*, 200.
90 al-Ẓawāhirī, *Tabriʾa*, 201.

and primitive indiscriminate weapons (such as catapults) is unconvincing.[91] He does not show any awareness of the difference between the destructive capacity of a primitive rock-hurling machine and a traditional bomb, let alone a nuclear bomb. Although jurists acknowledged that mangonels portray some indiscriminate traits, their destruction of bystanders is still somehow subject to more control than a bomb that explodes in the middle of a city. Probably, this element of minor control of destruction caused by mangonels led jurists like al-Shāfiʿī to demand that Muslim warriors attempt to avoid hitting those who may not be targeted,[92] a demand that would be almost impossible with a nuclear bomb or other wide-ranging weapons advocated as permissible by al-Ẓawāhirī.

Yet, al-Ẓawāhirī does not always rely on extensive juristic citation to support his arguments. Whenever convenient, he expands the application of general principles to accommodate tactics employed by militant operations. One example of this expansion is his employment of reciprocity. We have seen how ʿAbdul ʿAzīz resorted to the general principles of the sanctity of Muslim lives to prove the wrongfulness of indiscriminate terrorist attacks. Al-Ẓawāhirī seems to resort to the same approach when claiming that indiscriminate targeting by the enemy could justify the resort to such tactics by Muslims on the basis of the general principle of reciprocity.[93] But as mentioned by ʿAbdul ʿAzīz, al-Ẓawāhirī fails to recognize the exception of impermissible acts from reciprocity.[94] For example, he quotes al-Shāfiʿī in obligating Muslims who cause the death of an animal to compensate with a similar animal rather than pay its value.[95] In reference to conflict, he relies on some juristic positions that allow Muslims to inflict mutilation on enemy corpses in retaliation for similar acts by the enemy, and he relies on a statement made by Ibn Qayyim al-Jawziyya (d. 751/1350) that unbelievers' plantations may be burnt if the unbelievers had burnt Muslims' plantations.[96] In all these examples, none of the jurists allowed the targeting of groups who may not be targeted but referred rather to acts that are arguably permissible, according to many jurists, such as the destruction of plantations. In fact, jurists like Ibn Ḥazm were very critical of the idea of committing prohibited acts to gain military advantage. Criticizing the killing of animals with the objective of destroying the morale or the advantage of the

91 al-Ẓawāhirī, *Tabriʾa*, 138.

92 al-Shāfiʿī, *Umm*, 4:348.

93 al-Ẓawāhirī, *Tabriʾa*, 134.

94 ʿAbdul ʿAzīz, "Taʿriya" (22 November 2008).

95 al-Ẓawāhirī, *Tabriʾa*, 134.

96 al-Ẓawāhirī, *Tabriʾa*, 134.

enemy, Ibn Ḥazm says, "If one were to accept it, then why not kill their women and children as well?'[97] Thus, al-Ẓawāhirī's claim to reciprocity is far more problematic than ʿAbdul ʿAzīz's claim to *amān* as a restrictive obstacle to many militant operations, yet he is more comfortable accusing ʿAbdul ʿAzīz of expansive *qiyās*, despite his being guilty of using the same technique.

2.2.2 *Amān*: al-Ẓawāhirī's Biggest Challenge

Al-Ẓawāhirī's approach to the issue of *amān* shows similar attempts to innovate beyond the juristic tradition. As mentioned earlier, he accuses ʿAbdul ʿAzīz of improper *qiyās* in his argument that a visa is a form of *amān.* For his part, al-Ẓawāhirī offers multiple examples and modern juristic analyses to show that a visa is not a form of *amān*. He starts out by offering different definitions for a visa and argues that all definitions revolve around entry and residence rather than protection.[98] He then argues that the visa cannot be considered a contractual agreement, because jihadists cannot engage in contractual agreements with infidels, nor are jihadists bound by international agreements governing visa practice. This approach shows serious opportunism, since jihadists are entitled to protections bestowed upon their fellow citizens by virtue of international agreements between their country of citizenship and the host state, but at the same time they are relieved of the obligation of respecting those agreements. It can be argued that double standards when dealing with this issue reflect the kind of behaviour denounced by classical jurists when covering *amān.*[99] For example, al-Ẓawāhirī criticizes ʿAbdul ʿAzīz for "twisting" al-Shaybānī's words when he states that al-Shaybānī said forging a letter from *ahl al-ḥarb* to enter their land entitles *amān* to *ahl al-ḥarb* because he entered on its basis.[100] Al-Ẓawahirī states that al-Shaybānī was referring to Muslims who claim to be traders or messengers of the caliph. According to al-Ẓawāhirī, those two groups do not have the "right" to attack enemy territory, because it was common practice in al-Shaybānī's time to protect traders and messengers.[101] But al-Ẓawāhirī fails to take into account the authoritative commentary by al-Sarakhsī on the matter. Al-Sarakhsī states that *ahl al-ḥarb* are protected because they have no way of seeing beyond the claims made by entrant Muslims, and because Muslims are obligated to avoid treachery.[102] In

97 Ibn Ḥazm, *Muḥalla*, 295.

98 al-Ẓawāhirī, *Tabriʾa*, 98.

99 al-Ẓawāhirī, *Tabriʾa*, 98.

100 al-Ẓawāhirī, *Tabriʾa*, 119–20.

101 al-Ẓawāhirī, *Tabriʾa*, 119–20.

102 al-Shaybānī, *Sharḥ Kitāb al-Siyar al-kabīr*, ed. Abū ʿAbdullah Ismail al-Shāfiʿī (Beirut: Dār al-Kutub al-ʿIlmiyya, 1997), 2:66–67.

fact, al-Ẓawāhirī claims that if anyone were to go to a U.S. embassy, say he were a messenger from Mulla ʿUmar, and demand a visa, he would be arrested. According to him, the fact that Mulla ʿUmar's messenger would be denied a visa is an indication of deviation from the standard practice of ensuring the protection of messengers.[103] However, this particular point weakens al-Ẓawāhirī's argument on *amān* because it proves that militants entering the United States to commit a militant operation must conceal their identity in order to receive the permit. Concealing their identity to be granted protection, then taking advantage of this protection to launch attacks, plausibly is a form of treachery.

Al-Ẓawāhirī also argues that in common practice, a Muslim is not protected in a non-Muslim country. He offers numerous examples of the lack of such protection, for example, "A Muslim may not apply the *ḥukm* of Qurʾān on his wife if she disobeys him and refuses to share his bed ... and if he tries to reclaim his right against her will, she has the right to sue him because he 'raped' her."[104] Moreover, he may not "prevent his son or daughter from committing obscenity or drinking alcohol or gambling."[105] He also points out that many Muslims suspected of affiliation with jihadist networks have been arrested and their property confiscated, and that Muslims are often forced to pay taxes that contribute to a defence budget that is used against Muslim interests.[106] Again, al-Ẓawāhirī disregards the fact that most jurists did not argue that *amān* entitles Muslims to protection if they violate the laws of a non-Muslim state. In fact, al-Shaybānī argued that *ḥudūd* punishments should be waived if the crimes requiring such punishments were committed in *dār al-ḥarb*.[107] Moreover, al-Ẓawāhirī's reliance on Ibn Ḥazm to prove his point on this matter is further proof of the weakness of his claim. Ibn Ḥazm argued that it was not permissible for traders to travel to *dār al-ḥarb* if they expected to be humiliated and to be forced to follow the host state's laws.[108] Al-Ẓawāhirī uses the argument to prove that it was not permissible for Muslims to follow non-Muslim laws, which would render the visa an invalid contract under Islamic law because it allows for an impermissible act. But Ibn Ḥazm did not argue that traders were to violate these laws or pretend to be willing to respect them in order to attack the host state. He simply argued that traders should refrain from travelling, which also meant refraining from resorting to treachery. As for the argument that Muslims would

103 al-Ẓawāhirī, *Tabriʾa*, 120.
104 al-Ẓawāhirī, *Tabriʾa*, 102.
105 al-Ẓawāhirī, *Tabriʾa*, 102.
106 al-Ẓawāhirī, *Tabriʾa*, 102.
107 al-Shaybānī, *Sharḥ*, 5:108.
108 al-Ẓawāhirī, *Tabriʾa*, 146.

be forced to pay taxes in a non-Muslim state and that such money is used for defence purposes, one needs to remember that the *jizya* system was common practice at the time of classical jurisprudence and, as argued by ʿAbdul ʿAzīz, al-Shaybānī allowed the payment of *jizya* to non-Muslims.[109]

But in addition to rejection of the host country's laws and regulations applying to Muslims, al-Ẓawāhirī makes two alternative claims about the invalidity of the visa as a pretext for protecting non-Muslims from attacks by Muslims entering a non-Muslim territory via a visa. He argues that even if the visa were to be perceived as *amān*, then *amān* is breached in the case of offence to the Prophet.[110] He relies on the Kaʿb b. al-Ashraf incident, in which the Prophet's Companions pretended to turn against the Prophet to gain Ibn al-Ashraf's trust, then killed him for offending the Prophet. But that argument is refuted in the rebuttal by ʿAbdul ʿAzīz, who rightly states that Kaʿb b. al-Ashraf lived in Medina, so was a *dhimmī*, not someone from *dār al-ḥarb*.[111] Employing a potential case of deceit of a *dhimmī* to prove that the same acts may be committed against members of *dār al-ḥarb* is indeed an expansion of the applicability of this tradition. After all, many jurists set more stringent regulations on *dhimmī*s, but not necessarily other non-Muslims. For example, al-Shāfiʿī demands that they abide by the laws of Islam, and Ibn Ḥazm demands they acknowledge the prophethood of Muḥammad. The fact that *dhimmī*s belonged to the Muslim polity, whereas other non-Muslims did not, could be seen as a basis for the Companions' attack against Ibn al-Ashraf, who might be seen as a violator of the rules of the polity in which he resided.

Al-Ẓawāhirī also argues that Muslims (suspected jihadists) are often "subject to deportation to a place where they are tortured or killed. Many political asylum seekers were deported to Egypt and other countries, where they were subjected to torture,"[112] even if they possessed valid visas in "enemy" non-Muslim territory. According to him, if host countries consistently breach their *amān* agreement, then Muslims are under no obligation to respect it.[113] This argument, in particular, might appeal to many Muslims who feel under attack by the West and who have witnessed the different rendition incidents, whereby suspects were sent by the United States to other countries to be tortured.[114] As noted by Said, the rendition to torture practice eroded the legitimacy of the

109 ʿAbdul ʿAzīz, "Tarshīd" (21 November 2007).

110 al-Ẓawāhirī, *Tabriʾa*, 108.

111 ʿAbdul ʿAzīz, "Taʿriya" (24 November 2008).

112 al-Ẓawāhirī, *Tabriʾa*, 100.

113 al-Ẓawāhirī, *Tabriʾa*, 100.

114 For documentation and analysis of the rendition to torture policy, see Alan W. Clarke, "Rendition to Torture: A Critical Legal History," *Rutgers Law Review* 62 (2009), 1–74.

United States in the Middle East.[115] This argument may also be intended as a warning to Western countries that engage in rendition. What al-Ẓawāhirī is saying is that as long as Western countries continue to send Muslims to locations where they may be tortured, jihadists are more at liberty to disregard any *amān* owed to those states. But the argument does not necessarily carry much weight in the juristic tradition. As pointed out by ʿAbdul ʿAzīz, the *amān* agreement was always perceived by jurists as a very individual practice.[116] Muslims granted *amān* to traders from entities against whom they waged war, and Muslims were granted *amān* in the *dār al-ḥarb*. The *amān* agreement was always limited to the individual in question and did not extend beyond him or her. Accordingly, a breach of an *amān* agreement with one individual does not, and should not, affect an agreement with any other individual. For example, al-Shāfiʿī states that "if the enemy captures the Muslims' women and children, I would not prefer for them [Muslims granted *amān*] to be treacherous with the enemy, but I would prefer for them to ask them [the enemy] to retract the *amān*"[117] before they start fighting them. The situation explained above shows that al-Shāfiʿī envisioned a situation in which some Muslims would be entitled to *amān*, while others would not. In this case, those individually entitled to *amān* may not breach their *amān* agreement, even if the breach is intended to save women and children.

Additionally, terrorist attacks committed indiscriminately do not target solely those unbelievers who breach the *amān*, since they inflict harm on individuals who have not taken any action to deprive them of the *amān.* To resolve this issue, al-Ẓawāhirī relies on the notion of legal personality to consider the breach of *amān* by the government of a non-Muslim state a breach by all its citizens. Here, he relies on Nāṣir al-Fahd's *fatwā* considering all U.S. citizens legitimate targets. Despite his general inclination to accept that the visa is a form of *amān*, al-Fahd argued that:

> US citizens are the heads [leaders] of disbelief in this era and the inflictors of the largest of harm on God and his Prophet.... There is no power for the president, the Pentagon, or the army without the people, and if

115 Wadie Said, "The Exceptional Nature of Terrorism: The United States and Middle East Legal Systems," *Hastings International and Comparative Law* 32 (2009), 831–42. The Obama administration continued to uphold rendition. See David Johnston, "U.S. Says Rendition to Continue, But with More Oversight," *New York Times* (24 August 2009), online: <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>, accessed 19 July 2011.

116 ʿAbdul ʿAziz, "Taʿriya" (24 November 2008).

117 al-Shāfiʿī, *Umm*, 4:355.

> they [those institutions] stray in their policies from the whims of the population, they would be overthrown.... They are a legal personality similar to Kaʿb b. al-Ashraf.[118]

Although this argument seems at face value to be a contextual argument that accommodates classical jurisprudence to modern-day reality, it fails to take into account the historical context of the development of classical works. Ancient regimes in perpetual war with Muslims, like Byzantium, were still political entities that received some kind of support from their individuals during wars with an outside enemy, even in non-democratic societies. As ʿAbdul ʿAzīz argues, "The leaders of the Persians and the Byzantines (Rūm) had no power without the support of their people. Yet, when the Companions fought them, they did not apply to them the notion of legal personality invented by al-Fahd."[119]

2.2.3 Fighting in "Muslim" Territories

Another point of contention between the two former *jihād* comrades is the issue of domestic *jihād* within the borders of a Muslim state. Ironically, ʿAbdul ʿAzīz criticizes al-Qāʿida for targeting the further enemy and not the closer enemy, and argues that *sharīʿa* obligates Muslims to start their *jihād* with the closer enemy.[120] At the same time, he attempts to discredit attempts to fight "Muslim" regimes. As is well established from militant literature, the debate around attacking Muslim regimes and fighting in their territories follows in the footsteps of Ibn Taymiyya and his assertion on heresy and apostasy of some Muslim regimes, as detailed in Chapter 2. However, in his revisionist "Tarshīd" document, ʿAbdul ʿAzīz resorts to more classical understandings of rebellion, arguing that Muslims should not rebel unless the ruler's disbelief is clear and evident, relying on a *ḥadīth* to that effect.[121] He also adds some historical examples of rebellion, such as the rebellion of al-Ḥusayn, to show that internal strife in the Muslim world often inflicted damage on Muslims.[122] Finally, he quotes Ibn Taymiyya's reluctance to accept the legitimacy of rebellion against a Muslim ruler.[123] But he fails to refer to Ibn Taymiyya's well-known endorsement of *jihād* against leaders who claim allegiance to Islam without acting in

118 Nāṣir al Fahd, quoted in al-Ẓawāhirī, *Tabriʾa*, 110.
119 ʿAbdul ʿAziz, "Taʿriya" (24 November 2008).
120 ʿAbdul ʿAziz, "Taʿriya" (25 November 2008).
121 ʿAbdul ʿAziz, "Tarshīd" (22 November 2007).
122 ʿAbdul ʿAziz, "Tarshīd" (22 November 2007).
123 ʿAbdul ʿAziz, "Tarshīd" (22 November 2007).

accordance with *sharīʿa*.[124] In fact, Ibn Taymiyya's three *fatwā*s on the Mongols have made him a convenient jurist for modern-day militants, who rely on those *fatwā*s to argue that the failure of modern Muslim regimes to uphold *sharīʿa* means that they are the closer enemies who must be fought first.[125] ʿAbdul ʿAzīz himself, in *al-Jāmiʿ* and *al-ʿUmda*, relied on Ibn Taymiyya to prove the apostasy of domestic regimes. In *al-ʿUmda*, he relied extensively on Ibn Taymiyya to prove the legitimacy of fighting an apostate leader.[126] For example, he defined *dār al-ridda* (the land of apostasy) as:

> the land that was *dār al-Islām* at some point in time, then the apostates overtook it and implemented the rulings of the unbelievers [*al-kuffar*] in it, like the states referred to now as Islamic states, including Arab states. Those are lands of disbelief and apostasy, and *jihād* against its non-believing rulers is a *farḍ ʿayn* on all its Muslim population.[127]

Lav argues that ʿAbdul ʿAzīz deliberately obfuscated by glossing over matters of *takfīr* in his "Tarshīd" document to avoid contradicting himself while pretending that he tolerated the current regime, by refraining from offering a definitive position on whether the Egyptian state may be considered as *dār kufr*, thereby maintaining some level of consistency.[128] However, it would be very difficult for ʿAbdul ʿAzīz, who refuses to renounce his earlier books, to argue that such a statement is a general theoretical one that should not be interpreted by non-specialists. His specific reference to Arab states as infidel apostates that should be fought by all Muslims is a *fatwā* in itself, hardly needing another *muftī* to interpret it. It is unclear how he would reconcile this position, coupled with his statement that the closer enemy should be fought first, with his claim that rebellion against the ruler in Muslim countries contradicts *sharīʿa*. The difficulty of such reconciliation is made evident in his 2013 televised interview, after his release from prison and during the brief reign of the Muslim Brotherhood after

124 See Chapter 2 for more details.

125 Rashwān, "Murājaʿāt," 14.

126 ʿAbdul ʿAziz, *ʿUmda*, 312.

127 ʿAbdul ʿAziz, *Jāmiʿ*, 572–73.

128 Daniel J. Lav, "Jihadists and Jurisprudents: The 'Revisions' Literature of Sayyid Imām and al-Gama'a al-Islamiyya," in *Political Islam from Muhammad to Ahmadinejad*, ed. Joseph Morrison Skelly, Kindle ed. (Santa Barbara, CA: Praeger Security International, 2010), loc. 1845–49.

the Arab Spring, where he stated that the Mubārak regime and the Muslim Brotherhood's were not considered Muslim.[129]

Al-Ẓawāhirī's response to the claim is multifaceted, with a focus on jurisprudence, policy, and a portrayal of the Egyptian government's record of human rights violations and its alliance with the United States. He quotes a report issued by several respected Egyptian human rights organizations documenting incidents of extreme torture of Islamists, as well as attacks against women and children, to show that the current regime is un-Islamic.[130] He also questions the possibility of changing the Egyptian regime in any non-violent manner with its continued suppression of peaceful demonstration and other forms of oppositional political participation.[131]

Jurisprudentially, al-Ẓawāhirī does not attempt to challenge ʿAbdul ʿAzīz's claim that rebellion against the ruler is unjustifiable. He argues that rebellion in classical jurisprudence is of no concern to Muslims in their *jihād* against the current regimes because those regimes are apostates rather than Muslim.[132] Interestingly, both authors avoid the middle ground of the *baghy* legal regime and discuss rather the issue of apostasy because the pragmatism and the flexibility of rebellion rules under Islamic law prove inconvenient for both their positions. If one were interested in delegitimizing the resort to violence in dealing with the ruler, the *baghy* regime would prove highly ineffective, with its heritage of value-neutral regulation of such conflicts. On the other hand, if one were interested in fighting the ruler, it is far less convenient to resort to *baghy*, with its stringent regulation of military tactics and its attempt to promote a conflict situation with the least amount of casualties, than to resort to the regime governing apostasy, the least regulated type of armed conflict under Islamic law, in which some jurists even allow targeting apostate women, unlike other non-believing women.

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129 "al-Duktūr Faḍl Munaẓẓir al-Jihādīyīn maʿ ʿImād Adīb," Youtube video, 01:23:43. The interview was televised after the Muslim Brotherhood had come to power.

130 al-Ẓawāhirī, *Tabriʾa*, 91, quoting a report on a fact-finding visit conducted by the Egyptian Organization Against Torture, al-Nadeem Centre for Psychological Rehabilitation of Victims of Violence and Torture, and the Hisham Mubarak Law Centre, 15–17 November 2007.

131 al-Ẓawāhirī, *Tabriʾa*, 5. It is this focus on the Egyptian regime's autocratic governance that has led some commentators to argue the Arab Spring has eroded the legitimacy of al-Qāʿida as the sole tool for regime change. However, the reversion to authoritarianism makes this claim difficult to assess. See Richard Clarke, "Bin Laden's Dead, Al-Qaeda's Not," *New York Times* (2 May 2011), online: <http://www.nytimes.com/2011/05/03/opinion/03clarke.html>, accessed 19 July 2011.

132 al-Ẓawāhirī, *Tabriʾa*, 88.

In this debate, one comes across an example that proves the convenience – for any militant – of avoiding discussion of the *baghy* regime and debating rather the conflict on the apostasy premise: that is, the targeting of non-Muslims visiting Muslim lands. If the governments allowing the non-Muslims in are apostate governments, then entry and work visas granted to non-Muslims are invalid, and Muslims may target those non-Muslim tourists and workers. On the other hand, if one were to treat the government as a Muslim, albeit corrupt, government, then the *amān* granted by this government would be valid and it would be obligatory on all Muslims, including rebels, to respect it and ensure the protection of those non-Muslims.

Having earlier claimed apostasy of the regime, ʿAbdul ʿAzīz is aware of how apostasy claims may refute his rejection of rebellion against the ruler and attempts to counter such refutations. Accordingly, he tries to overcome the apostasy debate and to argue that even if one were to ignore the visa granted by the government, normally non-Muslims come on the basis of an invitation from a tourist office or an employer, which is a valid *sharʿī amān*.[133] Al-Ẓawāhirī responds that such a claim is based on fictitious circumstances since the apostate governments are the ones that grant the pledge of protection: "The tourist coming to a tourism company or a hotel does not imagine that this entity is the one that would protect his life and property. Rather, he is certain that it is the government that does so."[134] But as ʿAbdul ʿAzīz points out, this response disregards the ruling made by some jurists that in the event that such non-Muslims unknowingly receive an invalid *amān*, they should be escorted outside Muslim territories rather than be treated as legitimate war targets.[135]

The validity of the *amān* is not the sole obstacle set by ʿAbdul ʿAzīz to targeting tourists. He also relies on the potential presence of Muslims in tourist groups as an obstacle, since Muslims should not be targeted.[136] Additionally, reciprocity necessitates respecting tourists' lives, since Muslims are given *amān* in the form of a visa when they travel to non-Muslim territory.[137] He also argues that the Muslim obligation to treat the other well dictates the fair treatment of the other rather than his treacherous killing.[138] But his most important argument other than *amān* again relates to untargetable groups:

133 ʿAbdul ʿAzīz, "Tarshīd" (23 November 2007).

134 al-Ẓawāhirī, *Tabriʾa*, 152. Note that al-Ẓawāhirī concedes that a visa is a guarantee of protection.

135 ʿAbdul ʿAzīz, "Taʿriya" (24 November 2008).

136 ʿAbdul ʿAzīz, "Tarshīd" (23 November 2007).

137 ʿAbdul ʿAzīz, "Tarshīd" (23 November 2007).

138 ʿAbdul ʿAzīz, "Tarshīd" (23 November 2007).

> If we assume that the foreigners in the country are infidels who have no pact [of protection], then most of them may not be targeted even in the middle of the battle with the infidels if they happen to be in the infidel camp. How can we then kill them intentionally when they are on their own?[139]

Many of these issues, such as reciprocity and the prohibition on killing Muslims, were earlier dealt with by al-Ẓawāhirī when he addressed the issue of operations conducted in non-Muslim countries. But he fails to offer a convincing response to ʿAbdul ʿAzīz's claim with regards to the intentional killing of tourists who belong to groups that should not be targeted. In order to refute ʿAbdul ʿAzīz, al-Ẓawāhirī resorts to one of his least convincing arguments, the notion of the legal personality: "Women and elders in the West support their governments with the money they pay in the form of taxes and the votes they cast in elections of governments that transgress against us."[140] If one were to reject the notion of the legal personality, the intentional targeting of these groups outside the context of any form of conflict or battlefield would be hard to justify. Even if one were to accept that notion of legal personality, it is unclear how al-Ẓawāhirī would justify the targeting of children, who have no legal capacity to allow for their classification as indirect participants in the conflict.

ʿAbdul ʿAzīz also relies on Ibn Taymiyya's view on punishment to support his thesis that not all non-Muslims should be killed. To argue that infidelity is not punishable on earth, he quotes Ibn Taymiyya saying, "We know that some people are not punished in this world [*al-dunya*] even if they are [treated as] infidels in the hereafter, such as *dhimmī*s who accept the *jizya* and the hypocrites who pretend to follow Islam."[141] However, this quote makes no reference to refraining from fighting or killing infidels. In fact, one could possibly understand this statement as indicating that infidels who do not pay the *jizya* are indeed punishable. Al-Ẓawāhirī again asserts the notion of legal personality, rejecting ʿAbdul ʿAzīz's claim and arguing that nationality is an indication of allegiance and fidelity to a political entity with the power to fight Muslims.[142]

This debate over the classification of residents of Muslim lands rather than the classification of the regimes governing those lands is very relevant because it is starkly different from the positions taken by ISIS and supported by ʿAbdul ʿAziz in his 2013 televised interviews. But in this debate, both al-Ẓawāhirī's and

139 ʿAbdul ʿAzīz, "Tarshīd" (23 November 2007).

140 al-Ẓawāhirī, *Tabriʾa*, 153.

141 Quoted in ʿAbdul ʿAzīz, "Tarshīd" (23 November 2007).

142 al-Ẓawāhirī, *Tabriʾa*, 154.

Imām's published revisionist works avoid the muddy issue of the status of those residents and seem to accept the notion that their protection from targeting must be respected. As a matter of fact, al-Ẓawāhirī, despite using sectarian and inflammatory language on Christians, asserts that Egyptian Christians must be protected and calls on Muslims to refrain from inflicting harm on those Egyptian Christians who do not attempt to harm Muslims, raising interesting questions over whether he considers their *dhimmī* status valid despite the declared apostasy of the regime.[143] This vague reference indicates that al-Qāʿida, at least in this work, was unwilling to declare Muslims and non-Muslims residing in Muslim territories targetable, unlike ISIS's approach to such categories, as clarified in the next section.

Looking at one side of the debate between al-Ẓawāhirī and ʿAbdul ʿAzīz would give the reader the impression that the other side is manipulative in its reliance on Islamic law, but examining both sides together is a testament to the complexity, perhaps indeterminacy, of this old legal tradition. The debate shows how a yes/no response with regards to the legitimacy of militant attacks conducted by al-Qāʿida would be an oversimplification of the intricate legal issues involved in such a question. Both sides rely on textual sources – the Qurʾān and sunna – to support their positions, offering at many times contradictory interpretations of the texts. Both sides invoke the opinions of prominent classical jurists to add weight to their arguments. Although al-Ẓawāhirī shows more willingness to address juristic views that contradict his positions, both men are ready to disregard such juristic views when making their weakest arguments. Both criticize the other for resorting to *qiyās* when the issue involved stands against their promoted sets of rules. For example, al-Ẓawāhirī is highly critical of ʿAbdul ʿAzīz's analogy between the visa and the Islamic *amān* system, whereas he is willing to deduce an analogy between primitive weapons such as catapults, with their limited destructive power, and bombs, employed to destroy city centres, and even hints at a potential analogy with weapons with extremely destructive powers such as nuclear weapons.

Finally, the two militant ideologues do not limit themselves to a formalist reliance on the text but often resort to policy arguments to support their views and analyse the current state of affairs. Whereas both agree that Western domination and the creation of the state of Israel are the biggest calamities facing the Arab world,[144] they disagree over other matters. For example, ʿAbdul ʿAzīz argues against what he refers to as futile *jihād*, stating that with the current state of weakness, any operations conducted against governments and the

143 al-Ẓawāhirī, *Tabrīʾa*, 167–70.

144 ʿAbdul ʿAzīz, "Tarshīd" (18 November 2007) and al-Ẓawāhirī, *Tabrīʾa*, 138.

West would further weaken Muslims.[145] Al-Ẓawāhirī argues that things could not get worse and responds with a question that would resonate among many Egyptians: "If we take Egypt as an example of Muslim and Arab states, is there hope of peaceful change in Egypt? Is there even hope of peaceful demonstration in Egypt? ... Is the situation in Egypt progressing or regressing? ... Where is Egypt heading?"[146]

Such political reasoning shows that militant works are embedded in modern politics. They do not blindly replicate classical jurisprudence, with no regard for the context, which means that the changing Middle East after the Arab Spring and its ensuing demise must have significant effects on militant thought. Whereas the assumption that terrorism is a product of repressive authoritarian regimes is reductive, the exchange above show that repressive policies offer ammunition for terrorist organizations in their battles for sympathy. Moreover, both authors rely on notions such as *maṣlaḥa* to prove that their views not only comply with Islamic law but also promote the best interests of Muslims. This tendency to assess action on the basis of Muslim interest might allow for an alternative forum for engaging with militants, one that is premised on pragmatism and an examination of the effectiveness of militant tactics. It should also be noted that both ideologues demonstrate political tact and a strong interest in winning over the average Arab/Muslim mind. The way they both dealt with the death of Shaymāa' shows an awareness of the need to build on/overcome that incident to gain sympathizers.

3 ISIS: the "Fear Doctrine"

The rise of ISIS has taken the world by shock and surprise. When it declared itself in 2006, very few observers expected that this "rogue" branch of al-Qāʿida would eventually eclipse the parent global jihadist network, let alone dominate and control at a certain point an impressive expanse of territory across Iraq and Syria. It is true that by the time of writing of these words, ISIS has lost almost all territory it controlled. However, this does not undermine the fact that ISIS has taken the world by surprise. But it is this surprise element that has, among many other factors, guaranteed the shocking effect of its brand of militant Islamism. ISIS was an uncompromising, formidable, and largely successful organization. Unlike al-Qaʿida, it was not interested in portraying itself

145 'Abdul 'Azīz, "Tarshīd" (22 November 2007).

146 al-Ẓawāhirī, *Tabri'a*, 5. His statements on Egypt during the Mursī regime indicate that unlike ISIS, al-Ẓawāhirī showed greater tolerance for Muslim Brotherhood rule.

as a reasonable alternative to Muslim hearts and minds. ISIS's position is significantly different from al-Ẓawāhirī, who despite his critique of the modern nation-state in the Arab world, still accepted this modern state as a reality and referred to Arab Christians as genuine Arabs who sometimes fight crusaders and defend the Prophet of Islam and the Islamic civilization, so are worthy of protection and toleration.[147] ISIS, on the contrary, positioned itself as a caliphate, evoking imagery of the centuries-old Islamic political institution and its machinery and modality, including coinage and taxation systems. Most infamously, it claimed the revival of the institution of slavery.

Most analyses of ISIS's jurisprudence have portrayed the same shortcomings the discipline continues to suffer from, but with even more extensive brevity in dealing with the complex legal issues arising from the situation. The most prominent response to ISIS, for example, is the letter signed by many of the most respected scholars of Islamic law in the contemporary world. Although the letter raises interesting issues, such as the role of modern consensus in the prohibition of slavery,[148] and the exemption of payment of *jizya* for those who participate in Muslim armies,[149] such contentious claims are made without any reference to counterarguments employed by ISIS, and in many instances they rely on a claim that "jurists" had allowed the advocated position, without any reference to who those jurists are.[150]

In this section, I focus on two issues that I believe to be significantly distinctive in comparison to ISIS's parent/predecessor, al-Qā'ida. The first issue examined in detail is the *takfīr* of the ordinary Muslim residing in Muslim territories, and the second issue is the reinstitution of slavery and its closely associated denial of the protective status granted to non-Muslims in Muslim lands. Despite the increased number of attacks in non-Muslim states and the relatively strong appeal that ISIS has enjoyed and utilized across Europe, this chapter does not focus on ISIS's jurisprudential approach to such attacks, due to the extensive coverage of the issue in the previous section and the relative similarity between the two organizations' positions on that mode of militant activity. But before addressing those two areas, a very brief history of ISIS is due.

147 al-Ẓawāhirī, *Tabri'a*, 171.

148 Sultan Muhamad Saad Ababakr et al., "Letter to al-Baghdādī," online: <http://lettertobaghdadi.com/pdf/Booklet-Combined.pdf>, 16, accessed 24 May 2018. See also Ahmed Aldawoody, "ISIS and Its Brutality Under Islamic Law," *Kansai University Review of Law and Politics* 36 (2015), 101–17.

149 Ababakr et al., "Letter to al-Baghdādī," 15.

150 Ababakr et al., "Letter to al-Baghdādī," 14–16.

3.1 *History of ISIS*

Many scholars rightly trace the recent history of ISIS to the well-known militant figure Abū Muṣʿab al-Zarqāwī (d. 2006). A petty criminal who committed crimes including sexual assault, al-Zarqāwī eventually shifted towards religion after he was enlisted by his mother in a religious program in al-Ḥusayn b. Alī's mosque in Amman.[151] After spending close to four years in Afghanistan participating in the civil war that ensued after the Soviet retreat, al-Zarqāwī returned to Jordan to cooperate with the prominent militant ideologue Abū Muḥammad al-Maqdisī (b. 1959), which eventually led to their arrest and imprisonment in 1994.[152] After his amnesty release in 1999, al-Zarqāwī travelled to Pakistan and smuggled himself into Afghanistan. He headed a training camp funded by al-Qāʿida, where he emphasized monotheism and the rejection of "polytheists," whom he perceived to include Shīʿa and other normally tolerated religious groups such as Zoroastrians, a view rejected by Bin Lādin and al-Ẓawāhirī.[153] He moved to Iraq and later settled in Baghdad in 2002 to focus his efforts on the United States. Whereas the U.S. administration claimed he cooperated with the Ṣaddām regime, there was no evidence to that effect, and several calls to halt Anṣār al-Islām's expansion in Kurdistan were rebuffed by an administration determined to proceed with a full-fledged invasion of Iraq.[154] After the invasion, the de-Baathification process and the U.S. administration's empowerment of the Shīʿa led many Sunnīs to sense that their privileged status was being eroded, resulting in their resentment of the U.S. occupation.

This sentiment was capitalized on by al-Qāʿida, as made evident in Bin Lādin's statement to the Iraqi people: "The 'socialist infidels' of Ṣaddām's Baathist regime, Bin Lādin said, were worthy accomplices in any fight against the Americans. To hurt the 'far enemy,' jihadists were thus encouraged to collaborate with the remnants of a 'near enemy' until the ultimate Islamic victory could be won."[155] Baath Party members' leaning towards militant Islamist groups was in all likelihood rooted in al-Ḥamla al-Imāniya (Faith Campaign) initiated by Ṣaddām with his relative move towards Islamic revivalism in his later years. Although the campaign was aimed primarily at cementing his legitimacy in Iraq, some commentators claim that the program may have gone beyond its initial objectives, even leading some Baath Party members to turn

151 Hassan A. Hassan and Michael Weiss, *ISIS: Inside the Army of Terror*, 2nd ed. (New York: Regan Arts, 2016), 2.

152 Hassan and Weiss, *ISIS*, 10–11.

153 Hassan and Weiss, *ISIS*, 13–14.

154 Hassan and Weiss, *ISIS*, 17.

155 Hassan and Weiss, *ISIS*, 22.

against the regime.[156] But the strongest driving force behind this alliance and the growth in popularity of a primarily sectarian mode of revolt was the establishment of the sectarian Shīʿī regime of Nūrī al-Mālikī who served as prime minister from 2006 to 2014 and reproduced much of Ṣaddām's sectarian policies against the Shīʿa, with Sunnīs at the receiving end. Nūrī al-Mālikī, aided by equally sectarian members of the judiciary and the security apparatus, managed to sabotage every attempt at including Sunnī leaders, empowering Shīʿa militant activity even if that would be detrimental to Iraqi stability, as evidenced by his rash and callous handling of the leaders of al-Ṣaḥwa al-Islāmiyya ("The Islamic Awakening"), many of whom later fought at the side of ISIS and its predecessor, despite initial commitment to a relatively successful counterterrorism activity against them. Al-Zarqāwī and his successors were equally adept at utilizing and capitalizing on the discrimination policy against Sunnīs, finally succeeding in creating an atmosphere ripe for Sunnī militant activity against "infidel Western collaborating Shīʿites," a narrative conveniently reminiscent of Ibn Taymiyya's approach to the Shīʿa and their relationship with the demise of the caliphate in Baghdad at the hands of the Mongol invaders.

After the death of al-Zarqāwī in 2006, he was succeeded by Abū ʿUmar al-Baghdādī, who declared ISIS in Iraq. Abū ʿUmar was eventually assassinated together with Abū Ḥamza al-Muhājir, his deputy, in April 2010, leading to the naming of Abū Bakr al-Baghdādī as the leader of ISIS in Iraq. Coincidentally, the Arab world went through one of the most turbulent times in its recent modern history, the Arab Spring. An initial act of despair by Muḥammad al-Būazīzī, who set himself on fire on 17 December 2010 in Tunisia, created a strong tide of protest across the Arab world. The protests were not only reflective of anger and resentment at decades-long policies of oppression and corruption; they were, more important, revelatory of the fragile nature of the Arab states, despite their supposedly notorious security apparatuses.

The Syrian regime, despite this fragility, has proven itself more capable of adapting to this vacuum. President Bashār al-Assad, who had long tolerated his state being a back door for militant destabilization in Iraq, met the protests in Syria with determined, brutal force. Contrary to claims made by al-Assad and his supporters, protests in Syria were, in their initial stages, economically and politically motivated. As noted by Gerges, protests started in rural areas like Daraʿa that had been hit hard by the state's neoliberal shift away from the agrarian sector.[157] With a sectarian regime traditionally staffed at elite levels by Alawite associates of the al-Assad regime, the Syrian protests were met by

156 Hassan and Weiss, *ISIS*, 25.

157 Fawaz Gerges, *ISIS: A History* (Princeton, NJ: Princeton University Press, 2016), 170.

heavy force that eventually radicalized protesters and pushed many to lean towards Islamism. Other factors contributed to that development, including amnesties granted by the regime almost exclusively to Islamists in Syrian prisons like Sednaya; the relative toleration by the regime of militant Islamist and Baathist mobility through Syria into Iraq; instability in neighbouring Iraq; and foreign involvement from Gulf states in support of Islamist members of the opposition. All these factors accelerated the Islamization of the protests, which eventually turned into full-blown internal war in Syria.[158] This war, together with the deterioration of Iraqi politics along sectarian lines, created conditions ripe for the emergence, or perhaps rebirth, of ISIS under the leadership of Abū Bakr al-Baghdādī.

While the prison experience played an important role in radicalizing many Islamic militants, in al-Baghdādī's case it was more significant in allowing him to establish strong relations within the vast networks of militant Islam in Iraq. Born in the city of Samrāa' in 1971, he belonged to a lower middle-class family and was educated at a local public school. The religious al-Baghdādī was radicalized by the invasion of Iraq in 2003, which was "a turning point for thousands of Sunnis who suspected the United States of offering Iraq on a silver platter to the Shia and their regional sectarian patron, Iran, consequently disinheriting the Sunni Arabs."[159] Al-Baghdādī was eventually arrested and detained in the infamous Camp Bucca in Iraq, where he was said to have proven himself extremely apt at resolving internal tensions between Islamist militants held in the camp and at gaining the prison administration's trust as a mediator in prison conflicts.[160] This guaranteed him extensive mobility in the camp and allowed him the rare opportunity of cementing relations with former Iraqi army members, as well as with Islamists such as his spokesperson, Abū Muḥammad al-'Adnānī (d. 2016). Al-Baghdādī's Camp Bucca experience was also a rite of passage for him, allowing him to rank himself alongside high-profile Islamist militants in Iraq.[161] So when al-Zarqāwī's successors were bombed in 2010, the leadership decided to place their trust in al-Baghdādī, a leader holding a Ph.D. in Islamic studies, a level of official religious education rarely arrived at by Islamist militants.[162]

158 Gerges, *ISIS*, 170–75.

159 Gerges, *ISIS*, 131.

160 Gerges, *ISIS*, 134.

161 Jessica Stern and J. M. Berger, *ISIS: The State of Terror*, Kindle ed. (London: William Collins, 2015), loc. 753.

162 Stern and Berger, *ISIS*, loc. 764.

Around the same time, Nūrī al-Mālikī, whose targeting of al-Ṣaḥwa leaders eroded the potential for popular opposition to ISIS, was defeated in Iraqi elections. He used several political and legal manoeuvers, with the aid of the Supreme Constitutional Court, to remain in power as prime minister, minister of interior, and, briefly, defence minister.[163] His sectarian and divisive staffing of the security apparatus, his sabotage of the awakening movement, and his deliberate targeting of Sunnīs made it easier for ISIS to seize one-third of Iraqi territory in 2014 without a fight.[164]

Meanwhile in Syria, ISIS deliberately kept a low profile, providing support to al-Qāʿida-affiliated Jabhat al-Nuṣra. At that stage, Jabhat al-Nuṣra relied primarily on local fighters to avoid alienating the Syrian opposition. Some scholars claim that the mastermind behind the Syrian expansion of ISIS was Ḥajjī Bakr, a former lieutenant in Ṣaddām's army who was killed in Syria in 2014.[165] "ISIS went to great lengths to back al-Nusra's expansion in many towns in northern Syria, particularly in rural areas in the provinces of al-Raqqah, Idlib, Deir al-Zour, and Aleppo."[166] However, the leader of Jabhat al-Nuṣra – following al-Ẓawāhīrī's strategy of emphasis on local support and legitimacy – attempted to blend in with the Syrian opposition.[167] But in April 2013, al-Baghdādī announced the merger between ISIS in Iraq and Jabhat al-Nuṣra under his leadership, claiming a pledge of allegiance by Abū Mūḥammad al-Jūlānī, the emir of al-Nuṣra at the time, who denied the pledge and affirmed allegiance to al-Ẓawāhirī, who equally rejected such an alliance and urged both groups to restrict themselves to their localities.[168]

It is within this context that ISIS emerged and continues to play a key role in the Iraqi and Syrian conflicts, with varying degrees of territorial control. Considering ISIS's emphasis on unwavering and uncompromising *jihād* against unbelievers in comparison to other militant organizations such as al-Qāʿida and its affiliates, this chapter focuses on two primary and distinctive jurisprudential manifestations of this claim in their conduct of *jihād*, the expansion of *takfīr* to include the average Muslim living under Muslim rule, and the claim to puritanism by allegedly restoring archaic practices such as slavery and eroding non-Muslim protections.

163 Gerges, *ISIS*, 113.
164 Gerges, *ISIS*, 113.
165 Hassan and Weiss, *ISIS*, 116.
166 Gerges, *ISIS*, 181.
167 Gerges, *ISIS*, 182.
168 Gerges, *ISIS*, 188–89.

The literature examined in this chapter includes the works of a prominent ISIS ideologue, Turkī al-Binʿalī, and the English publications produced by ISIS, *Dabiq* and *Rumiyah*, until June 2017. Al-Binʿalī, a relatively young Bahraini scholar (he was born in 1984), went by several pseudonyms (e.g. Abū Khuzayma al-Mudarī, Abū Human al-Atharī, Abū Sufyān al-Sulamī, and interestingly, Ibn Ḥazm al-Salafī).[169] He briefly lived and studied in Dubai but was arrested and deported to Bahrain. Thereafter, he travelled to Beirut and studied at al-Awzāʿī University.[170] Until his death during a coalition attack in June 2017,[171] he was considered *persona non grata* in Bahrain, after the termination of his citizenship. He authored several works on a prolific array of subjects such as beard letting, suicide bombing, and *takfīr*. As noted by Bunzel, he also played a prominent role in refuting and attacking ISIS's adversaries, most prominently discrediting his former shaykh and the primary source of his legitimacy, al-Maqdisī.[172] In this section, I focus on al-Binʿalī's *Sharḥ shurūṭ wa mawāniʿ al-takfīr* ("The elaboration of the conditions and limitations to declarations of disbelief") and his *Muqarar fī l-tawḥīd li-l-muʿaskarāt* ("A curriculum in monotheism for the camps").

3.2 Takfīr*: Collapsing Categories*

As explained in previous chapters, the pre-modern Islamic legal tradition on the regulation of armed conflict determines the permissibility of targeting on the basis of four primary factors: religious status, gender, age, and, in many cases, capability of participation in combat. These factors intersect constantly with each other to determine the permissible course of action with the individual or groups of individuals when engaging in combat. The underlying assumption behind this system is that you can, with relative certainty, navigate within it. However, with the Islamic world moving to the defensive rather than the offensive, jurists have attempted to reformulate this system to varying degrees. Ibn Ḥazm, for example, determined that the *baghy* regime was incapable of addressing the fluidity of the Ṭāʿifa state, so he expanded the scope of the *ḥirāba* regime. Ibn Taymiyya, on the other hand, confronted with the question

169 Cole Bunzel, "The Caliphate's Scholar in Arms," *Jihadica* (9 July 2014), online: <http://www.jihadica.com/the-caliphate%E2%80%99s-scholar-in-arms>, accessed 15 April 2017.

170 Abū Usāma al-Gharīb, al-Mukhtaṣar al-jalliy bi-sīrat shaykhina Turkī al-Binʿalī, online: <http://www.jihadica.com/wp-content/uploads/2014/07/١-المختصر-الجلي-بسيرة-شيخنا-تركي-البنعلي.pdf>, accessed 15 April 2017.

171 United States Central Command Press Release No. 17–234, 20 June 2017, online: <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1220221/coalition-forces-killed-turki-al-bin-ali>, accessed 6 May 2018.

172 Bunzel, "Scholar in Arms."

of how to deal with rulers who he deemed to be shallow adherents of the Islamic faith, moved to the realm of *takfīr* of the ruler, where obligations of obedience to the ruler are supplanted by the obligation to fight against an apostate regime. Ibn Taymiyya's work proved exceptionally useful to Muḥammad ʿAbd al-Wahhāb, who wrote *Nawāqiḍ al-Islām*, for which al-Binʿalī provides a commentary in his *Muqarar fī l-tawḥīd*. However, arguably, the approach adopted by ʿAbd al-Wahhāb and followed by ISIS's ideologue, with its generalized assumptions of apostasy, deviates in significant areas from Ibn Taymiyya's thought.

3.2.1 Who is a *kāfir*?

3.2.1.1 *Turkī al-Binʿalī's Works*

Turkī al-Binʿalī's work is a theoretical attempt to precisely answer this question. Unlike the *Dabiq* magazine, al-Binʿalī's work is largely general, with few references to specific examples. Ironically, his classes, transcribed in the abovementioned books and made publicly available online, claim to be an attempt to regulate permissive uses of *takfīr* against opponents. As a matter of fact, and as noted by Bunzel, al-Binʿalī, shortly before his death, was involved in a serious ideological battle with camps attempting to expand the scope of *takfīr* within ISIS.[173]

Consistent with the general reverence for *wasaṭṭiyya* (centrism) in the Islamic tradition, al-Binʿalī argues that the nation is caught between those who have followed a methodology of *ifrāṭ* (expansion) and those who have chosen *tafrīṭ* (abandonment) of *takfīr*, alluding to his choice of the proper approach, which is neither dismissive nor expansive.[174] The work is a transcription of a set of lectures that he gave on the conditions for and impediments to the exercise of *takfīr*. The first lesson is an introduction dedicated to proving that *takfīr* is an essential element of the faith and that a Muslim must exercise *takfīr* both against original unbelievers and also against those deemed to have broken away from the faith. In it, al-Binʿalī examines the necessary proof for deeming someone an apostate, arguing that there are three elements for the "crime" of apostasy.

First, the act committed must be proven. Proof of the act may be established either by confession, by witness testimony, or, if the commission of the act by

173 Cole Bunzel, "Caliphate in Disarray: Theological Turmoil in the Islamic State," *Jihadica* (3 October 2017), online: <http://www.jihadica.com/caliphate-in-disarray/>, accessed 6 May 2018.

174 Turkī b. Mubārak al-Binʿalī, *Sharḥ shurūt wa mawāniʿ al-takfīr* (al-ghurabāʾ li-l-iʿlām, 2014), 4, online: <https://archive.org/details/Torki_bannali>, accessed 5 April 2017.

the "accused" is established, by *istifāḍa* (general knowledge among the people). Confession, however, is not confession of apostasy; rather, it is confession to the commission of the act deemed as constitutive of apostasy, regardless of the confessor's perception of the act as constitutive of apostasy or not. In other words, if you commit an act that is proven to constitute apostasy, it makes you an apostate, even if you believe that it does not.[175]

The second proof is two witness testimonies. Al-Binʿalī argues that only *zina* requires four testimonies, hence apostasy would require two. He argues that one testimony cannot be valid, because the Prophet refused to accept the testimony of Zayd b. al-Arqam that ʿAbdullāh b. Salūl had slandered the Prophet, despite the existence of a Qurʾanic verse confirming his testimony (Q 63:8). He argues that this incident indicates that certain knowledge, even if established by Qurʾanic text, is insufficient evidence of the commission of the crime, because certainty or knowledge do not constitute evidence.[176]

Ironically, the third form of evidence, *istifāḍa*, is perhaps more elusive and less evidentiary than a Qurʾanic text from an Islamic perspective. *Istifāḍa* refers to an entity or an individual being widely reputed for a certain fact. Al-Binʿalī uses the example of China: its existence is established even for those who have never been to it. He claims that this evidentiary rule may in some instances be stronger than testimony, and he vaguely claims that *istifāḍa* was accepted by people of knowledge, including Ibn Qudāma.[177] However, it is unclear how he treats general knowledge as *bayinna* (evidence), despite his previously mentioned distinction between knowledge, even if certain, and evidence. His rejection of a Qurʾanic verse as *bayinna* seems very hard to reconcile with this position, a position that of course proves exceptionally useful to an entity that may be interested in expanding *takfīr* as a tool in combat, especially to target public figures.

The second element of this "crime," according to al-Binʿalī, is evidence that the act already proven to have been committed by said individual constitutes apostasy. He argues that many acts constitute *kufr*, but he focuses primarily on the provision of support to unbelievers against Muslims. He argues that those who denounce *takfīr* (*murjiʾa*) have utilized the incident of Ḥāṭib b. Baltaʿa to prove their claims that the Prophet did not deem Ḥāṭib an apostate, even though he cooperated with unbelievers against the Prophet. He relies on ʿUmar's demand for permission from the Prophet to smite Baltaʿa's neck because some versions of the narrated *ḥadīth* state that ʿUmar said, "For he has

175 al-Binʿalī, *Sharḥ*, 22.

176 al-Binʿalī, *Sharḥ*, 23.

177 al-Binʿalī, *Sharḥ*, 24.

committed *kufr*."[178] Although there is no reference to the Prophet's words on the matter, al-Binʿalī claims that because Baltaʿa asserted that he had not committed his acts out of apostasy, those acts must have been understood to constitute *kufr*.[179]

The third lesson addresses impediments to *takfīr*, which al-Binʿalī divides into heavenly impediments – meaning impediments outside the individual's control, such as insanity and age – and acquired impediments, which he focuses the lesson on. The first such impediment is coercion, divided into debilitating and non-debilitating coercion, or in his words *kurh mulji'* (inevitable coercion) and *kurh ghayr mulji'* (not inevitable coercion). *Kurh mulji'* is in turn divided into fully forcible coercion (such as being carried by force to a place one swore not to go to) and coercion by threats (such as being threatened with death to go to said place).[180] Al-Binʿalī quotes Ibn Taymiyya to prove that both types constitute valid grounds for committing an act of *kufr* without being deemed a *kāfir* only if the threat is serious and painful, such as threats of death, cutting of limbs, and burning.[181] Such threats are valid as well only if: (1) the coercer is capable of fulfilling the threat, (2) the coercer is likely to fulfil the threat, (3) the threat is immediate, and (4) the coerced has no alternative other than to commit the act of *kufr*.[182] Finally, the act of *kufr* cannot be committed if it is permanent or it entails supporting unbelievers, as per consensus. However, it is worth noting that the consensus relied on in this case is a general consensus on the prohibition of killing another individual to save one's life.[183] Al-Binʿalī further asserted the same claim when asked by a member of the audience about scholars who legitimize, for example, cooperating with French intelligence to fight those that such scholars deem as *takfīrī*s.[184] He replied that such scholars are *kāfir*s beyond doubt.[185]

The other impediment to *takfīr* is when an act of *kufr* is committed unintentionally. Al-Binʿalī gives the example of a prophetic *ḥadīth*, where a man had said he was the lord and that Allah was his slave, and the Prophet said his slip was an act of confusion due to excitement rather than a pronunciation of

178 al-Binʿalī, *Sharḥ*, 25.

179 al-Binʿalī, *Sharḥ*, 26.

180 al-Binʿalī, *Sharḥ*, 38–39.

181 al-Binʿalī, *Sharḥ*, 38–39.

182 al-Binʿalī, *Sharḥ*, 39–41.

183 al-Binʿalī, *Sharḥ*, 41.

184 No context is provided for the question or the response of al- Binʿalī, but it is clear that the question and the response are reactions to the French led intervention in Mali in 2013–2014.

185 al-Binʿalī, *Sharḥ*, 53.

apostasy.[186] But the error mentioned here is a minor error in the performance of the act rather than an error in the assumption that an act does not constitute *kufr* and performing it. Al-Binʿalī gives the example of a person who believes in democracy or who believes that democracy is the path to justice without realizing that democracy entails deviating from God's laws and claims this person would still be a *kāfir*.[187]

The fourth lesson examines the impediment of *jahl* (ignorance). Al-Binʿalī quotes Ibn Taymiyya and states that ignorance precluding *takfīr* is ignorance that cannot be alleviated through pursuit of knowledge.[188] He then addresses the issue of judges who ignorantly fail to apply God's laws, relying on a *ḥadīth* that a judge who judges on the basis of his ignorance would end up in Hell.[189] He also quotes Ibn Qayyim stating that there are two types of *kāfir*, a resolute one, who refuses to accept religion despite knowledge of its correctness, and an ignorant one.[190] But minor ignorance of a branch of religion leading to a plausible interpretation (*taʾwīl mustasāgh*) is possibly a form of *jahl* that impedes *takfīr*.[191]

In the last lesson, al-Binʿalī addresses several other issues, such as how obedience to a scholar does not preclude one's responsibility for an act of *kufr*.[192] The most significant aspect of this lesson is al-Binʿalī's assertion that proof is necessary in the case of an individual over whom power is exercised, but not in the case of a person who possesses *shawka*, who may be automatically fought for acts of disbelief. He then quotes Muḥammad ʿAbd al-Wahhāb and Ibn Taymiyya stating that the Companions of the Prophet did not question those who refused to pay the *zakāt* (alms tax) to determine whether or not they deemed it an obligation under *sharīʿa*.[193]

Al-Binʿalī's other book examined here, *Muqarar fī l-tawḥīd li-l-muʿaskarāt*, focuses extensively on the notion of *ḥākimiyya* (divine sovereignty) and the legitimacy of human-made laws. According to him, a Muslim's foremost obligation is to disbelieve in the *ṭaghūt* (injustice and polytheism) and to believe solely in Allah. He quotes Ibn Qayyim stating that belief is not complete without animosity and hatred towards the enemies of God and that those enemies

186 al-Binʿalī, *Sharḥ*, 45.
187 al-Binʿalī, *Sharḥ*, 47.
188 al-Binʿalī, *Sharḥ*, 58.
189 al-Binʿalī, *Sharḥ*, 60.
190 al-Binʿalī, *Sharḥ*, 60.
191 al-Binʿalī, *Sharḥ*, 63.
192 al-Binʿalī, *Sharḥ*, 73.
193 al-Binʿalī, *Sharḥ*, 75.

must be fought to arrive at the satisfaction of the Divine.[194] He defines the *ṭaghūt* as any entity obeyed or worshipped other than Allah and follows Ibn ʿAbd al-Wahhāb's classification of *ṭaghūt* into five types: (1) Satan, (2) an unjust ruler who deviates from Allah's laws, (3) anyone who judges on the basis of anything other than Allah's laws, (4) anyone who claims knowledge of concealed matters, and (5) anyone who worships anyone other than Allah.[195] He defines worship for Allah or monotheistic belief as not just belief in one God, which many religions adhere to, but ritualistic practice in accordance with monotheistic belief in Allah and belief in his qualities and attributes as stipulated in the Qur'ān.[196] But most of the book is dedicated to *nāwaqid al-Islām* (nullifiers of Islam), based on Ibn ʿAbd al-Wahhāb's work. Of primary concern here to us are matters relating to governance.

In the first nullifier, al-Binʿalī asserts that average Muslims cannot use the excuse of following scholars or leaders against the will of Allah, following Ibn Taymiyya's arguments quoting the Qur'anic verse, "They take their rabbis and their monks as lords, as well as Christ, the son of Mary. But they were commanded to serve only one God: there is no god but Him; He is far above whatever they set up as His partners,"[197] to claim that those who do so belong to one of two camps. The first camp are those who commit *kufr* or *shirk* by knowingly deviating from Allah's orders to follow their leaders out of belief in their leaders' deviations. The second camp are those who continue to believe in Allah's orders but follow their leaders, hence committing a sin rather than *kufr*.[198]

As for the second nullifier, al-Binʿalī claims that there is juristic consensus that whoever believes that mediators, alive or dead, can help their prayers answered with God have committed *kufr*. However, there is no explicit reference to scholars taking that position, and there is no elaborate definition of what constitutes mediation and what doesn't. This statement is, of course, of significant relevance to the approach to the Shīʿa and the position on their belief.[199]

The third nullifier is failure to designate unbelievers as *kuffār*. According to al-Binʿalī, those who fail to do so with original unbelievers (i.e. non-Muslims) would be committing *kufr* themselves. Additionally, those who do not find acts by governors who deviate from *sharīʿa* as constituting *kufr* would also be

194 Turkī al-Binʿalī, *Muqarar fī l-tawḥīd li-l-muʿaskarāt*, 2014, 4, online: <https://archive.org/details/loras>, accessed 10 April 2017.

195 al-Binʿalī, *Tawḥīd*, 5.

196 al-Binʿalī, *Tawḥīd*, 14.

197 Q 9:31.

198 al-Binʿalī, *Tawḥīd*, 26.

199 al-Binʿalī, *Tawḥīd*, 29.

committing *kufr*. However, those who disagree on the designation of such rulers because of doubt, ignorance, or reliance on *ikhtilāf* do not commit *kufr*, unless evidence has been provided to them and they continue with their argument, in which case they still commit *kufr*.[200]

The fourth nullifier is very close to the first, to some extent, because it asserts that whoever believes that any rule other than the rule of Islam could be better would be committing *kufr*, hence following the laws of the *ṭaghūt* (anything or anyone other than Allah) constitutes *kufr*. To prove this argument, al-Binʿalī relies on general Qurʾanic verses that prove that true religion is Islam, like, "Today I have perfected your religion for you, completed My blessing upon you, and chosen as your religion Islam: [total devotion to God]";[201] "True Religion, in God's eyes, is Islam: [devotion to Him alone]";[202] and "If anyone seeks a religion other than complete devotion to God, it will not be accepted from him: he will be one of the losers in the Hereafter."[203] He also relies on the opinions of the former Grand Mufti of Saudi Arabia in the 1960s and Mauritanian scholar al-Shanqīṭī (d. 1970s).[204] Ruling against God's laws includes (1) judging against God's laws due to bribery or interests, (2) drafting and implementing human-made laws, (3) following the predecessors' laws, (4) willingly upholding a predecessor's human-made laws, (5) applying human-made laws due to coercion, and (6) applying human-made laws due to ignorance.[205] Al-Binʿalī claims the first case is minor *kufr* that does not deem one a non-Muslim, because according to Ibn ʿAbbās, it was committed during the reign of the Umayyads. However, resorting to human-made laws not only constitutes *kufr* but also represents a significant deviation from the Islamic tradition, a deviation that had only been introduced with Mongol rule.[206] He extensively examines the other five cases to prove that they all constitute *kufr* and that, as stated in his other works, coercion and ignorance do not constitute an impediment to establishing an individual's *kufr*.[207]

In addition to other less relevant nullifiers of Islam (such as disdain and mockery for God's laws, the belief that some individuals are superior to adherence to those laws, and sorcery), two other nullifiers stand out: the eighth and the tenth. The eighth nullifier is support and assistance for unbelievers.

200 al-Binʿalī, *Tawḥīd*, 30–32. This issue was the subject of his feud with more expansive ISIS militants. See Bunzel, "Caliphate in Disarray."

201 Q 5:3.

202 Q 3:19.

203 Q 3:85

204 al-Binʿalī, *Tawḥīd*, 33–34.

205 al-Binʿalī, *Tawḥīd*, 35.

206 al-Binʿalī, *Tawḥīd*, 35.

207 al-Binʿalī, *Tawḥīd*, 36–39.

Al-Binʿalī relies on both Ibn Ḥazm and Ibn Taymiyya's claims that such acts constitute *ridda*.[208] Finally, he asserts the limited space for ignorance as an impediment to establishing apostasy.[209]

3.2.1.1 Dabiq *and* Rumiyah*: ISIS's English Newsletters*

Until recently, ISIS published an English propaganda newsletter, *Dabiq*, but it seems that the title has been replaced with *Rumiyah*. Both titles invoke apocalyptic prophetic *ḥadīth*s relating to Muslim triumph at the end of times, a theme featured extensively in ISIS's propaganda.[210] Collectively, eighteen issues were published up to April 2017, with much of each issue dedicated to celebrating ISIS's triumphs in Iraq, Syria, and other parts of the world. Personal profiles of deceased fighters are often highlighted, and pieces criticizing ISIS's detractors are almost permanent content in the newsletters. Additionally, in many issues, we find brief and unelaborated references to jurisprudence justifying ISIS's operations against religious minorities, the Shīʿa, and some Sunnī groups, on the grounds of their apostasy (*kufr*).

3.2.1.2 *The Shīʿa*

A common theme in these ISIS publications is criticism of al-Ẓawāhirī, his supporters, and Muslim clergy for failing to "acknowledge" that the Shīʿa are apostates from Islam. Evidence to the apostasy of the Shīʿa is gathered from al-Zarqāwī's writings, and claims are made to consensus among scholars, including Ibn Ḥazm, Ibn Ḥanbal, and al-Shāfiʿī, to the apostasy of the Shīʿa. However, one interesting tactic employed is to assume automatically that Shīʿī theology is dependent on slander of the Prophet's Companions. Ibn Ḥanbal, for example, who is quoted in support of such claim, is quoted as stating that whoever slanders ʿĀ'isha, Abū Bakr, and ʿUmar commits apostasy.[211] This claim is employed collectively against all Shīʿa, including the Zaydī sect in Yemen.[212] In continuation of Ibn Taymiyya's critique of the Shīʿa, they assert that the Shīʿa deem Muslims apostates and have targeted and persecuted Muslims throughout their history, as evidenced by their cooperation with the Mongols

208 al-Binʿalī, *Tawḥīd*, 47.

209 al-Binʿalī, *Tawḥīd*, 49.

210 William McCants, *The ISIS Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State*, Kindle ed. (New York: St. Martin's Press, 2015), loc. 1761.

211 *Dabiq*, Issue 6, December 2014, 19, online: <https://clarionproject.org/docs/isis-isil-islamic-state-magazine-issue-6-al-qaeda-of-waziristan.pdf>, accessed 1 April 1 2017.

212 *Dabiq*, Issue 6, December 2014, 21.

to bring about the downfall of the ʿAbbāsid caliphate.[213] Another significant tactic is to claim that Shīʿī thought had been meant from its onset to corrupt Muslim belief. Ibn Taymiyya, and others, for example, are relied on to prove scepticism of the Rāfida's[214] sincerity in conversion to Islam and that despite their reverence of ʿAlī, he burnt them and their leader, ʿAbdullah b. Saba', alive.[215] This strategy of confusing the classical jurisprudential position on the Rāfiḍa with that on the Shīʿa is carried on consistently throughout the newsletter. In addressing the confusion in terminology, ISIS is deliberately attempting to create a confident belief that Twelver Shīʿa are and have always been seen as Rāfiḍa, drawing the conclusion that all Shīʿa are apostates who may be fought.[216]

> As for the name "Rāfidah," then it comes from the word "rafaḍ" meaning to reject. They were named so when they came to Zayd Ibn ʿAlī b. al-Ḥusayn Ibn ʿAlī Ibn Ibi Ṭālib (died 122AH) and asked him to declare *barā'ah* from Abū Bakr and ʿUmar in exchange for their support. He refused to do so and instead said, "May Allah have mercy upon them both." So they told him, "We then reject you." Henceforth, they were called "the rejecters." The scholars also called them so because the Rāfidah rejected the imāmah of Abū Bakr, ʿUmar, and ʿUthman, because they rejected the Sahābah, because they rejected the Sunnah, and because they essentially rejected the Qur'ān and the religion of Islam.
>
> As for the name "Shīah," then it is from the root "shāyaʿa" meaning to support, as the Rāfidah claimed to support ʿAlī, preferring him to Abū Bakr and ʿUmar.
>
> As for the names "Ithnāʿashriyyah" meaning "Twelver," and "Imāmiyyah," from the root "imam," then it is due to their belief in a line of twelve imams whom they claimed were "ma'sūm" (infallible). These twelve are ʿAlī b. Abī Ṭālib and … But none of these eleven was upon Rafd, except according to the fabrications propagated by the Rāfidah.[217]
>
> Shīʿah … is a label more general than that of the Rāfidah, as it includes those who preferred ʿAlī to Abū Bakr and ʿUmar and while still

213 *Dabiq*, Issue 11, September 2015, 17, online: <http://clarionproject.org/wp-content/uploads/Issue%2011%20-%20From%20the%20battle%20of%20Al-Ahzab%20to%20the%20war%20of%20coalitions.pdf>, accessed 1 April 2017.

214 Derogatory term currently used to refer to the Shīʿa.

215 *Dabiq*, Issue 13, January 2016, 33, online: <http://clarionproject.org/wp-content/uploads/Issue-13-the-rafidah.pdf>, accessed 1 April 2017.

216 *Dabiq*, Issue 13, January 2016, 35.

217 *Dabiq*, Issue 13, January 2016, 34.

> recognizing the Khilāfah of Abū Bakr and ʿUmar and their companionships. This is an extinct phenomenon.[218]

Additionally, laymen are deemed to have committed apostasy for allegedly committing acts that ISIS deems as constitutive of apostates, such as prostrating to graves and worshipping shrines; considering the Companions of the Prophet apostates and slandering them, particularly Abū Bakr, ʿUmar and ʿĀʾisha; and "fanatical love of the twelve imams, preferring some of them to most of the Prophets [and] even attributing to them attributes of Allah's worship."[219] Yet, no evidence is provided from Shīʿī scholarship to support these claims, unlike the evidence provided for reverence for the Mahdī (twelfth hidden *imām*) provided from several Shīʿī works.[220]

At first instance, the arguments put forward by ISIS for the *kufr* of the Shīʿa might seem convincing due to their extensive reliance on different juristic views from across Islamic history. But they do not withstand scrutiny, and they rely extensively on obfuscating the two terms used in classical jurisprudence: *rāfiḍī* and *shīʿī*. ISIS seems to be intent on leading the reader to believe in the similarity between the terms by insisting on glossing over the actual distinction between the modern-day Shīʿa and the Rāfiḍa, as evidenced from the definitions provided above. When confronted with the fact that many scholars did not, in fact, deem the Shīʿa apostates, they provide a very narrow definition for the Shīʿa, arguing that Shīʿī scholars talked about and believed to be Muslims are the ones who simply favoured ʿAlī as the first caliph but recognized the caliphate of Abū Bakr and ʿUmar and are now extinct,[221] and that scholars did not deem them collectively an apostate group, because they had concealed their *rafḍ* for centuries, until the rise of the Ṣafavid state.[222]

However, if one were to consult Ibn Ḥazm, a scholar quoted for his *takfīr* of the Shīʿa/Rāfiḍa, we find that his definition of Shīʿa differs significantly from the definition provided above by ISIS, where he defines the Shīʿa as those who believe that ʿAlī was the best of the Companions, that he and his descendants were entitled to the *imāma*, and that anyone who does not accept those claims cannot be referred to as a Shīʿī,[223] which proves that ISIS's claim to an early perception of the Shīʿa as limited to a mere preference for ʿAlī over Abū Bakr

218 *Dabiq*, Issue 13, January 2016, 38.
219 *Dabiq*, Issue 13, January 2016, 35.
220 *Dabiq*, Issue 11, September 2015, 16.
221 *Dabiq*, Issue 13, January 2016, 38.
222 *Dabiq*, Issue 13, January 2016, 38.
223 Ibn Ḥazm, *Fiṣal*, 2:90.

and ʿUmar while recognizing their caliphate is not an accurate reading of such jurisprudence. True, in some sections of his book, Ibn Ḥazm criticizes the different Shīʿī sects and makes claims as to their *kufr*, including *imāmiyya*. But in doing so, he goes through their different belief systems he believes to be heretic, including their belief in the divinity of ʿAlī b. Abī Ṭālib and slander of the Companions.[224] However, in the same book, he argues that a number of sects, including the Shīʿa, claim adherence to Islam. He then states the closest of the Shīʿa sects to the Sunnīs are the followers of al-Hamazānī, who believe in the right to *imāma* of the descendant of ʿAlī, while the furthest are the Imāmīs. Other extremist Rāfidīs, *ghālīya*, are not among the people of Islam, but are unbelievers as per the consensus of the nation.[225] The contrast provided between Imāmīs and other extremist Shīʿa, with one seen on the spectrum of Islam, while the other is cast outside the realm of Muslim belief, raises serious questions about the complexity of classical jurisprudential positions on the status of the Shīʿa, as well as about claims of disbelief, especially by scholars like Ibn Ḥazm, known for harsh, relentless criticism of the other. In other words, if Ibn Ḥazm seems in some instances to recognize the Islamicity of certain sects, while in other incidents to throw claims of *kufr* at them, how does one read his position? In this case, if one were to accept his accusations of *kufr*, how would one deal with the statement he once made of none other than Abū Ḥanīfa and his companions, "There is no response to this view other than that it is the *ḥukm* of Iblīs, Satan. By God, we do not know how a Muslim's soul opened up to such a view that is defiant of God Almighty and his prophet,"[226] knowing well that despite his disdain for Abū Ḥanīfa's brand of jurisprudence, he still considered him a prominent Muslim jurist?

But aside from the need to read and examine complexity and potential incoherence in classical jurisprudential texts, Ibn Ḥazm's approach and position on the Shīʿa makes it clear that ISIS's attempt to claim congruency between jurisprudential positions on the Shīʿa and the Rāfiḍa clearly oversimplifies the classical tradition. It might be counterargued that the essence of jurisprudential *takfīr* of the Rāfiḍa is their slander of the Companions, and that while a claim to their belief in the divinity of ʿAlī might be contested, their position on the Companions is clear, as is frequently stated in the *Dabiq* newsletter. However, this again oversimplifies a very complex and rich theological tradition and, more important, it disregards the plentiful evidence that members of the Shīʿī community in Iraq, including prominent religious authorities, have

224 Ibn Ḥazm, *Fiṣal*, 4:137–44.

225 Ibn Ḥazm, *Fiṣal*, 2:89.

226 Ibn Ḥazm, *Muḥalla*, 11:114.

expressed their respect for the Companions. For example, al-Najafī, the spokesperson for the Najaf *marjaʿ*, explicitly stated that it denounces slander or offence to any of the key figures of Muslims and other religions,[227] and al-Sistānī, Nurī al-Mālikī, and even Muqtada al-Ṣadr, albeit indirectly, have denounced slander of the Companions of the Prophet.[228] Although ISIS does claim that the Shīʿa hide their true belief under the pretext of *taqīyya*, its relying on a belief system of a particular group to deem them apostates, then rejecting their claims about their own belief system, is hardly an established tradition in Islamic jurisprudence.

3.2.1.3 *Sunnī Muslims*

One significant – in fact, necessary – category for the targeting of non-Muslim categories are Sunnī Muslims. Predictably, ISIS follows in the footsteps of many militant organizations that deemed Muslim regimes apostate ones. Building on a long tradition of insistence on the necessity of a state's applying Islamic law for it to be deemed Islamic, the *Dabiq* and *Rumiyah* newsletters reiterate the arguments put forward by al-Binʿālī with regards to *takfīr* and apply those arguments to modern-day reality. ISIS thus argues that whoever believes in "democracy, nationalism, and manmade laws"[229] is an apostate. Anyone who participates in an electoral process, even by voting, or relies on the existing legal system is also an apostate.[230] A Muslim who lives in such territories must resist those laws and abandon such acts of apostasy or otherwise be deemed a legitimate target by ISIS.[231] Naturally, a group receiving the most abrasive criticism for their toleration of *kufr* and failure to accept the tactics of ISIS are either Islamic militants who have issued *murājaʿāt*, like Sayyid Imām ʿAbdul ʿAzīz (who is curiously left out of a long list of "repenting" militants, despite his prominence in militant circles), or other militant "scholars" who deemed ISIS sinners for their splinter from al-Qāʿida. The most prominent, and those focused on extensively in *Dabiq*, are al-Ẓawāhirī, al-Maqdisī, and Abū Qatāda. It is hardly surprising that significant attention would be given to these

227 "Marjaʿiat al-Najaf: Nufariq bayn al-Ṣaḥābī al-Jalīl wa-l-Munāfiq," Al-Jazeera (26 December 2014), online: <https://www.aljazeera.net/news/arabic/2014/12/26/مرجعية-النجف-نفرق-بين-الصحابي-الجليل-والمنافق>, accessed 17 April 2017.

228 "al-Marjaʿ al-Sistānī: Sabb al-ṣaḥāba mustankar wa mudān wa yukhālif ma amar bih Āl al-Bayt," *al-Sumaria TV*, 10 October 2013, online: <http://www.alsumaria.tv/news/84240/>, accessed 17 April 2017.

229 *Rumiyah*, Issue 1, September 2016, 6.

230 *Rumiyah*, Issue 1, September 2016, 6.

231 *Rumiyah*, Issue 1, September 2016, 5.

three considering their credentials in Islamist militant circles and their strong jurisprudential or operational weight.

Aside from the issue of apostasy of the regime with all its complications, I will focus here on the attempt to deem Muslims living under rule by such regimes apostates, due to its serious implications on targeting in situations of armed conflict. It is clear that living in a territory where the laws of Islam are not implemented is one of the primary pretexts for deeming ordinary citizens who accept or interact with such a law *kuffār*. One of the strongest bases for this argument is the reliance on Ibn Ḥazm and his instruction to Muslims to emigrate from the territory of war, disregarding other alternative views such as al-Shaybānī's, which deal pragmatically with Muslim travel to the territory of war and prevent treachery in this case.[232] However, their selective reliance on Ibn Ḥazm fails to take account of his full view of the matter and his assertion that a Muslim has not committed *kufr* for submission to a state that may be deemed as apostate as long as it claims to adhere to Islam.

> If he was there to fight the Muslims and assist the *kuffār* with a service … he is an infidel and if he was living there for a material interest and he is like a *dhimmī* to them, then he is not far from infidelity and we do not excuse and pray for him. *But* [*the situation*] *is not the same with whoever lives in submission to the people of infidelity from the Ghāliya* [*extremist Shīʿa*] *and whoever is like them, because in Egypt and al-Qayrawān and their like, Islam is the dominant* [*religion*] *and their leaders, despite all this, do not publicly denounce Islam. Rather they belong to Islam, even if they are truly* kuffār.
>
> As for the one who resides in the land of the Qarāmiṭa [a sect perceived to portray heresy], he is an infidel with no doubt, because they [the Qarāmiṭa] are known for their infidelity and abandonment of Islam, and we pray to God to spare us that.
>
> As for the one who resides in a territory where some whims leading to infidelity are widespread, he is not a *kāfir*, because the banner of Islam is the dominant [one] there at any rate, from monotheism, to acknowledgement of Muḥammad's message, innocence from any religion other than Islam, holding of prayer and fasting during Ramadan.[233]

This sentiment is to some extent echoed in Ibn Taymiyya's famed Mardin *fatwā*, Mardin being a satellite statelet of the Mongols. Whereas Mardin was

232 *Dabiq*, Issue 11, September 2015, 23.

233 Ibn Ḥazm, *Muḥalla*, 11:200 (my italics).

not seen by Ibn Taymiyya as ruled by the laws of Islam, he stated that there is no automatic duty on a Muslim to emigrate from the territory of Islam unless he cannot uphold *his* religion.[234] Moreover, Ibn Taymiyya stated that the city is not a land of peace, because it does not uphold *aḥkām al-Islām*, but it is not a territory of war, because many of the inhabitants are Muslim. "Rather, it constitutes a third type [of domain], in which the Muslim shall be treated as he merits, and in which the one who departs from the Way/Law of Islam shall be combated as he merits."[235] As Michot rightly asserts, upholding one's religion may go beyond individual practice. "However, what is beyond doubt, is that, in the fatwa of Mardin, Ibn Taymiyya speaks of it in the singular, not the plural. Then, this giving practical effect to the religion, is in the first instance, an individual personal matter, not collective, not communitarian."[236] To a great extent, this appears to be in line with Ibn Taymiyya's views of Muslims under Muslim rule. When addressing the question of a Muslim coerced by Mongol rulers to fight other Muslims, he argues that this person may be killed, but he does not state that he ought to be killed for straying from Islam for the simple act of living under Mongol rulers, but because his apparent position is one of a Muslim waging war against other Muslims, hence he can be killed and if he were coerced, it would reflect on his appearance before God in the hereafter.[237]

3.2.2 Non-Muslims: Erosion of *Jizya* Protections

3.2.2.1 *Uncontested People of the Book: the Case of Christians*

ISIS has long attacked Christian communities in Iraq, Syria, and, most recently, Egypt. The justifications provided for targeting Christians is a three-step process, whereby initially they are deemed as unbelievers (*kuffār*), hence they legitimately fall under the *muḥāribūn* category, relying on an approach to Islamic law whereby non-Muslims may be targeted until they either convert to Islam, pay the *jizya*, or face death. The second step towards the legitimation of the targeting of Christians is an assertion that Christians are not *dhimmī*s, due to their failure to pay the *jizya* to ISIS. This argument is closely connected to the argument that Sunnī Muslim states are apostate states and that, in the present, the only legitimate authority in the Muslim world is ISIS itself. Failure to pay the *jizya* to ISIS indicates that People of the Book may not be deemed *dhimmī*s, so are considered *ḥarbī*s and may be attacked. Finally, ISIS also

234 Ibn Taymiyya quoted in Yahya Michot, *Muslims Under Muslim Rule* (Oxford: Interface Publishers, 2006), 63.

235 Michot, *Muslims*, 65.

236 Michot, *Muslims*, 18.

237 Ibn Taymiyya, *Majmūʿat*, 28:316.

argues that Christians are closely affiliated with the current apostate regimes in their battle against Islam. For example, in reference to Egyptian Christians, they state "the Copts yesterday chose *jizyah*, but today wage war against Islam."[238] Interestingly, Abū Khaṭṭāb al-Yamānī, who penned a statement on the slaughtering of tens of Coptic Christians at the hands of ISIS in Libya in 2015 refers to

> what happens to Muslims at the hands of the *Naṣāra*,[239] especially in Central Africa, from killing of Muslims, slaying, burning and mutilation of bodies.... All of that is not publicized by the agent Zionised Media because the murdered is a poor helpless Muslim.... Someone might say what do the Nāṣāra of Africa have to do with the Nāṣara of Egypt; we respond that the nation of disbelief is one [nation] and they fight Muslims in totality, so we fight them in totality in accordance with Allah's words.[240]

Aside from issues previously addressed in the section on al-Qāʿida with regards to the legitimacy of indiscriminate attacks, especially on places of worship or the issue of apostasy of the regime, there are two novel, core issues that are worthy of attention, the notion of loss of *dhimmī* status due to living under apostate regimes, and the notion that all Christians may be fought collectively in return for actions committed by Christian groups anywhere in the world.

On the first issue, the primary challenge comes from the jurisprudence of Ibn Taymiyya himself, who despite claiming that Mongol rulers were *kuffār*, does not argue that Christians and Jews were not entitled to *dhimmī* status. Although he uses his claim that the Mongol rulers either failed to or were reluctant to collect *jizya* from Jews and Christians to prove their *kufr*, he is silent on the status of those groups and does not make any reference to their loss of *dhimmī* status. If ISIS is keen on reproducing Ibn Taymiyya's jurisprudence on residing in territory ruled by self-proclaimed but "unfaithful" Muslims, why are they innovating with the introduction of said ruling? That, however, does not mean that there is no challenge to claims of protection on the basis of *dhimma* in the absence of *jizya* payment in modern times. There is no denial that the issue of *dhimma* portrays the limits of modern selective reliance on classical jurisprudence to make a claim for the treatment of non-Muslims as equal citizens considering that the juristic tradition was developed and articulated

238 *Dabiq*, Issue 15, July 2016, 19, online: <http://clarionproject.org/wp-content/uploads/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf>, accessed 16 April 2017.

239 Traditional, but now derogatory, term for Christians.

240 Abū Khaṭṭāb al-Yamānī, "Li-mādha aʿdamnā naṣāra Miṣr?" *al-Shaʿab*, online: <http://www.elshaab.org/news/156428/خطير-بالفيديو-الدولة-الإسلامية-ترد-لماذا-أعدمنا-نصارى-مصر؟>, accessed 16 April 2017.

in eras when notions of citizenship did not exist.[241] Nevertheless, al-Shāfiʿī, for example, seems to lean towards the sanctity of any semblance of a safety pledge given to non-Muslims in Muslim lands by the acquiescence of the *imām*. For example, he states that a breach of the *dhimma* pact, due to violations by the *dhimmī*, is not possible unless the said *dhimmī* refuses to pay the *jizya* or to subject himself to Islamic law *after an agreement to pay it:*

> If he said, I will pay the *jizya* but will not accept the rule [of Islam], he should be warned but not fought for it where he is. He is to be told, "You were given *amān* to [pay the] *jizya*.... You will be given time to leave the territory of Islam." Then, if he leaves and arrives at his place of safety, he may be killed.[242]

This approach, which one comes across with several other jurists, indicates a strong tendency to reject treachery. If non-Muslims residing in Muslim territories believe that they are protected in Muslim territory, then it would be fair to assume that ISIS would follow al-Shāfiʿī's logic and refrain from attacking in the territory they believe themselves to be immune in. It may be countered that when ISIS warned Christians in its newsletter that they must pay the *jizya* or face death, it was a general warning, despite the serious deviation from evidentiary rules in Islamic law. But this brings us to the crux of the matter. Most jurists set two conditions for *dhimmī* status – payment of the *jizya* and subjugation to the rule of Islam – in return for inviolability and protection in the territory of Islam. It is hard to envision how the violent operations against Christians outside territory controlled by ISIS, such as the ones conducted against Christian Egyptians, would ever fulfill that objective, considering that the group lacks control over Egyptian territory. Moreover, if an Egyptian Christian is subjected to a threat by the so-called apostate regime, is ISIS capable or willing to rise to their defence as per the agreed upon conditions of *jizya*? The only imaginable situation, in this case, would be to request that Christians emigrate to the territory of Islam in order to be able to pay the *jizya*, which would indeed be a novel condition for Christians, whereby they are called upon for *hijrā* in order to be protected.

Perhaps the oddest claim made by ISIS is the claim that all Christians ought to be fought for crimes committed by Christians anywhere in the world,

241 Of course, any system, modern or premodern, tends to oppress, exclude/include on the basis of artificially understood modes of social cohesion like religion, ethnicity, or nationality.

242 al-Shāfiʿī, *Umm*, 4:267.

regardless of proximity, position, and difference. This argument is contested by none other than the historical narrative ISIS relies on to explain the status of Christians, where they retell the communication between the kings of Ethiopia, Egypt, and the Romans and how the first accepted Islam, the second portrayed humility but adhered to his religion, and the third persisted in his animosity towards religion, leading to further battles with the Romans.[243] If anything, this narrative indicates clearly that the Prophet did not treat Christians as one unit. Moreover, Ibn Ḥazm, whose position on neighbouring Christian polities and whose strict treatment of *dhimmī*s in Spain is far from the most tolerant on the jurisprudential spectrum, does not at any point claim that Christians in Muslim polities may be targeted, despite his denouncing their ascent to power and his scepticism of their agenda. As a matter of fact, treating Christians as one polity, wherever they may be, deems the *jizya* regime moot and inapplicable, considering that no instance of acceptance of *jizya* from a group belonging to any religion ever meant complete subjugation or voluntary acceptance by adherents of that religion. According to this logic, even *jizya* taken from Christians by the Prophet and the early caliphs would indeed be seen as invalid, considering Roman enmity for the nascent Muslim polity.

3.2.1.2 *Yazīdīs: Sensationalist Revivalism*

The Yazīdīs are members of a small religion in Iraq who have been vehemently targeted and utilized by ISIS to publicise its purity and revival of Islamic law. The practises of ISIS might be considered alien, archaic, and oppressive by modern standards, but these are standards that they claim reflect a significant deviation from God's laws and accepted practices in the early centuries of the application of Islamic law. ISIS claim that the Yazīdīs have been misunderstood by some unnamed Muslim scholars and are deemed an apostate sect of Islam. However, upon further research, the group was found to adhere to an "original *mushrik* [polytheistic]" religion whose origin stems from Magianism, "but reinterpreted, with elements of Sabianism, Judaism, and Christianity, and ultimately expressed in the heretical vocabulary of extreme Sufism."[244] Since they are polytheists, they are to be treated in accordance with the (again unnamed) majority views of scholars; unlike Christians and Jews, they are not

243 *Dabiq*, Issue 15, July 2016, 14. The claim that the Ethiopian king converted rather than simply hosted the Muslims is heavily contested in history and in jurisprudence deeming Abyssinian lands protected by virtue of the *amān* granted by the Ashamah to the Muslims.

244 *Dabiq*, Issue 4, October 2014, 15.

People of the Book, so they are not entitled to pay the *jizya*. Hence, their men must either convert to Islam or be killed, and their women may be enslaved.

ISIS hardly conceals its excitement in the English-language publication at the opportunity to reinstate slavery. First, the reinstitution of slavery is utilized to assert the apocalyptic narrative of a battle to end all battles. In order to do so, convoluted logic is employed to prove that their enslavement of the Yazīdīs is evidence for the apocalyptic fulfillment of a prophetic *ḥadīth* stating that towards the end of time, the slave girl would give birth to her own master.[245] But more important, the reinstitution of slavery serves the purpose of casting ISIS as the saviour of the banner of Islam, lost over centuries of deviation from prophetic tradition and genuine Islamic practice. In an article penned by Umm Summaya al-Muhājira, a semi-permanent contributor to the newsletter, this objective is made evident:

> Therefore, I further increase the spiteful ones in anger by saying that I and those with me at home prostrated to Allah in gratitude on the day the first slave-girl entered our home. Yes, we thanked our Lord for having let us live to the day we saw *kufr* humiliated and its banner destroyed. Here we are today, and after centuries, reviving a prophetic Sunnah, which both the Arab and non-Arab enemies of Allah had buried. By Allah, we brought it back by the edge of the sword, and we did not do so through pacifism, negotiations, democracy, or elections. We established it according to the prophetic way, with blood-red swords, not with fingers for voting or tweeting.[246]

But it is clear that ISIS was not simply attempting to adhere to Islamic law in its treatment of the Yazīdīs. In the paragraphs below, I discuss ISIS's distortion of the classical tradition in order to arrive at the conclusion that there is a clear consensus among jurists that groups like the Yazīdīs are not entitled to *dhimmī* status. First, the newsletter claims a consensus among jurists that only Jews and Christians are allowed to acquire *dhimmī* status. Evidently, this is a serious and deliberate deviation from the juristic traditions, which as a bare minimum accepted *dhimmī* status for the Magians. This intentional obfuscation avoids the logical consequence of their claim that the Yazīdī religion is, in essence, a fringe sect of Magianism. Thus, recognizing that the majority of jurists accepted *dhimmī* status for the Magians would inevitably lead to the conclusion that Yazīdīs are entitled to the payment of the *jizya* and *dhimmī* status. More

245 *Dabiq*, Issue 4, October 2014, 16.

246 Umm Summaya al-Muhājira, "Slave Girls or Prostitutes," *Dabiq*, Issue 9, May 2015, 47.

important, even if ISIS were to argue that the Yazīdīs had deviated so severely from Magian belief that they could no longer be considered Magians, they would be left with an important challenge, which is that many scholars argued that non-Muslims outside the Ḥijāz were entitled to the payment of *jizya*, regardless of their religion. As a matter of fact, the primary challenge comes from Ibn Qayyim, Ibn Taymiyya's student, who is heavily relied on by ISIS. Ibn Qayyim argued that all non-Muslims, regardless of ethnicity, were entitled to pay the *jizya*. To prove his argument, he suggests that the narration used by al-Shāfiʿī to claim that ʿAlī b. Abī Ṭālib stated that the Magians were, in fact, People of the Book had been found weak by *ḥadīth* collectors.[247] Second, he relies on the general language of the *ḥadīth* examined earlier in al-Shāfiʿī's work, where there is a general instruction to call on unbelievers to pay the *jizya*, which al-Shāfiʿī claimed was specific to the People of the Book.[248] Finally, he claims that the reason no Arab polytheists were allowed to pay the *jizya* was that by the time the *jizya* verse was revealed in the Qurʾān, all Arab polytheists had already converted to Islam.[249]

In addition to such jurisprudential views casting serious doubts over ISIS's claim to be allowed to exterminate Yazīdī men and enslave Yazīdī women and children,[250] ISIS seems to disregard another challenging historical reality. As discussed in the section on the Shīʿa, the group claimed that the Rightly Guided Caliphs did not fight and exterminate the Shīʿa, because their heretical *rafiḍī* beliefs surfaced only later, hence acquiescing to the caliphs' practice being binding upon modern-day Muslims. With that in mind, an important and legitimate question that ISIS fails to address in this case is why those caliphs failed to exterminate polytheistic groups, which predated Islam, as they acknowledge. ISIS's failure to address this issue, coupled with its deliberate manipulation of the juristic tradition on *dhimmī* status, leads the reader to the obvious conclusion that there is a premeditated desire to narrow this legal regime.

So, if one assumes that ISIS has deliberately attempted to excessively narrow *dhimmī* status beyond classical jurisprudence, then why did ISIS target the Yazīdīs, despite their small numbers? On the one hand, as noted by other experts on ISIS, Sinjar, home to this religious minority (representing only 1.5 per

247 Ibn Qayyim, *Aḥkām ahl al-dhimma* (Dammām: Ramādī li-l-Nashr, 1997), 1:84.

248 Ibn Qayyim, *Aḥkām*, 1:88.

249 Ibn Qayyim, *Aḥkām*, 1:90.

250 It is interesting that in the attempt to claim that Yazīdīs are not entitled to *dhimmī* status, they disregard a compelling argument that might be made in their favour, which is that many jurists argue that women and children from groups entitled to *dhimmī* status may still be enslaved.

cent of the population of Iraq), was an important and strategic conduit between Raqqa and Mosul.[251] More important, provoking religious, sectarian, and ethnic strife is a policy advocated for in one of ISIS's most prominent strategic and military manifestos, as mentioned earlier. In this case, ISIS took advantage of political rivalry between Masʿūd Barzānī, former president of Iraqi Kurdistan (2005–2017) and Jalāl Talabānī, former president of Iraq (2006–2014) and their respective peshmerga groups. Sinjar had been under the protection of Barzānī's Kurdish Democratic Party (KDP) ever since the takeover of Kirkuk, "but owing to localized political tribalism, only the most KDP-loyal corps of Yazīdī residents of the town were armed by Barzani's paramilitary. The rest had to fend for themselves."[252] Inevitably, the failure of the KDP groups, their desertion, and their failure to return to the aid of the civilian population took its toll on ethnic and religious relations in the area.[253] Arguably, ISIS saw in this tension a golden opportunity for it to assume control of a strategic town and cement civil strife in the region.

It is my contention, however, that there was another significant objective, other than a strategic interest in the area – the imagery of slavery, or what Mamdani and others refer to as "pornographic violence," which Mamdani defines as the media's obsession with gory, gruesome, detailed descriptions of violence to provoke in their audience certain emotions, emotions charged with moral judgement rather than with reasoned political analysis.[254] In this case, it is ISIS that seems so keen on this kind of pornographic violence, with its concurrent provocation of emotions. The display of severed heads, the cinematographic and exceptionally violent execution of the captured Jordanian pilot Muʾādh al-Kasāsba, and the reinstitution of slavery follow the manifesto penned by militant Abū Bakr Nājī (d. 2008), *Idārat al-tawaḥḥush* ("The management of savagery") and its instruction to militants to resort to extreme and excessive violence in order to instil fear in the enemy and to lionize Muslims after decades of fear and domestication.[255] So, in other words, the more extreme and unimaginable the violence and brutal acts committed are, the more fear is instilled in the hearts of the enemy, and the more radical the paradigm shift is in the minds of its potential recruits across the world. Unlike al-Ẓawāhirī, whose examined book and communiques with al-Zarqāwī portray relative

251 Hassan and Weiss, *ISIS*, 229.

252 Hassan and Weiss, *ISIS*, 229.

253 Hassan and Weiss, *ISIS*, 229.

254 Mahmood Mamdani, *Saviors and Survivors: Darfur, Politics and the War on Terror* (New York: Random House, 2009), 66.

255 Abū Bakr Nājī, *Idārat al-tawaḥḥush*, 33–35, online: <https://archive.org/stream/edatalt/Udge4#page/n31/mode/2up>, accessed 1 April 2017.

self-restraint and political calculation premised on the fear of alienating sympathetic recruits still on the fence, ISIS's policy seems to sever those recruits' connections with the world they live in and create an alternate reality, where violence is glorified and celebrated, and where attempts to replicate a fantastical, unreal but imaginable past is the name of the game. By doing that, ISIS proposes itself to its recruits as the ultimate path to rebellion, not just against un-Islamic laws or discrimination in Western countries but also against what they are gradually conditioned to see as the delusional and dysfunctional moral code of modern society.

4 Militant Groups: Concluding Remarks

To a great extent, one can argue that al-Qāʿida has been eclipsed by ISIS and its willingness to move far beyond the realm of acceptable targetable categories set by its predecessor. But this claim might prove too hasty. True, ISIS's reliance on the grievances of disadvantaged communities in Syria and Iraq has proven incredibly useful for its rise and swift control over large swaths of territory. However, this appeal may prove as short-lived as the initial appeal of al-Zarqāwī's group to some disenchanted Sunnī tribes. In the case of ISIS, the primary factor that made it appealing to militants may be the same factor that brings about its demise: its claim to power. ISIS's appeal was not just that it introduced an alternative reality for some Muslims, who saw in it a chance for salvation by literally washing away any connection with their previously existing worlds. Its appeal came from its success in doing so – from being the formidable, feared enemy. Its recent failure to maintain this status and its loss of lands may prove al-Ẓawāhirī's prediction that alienating potential recruits, using excessive violence, and hastily creating a caliphate may very well terminate ISIS as we know it, allowing models like al-Qāʿida to outlive it, despite its relative lack of glamour in the eyes of militants.[256] But what is very clear is that both groups rely heavily on Islamic jurisprudence in order to gain recruits and legitimize their actions. It is also clear that such actions are driven by an alternative vision for the modern Muslim state, a vision in which there is no place for the contemporary compromises and reformulations of the Islamic world. Yet this vision is still unable to escape the realities of this modern world.

256 Gerges, *ISIS*, 282.

CONCLUSION

Authority and the Classical Tradition

Modern Islamist militants have long claimed that their controversial operations are justified under Islamic law, triggering responses from official institutions and scholars, who denounce the resort to such tactics and also attempt to legitimize their positions and views within the framework of the same legal system, Islamic law. Although those institutions and scholars offer valuable and equally legitimate alternatives to early understandings of the regulation of armed conflict under Islamic law, they fail to delegitimize militant groups' propositions, primarily because the two camps resort to the same jurisprudential techniques. Both claim to be building on a long juristic tradition that endorses their view of the conduct of warfare. In addition to claiming legitimacy from within Islamic jurisprudence, both groups also offer a direct interpretation of Islamic legal sources to legitimize their conclusions. The dilemma is, the resort to identical methodological tools by both camps renders the legitimacy battle between the two groups over which interpretation is genuinely "Islamic" almost impossible to resolve. This book argues that to attempt to resolve this battle, scholarship needs to critically examine the foundational literature relied upon by both camps. It is also necessary to develop an alternative technique by which we understand Islamic law, a technique that distances us from this legitimacy debate and the treatment of classical jurisprudence as foundational, because the reverence in which classical jurisprudence is held has long inhibited such critical examination. I am not saying that such reverence prohibits modern scholars from acknowledging that classical jurisprudence corresponded to the political reality of the time. On the contrary, many scholars – including those examined in this book – acknowledge that jurists were influenced by the realities of the time. However, such acknowledgements are limited to positions modern scholars feel the need to justify or distance themselves from. This is done without offering an alternative, coherent manner by which one can relate to said tradition, since it is often relied on as an authoritative source when convenient and dismissed when the arguments put forward by classical jurists seem to contradict the modern project of repackaging Islamic law in order to fit the modern moment. Whereas many modern scholars argue, for example, that regulations on slavery were contextual, none of the examined scholars argue that the prohibition on killing women and children was contextual and reflective of a particular moral framework, since

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said prohibition fits the contemporary narrative promoted for the Islamic regulation of armed conflict.

In a way, this book is an attempt to intervene in the debate over Islamic law in general and its applicability in "modern" times, but it is equally a revisionist reading of classical jurisprudence, in that it aims to prove that classical jurists often deviated from their declared jurisprudential techniques, *uṣūl al-fiqh* theories, or *taqlīd*, and that such deviation corresponded to the sociopolitical environment of their time. In essence, the book argues that jurisprudence, while it functions mostly within the contours of legal reasoning, can move outside those contours to correspond to sociopolitical factors as envisioned by the jurists in the development of their works. In order to do so, scholars and jurists are often selective in their reliance on sources and sometimes deviate from their theoretical frameworks to reach their desired conclusions. However, to a great extent, classical scholars show more willingness to engage with counterarguments and to refute opposing views than modern scholars, who often attempt to portray a singular image of Islamic jurisprudence, as articulated in the Introduction. Perhaps modern scholarship's shyness from controversy and engagement with counterarguments, as opposed to the classical tradition, is attributable to several factors. As noted earlier in the book, Islamic education in Egypt (the case study examined in the book) has come under heavy state control for the past century. Direct state control and lack of resources dedicated to innovation in Islamic education may have led to the impoverishment of this area of study and to the erosion of the long-standing *ikhtilāf* tradition. Additionally, as noted by Hallaq and others, the colonial experience led to acceptance of positivist fixed legal systems as desirable projects.[1] It is again possible that this shift from the precolonial diverse non-authoritarian approach to Islamic legal thought to positivist formalist thinking has led modern scholars to attempt to ascribe the same level of certainty to Islamic jurisprudence, especially with rising essentialist claims that Islamic culture is inherently violent. In a way, it is understandable that a modern scholar, feeling burdened with defending Islamic civilization against such claims, would be reluctant to treat matters relating to violence with any toleration for ambiguity.

However, the claim made in this book that classical jurists showed varying levels of selectivity across the board does not in any way mean that such scholars were whimsical or that they were intentionally and consciously subverting legal methodologies to achieve particular legal outcomes. Many of them displayed allegiance to the Islamic jurisprudential tradition even when this

1 Wael Hallaq, "What Is Shari'a?," *Yearbook of Islamic and Middle Eastern Law* 12 (2005–6), 151–52.

allegiance conflicted with their interests or ideologies. As detailed in previous chapters, al-Shaybānī refused to grant legitimacy to al-Rashīd's conduct with rebels, losing his judicial position in so doing. Al-Shāfiʿī states that had it not been a sin to favourably treat the Arab race, he would have stated that the enslavement of Arabs was prohibited. And although Ibn Taymiyya stripped the regime of *baghy* of any potential for application in the conflict with the Mongols, he accepted its theoretical application out of deference to the juristic tradition, as argued by Abou El Fadl. Finally, Ibn Rushd (al-Jadd) was keen to assert the consistency of the Mālikī tradition and to prove the coherence of its jurists' views, despite evidence to the contrary. All these examples provide strong evidence that jurists across the different schools were keen to maintain the integrity and coherence of the legal culture and its modes of reasoning. But although all these examples prove loyalty to the juristic culture, examples addressed in the book show that there were also instances of deviation. This deviation, it is argued, is better comprehended if one looks at the historical contexts experienced by the jurists.

1 Personal *Raʾy*: Employed by Its Critics

The book covers jurists from the four established Sunnī schools and a Ẓahirī jurist. Findings of the book prove that the impact of *raʾy* on legal reasoning is not limited to schools of jurisprudence commonly associated with the acceptance of resort to reason. As a matter of fact, jurists often seen as strong adherents of textual interpretation (at the expense of human reason) show instances of deviation from their jurisprudential techniques to push forward an interpretation they wish to promote. For example, Ibn Ḥazm's strict interpretive theory did not stand in the way of his project to limit non-Muslim power within the Muslim polity by imposing limitations on the *dhimma* regime.[2] Similarly, Ibn Rushd (al-Jadd), who was also a witness to perpetual war with northern Christian neighbours, offered a creative analysis of the sources of Islamic law, in order to devise a regime that promoted a harsher treatment of spies through the employment of the *ḥirāba* regime and its strict penal regulations. Not only was this argument, as established in Chapter 2, a deviation from standard juridical treatment of *ḥirāba* (as a regime reserved for robbers and bandits), but more important, it created an amalgam between different positions in the Mālikī

2 Nesrine Badawi, "Sunni Islam. Part 1: Classical Sources," in *Religion, War and Ethics: A Sourcebook*, ed. Gregory Reichberg and Henrik Syse (Cambridge: Cambridge University Press, 2014), 309.

school, to reach a new ruling not advocated by any of the jurists relied on as Mālikī authorities. Al-Shāfiʿī, who was very critical of citing anonymous sources to back up one's positions, relied on unestablished agreement of "the people of knowledge" to claim that the subjugation (*ṣighār*) of non-Muslims must entail applying Muslim laws to them. Finally, Ibn Taymiyya denied the application of the long tradition of *baghy* to conflicts with the Mongols, collapsing the regimes of apostasy and *jihād* against infidels to come up with an innovative approach that expanded the privileges of the factions fighting Muslim Mongols.

Yet, inconsistency is not in any way unique to literalist and textual approaches. Unlike claims made by their critics, Ḥanafīs also asserted textual sources as a basis for their legal methodology. A scholar like al-Shaybānī was always keen to rely on the Qurʾān and sunna in his legal analysis.[3] Yet, analysis offered in this book of his jurisprudence shows how his sociopolitical views have equally influenced his jurisprudence, beyond the claimed rubric of *istiḥsān*. His treatment of the regime of *tatarus*, for example, was clearly intent on expanding Muslim military advantage during conflict. At the same time, his approach to division of the booty among different factions within the military, his regulation of the *amān* framework, and his treatment of regulations in *dār al-ḥarb* indicate an interest in asserting institutional governance through the caliphate.

2 Modern Projects: Eclectic Approaches to Classical Legal Authority

In addition to selective reliance on sources, the modern tradition is perhaps even more incoherent than the classical tradition. It lacks a coherent theory of *uṣūl*, replacing it with what is, at least on its face value, an arbitrary reliance on classical jurisprudence. Yet, what calls for more attention than such selectivity is that mainstream scholars and militant works mirror each other's techniques in their approach to the classical tradition. It is noticeable that whenever one "camp" wants to undermine the other, it favours resorting to a literalist approach as the method of attack. For example, the sanctity of *amān* and the impermissibility of suicide (as part of suicide bombing) are often mentioned with an elaborate reiteration of classical jurisprudence on the subject matter in order to prove how "deviant" militant organizations are with their resort to suicide bombing as a war tactic. On the other hand, militant organizations are

3 Wael Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 112.

often literal and loyal to the classical tradition on matters such as targeting in order to prove that mainstream claims about targeting are fallacious. In both cases, each camp surveys classical jurisprudence and examines the sources relied upon by classical jurists in an attempt to prove congruence between their modern approach and the classical tradition. At the same time, when both camps are aware they might be deviating from the classical tradition, either they selectively rely on one convenient jurisprudential work and disregard others, who are relied upon in other instances, or they claim that the modern context differs significantly from the classical one, thereby deeming that it would be invalid to apply classical jurisprudence in the modern situation. For example, modern mainstream scholarship adopts an innovative approach in its claim that the *ḥirāba* regime should apply to terrorist activities, adopting a limited or extremely selective approach to the classical tradition, and deliberately ignoring how classical works generally limited the application of the *ḥirāba* regime to non-political crimes. At the same time, we have seen how al-Ẓawāhirī has gone to great lengths in citing classical jurisprudence on unintentional killing to argue that the killing of a schoolgirl is collateral damage in a failed assassination attempt, but shifted to policy-oriented, context-driven argument in order to discredit the claim that a modern-day visa is akin to the classical regime of *amān*.

Such similarities in techniques between mainstream scholars promoting an understanding of *jihād* that approximates modern international humanitarian law, and militant groups claiming a puritan revival of Islamic law, portrays the understanding of the two camps as reformist vs. traditional to be limited and reductive. Additionally, the perception of the classical regulation of conflict under Islamic law as archaic, and in need of evolution to catch up with international norms, fails to understand the complexity of both Islamic law and international humanitarian law, because it fails to understand these two legal regimes through the interests promoted and legal arrangements developed by jurists to respond to society as they envisioned it. This perception, because of its limited and evolutionary perception of development of societies and legal frameworks, fails to account, for example, for how classical Islamic law was more restrictive of armies' destructive power in armed conflicts between Muslims than modern international humanitarian law and its regulation of non-international armed conflicts, perhaps even international armed conflicts.[4] However, an understanding that pays attention to the interests placed in a favourable position by the jurisprudence and how those interests reflected themselves alongside legal reasoning and adherence to legal theory, allows us

4 Badawi, "Sunni Islam," 311–15.

to understand why scholars like al-Shaybānī and Ibn Rushd (al-Jadd) showed more faith in the political authority and offered a more pragmatic outlook on the law than scholars like al-Shāfiʿī and Ibn Ḥazm, who attempted to offer more restrictions on the political authority's power vis-à-vis competing Muslim factions.[5] It also gives us insight into how the waning power of the Muslim empire shaped the jurisprudence of scholars like Ibn Ḥazm and Ibn Rushd (al-Jadd) and their approach to the treatment of non-Muslims, as well as the impact of the Mongol acquisition of Muslim lands on Ibn Taymiyya's approach to illegitimate rulers. This approach similarly helps us navigate modern reviews and assess them in a manner that extends beyond either their adherence to the classical tradition or their assimilation into international norms. Most important, it helps us engage in a discussion about the relationship between the modern sociopolitical context and the rise of militancy.

3 Modern Institutions: What Can They Do?

The rise of militancy is closely connected to a legitimacy gap for the legal order across the Muslim world, and legal transplantation and the shift to modern secular legal systems have been of significant impact, as Hallaq points out.[6] Under modern legal regimes and their so-called modernist approaches to the application of Islamic law in Muslim states, approaches to Islamic regulation of armed conflict inevitably are vulnerable to accusations of incoherence and illegitimacy, in the light of those institutions' claimed adherence to the rules of Islamic jurisprudence in other areas, like personal status law. One must not be tempted, however, to accept the claim that there is one, specific form of legal order in the Islamic state, and that that form is classical *sharīʿa* as we traditionally understand it.[7] Although it is tempting to reject both the militant understanding of Islamic law and the authoritarian influence of the postcolonial state on the Islamic legal tradition, with a call for a glorious, golden past, such a call is hardly methodologically different from modern transformations of

5 Badawi, "Sunni Islam," 311–15.

6 Wael Hallaq, *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*, Kindle ed. (New York: Columbia University Press, 2012), loc. 65.

7 For a compelling critique of this approach, see Lama Abu-Odeh, "The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia," *American Journal of Comparative Law* 52 (2004), 789–824. See also reviews of Hallaq's recent book, such as Andrew F. March, "What Can the Islamic Past Teach Us About Secular Modernity?," *Political Theory* 43 (6) (2015), 838–49, and Lama Abu-Odeh, "Book Review of *The Impossible State* by Wael Hallaq (2013)," *International Journal of Middle Eastern Studies* 46 (1) (2014), 216–18.

Islamic law, because it equally disregards the complexity of the past. Rather, contextual analysis needs to carve out its own space in this historical moment, laden as it is with Islamophobia and essentialist readings of the Islamic legal tradition and Muslims as proponents and propagators of violence. Yet, at the same time, we must strenuously reject attempts to romanticize and glorify the Islamic tradition at the expense of critical assessment. Hallaq, for example, makes a very compelling argument in his critique of the modern nation-state, its closely connected notion of sovereignty, and its proclivity to promote authoritarianism and a highly unequal world order. Hallaq's is an argument asserted and promoted by many of the critics of international law referred to earlier in the book, not least Antony Anghie, whose work on sovereignty and colonialism continues to be a seminal text.[8] Yet, accepting this argument about the modern legal order does not entail accepting Hallaq's claim that Islamic culture, which he sees as a legal culture *par excellence*, is superior to the modern state system due to its highly moral nature.[9]

In a way, I agree with Hallaq that the Islamic legal system regulating *jihād* was heavily influenced by morality, an argument made by Abou El Fadl, who argues that the system developed by the jurisprudence attempted to balance moral principles with a functionalist interest in the expansion of the combatant's leeway in armed conflict, as discussed in the Introduction.[10] But stating that a system is premised morally on the protection of religion is no different from claiming that the international laws of armed conflict are morally premised on a chivalrous inclination to limit the loss of lives among non-combatants, a view contested in numerous literature offering a nuanced critique of international humanitarian law.[11] Throughout this book, I have attempted to prove that the moral and legal outlook in pre-modern jurisprudence, although it indeed aims to protect religion, was embedded in complex understandings

8 Antony Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law," *Harvard International Law Journal* 40, no. 1 (1999), 1–80.

9 Hallaq, *Impossible State*, loc. 3364.

10 Khaled Abou El Fadl, "Between Functionalism and Morality: The Juristic Debates on the Conduct of War," in *Islamic Ethics of Life: Abortion, War and Euthanasia*, ed. Jonathon E. Brockopp (Columbia, SC: University of South Carolina Press, 2003), 103–128.

11 See e.g. Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," *Columbia Journal of Transnational Law* 43 (2004–5), 5–17. See also David Kennedy, *Of War and Law* (Princeton, NJ: Princeton University Press, 2006), 36–37; Antony Anghie and B. S. Chimni, "Third-World Approaches to International Law and Individual Responsibility in Internal Conflicts," *Chinese Journal of International Law* 2 (2003), 80; Fredric Megret, "From Savages to Unlawful Combatants: A Post-colonial Look at International Humanitarian Law's Other," in *International Law and Its Others*, ed. Anne Orford (Cambridge: Cambridge University Press, 2006), 265–317.

of societal hierarchy and structures. This is a system that was conditioned to perceive slavery as a normal extension of the legal order; that sometimes aimed at increasing Muslim revenue from conflict, as seen in al-Shāfiʿī and al-Shaybānī's jurisprudence; that asserted social and hierarchical structures of class and gender when dividing booty and discussing women's entitlement to grant *amān*, as discussed by al-Shaybānī; that, shaped by fear of annihilation by the other, significantly limited the privileges of *dhimma*, as seen in Ibn Ḥazm's jurisprudence; and that denied the inherent privilege long established for a Muslim in internal armed conflict, as seen in Ibn Taymīyya's jurisprudence on the Mongols. So, although it may be true that Muslim conceptions of armed conflict are indeed helpful in critiquing the modern approach to war and armed conflict, failure to engage seriously with the dynamics of developments in the field – or with the biases and outlooks guiding morality and legality in devising a system of rules governing the field – reduces the potential for engaging critically with the modern order to mere apologetics and romanticizing one historical moment of understanding Islamic laws of war.

As mentioned earlier, the static, ahistorical approach to the regulation of armed conflict in early Islamic jurisprudence was strongly connected to the intellectual conundrum we find ourselves caught up in today – the debate over militant Islam – with both mainstream scholars and militant groups claiming legitimacy on the basis of the pre-modern tradition, with ISIS ironically making a claim to the reintroduction of the "impossible state" that Hallaq examines. With their assertion of moral supremacy, their absolutist adherence to a model heavily dependent on the erosion of the sovereign and their claim to legitimacy in the pursuit of God's will, ISIS seems not to differ significantly from the model of the so-called impossible state. True, its approach and the legal details of its model may legitimately be criticized for being internally contradictory, but the claim to morality is not that distinctive. I acknowledge that ISIS does not fit the model of the pre-modern Islamic state and that its approach to Islamic law is heavily shaped by the modern conception of the state, as I believe Hallaq would argue. It is also true that ISIS's model is clearly trapped in legal sanction and excessive resort to punishment, thereby significantly deviating from Hallaq's model of the Islamic state and its treatment of criminality in pre-modern Islam. It is also far from emulating the pre-modern separation of powers between jurists and the political authority, which indeed deems it a far cry from the impossible state described in Hallaq's work. Still, it makes the same ahistorical claim to a moral past, disregarding how its ideals, contradictions, and values were highly responsive to its time and its associated sociopolitical understanding of the world. This ahistorical understanding is also not different from the widely witnessed regressive attempts in the West to

position Muslims and their world outlook as reflective of a static legal order with an archaic understanding of violence, a violence that is ill suited to this modern world and that must be shunned, whether physically (by halting immigration and banning refugees in the midst of a humanitarian crisis) or by enforced assimilation in the modern state, with its acknowledged proclivity towards coercion and attempts to control public space, erode its long-held commitment to private space and, in many instances, control agency over the body, because Muslims "cannot appreciate the political order of the present," and because of their fixation on a moral system developed centuries ago.

Undeniably, the call for internal critique and critical engagement with both the Islamic legal tradition and the modern laws of war barely addresses the surface of the dilemmas of a modern doctrine of regulation of armed conflict. In a way, I agree that the modern replacement of the system with the international legal order hardly addresses the issue of Islamic militancy and not just for the equal tendency of international laws of armed conflict to sanction and channel violence and legitimize the loss of life. True, many Islamists see the colonial experience as a serious abomination and an indication of the *kufr* of the current regimes, with their resort to secular laws and claims for displacement of a system that has for long been seen a mere theoretical field, yet a field highly revered and romanticized because of a perception that it touches the core of the Muslim culture: how and when it sanctions the loss of life.

In this book, I have attempted to dissociate this relationship. Historical understandings of how violence is promoted should not essentialize cultures, because cultures have always sanctioned violence and will continue to do so. It is in this context that modern mainstream readings of the Islamic regulation of armed conflict become extremely relevant, for they are collectively seen as significant contributors to present-day understandings of conflict. However, in order for them to be more relevant in this debate, modern scholars of Islam need to engage critically with the premise upon which the debate is set. They must acknowledge the inseparable relationship between politics, morality, and the law, in the past and in the present, and, more important, in their own projects.

For modern institutions to offer a coherent understanding of Islamic law, they need to address internal contradictions in their projects, in their approach not just to Islamic laws of armed conflict but also to Islamic law in general. Take the case of al-Azhar. Its contextualized, albeit rudimentary, approach to Islamic regulation of armed conflict is starkly contrasted with its approach to social issues, more specifically, its approach to gender issues. As discussed in Chapter 3, the Grand Shaykh of al-Azhar came head to head with the Egyptian head of state for failing to toe the president's line on verbal divorce, whereby

the Egyptian president wished to amend the law to limit the state's acknowledgement of divorce to one registered with the state. Undoubtedly, aside from the president's interference, addressed below, the issue touches the lives of many women who have long suffered from being in a limbo – seen as divorced because their husbands have verbally pronounced them as such, but treated legally as married because they are unable to provide evidence of the divorce. As noted by many analysts, due to historical legal "reform," personal status law has long been seen as the last remaining sphere of influence for al-Azhar, leading it to show serious reluctance to deviate from pre-modern jurisprudence.[12] But this position, aside from serious questions relating to the "scapegoating"[13] of gender in the modern state, raises an important theoretical question: how can an institution that promotes strict adherence to pre-modern jurisprudence in some instances, even when there is a serious social need to reformulate such jurisprudence, legitimate the alternative theoretical and practical position when it attempts to offer novel interpretations of the jurisprudence, especially if those interpretations deviate from the traditional pedagogical and doctrinal approaches to the study of law at the institution? True, any doctrine of internal criticism, as Zaman calls it, is bound to incoherence, and in many instances it may also be true that, as he argues in the case of al-Qaraḍāwī, some conservative views lend legitimacy to more lenient views.[14] But this dynamic, although it may lead to some significant wins, freezes the jurisprudence in a debate over legitimacy, with pre-modern jurisprudence constantly resorted to as the benchmark.

Additionally, any attempt by al-Azhar (or by other significant religious institutions across the Muslim world) to maintain its relevance and legitimacy is closely connected to its authority and independence. Prominent religious institutions often come under heavy criticism from militant groups for subservience to corrupt and authoritarian regimes. Because al-Azhar has been very much controlled over the years by the Egyptian state,[15] both legally and politically, and because the move towards national legal systems and national courts has eroded its scholars' power, al-Azhar has long been seen as a tool of the political regime. This has created the space for the rise of alternative influences on Muslim youths, searching for what they hope is "depoliticized and

12 Lama Abu-Odeh, "Modernizing Muslim Family Law: The Case of Egypt," *Vanderbelt Journal of Transnational Law* 37, no. 4 (2004), 1047.

13 Abu-Odeh, "Modernizing Muslim Family Law," 1047.

14 Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age* (Cambridge: Cambridge University Press, 2012), 310–12.

15 See discussion in Chapter 3.

genuine Islamic authority," influences that utilize the above-mentioned contradictions and deviations from pre-modern jurisprudence to paint al-Azhar as a political tool of the regime. In this situation, calls for the state to reign in al-Azhar, to impose an alternative, more tolerant understanding of the "other" in Islamic law and in its curricula[16] – and even to deem ISIS an apostate group[17] – are extremely short-sighted in their understanding of authority in the Islamic tradition and the traditionally upheld, and indeed laudable, inverse relationship between scholars' authority and legitimacy and their proximity to the ruler. Muslim states' enforcing a vision of *jihād* on their scholars and institutions would only further erode any chance at legitimacy and influence for these institutions.[18]

That is not to say that independent scholars have not also come under heavy criticism in recent years. After all, a group like ISIS, which flirts with deeming even figures like al-Maqdisī and Abū Qatāda apostates, can hardly be satisfied with anyone's Islam except for its own recruits and fighters. But like any group, ISIS relies significantly on a flow of recruits willing to die in its name, and that is why the legitimacy of scholars and institutions providing alternative and nuanced understandings of the field is still extremely significant. But even scholars traditionally perceived as independent, like al-Qaraḍāwī, are eroding their independence with highly inconsistent and sectarian approaches to political dissent and political violence after the Arab Spring.

In conclusion, this book is not an attempt to tell the reader what Islamic laws of armed conflict are, or what the "correct" understanding of the rules during armed conflict is. It is, rather, an attempt to build on a long tradition of criticism, both in Islam and in Western scholarship of law, to reorient the debate in this field, with an acknowledgement that the arguments I put forward here could be subject to the same critique of incoherence and political influence. What I am hoping to do is shift the debate. The question is not what the laws are, as much as it is what pronouncements on the law – whether made by revered, towering figures in Islamic legal history, official Muslim institutions, independent modern scholarship, or even militant groups – tell us about those

16 Hamza Hendawi, Lea Keath, and Mariam Fam, "Angry Debate in Egypt over Reforms in Islam Against Radicals," *Associated Press*, online: <https://www.washingtonpost.com/world/middle_east/who-speaks-for-islam-and-reform-debate-heats-up-in-egypt/2017/04/26/b68068d4-2a4b-11e7-9081-f5405f56d3e4_story.html?utm_term=.e47276848d97>, accessed 1 May 2015.

17 "Shaykh al-Azhar: Dāʿish min ahl al-qibla wa-la yumkin takfīrahum," *al-Masry al-Youm*, online: <http://www.almasryalyoum.com/news/details/617771>, accessed 28 April 2017.

18 See e.g. Aharon Layish, "Transformation of Shariʿa from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welt des Islams* 44, no. 1 (2004), 85–113.

who make such pronouncements, their biases, their outlook on the world, and, more important, their objectives in conflict situations. Rather than engaging in a cyclical debate over whether ISIS was entitled to enslave Yazīdī women – whether they were permissible targets due to the "apostasy" of the Iraqi regime – we need to expose ISIS's position for what it is and disarm it of the shield of claims of apolitical adherence to Islamic jurisprudence. We need to ask the necessary questions: why was the image of slave markets necessary for the group's propaganda, and what did the heavy-handed targeting of a small, ethnically Kurdish minority mean for its battle with Kurdish paramilitary groups and its fueling of sectarian conflict in Iraq and Syria? But in order to ask such questions, it is pertinent to disarm those groups of their claim to legitimacy and authenticity as revivers of the classical tradition, not simply by pointing out their deviation from said tradition but, more important, by reorienting our reading of the classical figures of Islamic jurisprudence.

Bibliography

Arabic Sources

Ababakr, Sultan Muhamad Saad et al. "Open Letter to Dr. Ibrahim Awwad al-Badri, alias ʿAbū Bakr al-Baghdādī. Online: <http://lettertobaghdadi.com/pdf/Booklet-Combined.pdf>. Accessed 24 May 2018.

ʿAbdul Nāṣir, Jamāl. "Kalimat al-muʾtamar." Presentation. *Majmaʿ al-Buḥūth al-Islāmiyya Fifth Conference*. al-Azhar. Cairo, September 1970.

al-ʿUmda fī iʿdād al-ʿudda. Online: <http//www.tawhed.ws/a?a=85ud42ss>. Accessed 12 April 2010.

ʿAbdul Aziz, Sayid Imām (authored under the name of ʿAbdul Qādir b. ʿAbdul ʿAzīz). *al-Jāmiʿ fī ṭalab al-ʿilm al-sharīf*. Online: <http//www.tawhed.ws/a?a=85ud42ss>. Accessed 12 April 2010.

ʿAbdul Ḥalīm, Rajab Muḥammad. *Intishār al-Islām bayn al-maghūl*. Cairo: Dār al-Nahḍa al-ʿArabiyya, 1986.

ʿAbdullah, Nājiḥ Ibrāhīm. "al-Jamāʿa al-Islāmiyya bayn al-mubādara wa-l-murājaʿa." In *al-Murājaʿāt min al-Jamāʿa al-Islāmiyya ila al-jihād*, edited by Diyāaʾ Rashwān, 27–54. Cairo: al-Ahrām, 2008.

ʿAbdullah, Nājiḥ Ibrāhīm. "al-Taʿriya li-Kitāb al-Tabriʾa." *al-Masry al-Youm*, 18 November–2 December 2008.

ʿAbdullah, Nājiḥ Ibrāhīm. "Wathīqat tarshīd al-jihād fī Miṣr wa-l-ʿālam." *al-Masry al-Youm*, 18 November–4 December 2007.

Abū ʿĀṣī, Muḥammad Sāmī. "al-Fikr al-takfīrī: al-munṭalaqāt wa-l-natāʾij." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Fourth Conference*: *ʿAẓamat al-Islām wa-akhṭāʾ baʿḍ al-muntasibīn ilayhi*. Cairo, 28 Feb–1 Mar, 2015. Cairo: Maṭābiʿ al-Ahrām, 2015.

Abū Khalīl, Shawqī. *Hārūn al-Rashīd: Amīr al-khulafāʾ wa ajal mulūk al-dunyā*. Damascus: Dār al-Fikr, 1997.

Abū Ṭālib, Ṣūfī. "al-Islām wa-l-akhar fī l-ʿilaqāt al-dawliyya: Nazra ʿama." Presentation. Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Sixteenth Conference: al-Tasāmuḥ fī l-Ḥaḍāra al-Islāmiyya*. Cairo, 28 April–1 May 2004. Online: <http://www.elazhar.com/conf_au/16/conf_16.pdf>. Accessed 7 June 2011.

Abū Zahra, Muḥammad. *Abū Ḥanīfa: Ḥayātuh wa-ʿaṣruh, arāʾuh wa-fiqhuh*. Cairo: Dār al-Fikr al-ʿArabī, 1947.

Abū Zahra, Muḥammad. *al-Shāfiʿī: Ḥayātuh wa-ʿaṣruh, arāʾuh wa-fiqhuh*. Cairo: Dār al-Fikr al-ʿArabī, 1948.

Abū Zahra, Muḥammad. *Ibn Ḥazm: Ḥayātuh wa-ʿaṣruh, arāʾuh wa-fiqhuh*. 2nd ed. Cairo: Maṭbaʿat Aḥmad ʿAlī Mikhīmar, 1954.

Abū Zahra, Muḥammad. *Ibn Taymiyya: Ḥayātuh wa-ʿaṣruh, arāʾuh wa-fiqhuh.* Cairo: Dār al-Fikr al-ʿArabī, 1958.

Abū Zahra, Muḥammad. "al-ʿIlaqāt al-dawliyya fī l-Islām." Presentation. *Majmaʿ al-Buḥuth al-Islāmiyya First Conference.* al-Azhar. Cairo, March 1964.

Abū Zahra, Muḥammad. *al-ʿIlaqāt al-dawliyya fī l-Islām.* Cairo: al-Dār al-Qawmiyya li-l-Ṭibāʿa wa-l-Nashr, 1995.

Abū Zahra, Muḥammad. "al-Mujtamaʿ al-insānī fī ẓil al-Islām." Presentation. *Majmaʿ al-Buḥuth al-Islāmiyya Third Conference*. al-Azhar. Cairo, October 1966.

Abū Zahra, Muḥammad. "al-Jihād." Presentation. *Majmaʿal-Buḥuth al-Islāmiyya Fourth Conference*. al-Azhar. Cairo, September 1968.

Abū Zayd, Naṣr Ḥāmid. *al-Shāfiʿī wa taʾsīs al-idīyulūjiyya al-wasaṭiya.* Cairo: Sinā li-l-Nashr, 1992.

ʿAlī, Luʾay. "Hayʾat kibār al-ʿulamāʾ: Tashwīh manāhij al-Azhar tadlīs fāḍiḥ li-tazyīf yaʿy al-nās." *al-Yawm al-Sābiʿ*. 18 April 2017. Online: <https://www.youm7.com/story/2017/4/18/3195629/هيئة-كبار-العلماء-تشويه-مناهج-الأزهر-تدليس-فاضح-لتزييف-وعى>. Accessed 20 April 2017.

Amīn, Aḥmad. *Ḍuḥa al-Islām.* Cairo: Lajnat al-Tarjama wa-l-Nashr, 1938.

al-Amīn, ʿAlī ʿAbdul Raḥman. "ʿAwāmil intishār al-Islām." Presentation. *Majmaʿ al-Buḥuth al-Islāmiyya First Conference*. al-Azhar. Cairo, March 1964.

al-Amīn, al-Amīn Aḥmad. "Mawqif al-Islām min ẓahirat al-irhāb." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Tenth Conference*: *al-Islām wa-l-Qarn al-Ḥādī wa-l-ʿIshrūn.* Cairo, 2–5 Jul 1998. Cairo, 2008. Online: <http://elazhar.com/conf_au/10/35.asp>. Accessed 6 June 2011.

ʿArajāwī, Mustafa. "al-Asbāb al-Mūʾdiya li-dhāhirat al-takfīr." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Third Conference: Khuṭūrat al-fikr al-takfīrī wa-l-fatwā bidūn ʿilm*. Cairo, 25–26 Mar 2014. Cairo: Maṭābiʿ al-Ahrām, 2014.

al-Bayhaqī. *Manāqib al-Shāfiʿī.* Edited by Aḥmad Ṣaqr al-Sayyid. Cairo: Maktabat Dār al-Turāth, 1970.

al-Binʿalī, Turkī b. Mubārak. *Sharḥ shurūṭ wa mawāniʿ al-takfīr*. Online: <https://archive.org/details/Torki_bannali>. al-Ghurabāʾ li-l-iʿlām. 2014. Accessed 5 April 2017.

al-Binʿalī, Turkī b. Mubārak. *Muqarar fī l-tawḥīd li-l-muʿaskarāt*. 4102. Online: <https://archive.org/details/loras>. Accessed 10 April 2017.

al-Bukhārī, ʿAlāʾ al-Dīn. *Kashf al-asrār ʿan uṣūl Fakhr al-Islām al-Bazdawī.* Edited by ʿAbdullah ʿUmar. Beirut: Dār al-Kutub al-ʿIlmiyya, 1997.

CNN bi-l-ʿArabiyya. "al-Qaraḍāwī: Thawrat al-Bahrayn madhhabīya tastahdif al-sunna." 7 February 2013. Online: <http://archive.arabic.cnn.com/2011/bahrain.2011/3/19/qaradawi.bahrain/>. Accessed 2 May 2017.

corleonecorleone2003 (Youtube-username). "al-Qaraḍāwī: al-Khurūj ʿalā Mursī ḥarām." Youtube video, 10:28. Filmed June 2013. Posted June 2013. <https://www.youtube.com/watch?v=gNDgNLFOGfg>. Accessed 1 May 2017.

Ḍayf, Nash'āt ʿAbdul Jawād. "Mawqif al-dīn min al-irhāb wa-l-taṭaruf." Presentation. *al-Majlis al-ʿAlā li-l-Shu'ūn al-Islāmiyya Eighth Conference*: *al-Islām wa Mustaqbal al-Ḥiwār al-Ḥaḍārī.* Cairo, 24–26 Jul 1996. Online: <http://elazhar.com/conf_au/8/21.asp>. Accessed 6 June 2011.

al-Dhahabī, Abū ʿAbdullah Muḥammad. *Manāqib al-Imām Abī Ḥanīfa wa ṣāḥibayh Abī Yūsuf wa Muḥammad b. al-Ḥasan.* Edited by Muḥammad Zāhid al-Kawtharī and Abū l-Wafā al-Afghānī. Cairo: Dār al-Kitāb al-ʿArabī, 1947.

Egyptian Law No. 103 of 1961, Regarding Restructuring al-Azhar and Its Institutions. *Official Gazette*. Issue 153. 10 July 1961.

Egyptian Law No. 12 of 1996, Issuing the Child Law. *Official Gazette.* Issue 13. 28 March 1996.

Egyptian Law No. 13 of 2012, Amending Some Provisions of Law No. 103 of 1961, Regarding Restructuring al-Azhar and Its Institutions. *Official Gazette*. Issue 3. 19 January 2012 (3).

Elhadi, Abdulrahman. "Shaykh al-Azhar Aḥmad al-Ṭayyib mūwaḍiḥ mawqif al-Azhar min al-thawra wa yarud ʿalā l-ladhīn itahamūh bi-l-khiyāna." Youtube video, 14:35. Filmed February 2011. Posted March 2011. <https://www.youtube.com/watch?v=VcbQfHkK5ac>. Accessed 5 May 2017.

For Islam Series. "'Alī Jumʿa: Thuwār yanāyir khawārij wa yajib qatluhum." Youtube video, 3:06. Filmed January–February 2011. Posted August 2013. Accessed 1 May 2017

al-Gharīb, Abū Usāma. al-Mukhtaṣar al-jalliy bi-sīrat shaykhina Turkī al-Binʿalī. Online: <http://www.jihadica.com/wp-content/uploads/2014/07/1-المختصر-الجلي-بسيرة-شيخنا-تركي-البنعلي.pdf>. Accessed 15 April 2017.

Ghawsa, ʿAbdullah. "al-Jihād ṭarīq al-naṣr." Presentation. *Majmaʿ al-Buḥuth al-Islāmiyya Fourth Conference*. al-Azhar. Cairo, September 1968.

Ḥasan, Ḥasan Ibrāhīm. *Ta'rīkh al-Islām al-sīyāsī wa-l-thaqāfī wa-l-ijtimāʿī.* 9th ed. Cairo: Maktabat al-Nahda al-Miṣriyya, 1980.

"al-Ḥāya fī Sijn Ṭura al-Miṣrī tuhāwir ṣāḥib Wathīqat tarshīd al-jihād fī Miṣr wa al-ʿĀlam." *al-Hāya* (newspaper). 8 August 2007. Accessed 12 December 2007.

Ḥub Allah, Maḥmūd. "Kalimat iftitāḥiyya.' Presentation. *Majmaʿ al-Buḥūth al-Islāmiyya First Conference*. al-Azhar. Cairo, March 1964.

al-Hudhud, Ibrāhīm. "Wāqiʿ al-khiṭāb al-dīnī al-muʿāṣīr: muqāraba fī al-waṣf wa-l-ḥal." Presentation. *al-Majlis al-ʿAlā li-l-Shu'ūn al-Islāmiyya Twenty Fifth Conference: Rū'yat al-a'ima wa-l-duʿāt li-tajdīd al-khiṭāb al-dīnī wa-tafkīk al-fikr al-mutaṭarif.* Cairo, 14–15 Nov 2015.

Hūwaydī, Fahmī. "Mulāḥaẓāt ʿalā l-murājaʿāt." *al-Ahram* (newspaper). 11 December 2007, 11.

<http://24.ae>. "Bayān Shaykh al-Azhar D. Aḥmad al-Ṭayyib ḥawl faḍ iʿtiṣāmay rabʿa al-ʿadawiyya wa-l-nahḍa." Youtube video, 2:31. Filmed August 2013. Posted August 2013. <https://www.youtube.com/watch?v=sKEAxbZKLug>. Accessed 1 May 2017.

Ibn Anas, Mālik. *Mūwaṭṭa' al-Imām Mālik.* Narrated by Yaḥya b. Yaḥya Al-Laythī. Edited by Aḥmad Rātib ʿArmūsh. Beirut: Dār al-Nafā'is, 1977.

Ibn Anas, Mālik. *al-Mudawana al-kubra li-l-Imām Mālik b. Anās al-Aṣbaḥī wa yalīha Kitāb al-Muqaddamat*. Reported by Saḥnūn b. Saʿīd al-Tanūkhī and ʿAbdul Raḥman b. al-Qāsim. Vol. 1–16. Beirut: Dār al-Kutub al-ʿIlmiyya, 1994.

Ibn Anas, Mālik. *Mūwaṭṭa' al-Imām Mālik*. Narrated by Muḥammad al-Ḥasan al-Shaybānī. Edited by ʿAbdul Wahhāb ʿAbdul Laṭīf. Cairo: al-Ahrām, 1994.

Ibn al-Athīr, Izz al-Dīn. *al-Kāmil fī l-ta'rīkh*. Edited by Muḥammad Yūsuf al-Daqqāq. 4th ed. Vol.11–1 . Beirut: Dār al-Kutub al-ʿIlmiyya, 2003.

Ibn Ḥazm, ʿAlī Aḥmad. *al-Fiṣal fī l-milal wa-l-ahwā' wa-l-niḥal*. Vol. 1–5. Cairo: al-Khānjī, 1899.

Ibn Ḥazm, ʿAlī Aḥmad. *al-Muḥalla bi-l-athār.* Edited by Aḥmad Muḥammad Shākir. Vol. 1–11. Beirut: al-Maktab al-Tijārī li-l-Ṭibaʿa wa-l-Nashr, 1969.

Ibn Ḥazm, ʿAlī Aḥmad. "Rad Abī Muḥammad b. Ḥazm ʿala Ibn al-Naghrīla al-Yahūdī laʿanahu Allah." In *Rasā'il Ibn Ḥazm al-Andalusī*, edited by Iḥsān ʿAbbās. Vol. 3. 1–70. 2nd ed. Beirut: al-Mū'asasat al-ʿArabiyya li-l-Dirāsāt wa-l-Nashr, 1987.

Ibn Ḥazm, ʿAlī Aḥmad. *al-Iḥkām fī uṣūl al-aḥkām*. Edited by Maḥmūd Ḥāmid ʿUthmān. Vol. 1–8. Cairo: Dār al-Ḥadīth, 1998.

Ibn Kathīr, Ismāʿīl b. ʿUmar. *al-Bidāya wa-l-nihāya*. Vol. 1–15. Cairo: Hajar, 1997.

Ibn Qayyim al-Jawziyya, Shams al-Dīn Abī ʿAbdullah Muḥammad b. Abī Bakr. *Aḥkām ahl al-dhimma.* Dammām: Ramādī li-l-Nashr, 1997.

Ibn Qudāma, Mūwafaq al-Dīn. *al-Mughni.* Edited by ʿAbdullah b. ʿAbdul Muḥsin al-Turkī. Vol. 1–15.Riyadh: Dār ʿĀlam al-Kutub, 1999.

Ibn Rushd (al-Ḥafīd), Abū l-Walīd Muḥammad b. Aḥmad. *Bidāyat al-mujtahid wa nihāyat al-muqtaṣid*. Vol. 1–2. Cairo: Dār al-Ḥadīth, 2004.

Ibn Rushd (al-Jadd), Abū l-Walīd Muḥammad b. Aḥmad. *al-Bayān wa-l-taḥsīl wa-l-sharḥ wa-l-tawjīh wa-l-taʿlīl fī masā'il al-mustakhraja.* Edited by Muḥammad Ḥijjī. Vol. 1–20. 2nd ed. Beirut: Dār al-Gharb al-Islāmī, 1988.

Ibn Rushd (al-Jadd), Abū l-Walīd Muḥammad b. Aḥmad. *Fatāwa Ibn Rushd.* Edited by al-Mukhtār al-Talīlī. Vol. 1–3. 2nd ed. Beirut: Dār al-Gharb al-Islāmī, 1996.

Ibn Taymiyya, Taqī al-Dīn Aḥmad. *Risāla fī qitāl al-kuffār.* Edited by Sulaymān al-Sanīʿ. Riyadh: Jāmiʿat al-Malik Saʿūd, 1946.

Ibn Taymiyya, Taqī al-Dīn Aḥmad. *al-Fatāwa al-kubra*. Beirut: Dār al-Qalam, 1987.

Ibn Taymiyya, Taqī al-Dīn Aḥmad. *Fiqh al-jihād*. Compiled by Zuhayr Shafīq al-Kabi. Beirut: Dār al-Fikr al-ʿArabī, 1992.

Ibn Taymiyya, Taqī al-Dīn Aḥmad. *Majmūʿat al-fatāwa.* Edited by Khayrī Saʿīd. Vol. 1–28. Cairo: al-Maktabat al-Tawfīqiyya, 2000.

Ibn Taymiyya, Taqī al-Dīn Aḥmad. *Jāmiʿ al-masā'il.* Edited by Muḥammad Azīz Shams. Vol. 1–9. Jeddah: Majmaʿ al-Fiqh al-Islāmī, 2001.

ʿImāra, Muḥammad. "al-Khilāfa al-Islāmiyya." Presentation. al-Azhar fī muwājahāt al-fikr al-irhābī conference. Cairo, 3–4 December 2014. Cairo: Dār al-Quds al-ʿArabī, 2014.

Islamic Egypt News. "Raʾy Shaykh al-Azhar: La yajūz al-thawra wa-l-khurūj ʿalā l-Ḥākim Ḥusnī Mubārak." Youtube video, 1:51. Filmed January–February 2011. Posted June 2013. <https://www.youtube.com/watch?v=jHc0UjacnPs>. Accessed 5 May 2017.

al-Islam website, Saudi Ministry of Awqāf. Online: <http://quran.al-islam.com/Tafseer/DispTafsser.asp?nType=1&bm=&nSeg=0&l=arb&nSora=8&nAya=39&taf=TABARY&tashkeel=0>. Accessed 9 January 2010.

Ismail Elsherif. "al-Duktūr Faḍl munaẓẓir al-jihādīyīn maʿ ʿImād Adīb." Posted 15 April 2013. Youtube video. Duration: 01:23:43. Filmed [Unknown]. <https://www.youtube.com/watch?v=72q5_wGhWSU>. Accessed 01 April 2017.

Jād, ʿAmr. "Fatwa Yūsuf al-Qaraḍāwī bi tahrīm al-jidār al-fūladhī tuhadid bi inhā ʿudwīyatuh fī Majmaʿ al-Buḥūth al-Islāmiyya." *al-Yawm al-Sābiʿ* (25 January 2009). Online: <http://www.youm7.com/News.asp?NewsID=177577&SecID=162&IssueID=94>. Accessed 10 June 2011.

al-Jazeera.net. "Baʿd muṭālabatihi bi-taṭbīq ʿuqūbat al-jald fī qaḍāya al-nashr: Ṣaḥafiyū Miṣr yastahjinūn taḥrīḍ Shaykh al-Azhar ḍid al-ṣuḥuf." 14 October 2007. Online: <http://www.aljazeera.net/News/archive/archive?ArchiveId=1071529>. Accessed 05 June 2011.

al-Jazeera.net. "Marjaʿiat al-Najaf: Nufariq bayn al-Ṣaḥābī al-Jalīl wa-l-Munāfiq." 26 December 2014. Online: <https://www.aljazeera.net/news/arabic/2014/12/26/مرجعية-النجف-نفرق-بين-الصحابي-الجليل-والمنافق>, accessed 17 April 2017.

al-Jazīrī, ʿAbdul Raḥman. *Kitāb al-fiqh ʿalā l-madhāhib al-arbaʿa.* Vol. 1–5. Beirut: Dār al-Kutub al-ʿIlmiyya, 2002.

Jumʿa, ʿAlī. "al-Jihād fī l-Islām." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Fourteenth Conference: Ḥaqiqat al-Islām fī ʿAlām Mutaghayyir.* Cairo, 20–23 May 2003. Online: <http://elazhar.com/conf_au/14/44.asp>. Accessed 7 June 2011.

Kanūn, ʿAbdullah. "al-ʿAmāl al-fidāʾiyya fī naẓar al-Islām." Presentation. *Majmaʿ al-Buḥuth al-Islāmiyya Fifth Conference*. al-Azhar. Cairo, March 1970.

Karīma, Aḥmad Maḥmūd. "Nadharāt fī fitnat al-takfīr wa-ṣuwar li-takfīr al-muslimīn." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Third Conference: Khuṭūrat al-fikr al-takfīrī wa-l-fatwā bidūn ʿilm.* Cairo, 25–26 Mar 2014. Cairo: Maṭābiʿ al-Ahrām, 2014.

al-Kawtharī, Muḥammad. *Bulūgh al-amānī fī sirat Muḥammad b. al-Ḥasan al-Shaybānī.* Cairo: Maktabat al-Khānjī, 1936.

Khālid, Ḥasan. "al-Jihād fī sabīl Allah." Presentation. *Majmaʿ al-Buḥūth al-Islāmiyya Fourth Conference*. al-Azhar. Cairo, September 1968.

Khān, Iqbāl Aḥmad. "Mawqif al-adyān tijāh al-irhāb wa-al-taṭaruf.' Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Eighth Conference*: *al-Islām wa Mustaqbal al-*

Ḥiwār al-Ḥaḍārī. Cairo, 24–26 Jul 1996. Online: <http://elazhar.com/conf_au/8/23.asp>. Accessed 6 June 2011.

al-Kharāshī, Sulaymān. "Aqwāl al-ʿulamāʾ fī l-risāla al-mansūba ila Shaykh al-Islām Ibn Taymiyya fī l-jihād." Online: <http://www.saaid.net/Warathah/Alkharashy/32.htm>. Accessed 4 July 2011.

al-Khayāt, ʿAbdul ʿAzīz. "al-Islām dīn al-salām: Mafhūm al-ḥarb wa-l-salām fī l-Islām." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Tenth Conference*: *al-Islām wa-l-Qarn al-Ḥādī wa-l-ʿIshrūn.* Cairo, 2–5 Jul 1998. Online: <http://www.elazhar.com/conf_au/10/36.asp>. Accessed 8 June 2011.

Māḍī, Muḥammad ʿAbdullah. "al-Jihād fī sabīl Allah bi-l-māl.' Presentation. Majmaʿ al-Buḥuth al-Islāmiyya Fifth Conference. al-Azhar. Cairo, March 1970.

Maḥmūd, ʿAbdul Ḥalīm. "al-Jihād." Presentation. *Majmaʿ al-Buḥūth al-Islāmiyya Fourth Conference*. al-Azhar. Cairo, September 1968.

"Majmaʿ al-Buḥūth al-Islāmiyya yuʾakid ḥurmat irāqat al-dam al-Miṣrī." *Ahram Daily* (2 February 2011). Online: <http://gate.ahram.org.eg/News/36475.aspx>. Accessed 24 April 2017.

Marānī, Aḥmad. "Mawqif al-Islām min ẓahirāt al-irhāb." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Tenth Conference: al-Islām wa-l-Qarn al-Ḥadī wa-l-ʿIshrūn*. Cairo, 2–5 Jul 1998. Online: <http://elazhar.com/conf_au/10/34.asp>. Accessed 6 June 2011.

Maʿrūf, Bashshār ʿAwād. "Niẓām al-khilāfa niẓām mustaḥdath." Presentation. al-Azhar fī muwājahāt al-fikr al-irhābī conference. al-Azhar. Cairo, 3–4 December 2014. Cairo: Dār al-Quds al-Arabī, 2014.

al-Masry al-Youm. "Shaykh al-Azhar: Dāʿish min ahl al-aibla wa-la yumkin takfīrahum." Online: <http://www.almasryalyoum.com/news/details/617771>. Accessed 28 April 2017.

al-Muhājira, Um Sumayia. "Slave Girls or Prostitutes." *Dabiq*. Issue 9 (May 2015). Online: <https://clarionproject.org/docs/isis-isil-islamic-state-magazine-issue+9-they-plot-and-allah-plots-sex-slavery.pdf>. Accessed 1 April 2017.

al-Najjār, ʿAbdullah. "Mustajadāt fiqh al-khilāfa." Presentation. al-Azhar fī muwājahāt al-fikr al-irhābī conference. al-Azhar. Cairo, 3–4 December 2014. Cairo: Dār al-Quds al-Arabī, 2014.

al-Najjār, ʿAbdullah. "al-Tawẓīf al-sīyāsī l-il-Dīn: ḥaqīqatuh wa-athāruh." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Twenty Fourth Conference*: *ʿAẓamat al-Islām wa-akhṭāʾ baʿḍ al-muntasibīn ilayhi*. Cairo, 28 Feb–1 Mar 2015. Cairo: Maṭābiʿ al-Ahrām, 2015.

Najī, Abu Bakr. *Idarāt al-tawaḥush: Akhtar marḥala satamur biha al-umma*. Online: <https://www.cia.gov/library/abbottabad-compound/20/207DE0C1094BC68A7061C96629DD5C1A_adara_twahsh.pdf>. Accessed 25 July 2017.

On Ent. "Bayān faḍīlat al-Imām al-Akbar Shaykh al-Azhar al-Sharīf: D. Aḥmad al-Ṭayyib." Youtube video, 0:57. Filmed July 2013. Posted July 2013. Online: <https://www.youtube.com/watch?v=r6USefmXnp0>. Accessed 1 May 2017.

Qāḍī ʿIyāḍ, *al-Ghunaya.* Edited by Zuhayr Jarār. Beirut: Dār al-Gharb al-Islāmī, 1982.

Qaradawi Website. "Istiqālat al-Shaykh al-Qaraḍāwī min Majmaʿ al-Buḥūth al-Islāmiyya." 21 December 2013. Online: <http://www.qaradawi.net/new/Articles-7047>. Accessed 2 May 2017.

al-Qaraḍāwī, Yūsuf. *al-Ijtihād fī l-sharīʿa al-Islāmiyya: Maʿ naẓrā taḥlīliyya fī l-ijtihād al-muʿāṣir.* Kuwait: Dār al-Qalam, 1996.

al-Qaraḍāwī, Yūsuf. *Fiqh al-jihād.* Cairo: Maktabat Wahba, 2009.

al-Qaraḍāwī, Yūsuf. "Ḥawl al-Qaraḍāwī: Mudhakirāt al-Qaraḍāwī." Online: <http://www.qaradawi.net/site/topics/article.asp?cu_no=2&item_no=1766&version=1&template_id=217&parent_id=1>. Accessed 10 June 2011.

al-Qurashiyy, Ibn Abī l-Wafā. *al-Jawāhir al-muḍiya fī tarājim al-Ḥanafiyya.* Edited by ʿAbdul Fatāḥ Muḥammad al-Ḥilw. 2nd ed. Cairo: Hajar, 1993.

Rashwān, Ḍiāaʾ. "al-Murājʿāt: al-maʾna, al-siyāq, al-dalālāt." In *al-Murājaʿāt min al-Jamāʿa al-Islāmiyya ila al-jihād*, edited by Diyāaʾ Rashwān, 11–23. Cairo: al-Ahrām, 2008.

al-Rāzī, Fakhr al-Dīn. *Manāqib al-Imām al-Shāfiʿī.* Cairo: al-Maktabat al-ʿĀlamiyya, 1986.

al-Rāzī, Muḥammad ʿAbdul Raḥman b. Abī Ḥatim. *Adāb al-Shāfiʿī wa manāqibuh*. Edited by ʿAbdul Ghanī ʿAbdul Khāliq. Cairo: Maktabat al-Turāth al-Islāmī, 1954.

Sālim, ʿAbdul Raḥmān. "Bayn al-ʿuhda al-ʿUmariyya wa-ʿahd Muḥammad al-Fātiḥ li-ahālī al-Qusṭanṭīniyya." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Sixteenth Conference: al-Tasāmuḥ fī l-Ḥaḍāra al-Islāmiyya.* Cairo, 28 April–1 May 2004. Online: <http://www.elazhar.com/conf_au/16/conf_16.pdf>. Accessed 7 June 2011.

al-Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl. *Uṣūl al-Sarakhsī.* Vol 1–2. Edited by Abū l-Wafā al-Afghānī. Cairo: Dār al-Kitāb al-ʿArabī, 1952.

al-Sarakhsī, Muḥammad b. Aḥmad b. Abī Sahl. *al-Mabsūṭ.* Beirut: Dār al-Kutub al-ʿIlmiyya, 2001.

al-Sayyid, Raḍwān. "al-Dawla al-Islāmiyya wa-l-khilāfa." Presentation. al-Azhar fī muwājahāt al-fikr al-irhābī conference. Cairo, 03–04 December 2014. Cairo: Dār al-Quds al-Arabī, 2014.

al-Sayyid, Raḍwān. "al-Shaykh Wahba al-Zuḥaylī wa-l-taqlīd al-fiqhī wa-l-thawra al-sūrīyya." *al-Sharq al-Awsaṭ.* 14 August 2015. Online: <https://aawsat.com/home/article/429266/رضوان-السيد/الشيخ-وهبة-الزحيلي-والتقليد-الفقهي-والثورة-السورية>. Accessed 22 April 2017.

al-Shāfiʿī. *al-Umm*. Edited by Maḥmūd Mutrajī. Vol. 1–9. Beirut: Dār al-Kutub al-ʿIlmiyya, 1993.

al-Shaybānī. *Sharḥ kitāb al-siyar al-kabīr*. Vol. 1–5. Edited by Ṣalāḥ al-Munajjid. 2nd ed. Cairo: Maʿhad al-Makhṭūṭāt bi-Jāmiʿat al-Duwwal al-ʿArabiyya, 1971.

al-Shaybānī. *Sharḥ Kitāb al-Siyar al-kabīr*. Vol. 1–5. Edited by Abū ʿAbdullah Muḥammad Ḥasan Ismāʿīl al-Shāfiʿī. Beirut: Dār al-Kutub al-ʿIlmiyya, 1997.

al-Shaybānī. *al-Aṣl.* Edited by Mehmet Boynukalin. Vol. 1–12. Beirut: Dār Ibn Ḥazm, 2012.

al-Shaykh, ʿIzz al-Dīn. *al-Imām Muḥammad b. al-Ḥasan al-Shaybānī: Muḥadith wa faqīh.* Beirut: Dār al-Kutub al-ʿIlmiyya, 1993.

Ṣultān al-ʿUlamā', Muḥammad ʿAbdul Raḥīm. "Mawqif al-Islām min al-irhāb." Presentation. Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Sixteenth Conference: al-Tasāmuḥ fī l-Ḥaḍāra al-Islāmiyya.* Cairo, 28 April–1 May 2004. Online: <http://www.elazhar.com/conf_au/16/conf_16.pdf>. Accessed 7 June 2011.

al-Sumaria TV. "al-Marjaʿ al-Sistānī: Sabb al-ṣaḥāba mustankar wa mudān wa yukhālif ma amar bih Āl al-Bayt." 10 October 2013. Online: <http://www.alsumaria.tv/news/84240/>. Accessed 17 April 2017.

al-Ṭabarī. *Kitāb al-Jihād wa Kitāb al-Jizya wa aḥkām al-muḥāribīn min Kitāb Ikhtilāf al-fuqahā'*. Edited by Joseph Schacht. Leiden: Brill, 1933.

al-Ṭabṭabā'ī, Muḥammad ʿAbdul Razzāk al-Sayyid Ibrāhīm. "Aḥkām al-jihād." Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Fourteenth Conference: Ḥaqiqat al-Islām fī ʿAlām Mutaghayyir.* Cairo, 20–23 May 2003. Online: <http://elazhar.com/conf_au/14/49.asp>. Accessed 7 June 2011.

al-Ṭabṭabā'ī, Muḥammad ʿAbdul Razzāk al-Sayyid Ibrāhīm. "al-Taṭaruf wa-l-irhāb: Dirāsa sharʿīya." Presentation. Presentation. *al-Majlis al-ʿAlā li-l-Shuʾūn al-Islāmiyya Sixteenth Conference: al-Tasāmuḥ fī l-Ḥaḍāra al-Islāmiyya*. Cairo, 28 April–1 May 2004. Online: <http://www.elazhar.com/conf_au/16/conf_16.pdf>. Accessed 7 June 2011.

al-Talīlī, al-Mukhtār. *Ibn Rushd wa kitābuh al-muqaddamāt.* Tripoli: al-Dār al-ʿArabiyya li-l-Kitāb, 1988.

al-Ṭayyib, Aḥmad. Interview by Muna al-Shāzlī, *al-ʿĀshira māsa'*, Dream 2 TV, 4 January 2011.

al-Ṭayyib, Aḥmad. "Khutūrat al-takfīr." Presentation. al-Azhar fī muwājahāt al-fikr al-irhābī conference. *Cairo, 03–04 December 2014.* Cairo: Dār al-Quds al-Arabī, 2014.

Ten TV. "al-Bayt baytak: al-Shaykh Yūsuf al-Qaraḍāwī yuṣdir fatwā tubīḥ tafjīr al-intiḥarī li-nafsahu bunāʿ ʿalā ṭalab al-jamāʿa." Youtube video, 4:19. Posted November 2015. Filmed: [Unknown]. Online: <https://www.youtube.com/watch?v=Bl4rsbnqBBM>. Accessed 2 March 2017.

al- Tūnjī, Muḥammad. *Bīlād al-Shām ibān al-ghazw al-maghūlī.* Beirut: Dār al-Fikr al-ʿArabī, 1998.

ʿUmar, Farūq. *al-ʿAbāssiyūn al-awā'il*. Beirut: Dār al-Irshād, 1970.

ʿUmar, Farūq Fawzī. *al-Khilāfa al-ʿAbbāsiyya.* Vol. 1–2. Amman: Dār al-Shurūq, 1998.

'Uthmān, Muḥammad Rā'fat. "al-Khilāfa." Presentation. al-Azhar fī muwājahāt al-fikr al-irhābī conference. Cairo, 3–4 December 2014. Cairo: Dār al-Quds al-Arabī, 2014.

Wahba al-Zuḥaylī website. "Sīra ẓātīya." Online: <http://www.fikr.com/zuhayli/biography.htm>. Accessed 12 June 2011.

Wizārat al-Awqāf wa-l- Shu'ūn al-Dīniya, "Ishkāliyat al-'ilāqa bayn al-dīn wa-l-sīyāsa." Presentation. *al-Majlis al-'Alā li-l-Shu'ūn al-Islāmiyya Twenty Fourth Conference*: *'Aẓamat al-Islām wa-akhṭā' ba'ḍ al-muntasibīn ilayhi*. Cairo, 28 Feb–1 Mar 2015. Cairo: Maṭābi' al-Ahrām, 2015.

al-Yamānī, Abū Khaṭṭāb. "Li-mādha a'damnā naṣāra Miṣr?" *al-Sha'ab*. Online: <http://www.elshaab.org/news/156428/خطير-بالفيديو-الدولة-الإسلامية-ترد-لماذا-أعدمنا-نصارى-مصر؟>. Accessed 16 April 2017.

al-Ẓawāhirī, Ayman. *al-Tabri'a: Risāla fī tabri'at ummat al-qalam wa-l-sayf min manqaṣat tuhmat al-khawr wa-l-ḍa'f*. January 2008. Online: <http://www.tawhed.ws/a?a=3i806qpo>. Accessed 21 June 2011.

al-Zayāt, Montaṣṣir. *al-Jamā'āt al-Islāmiyya: Rū'iya min al-dākhil*. Cairo: Dār Miṣr al-Maḥrūsa, 2005.

al-Zunayrī, Najāt. *al-Majlis al-A'la li-l-Shu'ūn al-Islāmiyya: Nāfizat Misr 'alā l-'ālam, ta'rīkh wa risāla*. Cairo: Matābi' al-Ūvist, 1995.

al-Zuḥaylī, Wahba. *al-Fiqh al-Islāmī fī uslūbih al-jadīd*. Beirut: Dār al-Kitāb, 1974.

al-Zuḥaylī, Wahba. *Athār al-ḥarb fī l-fiqh al-Islāmī*. 3rd ed. Damascus: Dār al-Fikr, 1981.

al-Zuḥaylī, Wahba. *al-Wajīz fī uṣūl al-fiqh*. 2nd ed. Damascus: Dār al-Fikr, 1999.

English and French Sources

Abou El Fadl, Khaled. "The Rules of Killing at War: An Inquiry into Classical Sources." *The Muslim World* 89, no. 2 (1999): 144–57.

Abou El Fadl, Khaled. *Rebellion and Violence in Islamic Law*. Cambridge: Cambridge University Press, 2002.

Abou El Fadl, Khaled. "Between Functionalism and Morality: The Juristic Debates on the Conduct of War." In *Islamic Ethics of Life: Abortion, War and Euthanasia*, edited by Jonathon E. Brockopp, 103–28. Columbia, SC: University of South Carolina Press, 2003.

Abou El Fadl, Khaled. *The Great Theft*. Kindle ed. New York: Harper Collins, 2005.

Abu-Odeh, Lama. "Modernizing Muslim Family Law: The Case of Egypt." *Vanderbilt Journal of Transnational Law* 37 (2004): 1043–46.

Abu-Odeh, Lama. "The Politics of (Mis)recognition: Islamic Law Pedagogy in American Academia." *American Journal of Comparative Law* 52 (2004): 789–824.

Abu-Odeh, Lama. "Review of *The Impossible State* by Wael Hallaq (2013)." *International Journal of Middle Eastern Studies* 46, no. 1 (2014): 216–18.

Adang, Camilla. *Muslim Writers on Judaism and the Hebrew Bible: From Ibn Rabban to Ibn Hazm.* Leiden: Brill, 1996.

Aigle, Denise. "The Mongol Invasions of Bilād al-Shām by Ghāzān Khān and Ibn Taymīyah's Three 'Anti-Mongol' Fatwas." *Mamluk Studies Review* 11, no. 2 (2007): 89–120.

Ali, Kecia. *Sexual Ethics in Islam: Feminist Reflections on Qur'an, Hadith and Jurisprudence.* Oxford: One World, 2006.

Ali, Kecia. *Imam Shafi'i: Scholar and Saint.* Kindle ed. Oxford: One World, 2011.

al-Anani, Khalil. "Jihadi Revisionism: Will It Save the World?" Middle East Brief No. 35, Crown Center for Middle East Studies, Brandeis University, April 2009. Online: <http://www.brandeis.edu/crown/publications/meb/MEB35.pdf>. Accessed 21 June 2011.

Anghie, Antony. "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law." *Harvard International Law Journal* 40, no. 1 (1999): 1–80.

Anghie, Antony, and B. S. Chimni. "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts." *Chinese Journal of International Law* 2 (2003): 77–103.

Anjum, Ovamir. *Politics, Law, and Community in Islamic Thought: The Taymiyyan Moment.* Cambridge: Cambridge University Press, 2012.

Arnaldez, R. "Ibn Ḥazm, Abū Muḥammad ʿAlī b. Aḥmad b. Saīd." In *Encyclopaedia of Islam.* 2nd ed. Edited by P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel and W. P. Heinrichs. Online. Accessed 23 January 2011.

Ayoub, Samy. "Territorial Jurisprudence, *Ikhtilāf al-Dārayn*: Political Boundaries and Legal Jurisdiction." *Contemporary Islamic Studies* 2 (2012): 1–14.

Badawi, Nesrine. "Regulation of Armed Conflict: Critical Comparativism." *Third World Quarterly* 37, no. 11 (2016): 1990–2009.

Badawi, Nesrine. "Sunni Islam. Part 1: Classical Sources." In *Religion, War and Ethics: A Sourcebook*, edited by Gregory Reichberg and Henrik Syse, 301–69. Cambridge: Cambridge University Press, 2014.

Barraclough, Steven. "al-Azhar: Between the Government and the Islamists." *Middle East Journal* 52, no. 2 (1998): 236–49.

Berman, Nathaniel. "Privileging Combat? Contemporary Conflict and the Legal Construction of War." *Columbia Journal of Transnational Law* 43 (2004–5): 1–71.

Bin Lādin, Osama. *Messages to the World: The Statements of Osama Bin Laden.* Edited by Bruce Lawrence. New York: Verso, 2005.

Bonner, Michael. *Jihad in Islamic History*. Princeton, NJ: Princeton University Press, 2006.

Bonney, Richard. *Jihād: From Qur'an to Bin Laden.* London: Palgrave Macmillan, 2004.

Bori, Caterina. "Ibn Taymiyya wa-Jamāʿatuhu, Authority, Conflict and Consensus in Ibn Taymiyya's Circles." In *Ibn Taymiyya and His Times*, edited by Yossef Rapoport and Shahab Ahmed, 23–52. Karachi: Oxford University Press, 2010.

Brachman, Jarret M. *Global Jihadism: Theory and Practice.* New York: Routledge, 2009.

Brockopp, Jonathan E. "Captives." In *Encyclopaedia of the Qur'ān*. Edited by Jane Dammen McAuliffe. Online. Accessed 6 November 2008.

Bunzel, Cole. "The Caliphate's Scholar in Arms." *Jihadica* (9 July 2014). Online: <http://www.jihadica.com/the-caliphate%E2%80%99s-scholar-in-arms/>. Accessed 15 April 2017.

Bunzel, Cole. "Caliphate in Disarray: Theological Turmoil in the Islamic State." *Jihadica* (3 October 2017). Online: <http://www.jihadica.com/caliphate-in-disarray/>. Accessed 6 May 2018.

Caeiro, Alexandre. "The Social Construction of Sharīʿa: Bank Interest, Home Purchase, and Islamic Norms in the West." *Die Welt des Islams* 44, no. 3 (2004): 351–75.

Caeiro, Alexandre, and Mahmoud al-Saify. "Qaraḍāwī in Europe, Europe in Qaraḍāwī: The Global Muftī's European Politics." In *Global Muftī*, edited by Bettina Gräf and Jakob Skovgaard-Petersen, 109–48, New York: Columbia University Press, 2009.

Calder, Norman. *Studies in Early Muslim Jurisprudence*. Oxford: Clarendon Press, 1993.

Carmona, Alfonso. "The Introduction of Mālik's Teachings in Al-Andalus." In *The Islamic School of Law: Evolution, Devolution and Progress*, edited by Peri Bearman, Rudolph Peters and Frank E. Vogel, 41–56. Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2005.

Chaumont, E. "al-Shāfiʿī." In *Encyclopaedia of Islam*. 2nd ed. Edited by P. Bearman, Th. Bianquis, C. E. Bosworth, E. van Donzel and W. P. Heinrichs. Online. Accessed 27 December 2010.

Clarke, Alan. "Rendition to Torture: A Critical Legal History." *Rutgers Law Review* 62 (2009), 1–74.

Clarke, Richard. "Bin Laden's Dead, al-Qaeda's Not." *New York Times* (2 May 2011). Online: <http://www.nytimes.com/2011/05/03/opinion/03clarke.html>. Accessed 19 July 2011.

Cook, David. "The Implications of Martyrdom Operations for Contemporary Islam." *The Journal of Religious Ethics* 32, no. 1 (2004): 129–51.

Cook, David. "Islamism and Jihadism: The Transformation of Classical Notions of *Jihad* into an Ideology of Terrorism." *Totalitarian Movements and Political Religions* 10, no. 2 (2009): 177–87.

Coope, Jessica A. "With Heart, Tongue and Limbs: Ibn Ḥazm on the Essence of Faith." *Medieval Encounters* 6, nos. 1–3 (2000): 101–13.

Crecelius, Daniel. "al-Azhar in the Revolution." *Middle East Journal* 20, no. 1 (1966): 31–49.

Dabiq. Issue 6. December 2014. Online: <https://clarionproject.org/docs/isis-isil-islamic-state-magazine-issue-6-al-qaeda-of-waziristan.pdf>. Accessed 1 April 2017.

Dabiq. Issue 11. September 2015. Online: <http://clarionproject.org/wp-content/uploads/Issue%2011%20-%20From%20the%20battle%20of%20Al-Ahzab%20to%20the%20war%20of%20coalitions.pdf>. Accessed 1 April 2017.

Dabiq. Issue 13. January 2016. Online: <http://clarionproject.org/wp-content/uploads/Issue-13-the-rafidah.pdf>. Accessed 1 April 2017.

Dabiq. Issue 15. July 2016. Online: <http://clarionproject.org/wp-content/uploads/islamic-state-magazine-dabiq-fifteen-breaking-the-cross.pdf>. Accessed 16 April 2017.

Daftary, Farhad. "Assassins." In *Encyclopaedia of Islam*. 3rd ed. Edited by Gudrun Krämer, Denis Matringe, John Nawas, and Everett Rowson. Online. Accessed 22 December 2009.

al-Dawoody, Ahmed. *The Islamic Law of War: Justifications and Regulations*. New York: Palgrave Macmillan, 2011.

al-Dawoody, Ahmed. "ISIS and Its Brutality Under Islamic Law." *Kansai University Review of Law and Politics* 36 (2015): 101–17.

De Bellefonds, Y. Linant. "Ibn Ḥazm et le Zahirisme Juridique." *Revue Algerienne, Tunisienne et Marocaine de Legislation et de Jurisprudence* 76 (1960): 1–43.

Donner, Fred. "The Sources of Islamic Conceptions of War." In *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, edited by John Kelsay and James Turner Johnson, 31–69. New York: Greenwood Press, 1991.

El-Rouyaheb, Khaled. "From Ibn Ḥajar al-Haytamī (d. 1566) to Khayr al-Dīn al-Ālūsī (d. 1899): Changing Views of Ibn Taymiyya Among non-Ḥanbalī Sunni Scholars." In *Ibn Taymiyya and His Times*, edited by Yossef Rapoport and Shahab Ahmed, 269–318. Karachi: Oxford University Press.

Emon, Anvor, Mark Ellis, and Benjamin Glahn, eds. *Islamic Law and International Human Rights Law.* Oxford: Oxford University Press, 2012.

Esposito, John L. *Unholy War: Terror in the Name of Islam.* New York: Oxford University Press, 2002.

Fassbender, Bardo, and Anne Peters. "Introduction: Towards a Global History of International Law." In *Oxford Handbook of the History of International Law*, edited by Bardo Fassbender and Anne Peters, 1–27. Oxford: Oxford University Press, 2016.

Fierro, Maribel. "Proto-Malikis, Malikis, and Reformed Malikis in al-Andalus." In *The Islamic School of Law: Evolution, Devolution and Progress*, edited by Peri Bearman, Rudolph Peters, and Frank E. Vogel. Cambridge, MA: Islamic Legal Studies Program, Harvard Law School, 2006.

Firestone, Reuven. *Jihād: The Origin of Holy War in Islam.* New York: Oxford University Press, 1999.

"French Visa Ban Blow to Qaradawi." *Gulf News*. Online: <https://gulfnews.com/news/gulf/qatar/french-visa-ban-blow-to-al-qaradawi-1.1000137>. Accessed 3 May 2018.

Galal, Ehab. "Yūsuf al-Qaraḍāwī and the New Islamic TV." In *Global Mufti*, edited by Bettina Gräf and Jakob Skovgaard-Petersen, 149–80. New York: Columbia University Press, 2009.

Gerges, Fawaz. *ISIS: A History*. Princeton, NJ: Princeton University Press, 2016.

Gómez-Rivas, Camilo. *Law and the Islamization of Morocco Under the Almoravids: The Fatwas of Ibn Rushd, al-Jadd to the Maghrib*. *Studies in the History and Society of the Maghrib Series*, edited by Amira K. Benison et al., Leiden: Brill, 2014.

Gordon, Robert W. "Critical Legal Histories." *Stanford Law Review* 36 (1984): 57–125.

Griffel, Frank. "Toleration and Exclusion: al-Shāfiʿī and al-Ghazālī on the Treatment of Apostates." *Bulletin of the School of Oriental and African Studies* 64, no. 3 (2001): 339–54.

Grousset, Rene. *The Empire of the Steppes: A History of Central Asia.* Translated by Naomi Walford. 8th ed. New Brunswick, NJ: Rutgers, 2002.

Habeck, Mary. *Knowing the Enemy: Jihadist Ideology and the War on Terror.* New Haven, CT: Yale University Press, 2006.

Hallaq, Wael. "The Use and Abuse of Evidence: The Question of Influence of Roman and Provincial Law on Islamic Law." *Journal of the American Oriental Society* 110, no. 1 (1990): 79–91.

Hallaq, Wael. Introduction to *Ibn Taymiyya Against the Greek Logicians*, xi–lvii. By Taqī al-Dīn Ibn Taymiyya. New York: Oxford University Press, 1993.

Hallaq, Wael. "Was al-Shāfiʿī the Master Architect of Islamic Jurisprudence?" *International Journal of Middle East Studies* 25, no. 4 (1993): 587–605.

Hallaq, Wael. *Law and Legal Theory in Classical and Medieval Islam.* Aldershot, UK: Variorum, 1994.

Hallaq, Wael. *A History of Islamic Legal Theories*. Cambridge: Cambridge University Press, 1997.

Hallaq, Wael. *Authority, Continuity and Change in Islamic Law.* Cambridge: Cambridge University Press, 2001.

Hallaq, Wael. "On Dating Malik's Muwatta." *UCLA Journal of Islamic and Near Eastern Studies* 1 (2001–2): 47–65.

Hallaq, Wael. "Can the Shariah Be Restored?" In *Islamic Law and the Challenges of Modernity*, edited by Yvonne Yazbak Haddad and Barbara Freyer Stowasser, 21–53. Walnut Creek, CA: AltaMira Press, 2004.

Hallaq, Wael. *The Origins and Evolution of Islamic Law.* Cambridge: Cambridge University Press, 2005.

Hallaq, Wael. "What Is Shariʿa?" *Yearbook of Islamic and Middle Eastern Law* 12 (2005–6): 151–80.

Hallaq, Wael. *Sharīʿa: Theory, Practice, Transformations.* Cambridge: Cambridge University Press, 2009.

Hallaq, Wael. *The Impossible State: Islam, Politics, and Modernity's Moral Predicament*. Kindle ed. New York: Columbia University Press, 2012.

Hamidullah, Muhammad. *Muslim Conduct of State.* Lahore: Kashmiri Bazar, 1945.

Hamzawy, Amr, and Sarah Grebowski. "From Violence to Moderation: al-Jama'a al-Islamiya and al-Jihad." Carnegie Papers No. 20, Carnegie Middle East Center, Carnegie Endowment for International Peace, Washington, D.C., April 2010. Online: <http://carnegieendowment.org/files/Hamzawy-Grebowski-EN.pdf>. Accessed 21 July 2018.

Hashmi, Sohail M. "Saving and Taking Lives in War: Three Modern Muslim Views." In *Islamic Ethics of Life: Abortion, War and Euthanasia*, edited by Jonathon E. Brockopp, 129–54. Columbia, SC: University of South Carolina Press, 2003.

Hassan, Hassan A., and Michael Weiss. *ISIS: Inside the Army of Terror*. 2nd ed. New York: Regan Arts, 2016.

Hendawi, Hamza Lea Keath, and Mariam Fam. "Angry Debate in Egypt over Reforms in Islam Against Radicals." *Associated Press* (26 April 2017). Online: <https://www.washingtonpost.com/world/middle_east/who-speaks-for-islam-and-reform-debate-heats-up-in-egypt/2017/04/26/b68068d4-2a4b-11e7-9081-f5405f56d3e4_story.html?utm_term=.e47276848d97>. Accessed 1 May 2017.

Herget, James. "Unearthing the Origins of a Radical Idea: The Case of Legal Indeterminacy." *American Journal of Legal History* 39 (1995): 59–70.

Hutchinson, Allan C., and Patrick J. Monahan. "Law, Politics and the Critical Legal Studies Scholars: The Unfolding Drama of American Legal Thought." *Stanford Law Review* 36 (1984): 199–246.

Ibn al-Ḥajāj, Muslim. *Ṣaḥīḥ Muslim.* Translated by Hamid Siddiqui. Center for Muslim Jewish Engagement, University of South California. Online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muslim/023.smt.html>. Accessed 5 July 2011.

Ibn Anas, Mālik. *al-Muwaṭṭa'*. Translated by ʿĀ'isha ʿAbdarahman at-Tarjumana and Yaʿqub Johnson. Center for Muslim Jewish Engagement, University of Southern California, Online: <http://www.usc.edu/schools/college/crcc/engagement/resources/texts/muslim/hadith/muwatta/021.mmt.html>. Accessed 18 January 2011.

Jackson, Sherman. "Ibn Taymiyyah on Trial in Damascus." *Journal of Semitic Studies* 39, no. 1 (1994): 41–85.

Jockish, Benjamin. "*Ijtihād* in Ibn Taymiyya's Fatāwa." In *Islamic Law: Theory and Practice*, edited by Robert Gleave and Eugenia Kermeli, 119–37. 2nd ed. London: I. B. Tauris, 2001.

Johansen, Baber. "Signs as Evidence: The Doctrine of Ibn Taymiyya (1263–1328) and Ibn Qayyim al-Jawziyya (d. 1351) on Proof." *Islamic Law and Society* 9, no. 2 (2002): 168–93.

Johnson, James Turner, and John Kelsay, eds. *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition*. New York: Greenwood Press, 1990.

Johnston, David. "U.S. Says Rendition to Continue, But with More Oversight." *New York Times* (24 August 09). Online: <http://www.nytimes.com/2009/08/25/us/politics/25rendition.html>. Accessed 19 July 2011.

Kaddouri, Samir. "Ibn Hazm al-Qurṭubī (d. 456/1064)." In *Islamic Legal Thought: A Compendium of Muslim Jurists*, edited by Oussama Arabi, David S. Powers, and Susan A. Spectorsky, 211–38. Leiden: Brill, 2013.

Kelsay, John. "Religion, Morality and the Governance of War: The Case of Classical Islam." *The Journal of Religious Ethics* 18, no. 2 (1990): 123–29.

Kelsay, John. "Divine Command Ethics in Early Islam: al-Shafi'i and the Problem of Guidance." *The Journal of Religious Ethics* 22, no. 1 (1994): 101–26.

Kelsay, John. "al-Shaybani and the Islamic Law of War." *Journal of Military Ethics* 2, no. 1 (2003): 63–75.

Kennedy, David. *Of War and Law.* Princeton, NJ: Princeton University Press, 2006.

Kennedy, Hugh. *The Early Abbasid Caliphate*. London: Croom Helm, 1981.

Kennedy, Hugh. "Byzantine-Arab Diplomacy in the Near East from the Islamic Conquests to the Mid Eleventh Century." In *Byzantine Diplomacy: Papers from the Twenty-Fourth Spring Symposium of Byzantine Studies*, edited by J. Shepard and S. Franklin, 133–43. Aldershot, UK: Variorum, 1992.

Kennedy, Hugh. *The Great Arab Conquests*. London: Wiedenfield and Nicolson, 2007.

Kennedy, Hugh. *Muslim Spain and Portugal*. London: Longman, 1996.

Kennedy, Hugh. *When Baghdad Ruled the Muslim World: The Rise and Fall of Islam's Greatest Dynasty.* Cambridge, MA: De Capo Press, 2004.

Kepel, Gilles. "The Origins and Development of the Jihadist Movement: From Anti-Communism to Terrorism." *Asian Affairs* 35, no. 2 (2003): 91–108.

Kepel, Gilles. *The War for Muslim Minds: Islam and the West.* Cambridge, MA: The Belknap Press of Harvard University Press, 2004.

Kepel, Gilles. "General Introduction." In *al-Qaeda in Its Own Words*, edited by Gilles Kepel and Jean-Pierre Milelli, translated by Pascale Ghazaleh, 1–11. Cambridge, MA: The Belknap Press of Harvard University Press, 2008.

Kepel, Gilles, and Jean-Pierre Milelli, eds. *al-Qaeda in Its Own Words*. Translated by Pascale Ghazaleh. Cambridge, MA: The Belknap Press of Harvard University Press, 2008.

Khadduri, Majid. *War and Peace in the Law of Islam.* Baltimore, MD: Johns Hopkins University Press, 1955.

Lacroix, Stephane. "Ayman al-Zawahiri, Veteran of Jihad." In *al-Qaeda in Its Own Words*, edited by Gilles Kepel and Jean-Pierre Milelli, translated by Pascale Ghazaleh, 147–70. Cambridge, MA: The Belknap Press of Harvard University Press, 2008.

Landau-Tasseron, Ella. "Non-Combatants in Muslim Legal Thought." Center on Islam, Democracy and the Future of the Muslim World Monographs. Series no. 1, Paper 3 (2006): 6–7. Online: <http://www.futureofmuslimworld.com/research/pubID.60/pub_detail.asp>. Accessed 9 March 2007.

Laoust, H. "Ibn Taymiyya, Taḳī al-Dīn Aḥmad." In *Encyclopaedia of Islam.* 2nd ed. Edited by P. Bearman, Th. Bianquis, C. E.Bosworth, E. van Donzel and W. P. Heinrichs. Online. Accessed 21 December 2009.

Lav, Daniel J. "Jihadists and Jurisprudents: The 'Revisions' Literature of Sayyid Imam and al-Gama'a al-Islamiyya." In *Political Islam from Muhammad to Ahmadinejad*, edited by Joseph Morrison Skelly, 105–47. Santa Barbara, CA: Praeger Security International, 2010.

Layish, Aharon. "Transformation of Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World." *Die Welt des Islams* 44, no. 1 (2004): 85–113.

Lowry, Joseph E. "The Legal Hermeneutics of al-Shāfi'ī and Ibn Qutayba: A Reconsideration." *Islamic Law and Society* 11, no. 1 (2004): 1–41.

Lowry, Joseph E. *Early Islamic Legal Theory: The* Risāla *of Muḥammad ibn Idrīs al-Shāfi'ī.* Boston, MA: Brill, 2007.

Makin, Al. "The Influence of Ẓāhirī Theory on Ibn Ḥazm's Theology: The Case of His Interpretation of the Anthropomorphic Text 'The Hand of God.'" *Medieval Encounters* 5, no. 1 (1999): 112–20.

Mamdani, Mahmood. *Saviors and Survivors: Darfur, Politics and the War on Terror.* New York, Random House, 2009.

March, Andrew F. "What Can the Islamic Past Teach Us About Secular Modernity?" *Political Theory* 43, no. 6 (2015): 838–49.

al-Matroudi, Abdul Hakim. *The Ḥanbalī School of Law and Ibn Taymiyyah: Conflict or Conciliation.* London: Routledge, 2006.

Mayer, Ann Elizabeth. "War and Peace in the Islamic Tradition." In *Just War and Jihad: Historical and Theoretical Perspectives on War and Peace in Western and Islamic Traditions*, edited by John Kelsay and James Turner Johnson, 195–226. New York: Greenwood Press, 1991.

McCants, William. *The ISIS Apocalypse: The History, Strategy, and Doomsday Vision of the Islamic State*. Kindle ed. New York: St. Martin's Press, 2015.

Megret, Frederic. "From Savages to Unlawful Combatants: A Post-colonial Look at International Humanitarian Law's Other." In *International Law and Its Others*, edited by Anne Orford, 265–317. Cambridge: Cambridge University Press, 2006.

Melchert, Christopher. "Traditionist-Jurisprudents and the Making of Islamic Law." *Islamic Law and Society* 8, no. 3 (2001): 383–406.

Michot, Yahya. *Muslims Under Muslim Rule.* Oxford: Interface Publishers, 2006.

Minbar al-tawḥīd wa al-jihād. Online: <http://www.tawhed.ws/f>. Accessed 21 June 2011.

Mir-Hosseini, Ziba. "The Construction of Gender in Islamic Legal Thought and Strategies for Reform." *Hawwa* 1, no. 1 (2003): 1–28.

Montada, Josep Puig. "Reason and Reasoning in Ibn Ḥazm of Cordova." *Studia Islamica* 92 (2001): 165–85.

Morgan, David. *The Mongols.* Cambridge, MA: Blackwell, 1990.

Moustafa, Tamir. "Conflict and Cooperation Between the State and Religious Institutions in Contemporary Egypt." *International Journal of Middle East Studies* 32, no. 1 (2000): 3–22.

Munir, Muhammad. "Suicide Attacks and Islamic Law." *International Review of the Red Cross* 90, no. 869 (2008): 71–89.

Nafi, Basheer M. "Fatwā and War: On the Allegiance of the American Muslim Soldiers in the Aftermath of September 11." *Islamic Law and Society* 11, no. 1 (2004): 102.

an-Naim, Abdullahi Ahmed. *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law.* Cairo: American University in Cairo Press, 1992.

Osman, Amr. *The Ẓāhirī Madhhab (3rd/9th–10th/16th Century): A Textualist Theory of Islamic Law.* Leiden: Brill, 2014.

Peters, Rudolph. *Jihad in Classical and Modern Islam: A Reader.* Princeton, NJ: Marcus Wiener, 1996.

The Qur'an. Translated by M. A. S. Abdel Haleem. Oxford: Oxford University Press, 2005.

Rabb, Intissar. "Islamic Legal Maxims as Substantive Canons of Construction: *Ḥudūd*-Avoidance in Cases of Doubt." *Islamic Law and Society* 17, no. 1 (2010): 63–125.

Rapoport, Yossef. "Ibn Taymiyya's Radical Legal Thought: Rationalism, Pluralism and the Primacy of Intention." In *Ibn Taymiyya and His Times*, edited by Yossef Rapoport and Shahab Ahmed, 191–226. Karachi: Oxford University Press, 2009.

Rapoport, Yossef, and Shahab Ahmad, eds. *Ibn Taymiyya and His Times.* Karachi: Oxford University Press, 2010.

Ringrose, David. *Expansion and Global Interaction*. New York: Longman, 2000.

Ruano, Delfina Serrano. "Ibn Rushd al-Jadd (d. 520/1126)." In *Islamic Legal Thought: A Compendium of Muslim Jurists*, edited by Oussama Arabi, David S. Powers, and Susan A. Spectorsky, 295–323. Leiden: Brill, 2013.

Sabra, Adam. "Ibn Ḥazm's Literalism: A Critique of Islamic Legal Theory (1)." *al-Qantara* 28, no. 1 (2007): 7–40.

Sabra, Adam. "Ibn Ḥazm's Literalism: A Critique of Islamic Legal Theory." In *Ibn Ḥazm of Cordoba: The Life and Works of a Controversial Thinker* (Handbook of Oriental Studies: Section 1: The Near and Middle East), edited by Camilla Adang, Maribel Fierro, and Sabine Schmidtke, 95–160. Leiden: Brill, 2012.

Sachedina, Abdulaziz. "The Development of Jihad in Islamic Revelation and History." In *Cross, Crescent and Sword: The Justification and Limitation of War in Western and Islamic Tradition*, edited by James Turner Johnson and John Kelsay, 35–50. New York: Greenwood Press, 1990.

Sadeghi, Behnam. "The Authenticity of Two 2nd/8th Century Ḥanafī Legal Texts: The Kitāb al-Āthār and al-Muwaṭṭa' of Muḥammad b. al-Ḥasan al-Shaybānī." *Islamic Law and Society* 17 (2010): 291–319.

Sadiki, Laribi. "One 'Islam,' Many 'Islams': Understanding the Arab-Islamic Perspective on 11 September in a Globalising World." *Irish Studies in International Affairs* 13 (2002): 43–60.

Ṣaḥīḥ al-Bukhārī: The Translation of the Meanings of Sahih al-Bukhari (Arabic/English). Translated by Muhammad Muhsin Khan. Chicago: Kazi Publications, 1979.

Said, Wadie. "The Exceptional Nature of Terrorism: The United States and Middle East Legal Systems." *Hastings International and Comparative Law* 32 (2009): 831–42.

Salaymeh, Lena. *The Beginnings of Islamic Law: Late Antique Islamicate Legal Traditions.* Cambridge: Cambridge University Press, 2016.

Salvatore, Armando. "Qaraḍāwī's *Maṣlaḥa*: From Ideologue of the Islamic Awakening to Sponsor of Transnational Public Islam." In *Global Mufti*, edited by Bettina Gräf and Jakob Skovgaard-Petersen, 239–51, New York: Columbia University Press, 2009.

Samour, Nahed. "Is There a Role for Islamic International Law in the History of International Law?" *European Journal of International Law* 25, no. 1 (2014): 313–19.

Schacht, Joseph. *The Origins of Muhammadan Jurisprudence.* Oxford: Clarendon Press, 1953.

al-Shāfiʿi. *al-Shāfiʿī's* Risāla: *Treatise on the Foundation of Islamic Jurisprudence.* Translated by Majid Khadduri. 2nd ed. Cambridge: The Islamic Texts Society, 1997.

Shalakany, Amr. "Islamic Legal Histories." *Berkeley Journal of Middle Eastern and Islamic Law* 1 (2008): 1–82.

al-Shamsy, Ahmed. *The Canonization of Islamic Law: A Social and Intellectual History*. Cambridge: Cambridge University Press, 2013.

Sharif, Mohammad Farid b. Mohamad. "*Jihād* in Ibn Taymīyyah's Thought." *The Islamic Quarterly* 49, no. 3 (2005): 183–203.

al-Shaybānī, Muḥammad b. al-Ḥasan. *The Islamic Law of Nations, Shaybānī's Siyar.* Translated by Majid Khadduri. 2nd ed. Baltimore, MD: Johns Hopkins University Press, 1966.

Skovgaard-Peterson, Jakob. "Yūsuf al-Qaraḍāwī and al-Azhar." In *Global Mufti*, edited by Bettina Gräf and Jakob Skovgaard-Petersen, 27–54. New York: Columbia University Press, 2009.

Stern, Jessica and Berger, J. M. *ISIS: The State of Terror.* Kindle ed. London: William Collins, 2015.

Tammam, Husam. "Yusuf al-Qaradawi and the Muslim Brothers." In *Global Mufti*, edited by Bettina Gräf and Jakob Skovgaard-Petersen, 55–84. New York: Columbia University Press, 2009.

al-Tobgui, Carl Sharif. "The Epistemology of *Qiyas* and *Taʿlil* between the Muʿtazilite Abu 'l-Husayn al-Basri and Ibn Hazm al-Zahiri." *UCLA Journal of Islamic and Near Eastern Law* 2 (2003): 281–54.

Turki, Abdel Magid. *Polemiques entre Ibn Ḥazm et Bagi sur les Principles de la Loi Musulmane.* Algiers: Etudie et Documents, 1973.

Verskin, Alan. *Islamic Law and the Crisis of the Reconquista: The Debate on the Status of Muslim Communities in Christendom*, in *Studies in Islamic Law and Society*. Vol. 39, edited by Ruud Peters and A. Kevin Reinhart. Leiden: Brill, 2015.

Vílchez, José Miguel Puerta. "Abū Muḥammad Alī Ibn Ḥazm: A Biographical Sketch." In *Ibn Ḥazm of Cordoba: The Life and Works of a Controversial Thinker* (Handbook of

Oriental Studies: Section 1: The Near and Middle East), edited by Camilla Adang, Maribel Fierro, and Sabine Schmidtke, 95–160. Leiden: Brill, 2012.

Warburg, Gabriel R. "Islam and Politics in Egypt: 1952–1980." *Middle Eastern Studies* 18, no. 2 (1982): 131–57.

Wasserstein, David. *The Rise and Fall of the Party-Kings: Politics and Society in Islamic Spain 1002–1086.* Princeton, NJ: Princeton University Press, 1985.

Watt, William Montgomery. *A History of Islamic Spain.* 3rd ed. Edinburgh: Edinburgh University Press, 1971.

Welchman, Lynn. "Honour and Violence Against Women in a Modern *Sharʿī* Discourse." *Hawwa* 5, nos. 2–3 (2007): 139–65.

White, G. Edward. "From Realism to Critical Legal Studies: A Truncated Intellectual History." *Southwestern Law Journal* 40 (1986–87): 819–44.

Wood, Graeme. "What ISIS Really Wants." *The Atlantic* (March 2015). Online: <https://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980/>. Accessed 8 April 2017.

Zaman, Muhammad Qasim. "The Caliphs, the 'Ulama' and the Law: Defining the Role and Function of the Caliph in the Early Abbasid Period." *Islamic Law and Society* 4, no. 1 (1997): 1–36.

Zaman, Muhammad Qasim. *The Ulama in Contemporary Islam: Custodians of Change*. Princeton, NJ: Princeton University Press, 2002.

Zaman, Muhammad Qasim. *Modern Islamic Thought in a Radical Age*. Cambridge: Cambridge University Press, 2012.

Zeghal, Malika. "Religion and Politics in Egypt: The Ulema of al-Azhar, Radical Islam, and the State (1952–94)." *International Journal of Middle East Studies* 31, no. 3 (1999): 371–99.

al-Zuhili, Wahbeh. "Islam and International Law." *International Review of the Red Cross* 87, no. 858 (2005): 269–83.

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Note: Except in instances where people are more recognizable by first names, Arabic names are listed by last name.